[2001–02 Gib LR 21]

RENT TRIBUNAL v. AIDASANI

COURT OF APPEAL (Neill, P., Glidewell and Clough, JJ.A.): May 29th, 2001

Landlord and Tenant—rent—rent control—rent control under Landlord and Tenant Ordinance not unconstitutional—deprives landlords of property by restricting contractual rent but effects no transfer to acquiring authority as prohibited by Constitution, s.6

Landlord and Tenant—rent—rent control—no compensation for deprivation of property by landlord and tenant legislation since general and for public benefit—remains true with passage of time even though no provision for periodic review of statutory rents or formula

The respondent landlord appealed to the Supreme Court against a decision of the Rent Tribunal fixing the rent of his tenant's flat.

A tenant of the respondent applied to the Rent Tribunal to determine the statutory rent of his flat. The tribunal fixed the statutory rent at a figure less than one-third of the contractual rent. The respondent appealed to the Supreme Court on the basis that the rent control provisions of the Ordinance, and in particular ss. 11 and 30 and Schedule 1, contravened ss. 1 and 6 of the Constitution and thus had no legal validity.

The Supreme Court (Schofield, C.J.) concluded that these provisions did not contravene s.6 of the Constitution but were contrary to s.1 and set aside the Rent Tribunal's decision.

The Attorney-General on behalf of the Rent Tribunal appealed and applied for a stay of the Supreme Court's decision, pending the decision of the appeal. No stay was granted of its decision that the provisions were contrary to s.1 but a stay was granted of the order setting aside the decision of the Rent Tribunal. The proceedings are reported at 2001–02 Gib LR 6.

On the substantive appeal, the appellant submitted that (a) it was necessary to maintain statutory rent control as the housing shortage in Gibraltar still presented a serious problem and rent control gave assistance to residents on lower incomes; (b) s.1 of the Constitution, which was a general provision for the protection of human rights, itself gave no rights which could be directly enforced by an individual; (c) alternatively, s.1 had to be read subject to s.6, which protected individuals against the compulsory acquisition of their property, but provided an exception in the case of property acquired as an incident of a lease or tenancy; (d) the Landlord and Tenant Ordinance 1983 was a general regulatory provision enacted in the public interest and it had not lost these characteristics by the passage of time; and (e) the competing public interest considerations in this case were properly a matter for the legislature and not for the courts.

The respondent (who was supported by a newly-founded landlords' association) submitted in reply that (a) the present low level of statutory rents, found in Schedule 1, made it impossible for landlords to maintain their properties, let alone achieve a reasonable profit (Schedule 1 provided that the statutory rent for self-contained residential accommodation with a bathroom should be £60 p.a. per 100 sq. ft. exclusive of rates; this has not been amended since the Ordinance was enacted and the Schedule contained no mechanism for any periodical review of rent); (b) as a result of the low level of statutory rents, landlords were in effect being deprived of their property without compensation contrary to ss. 1 and 6 of the Constitution, which could not be justified as being in the public interest; and (c) the 1983 Ordinance could not be regarded as a regulatory enactment and, even if it had been a regulatory enactment when enacted, by the passage of time it had become confiscatory.

Held, allowing the appeal:

(1) Schedule 1 to the 1983 Ordinance did not offend s.1 of the Constitution. Accordingly, the Chief Justice had erred in concluding that the passage of time had rendered the 1983 Ordinance unconstitutional (para. 121).

(2) Section 1 was not merely declaratory but created rights enforceable by individuals, including the right not to be deprived of property without compensation. The effect of the application of Schedule 1 deprived the respondent of the sum representing the difference between the contractual rent and the statutory rent fixed by the Rent Tribunal pursuant to Schedule 1. The right to rent came within the definition of property, as it was a profit arising out of or incidental to property. In principle, however,

since the legislation was general and enacted for the public benefit, any deprivation caused would not give rise to a right to compensation. The position had not changed with the passage of time since 1983. Whilst the Ordinance did not contain any provision for the periodic review of statutory rents, or any formula whereby adjustments could be made, the absence of such provisions did not invalidate Schedule 1 or render it unconstitutional. Section 1, additionally, did not have to be read in the light of the limitations contained in s.6. Although s.6 and the other provisions of the Constitution had to be construed in the light of s.1, s.1 did not have to be read subject to the provisions of ss. 2 to 14 (para. 68; para. 72; paras. 92–93; para. 105; paras. 108–109; paras. 110–111).

(3) The Chief Justice was correct in holding that s.6, which restricted the compulsory taking possession of or acquisition of any interest or right over property, did not apply to the case. Its application required the transfer under compulsory powers to an acquiring authority and whilst the effect of the rent control provisions was to deprive landlords of their property by restricting their contractual right to rent, that property was not transferred to an acquiring authority (paras. 74–76).

(4) The court was ill-equipped to undertake a full enquiry, which would be required in order to provide a just solution and recommended that the effect of Schedule 1 should be reconsidered as an urgent matter by the Government. Currently, the low level of rents permitted was unfair to the landlords and there was evidence that residential re-development was being inhibited and that the condition of some private housing stock was deteriorating. The appeal would be allowed (paras. 120–126).

Cases cited:
(1) *Blake* v. *Att.-Gen.*, [1982] I.R. 117, considered.
(2) *Bland Ltd., In re*, [1985] L.R.C. (Const.) 1137, not followed.
(3) *Grape Bay Ltd.* v. *Att.-Gen. (Bermuda)*, [2000] 1 W.L.R. 574; [2000] 1 L.R.C. 167, applied.
(4) *Ladd* v. *Marshall*, [1954] 3 All E.R. 745; [1954] 1 W.L.R. 1489, distinguished.
(5) *Morgan* v. *Att.-Gen.*, [1988] 1 W.L.R. 297; [1988] L.R.C. (Const.) 468, applied.
(6) *Penn Central Transp. Co.* v. *New York City* (1978), 438 U.S. 104; 57 L.Ed.2d. 631, *dicta* of Brennan, J. considered.
(7) *Société United Docks* v. *Govt. of Mauritius*, [1985] A.C. 585; [1985] 1 All E.R. 864, followed.
(8) *Spath Holme Ltd., Ex p.*, [2001] 1 All E.R. 195; (2000), 46 E.G. 181, applied.

Legislation construed:
Interpretation and General Clauses Ordinance (Supplement No. 12, L.N. 8/2000), s.2: The relevant terms of this section are set out at para. 67.

Landlord and Tenant Ordinance 1983 (1984 Edition), s.11: The relevant terms of this section are set out at para. 14.
s.31: The relevant terms of this section are set out at para. 20.
s.74: The relevant terms of this section are set out at para. 13.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.1: The relevant terms of this section are set out at para. 25.
s.6(1): The relevant terms of this sub-section are set out at para. 26.
(4)(a)(iii): The relevant terms of this sub-section are set out at para. 90.
s.15(1): The relevant terms of this sub-section are set out at para. 27.
(2): The relevant terms of this sub-section are set out at para. 27.

Constitution of the United States, Fifth Amendment: The relevant terms of this Amendment are set out at para. 95.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), Protocol 1, art. 1: The relevant terms of this article are set out at para. 94.

R.R. Rhoda, Q.C., Attorney-General, and *C. Pitto, Crown Counsel*, for the Rent Tribunal;
A.A. Vasquez and *Miss S. Pilcher* for the respondent.

1 **NEILL, P.,** delivering the judgment of the court:

Introduction

This is an appeal by the Rent Tribunal from the order of the Chief Justice dated January 31st, 2001, whereby he set aside a decision of the Rent Tribunal dated July 24th, 2000, relating to a flat on the first floor of premises at 52 Turnbull's Lane, Gibraltar.

2 The premises at 52 Turnbull's Lane are owned by Mr. Deepa Aidasani (the landlord and first respondent). The landlord acquired the premises in or about 1982. The premises comprise commercial premises on the ground floor, three residential flats on the first floor and a larger residential flat on the second floor. The subject of the present appeal is one of the first floor flats, a single room with the use of kitchen and bathroom. This room has been occupied by Mr. Mohammed Nadi (the tenant) and his wife for about 20 years. It is 662 sq. ft. in area.

3 When Mr. Nadi went into occupation of the flat at 52 Turnbull's Lane, he occupied it as a registered licensee under the Labour From Abroad (Accommodation) Ordinance 1971. Under this Ordinance, a landlord could apply to license property as accommodation for visiting (principally Moroccan) workers. The licence fees chargeable by landlords under these lettings were supervised by the Department of Health.

4 The rent paid by Mr. Nadi while he was a licensee under the 1971 Ordinance was £18 per week.

5 In 1988, for reasons of which this court is not aware, Mr. Nadi ceased to be a registered licensee under the 1971 Ordinance. Thereupon the flat which Mr. Nadi occupied at 52 Turnbull's Lane became subject to the provisions in Part III of the Landlord and Tenant Ordinance 1983.

6 In 1989 the 1971 Ordinance was repealed. At the same time a new s.36A was added to the 1983 Ordinance. This section had the effect of preserving the existing rents of properties licensed under the 1971 Ordinance until a statutory rent was fixed under Part III of the 1983 Ordinance.

7 In 1994 Mr. Aidasani increased Mr. Nadi's rent from £18 per week to £20 per week. Mr. Nadi paid this increased rent for the next five or six years.

8 On July 26th, 1999, however, as the result of a complaint made by Mr. Nadi, Mr. Aidasani was served with a notice under the Public Health Ordinance to abate a nuisance at 52 Turnbull's Lane and was subsequently served with a summons dated November 22nd, 1999.

9 In February 2000, Mr. Nadi served notice of his intention to apply to the Rent Tribunal for the determination of the statutory rent payable by him in accordance with Part III of the 1983 Ordinance.

10 The hearing before the Rent Tribunal took place in July 2000. Both Mr. Nadi and Mr. Aidasani attended and were represented. At the hearing, Mr. Aidasani gave evidence that he estimated that since he had become the owner of 52 Turnbull's Lane he had spent about £40,000 to £50,000 on maintenance and repairs to the property. He added that in the few months preceding the hearing he had spent about £4,000 to £5,000 on works and repairs at the property. He produced receipts totalling £4,150.

11 Counsel for Mr. Aidasani also raised an issue as to the legality of the provisions under which Mr. Nadi had made his application and sought to persuade the Rent Tribunal to dismiss the application on the basis that these provisions were unconstitutional. At the end of the hearing, the tribunal reserved its decision.

12 On July 24th, 2000, the Rent Tribunal delivered its decision whereby it determined that the dwelling occupied by Mr. Nadi was subject to the provisions of Part III of the 1983 Ordinance and that the statutory rent payable by Mr. Nadi was £33.10 per month exclusive of rates. It declined to deal with any of the constitutional issues.

13 The landlord then appealed to the Supreme Court. The appeal was brought pursuant to s.74 of the Ordinance which provides:

> "(1) Any person who is aggrieved by any decision of the Rent Tribunal or of the Rent Assessor under this Ordinance may, within 21 days after being notified in writing of the decision, appeal against it to the Supreme Court.
>
> (2) On hearing the appeal, the court may confirm, reverse or vary the decision."

The Landlord and Tenant Ordinance 1983

14 By s.10 of the 1983 Ordinance (as originally enacted) the provisions of Part III of the Ordinance apply to every dwelling-house erected on or before January 1st, 1945. The flat at 52 Turnbull's Lane falls within that provision. Section 11 of the Ordinance is in the following terms:

> "Except where otherwise provided in this Ordinance, the statutory rent of any dwellinghouse to which this Part applies shall be the rent appropriate to that dwellinghouse as calculated in accordance with Schedule 1."

15 Schedule 1 to the Ordinance provides that the statutory rent for a dwelling-house or part of a dwelling-house comprising a self-contained unit with a bathroom shall be £60 p.a. per 100 sq. ft. exclusive of rates. This statutory rent was set when the Ordinance was enacted in 1983, and has not been amended since. It is to be noted that there is no mechanism in the Ordinance for any periodical review of rent.

16 In 1992, s.10 of the 1983 Ordinance was amended so as to bring within the system of control every dwelling-house erected on or before the 1st January "of the year preceding by 45 years the 1st day of January of the current year."

17 It will be seen that as a result of this amendment, properties erected since January 1st, 1945, have gradually been brought within the system of rent control. However, by s.11A of the 1983 Ordinance and the Statutory Rent (Forty-Five Year Rule) Regulations 1992, a different method of calculating the statutory rent for these newer properties was prescribed. We are not concerned in the present case with the 1992 amendment, but it can be recorded that we were told that in practice the statutory rents assessed under the 1992 Regulations are substantially higher than those assessed in accordance with the formula in Schedule 1.

18 Section 11(2) of the Ordinance gives the Rent Assessor certain limited powers to increase the statutory rent in the circumstances therein set out, but it is clear that these powers have no relevance in the present case.

19 Section 13 of the Ordinance provides that the Rent Assessor may increase the statutory rent where the landlord has, since the

commencement of the Ordinance, incurred expenditure on improving or structurally altering the dwelling-house. Section 13(3) specifically excludes any works carried out by the landlord as a consequence of a notice served upon him under the Public Health Ordinance.

20 Section 31 of the Ordinance provides that:

> "Notwithstanding any agreement to the contrary, where the rent of any dwelling-house to which this Part applies exceeds the rent that is for the time being permitted under this Part, the amount of the excess shall be irrecoverable from the tenant."

21 In the course of the hearing in this court, we were also referred to a number of other provisions of the 1983 Ordinance, including s.15 (which applies to properties that have become vacant and are then let to Gibraltarians) and s.22 (which applies to properties that have been reconstructed so that after reconstruction either the dwelling-house is substantially larger than before or it has been converted into two or more separate, self-contained dwelling-houses). We are not satisfied, however, that an examination of rents payable in respect of dwelling-houses to which either s.15 or s.22 applies is of any assistance in the determination of the current appeal. As Mr. Vasquez made clear in his final submissions on behalf of the respondents, we are concerned solely with the legality of the system of control imposed in respect of dwelling-houses to which Schedule 1 applies.

22 Nevertheless, we consider that we should make reference to s.80A of the 1983 Ordinance that imposes, in respect of each building containing either wholly or in part domestic premises to which Part III of the Ordinance applies, an obligation to maintain a reserve fund into which a specified proportion of the rent is to be paid. This reserve fund is designed to provide money for repairs. We are, however, very uncertain of the extent to which this system of a compulsory reserve fund is operated in practice.

23 We should also refer to the fact that the amendment or replacement of Schedule 1 is one of the matters that can be dealt with by regulations made in accordance with s.81 of the 1983 Ordinance.

The relevant provisions of the Constitution

24 The Constitution of Gibraltar is set out as Annex 1 to the Gibraltar Constitution Order 1969. Chapter 1 of the Constitution is concerned with the protection of fundamental rights and freedoms of the individual. The chapter contains 17 sections. The landlord places reliance on ss. 1 and 6.

25 Section 1 of the Constitution, so far as is material, provides as follows:

> "It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—
>
> . . .
>
> (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

26 Section 6 of the Constitution contains provisions relating to the compulsory acquisition of property. It is sufficient at this stage to set out the terms of s.6(1):

> "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say—
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> (a) the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit; and
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> (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
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> (c) provision is made by a law applicable to that taking of possession or acquisition:
>
> (i) for the prompt payment of adequate compensation; and
>
> (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or

> acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation."

27 In addition, we should set out the provisions of s.15 of the Constitution. This section provides:

> "(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of the preceding subsection, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled."

We do not consider that it is necessary to set out sub-ss. (3) and (4) of s.15.

The hearing before the Chief Justice

28 We can deal with the hearing before the Chief Justice quite shortly because the arguments have been canvassed again in this court.

29 The main issues before the Chief Justice can be summarized as follows:

(1) Whether the right to rent was "property" within the meaning of ss. 1 to 6 of the Constitution.

(2) Whether any property of Mr. Aidasani had been compulsorily acquired within the meaning of s.6 of the Constitution.

(3) Whether s.1 of the Constitution was declaratory only, or whether it gave Mr. Aidasani additional rights to those contained in s.6.

(4) Whether, if s.1 conferred additional rights, the effect of the low rent was to deprive Mr. Aidasani of property without compensation within the meaning of s.1 of the Constitution.

(5) Whether in the circumstances the statutory scheme as it affected Mr. Aidasani in relation to this property was unconstitutional and that therefore the decision of the Rent Tribunal should be set aside.

The decision of the Chief Justice

30 On the first issue, the Chief Justice referred to s.2 of the Interpretation and General Clauses Ordinance and concluded that the right to rent, present or future, vested or contingent, was properly within the definition of property.

31 On the second issue, the Chief Justice held that it could not be said that by reason of the imposition of the statutory rent anything had been compulsorily acquired or that possession had been taken of anything compulsorily. He therefore rejected the argument put forward by the landlord under s.6.

32 The Chief Justice considered the third issue at some length. He was referred to a decision of Davis, C.J., in which he had held that s.1 of the Constitution was declaratory only, but the Chief Justice considered that this decision could not stand in the light of the decision of the Privy Council in *Société United Docks* v. *Govt. of Mauritius* (7). The Chief Justice therefore concluded that he should follow the decision of the Privy Council and held that the provisions of s.1 of the Constitution were not merely declaratory, but gave rise to rights.

33 We come then to the fourth issue before the Chief Justice and to his decision as to the effect of s.1. We should refer to certain passages in his judgment. He said:

> "As I understand it, the landlord has been deprived of property in two ways. The first way relates to the rent which he is entitled to demand from the tenant. The impugned provisions deprive the landlord of a market or fair rent for the premises; in other words, they deprive him of the difference between the rent which he could obtain if the rent control provisions were not in force and the rent which the Ordinance prescribes for the premises."

34 A little later the Chief Justice added: "The deprivation of a market or fair rent for the premises would not, in itself, be contrary to the public interest." As we understand it, the Chief Justice was there deciding that the first way in which a landlord had been deprived of his property, namely, by the deprivation of a market or fair rent, was not by itself contrary to the public interest. He therefore turned, by way of contrast, to the second way in which, on his analysis, the landlord had been deprived of his property.

35 The Chief Justice continued:

> "The effect of the passage of time and of inflation is to deprive the landlord of his control and use of the premises. The present-day effect of the provisions is very different from their effect when the legislation was passed in 1983."

The Chief Justice then referred to passages in the judgment of McWilliam, J. in *Blake* v. *Att.-Gen.* (1), in which the court had to consider the constitutionality of the rent control provisions of the Irish Rent Restriction Acts. The Chief Justice cited a passage in which McWilliam, J. had said that provisions controlling rents and restricting the rights of a landlord to obtain possession "can have the effect of preventing a landlord from obtaining in the foreseeable future any benefit at all from the property . . ."

36 The Chief Justice then continued:

> "Looked at in this way, the impugned provisions of our Ordinance deprive the landlord of his control and use of the premises and, in so doing, deprive him of his property. The landlord in this case cannot maintain the premises without dipping into his own resources. The statutory rent is so absurdly low that he derives no benefit from the premises . . . The landlord cannot take possession of the premises unless he needs it for his own use, and neither he nor any purchaser could evict this tenant . . . Effectively, the landlord has been deprived of his control and use of the property, and thus of the property itself."

37 The Chief Justice then considered and rejected the possibility that this situation was in the public interest. He added:

> "No doubt the impugned provisions were in the public interest when they were enacted . . . I have not heard it argued that with the passage of time the impugned provisions operate otherwise than unfairly, arbitrarily and in a manner which affects the market in older properties and the condition of many of the older properties in Gibraltar. I find that the impugned provisions provide for a deprivation of the landlord of his property, without compensation and that they are not saved as being in the public interest. They constitute a contravention of s.1 of the Constitution."

38 It will be seen from these passages in the judgment that the Chief Justice considered that the passage of time was relevant in two ways. First, the diminishing value of the statutory rent resulted over a period in the property becoming valueless so that it could be said that the landlord was "deprived" of it. Secondly, with the passage of time the increasingly damaging effects of the low rents meant that the impugned provisions could no longer be saved on the basis that they were in the public interest. The Chief Justice therefore allowed the appeal from the Rent Tribunal and set aside the rent that had been determined.

39 The formal order of the Supreme Court was in the following terms:

> "That the decision of the Rent Tribunal of July 24th [sc. 2000] determining the statutory rent in respect of the premises known as Flat 52/1–2 Turnbull's Lane, Gibraltar be hereby set aside."

The Attorney-General was also ordered to pay the landlord's costs of the appeal to the Supreme Court.

Orders of the court and proceedings following the judgment

40 The Attorney-General on behalf of the Rent Tribunal gave notice of appeal to this court against the Chief Justice's decision. By notice of motion dated February 22nd, 2001, the Attorney-General also applied for a stay pending the hearing of the appeal. The order which this court was invited to make on that application was:

> "1. That the order of the Chief Justice of January 31st, 2001, setting aside the decision of the Rent Tribunal of July 24th, 2000, determining the statutory rent in respect of the premises known as Flat 52/1–2 Turnbull's Lane, Gibraltar; and
>
> 2. That the ruling by the learned Chief Justice that ss. 11 and 30 of the Landlord and Tenant Ordinance and Schedule 1 thereto constitute a contravention of s.1 of the Gibraltar Constitution Order,
>
> be stayed pending the judgment of the Court of Appeal in this matter."

41 From our recital of the terms of the formal order made by the Supreme Court, it is apparent that the Chief Justice did not make a ruling in the terms set out in para. 2 of the proposed order, although this was the substance and effect of his reasoning in his judgment.

42 On March 2nd, 2001, this court, after hearing the Attorney-General for the Rent Tribunal and Mr. Vasquez for the respondent, Mr. Aidasani, made an order in the terms of para. 1 of the proposed order. (The proceedings are reported at 2001–02 Gib LR 6.)

43 After giving judgment on the stay application, in view of the general importance of the issues in this appeal, this court invited counsel for the parties then present to consider whether it was desirable that other parties should be added to the proceedings, in particular some persons or body representing landlords or tenants in Gibraltar generally.

44 In response to that invitation, an association of landlords was formed and on March 23rd, 2001, Mr. Vasquez on its behalf gave notice of intention to apply for an order joining that association as a respondent to this appeal. On April 2nd, 2001, the Chief Justice sitting as a single judge of this court made an order to that effect.

45 Counsel have informed us, and we of course accept, that although when suggesting the possibility of other parties being added to the appeal we said nothing about evidence being tendered on behalf of any party so added, they understood us to have in mind that this might be necessary or

at least desirable, since such a party might wish to canvass issues wider than those already raised on behalf of the landlord and tenant.

The appeal to the Court of Appeal

46 The appeal came on for hearing before the Court of Appeal on Tuesday, May 22nd, 2001. Mr. Nadi, the tenant, took no part in the proceedings either here or below.

47 The court heard oral evidence from Mr. Hassan, a chartered surveyor called on behalf of the respondent association; and from Mr. Pons, the Rent Assessor, and Mr. Netto, a member of the Committee of Action for Housing, who both gave evidence in support of the Rent Tribunal. We consider this evidence and its effect a little later in this judgment.

48 Counsel for the parties provided the court with written skeleton arguments and these written arguments were supplemented at the hearing by oral submissions that were directed both to the evidence and to the difficult questions of law raised by this appeal. We were very grateful to counsel for the assistance given to us.

49 At the conclusion of the hearing on Thursday, May 24th, we reserved our judgment and indicated that we hoped to deliver judgment on Tuesday, May 29th.

The evidence before the Court of Appeal and its effect

50 On the hearing of the appeal we admitted the oral evidence of Mr. Hassan on behalf of the association and of Mr. Netto and Mr. Pons on behalf of the Rent Tribunal, because we considered that the special circumstances occasioned by the joinder of the association of landlords as the second respondent to the appeal, rendered the *Ladd* v. *Marshall* (4) conditions inapplicable. We were thus able to rule that the association should be permitted to adduce evidence and that the Rent Tribunal should have the opportunity to adduce evidence in reply.

51 All the witnesses verified their statements, with qualifications in the case of Mr. Hassan and Mr. Pons. Mr. Hassan gave detailed expert evidence on behalf of the association, in which he was highly critical of Part III of the Landlord and Tenant Ordinance. Mr. Pons gave evidence contradicting specific parts of Mr. Hassan's evidence. Mr. Netto's evidence was not directed specifically at the matters dealt with by Mr. Hassan, but related to his knowledge and experience of the housing shortage in Gibraltar, its consequences and the need for rent control for the benefit of Gibraltarians and non-Gibraltarians on lower incomes.

52 We emphasize that this appeal is only concerned with the older type of property subject to s.11 and Schedule 1 rent control. These are the

properties erected before January 1st, 1945, which were initially subjected to control when the 1983 Ordinance took effect.

53 It was common ground before the Chief Justice and between Mr. Hassan and Mr. Pons in this appeal that, with the passage of time, the effect of the fixed rent of £60 per 100 sq. ft. per annum has been to provide the landlord with insufficient return to enable him to maintain the tenanted property in a reasonable state of repair, without dipping into his own pocket. Mr. Hassan's evidence demonstrated that if the Schedule 1 rent had been adjusted over the years to keep pace with inflation, it would in 1999 have reached a figure of £119.40. Clearly, one of the original purposes of the legislature when enacting the 1983 Ordinance, namely that landlords should obtain rents which would permit them to keep their property in a good state of repair, is not being achieved.

54 The situation is not being alleviated by landlords carrying out reconstruction and applying for increased rent under s.22 of the Ordinance. The result is that in many cases landlords are failing to maintain their properties and finding themselves (as was Mr. Aidasani) served with abatement notices under the Public Health Ordinance. Many of the properties subject to Schedule 1 are in the old city of Gibraltar. Telling evidence of the blight caused to such properties was given by Mr. Hassan. Attractive facades of buildings are being maintained by their owners in compliance with Preservation Amenities Notices, under s.23 of the Town Planning Ordinance, but the buildings behind the facades are left derelict and unoccupied to avoid the effects of rent control.

55 In this connection there was no evidence to indicate whether landlords have complied with the reserve fund requirements of s.80A of the Ordinance and of the Landlord and Tenant (Reserve Funds) Regulations 1987. In the case of Mr. Aidasani, who said he had spent £40,000 to £50,000 on the maintenance and repair of his property, no copy of any register maintained by him under reg. 4 of the 1987 Regulations or of any audited annual returns submitted by him to the Housing Department under reg. 5 were produced. On the second day of the hearing of this appeal counsel undertook to provide the court with a "schedule of rent," but none has been forthcoming.

56 It is common ground that the pressure for housing is less than it was when the 1983 Ordinance came into force. Both private and government housing stock have increased. The population of Gibraltar has decreased by about 2,000 since the Ordinance was enacted. There is disagreement as to the extent of the present shortage. Mr. Hassan's evidence was that there is no longer a significant housing problem. His opinion is that rents should be allowed to increase, thereby increasing tax and rate revenue, part of which could be used by the Government for housing benefit. Mr. Pons and Mr. Netto consider the shortage to be appreciable.

57 As regards housing benefit, in view of the fact that s.35 of the 1983 Act (which made provision for rent relief) was repealed by s.4 of the Landlord and Tenant (Amendment) Ordinance 1989, the court requested Mr. Vasquez to explain the statutory basis for the application of the Rent Relief Regulations, which he was praying in aid, in his closing submissions. It transpires that the Rent Relief Regulations were revoked by the Rent Relief (Revocation) Regulations with effect from August 10th, 1989 (when the repeal of s.35 took effect under the 1989 Act). There is therefore no statutory basis for rent relief, but Mr. Vasquez informed the court that the practice since 1995 has been for the Department of Housing to award rent relief in appropriate cases to private tenants of premises, which are subject to Part III of the 1983 Ordinance. In doing so the department applies the same criteria as those set out in the revoked Rent Relief Regulations.

58 Various conflicting figures were given in evidence regarding the numbers on the official waiting list for housing. The uncertainty was resolved during the hearing of the appeal when the Attorney-General produced the official figures which were not disputed by the respondents. At the present time there are 230 applicants on the waiting list. There are 416 on the pre-list of which 284 are described as active because the remainder may not satisfy the relevant criteria.

59 Although the parties' witnesses were not agreed as to the extent of the housing shortage in Gibraltar, Mr. Hassan accepted that, as Mr. Netto had asserted, there is an appreciable need for housing accommodation for non-Gibraltarians and Gibraltarians with lower incomes. Those who were not Gibraltarians (mostly British and Moroccan couples) are not eligible to be placed on the official waiting list for housing. This significant section of the community, some of whom have no hostel facilities, gravitate, through lack of means, to run-down properties which are subject to Schedule 1 rent control.

60 In these circumstances it is not necessary to make any further detailed reference to the evidence.

The submissions of the parties

61 We shall consider later the main issues that arise for decision in this appeal and we shall then look in detail at the contentions. At this stage it is sufficient to set out a summary of the principal submissions. We propose to refer first to the submissions advanced on behalf of the respondents.

62 The case for the respondents can be summarised as follows:

(1) That the evidence demonstrated that, whatever the position may have been in 1983 when the Ordinance was enacted (as to which no

admissions were made), at the present time the level of statutory rents was absurdly low and made it impossible for landlords to maintain their properties, let alone achieve a reasonable profit.

(2) This state of affairs was quite contrary to that which was contemplated in the report of the Select Committee to the House of Assembly dated April 5th, 1983.

(3) As a result of the low level of rents received by landlords (and in particular Mr. Aidasani), they were in effect deprived of their property without compensation.

(4) This deprivation was contrary to s.1 of the Constitution of Gibraltar (which gave enforceable rights including the right not to be deprived of property without compensation), and was also contrary to s.6 of the constitution, when properly construed.

(5) That this deprivation, which meant that one section of the population was obliged to subsidise another section, could not be justified as being in the public interest.

(6) That the principle enunciated in *Grape Bay* v. *Att.-Gen.* (3) had no application because (a) the 1983 Ordinance could not be regarded as a regulatory enactment; and (b) even if it had been regulatory at the outset it had ceased to have that characteristic. By the passage of time it had become confiscatory. The Chief Justice was correct to look at its effect at the present day.

63 On the other hand, it was contended by the Attorney-General on behalf of the Rent Tribunal:

(1) That the evidence showed that, though the housing shortage in Gibraltar was less acute than in 1983, it still presented a serious problem.

(2) That s.1 of the Constitution gave no rights which could be enforced directly by an individual.

(3) That in the alternative, s.1 had to be read in conjunction with and subject to s.6. Section 6 provided an exception in the case of the acquisition of property that was an incident of a lease or tenancy (s.6(4)(a)(iii)). If rent control had the effect contended for, it was an incident of a statutory tenancy.

(4) That in any event s.6 had no application in the present case, as it was concerned with compulsory purchase.

(5) That the principle in *Grape Bay* applied. The 1983 Ordinance was a general regulatory provision enacted in the public interest and it had not lost its character by the passage of time.

(6) That the competing aspects of the public interest that had to be

considered in this case were properly a matter for the legislature and not for the courts. Though it was accepted that Schedule 1 created unfairness for landlords, the removal of the present protection would cause great hardship to a very vulnerable section of the community.

The issues for decision

64 In the light of the submissions of the parties, it seems to us that the main issues for decision can be grouped under the following headings:

(1) The meaning of "deprivation of property" in s.1 of the Constitution.

(2) Whether the respondents can rely on s.6 of the Constitution.

(3) Whether the respondents can rely on s.1 of the Constitution, and, if so, how.

(4) Whether the *Grape Bay* principle applies and the scope of this principle.

(5) Whether the 1983 Ordinance was a piece of regulatory legislation when enacted.

(6) Whether the nature of the 1983 Ordinance has changed because its effect over time has become more onerous.

(7) The competing public interests and the role of the court.

The meaning of "deprivation of property" in s.1 of the Constitution

65 We will consider later the question whether s.1 of the Constitution enables the respondents to claim an enforceable right to protection from the deprivation of property without compensation. At this stage, we are concerned to consider whether, on the assumption that such a right exists, the effect of the rent control provisions in Part III of the 1983 Ordinance can amount to the deprivation of property within s.1 of the Constitution.

66 The first question for consideration is the meaning of "property" in this context.

67 Section 2 of the Interpretation and General Clauses Ordinance is in the following terms:

> "'[P]roperty' includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incidental to property as above defined . . ."

68 The Chief Justice referred to this provision in his judgment and concluded that the right to receive rent from the premises was "property"

within the definition. We are satisfied that the Chief Justice was correct in reaching this conclusion. The owner of premises has a number of rights incidental to that ownership. These include the right to occupy the premises himself, the right to sell the premises and the right to receive an income in the form of rent from the premises. The right to rent is a profit arising out of or incidental to the premises.

69 The next question is whether the rent control provisions have the effect of "depriving" the respondents of any property.

70 It was argued by the Attorney-General on behalf of the Rent Tribunal that landlords have no enforceable rights to receive a market rent and that, accordingly, the rent control provisions in the 1983 Ordinance did not deprive the respondents of any property. With respect, we are unable to agree. For several years, Mr. Aidasani received a rent of £20 a week from this property. If the decision of the Rent Tribunal remains in force, Mr. Aidasani will only be entitled to receive by way of rent a sum less than half this figure. In ordinary language, he will have been "deprived" of the difference between the two figures by the application to Mr. Nadi's letting of the provisions of Schedule 1 to the 1983 Ordinance. The contractual right to the higher rent, though suspended, may remain but part of that rent will be irrecoverable.

71 Moreover, there is powerful authority in support of this view as to the meaning of "deprivation." In *Morgan* v. *Att.-Gen.* (5), the Privy Council was concerned to consider the effect of rent control legislation in Trinidad and Tobago. The appellant landlord in that case owned a building which he had let unfurnished in 1981 at the monthly rent of $500. By reason of the relevant rent control legislation he became unable to recover more than $150 a month, which had been the rent payable in 1978. In delivering the opinion of the board, Lord Templeman said ([1988] L.R.C. (Const.) at 469):

> "The Act of 1981 interferes with the right of the landlord to the enjoyment of his property by depriving him of $350 per month which he was enjoying by way of rent in 1981 pursuant to a contract of letting freely and lawfully negotiated."

It is also to be noted that in the recent decision of the House of Lords in *Ex p. Spath Holme Ltd.* (8), where the House was considering the legality of the Rent Act (Maximum Fair Rent) Order 1999, Lord Bingham said ([2001] 1 All E.R at 203):

> "But a power to restrict or prevent increases of rent which would otherwise take place or restrict the amount of rent which would otherwise be payable on a new letting must of necessity deprive the landlord of rent which he would, but for the minister's order, receive. The words used are capable of no other construction . . .

> Any measure restricting rents, or prices or charges of any kind, must have the effect of depriving the recipient of what he would otherwise receive . . ."

72 In these circumstances, we have no hesitation in concluding that the effect of the application of Schedule 1 to the 1983 Ordinance on the room let to Mr. Nadi "deprives" Mr. Aidasani of the sum representing the difference between the rent he was previously receiving and the statutory rent fixed by the Rent Tribunal pursuant to Schedule 1.

The effect of ss. 1 and 6 of the Constitution

A. Section 6

73 The first argument of Mr. Vasquez, who was then acting only for Mr. Aidasani, at the hearing before Schofield, C.J. was that the effect of ss. 11 and 30 and Schedule 1 to the Landlord and Tenant Ordinance was to contravene s.6 of the Constitution. That section relates to the compulsory taking possession of, and the compulsory acquisition of any interest or right over, property of any description.

74 The phases "compulsorily taken possession of" and "compulsorily acquired" in their normal meaning relate to the transfer, under compulsory powers, of the possession of or other interests in property from a land owner to an acquiring authority. Compulsory acquisition is one way, but not the only way, in which a land owner may be deprived of his property. We have concluded that the effect of the relevant sections of the Landlord and Tenant Ordinance is to deprive landlords of property. Such property, the loss of control over and of much of the rental value in their land and buildings, is not transferred to any acquiring authority or to anybody else. We therefore agree with the Chief Justice that it does not amount to compulsory acquisition in its normal sense.

75 Before us, however, Mr. Vasquez has advanced an alternative argument on s.6. He submits that the evidence shows that Mr. Aidasani, as a result of the restricted rent he is receiving for the subject premises, coupled with his enforced expenditure on repairs, has not only been deprived of some property; he has been left with a property which is not merely valueless but is a financial burden on him, one which in practice he cannot dispose of. This amounts to compulsory acquisition, and since there is no compensation for it, s.6 of the Constitution is breached.

76 It suffices to say that even if the evidence justified such a conclusion of fact (as to which we make no finding), it is a deprivation of property as we have already explained but still does not amount to compulsory acquisition. In our view, the Chief Justice was correct in holding that s.6 of the Constitution does not apply to the facts of this case.

B. Section 1

77 The Chief Justice, however, found that s.1 of the Constitution does on its wording give protection against the deprivation of property which Mr. Aidasani and other landlords have suffered. The Attorney-General, for the Rent Tribunal, argues that s.1 does not of itself grant such protection, because it is a mere preamble to the Constitution, not an enacting provision.

78 This question was argued before Davis, C.J. in the Supreme Court in *In re Bland Ltd.* (2). In giving judgment on November 18th, 1983, Davis, C.J. concluded ([1985] L.R.C. (Const.) at 1140) that—

> "section 1 of the Constitution is declaratory only and . . . to show that they have a right of action under Chapter 1 of the Constitution the applicants must show that they have a right the protection of which is provided for in sections 2 to 14 of the Constitution."

This is persuasive and were there no other authority from elsewhere, we might have adopted this view.

79 There is, however, a body of authority on this question in decisions of the Judicial Committee of the Privy Council on appeal from other Commonwealth jurisdictions. In the recent decision of the Judicial Committee in *Grape Bay Ltd.* v *Att.-Gen. (Bermuda)* (3), Lord Hoffmann said ([2000] 1 W.L.R. at 580):

> "The Constitutions of certain of the United Kingdom Overseas Territories such as Bermuda and many of the former British possessions, now independent states, have a family resemblance. Typically they contain a chapter on the protection of the fundamental rights and freedoms of the individual which is introduced by a provision such as section 1 of the Bermuda Constitution, stating those rights and freedoms and their limitations in general terms, followed by a series of sections dealing with particular rights and more detailed exceptions and qualifications. Finally, there is an enforcement provision which gives any person who alleges a contravention of some or all of the provisions of the chapter the right to claim constitutional relief from the court."

80 As we have made clear, the Constitution of Gibraltar follows this pattern, the enforcement provision being s.15. Examples of constitutions of this kind to which we have been referred or seen reference are those of Bermuda, Botswana, Dominica, Guyana, Malta, Mauritius, Trinidad and Tobago as well as Gibraltar. There are, however, some differences between the wording of these various constitutions which, though small in extent, may make a material difference to the issue whether the provision equivalent to s.1 of the Gibraltar Constitution provides enforceable rights.

81 In *Société United Docks* v. *Govt. of Mauritius* (7) in the Privy Council, Lord Templeman said ([1985] A.C. at 599):

> "Their Lordships have no doubt that all the provisions of Chapter II, including section 8, must be construed in the light of the provisions of section 3. The wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. Section 3 recognizes that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to [compensation for] deprivation of property can be set aside but it is not to curtail the ambit of section 3. Prior to the Constitution, the government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies. Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition."

Sections 3 and 8 of the Constitution of Mauritius are the equivalent of ss. 1 and 6 of the Constitution of Gibraltar.

82 Slightly later in his judgment Lord Templeman quoted a sentence from an earlier decision of the Privy Council when he said ([1985] A.C. at 603):

> "Finally, in *Attorney-General of The Gambia v. Momodou Jobe* [1984] A.C. 689, 700 Lord Diplock dealing with the Constitution of The Gambia said:
>
> > 'A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.'"

83 One difference between the Constitution of Mauritius and that of Gibraltar is that in the enforcement section of the Mauritius Constitution, s.17(2) specifically refers to enforcing "any of sections 3 to 16" of that constitution, whereas in the Constitution of Gibraltar the equivalent sub-section, s.15(2), refers to enforcing "any of the foregoing provisions of this Chapter." The Attorney-General argues for the appellant that the difference in wording between the two constitutions means that the enforcement provisions in s.15 of the Gibraltar Constitution do not apply

to s.1 of the Constitution. In other words, he submits that in the Gibraltar Constitution, the phrase "the foregoing provisions" does not include the provisions of s.1.

84 The Chief Justice rejected this argument, holding that there is no essential difference in the meaning of the two sub-sections. We agree. We therefore conclude that the Chief Justice was correct to follow, even if he was not strictly bound by, the decision in *Société United Docks* (7) and to hold that s.1 of the Gibraltar Constitution is not merely declaratory, but sets out rights which are enforceable whether or not they are specified in more detail in later sections.

85 This leaves the question, what is the nature of the rights granted by s.1? The words "It is hereby recognised and declared that in Gibraltar there have existed . . . each and all of the following human rights and fundamental freedoms . . ." are clearly intended, in our view, to set out the common law as it was before the Constitution came into force.

86 The section, however, then provides that those rights and freedoms "shall continue to exist . . . subject to respect for the rights and freedoms of others and for the public interest . . ." Having identified "(c) the right of the individual to protection . . . from deprivation of property without compensation" the section continues—

> "and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

87 We have already concluded in paras. 83 and 84 above, that the phrase "the foregoing provisions of this Chapter" in s.15(2) of the Constitution includes the provisions of s.1. In our judgment, that is also the meaning of the words "the provisions of this Chapter" in s.1, *i.e.* the phrase includes all the provisions in ss. 1 to 17 inclusive of the Constitution.

88 To return to Lord Templeman's words in *Société United Docks* (7) ([1985] A.C. at 599 and 600) and adapt the numbering to the Gibraltar Constitution, s.1 is an enacting section. In other words, the right of the individual to protection from deprivation of property without compensation is enshrined in the Constitution by the Gibraltar Constitution Order 1969, but subject to the limitations contained in s.1, including "respect for" and not prejudicing the public interest. The common law rights and the limitations on those rights are enacted in the Constitution.

89 However, even if that were wrong, the alternative effect of s.1 is that the rights referred to in that section, which had previously been part of the

common law, continue as common law rights "subject to respect for the rights and freedoms of others and for the public interest." For present purposes, this interpretation of s.1 would produce the same effect as if the rights and limitations were enacted.

90 Finally, we should refer to an alternative argument advanced by the Attorney-General for the appellant. Adopting again Lord Templeman's words in *Société United Docks* (7) ([1985] A.C. at 599), s.6 must be construed in the light of the provisions of s.1. The Attorney-General submits that this must also require that s.1 is to be read in the light of s.6 and that is subject to the limitations contained in s.6, which include s.6(4)(a)(iii) which reads:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—
>
> (a) to the extent that the law in question makes provision for the taking of possession or acquisition of property—
>
> . . .
>
> (iii) as an incident of a . . . tenancy . . ."

91 The submission continues that the rent restriction provisions in Part III of the Landlord and Tenant Ordinance, are "an incident . . . of a (statutory) . . . tenancy . . ." and therefore those provisions are not to be held to be inconsistent with or contravene the protection accorded by s.1 of the Constitution against deprivation of property without compensation.

92 We intend no disrespect to the Attorney-General when we say that in our view there are a number of fallacies in this argument. They are:

(a) The submission reverses what Lord Templeman said in *Société United Docks*. Construing s.6 and the other detailed provisions of the Constitution in the light of s.1 does not require s.1 to be read subject to all the detailed provisions of ss. 2 to 14;

(b) Section 6(4) starts "Nothing contained in . . . any law shall be held to be inconsistent with or in contravention of subsection (1) of this section . . ." We have already held that this is not a s.6(1) case and therefore s.6(4) cannot apply;

(c) The rent control provisions in the Landlord and Tenant Ordinance are not an incident of a statutory tenancy. We have not been referred to, and have been unable to find, a definition of the phrase "statutory tenancy" in that Ordinance, though the reference to the phrase in s.3(4) of the Ordinance suggests that it is a tenancy held by a successor in title to the original tenant, a situation which does not arise in this case. Whether

that be so or not, the restriction of rent contained in the Ordinance applies to a tenant whether the tenancy is still contractual or statutory.

We therefore reject this argument.

93 We therefore conclude that the Chief Justice was correct in his conclusion that the tenant is entitled to rely on the protection afforded by s.1 of the Constitution. We do not accept this ground of appeal.

The *Grape Bay* principle and its scope

94 It is a principle of law in many jurisdictions that individuals should be entitled to protection so that they can enjoy their possessions in peace and without the threat of arbitrary confiscation. By way of example, this general principle finds expression in art. 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This article provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

95 In many jurisdictions which have, as does Gibraltar, a written constitution, this principle is reinforced by specific provisions designed to ensure that, even in cases where the compulsory transfer of property is justified on some proper ground, individuals are not deprived of their property without compensation. A similar principle is to be found in the Fifth Amendment to the Constitution of the United States, which provides in part: ". . . [N]or shall private property be taken for public use, without just compensation."

96 It seems clear, however, that this general principle is concerned primarily with the compulsory acquisition of property and not with measures which only affect the use of property.

97 In considering measures which affect the use of property, it is necessary to take account of another general principle to which Lord Hoffmann made reference in *Grape Bay Ltd.* v. *Att.-Gen.* (3). Lord Hoffmann, delivering the opinion of the Privy Council, said ([2000] 1 W.L.R. at 583):

> "It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a

deprivation of that property for which compensation should be paid. . . . The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest. The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as will inevitably be the case, the legislation in general terms affects some people more than others. For example, rent control legislation restricts only the rights of those who happen to be landlords but nevertheless falls within the general principle that compensation will not be payable. Likewise in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the New York City's Landmarks Preservation Law restricted only the rights of those people whose buildings happened to have been designated historic landmarks. Nevertheless the Supreme Court of the United States held that it was a general law passed in the public interest which did not violate the Fifth Amendment prohibition on taking private property without compensation."

98 Cases may arise, however, where the measures of control may so affect the value of property in the ownership of an individual, that it becomes valueless or even a net liability. That is the substance of the case for Mr. Aidasani in the appeal before us.

99 It will be remembered that the Chief Justice came to the conclusion that the effect of the 1983 Ordinance and Schedule 1 was to deprive Mr. Aidasani of his property, because the room let to Mr. Nadi was valueless to Mr. Aidasani and indeed a liability because he remained responsible for the maintenance of the premises, including the room. It is also to be noticed that in the *Penn Central* case (6) the Supreme Court emphasized that its decision was made on the basis that the premises as a whole remained "economically viable": see footnote 36 to the majority judgment delivered by Brennan, J.

100 We have, therefore, had to consider the scope of the *Grape Bay* principle with great care. It clearly applies to the ordinary case where the use of property is restricted by legislation of general application which is enacted for the public benefit. An individual cannot recover compensation because the general restriction has made the use of his property less profitable. As was pointed out in the *Penn Central* (6) case: "Government hardly could go on if to some extent values incident to

property could not be diminished without paying for every such change in the general law . . .”

101 Does the principle cease to apply, however, where an individual can show not merely that there has been a diminution in the value of his property, but that it has become valueless? With all due respect to the Chief Justice, to whose careful judgment we are much indebted, we would give a negative answer to this question.

102 As far as we are aware, the Chief Justice was not referred to the decision in *Grape Bay* (3) and therefore did not have an opportunity to examine its scope. In our opinion the decision and the principle to which Lord Hoffmann referred is of critical importance in a case such as the present.

103 It is first necessary to consider the nature of the legislation. Does it satisfy the two relevant tests (a) of being of general application and (b) of having been enacted for the public benefit? It is then necessary to consider the facts and the effect of the legislation on the property concerned. If the legislation passes the two tests and the legislation does not effect any transfer of property from the owner, it seems to us that the principle applies and that no compensation is payable even though the effect on the value of the property remaining in the hands of the owner is reduced to vanishing point.

104 The matter can be tested by considering the alternative. Suppose some general legislation was passed in the public interest that restricted the height of buildings in a certain area of a city to five storeys. This restriction would be likely to have an adverse effect on the development value of the affected buildings and some owners might find that because of mortgage debts, they had a negative equity in their property. It seems to us that it would be impossible to distinguish between owners who were left with a negative equity and those whose property retained some, though a diminished value. Similarly, it would be impossible logically to distinguish between owners whose rental income as a result of the legislation was less than their outgoings and those whose net return remained positive though much reduced.

105 General legislation may “deprive” an owner of property of some of the profit that he could otherwise obtain from it, and to that extent he is deprived of the sum representing that loss of profit, but, provided the legislation is for the public benefit, the *Grape Bay* principle applies and the owner is not entitled to compensation.

Whether the 1983 Ordinance was regulatory when passed

106 It was argued by Mr. Vasquez on behalf of Mr. Aidasani that the 1983 Ordinance went much further than merely regulate rents.

Accordingly, it was not a general regulatory enactment within the meaning of *Grape Bay*. He drew attention to a number of the provisions in the Ordinance, including those which imposed certain statutory obligations on landlords and those which gave rights of inheritance to statutory tenancies.

107 In our judgment, this Ordinance, as its title suggests, is intended to regulate the relationship between landlords and tenants and is a classic example of a piece of legislation of general application. In any event, as Mr. Vasquez made clear at the end of his oral submissions, the only provision that is now impugned is Schedule 1 itself which contains the formula for the calculation of statutory rents.

108 We are therefore entirely satisfied that the 1983 Ordinance when first enacted came within the *Grape Bay* principle. It was of general application and was clearly for the public benefit. Indeed it is noteworthy that Mr. Hassan in para. 21 of his statement said that the new formula in Schedule 1 was generally welcomed by landlords "as it represented a relatively generous increase."

109 It is of course true that the 1983 Ordinance did not contain any provision for the periodic review of statutory rents or any formula whereby adjustments to meet inflation or increases in the cost of living could be made. But we find it impossible to say that the absence of such provisions invalidated Schedule 1 or rendered it unconstitutional.

Whether the nature of the 1983 Ordinance has changed

110 It was argued by Mr. Vasquez that, even if (which he did not formally accept) Schedule 1 was not contrary to the Constitution when the 1983 Ordinance was passed, it had become unconstitutional with the passage of time. Schedule 1 had never been amended and the statutory rents fixed by a formula devised 18 years ago now caused great hardship to landlords and amounted to a confiscation of their property.

111 We feel bound to reject this argument. It is of course possible in a hypothetical case that the circumstances in which some piece of legislation was passed had completely changed, so that there remained no scope for an evaluation of competing public interests. But that is not this case. The hardship to the landlords may have increased to a significant degree and the number of those needing protection may have fallen, but we cannot say that the nature of the legislation has lost its characteristic of being legislation of general application passed for the public interest.

112 The passage of time and the resultant change in the value to the landlords of the rents they derive from their properties are relevant in another context. In his judgment, the Chief Justice said:

> "The effect of the passage of time and of inflation is to deprive the landlord of his control and use of the premises. The present-day effect of the provisions is very different from their effect when the legislation was passed in 1983. And it is the effect of the provisions we look at and not just their form (see *Chapman* v. *Becerra (No. 2)*, a decision of Spry, C.J.)."

113 The Chief Justice then said that he had derived considerable assistance from the Irish decision in *Blake* v. *Att.-Gen.* (1). That was a case in which some of the provisions of the rent control scheme in force in Ireland were held to contravene the Irish Constitution by McWilliam, J. in the High Court and by the Supreme Court on appeal.

114 In his judgment in the present case the Chief Justice quoted and adopted parts of the judgment of McWilliam, J. in *Blake,* where he said ([1982] I.R. at 125):

> ". . . I have to examine the operation of the Act now to see whether it now offends against any of the provisions of the Constitution, and that I am not concerned to investigate whether it or any earlier statute offended against the provisions of the Constitution at the time of enactment."

115 The Chief Justice, however, did not refer to or quote from the judgment of the Supreme Court, delivered by O'Higgins, C.J. in *Blake*. That judgment, although upholding the decision of McWilliam, J., did not adopt his reasoning. Instead the Supreme Court concluded that the rent control provisions under attack contravened the Constitution when the latest version of the landlord and tenant legislation was enacted in the report of *Blake* ([1982] I.R. at 140).

116 We do not find it necessary to express any conclusion as to whether or not the approach and reasoning of McWilliam, J. was or was not correct in the context of the case before him. We are satisfied, however, for the reasons we have endeavoured to outline, that Schedule 1 to the 1983 Ordinance was not in breach of the Constitution of Gibraltar when enacted, nor does it offend the Constitution at the present time (see paras. 108–111). Accordingly, we respectfully disagree with the analysis of the Chief Justice which led him to conclude that the passage of time had rendered the 1983 Ordinance unconstitutional when looked at in the present day. In our opinion, the legislation has throughout retained its original character of being general legislation enacted for the public benefit.

The competing public interests and the role of the court

117 The imposition of any system of rent control involves the consideration of issues of social policy of great difficulty, and as Lord Bingham

pointed out in *Ex p. Spath Holme Ltd.* (8) ([2001] 1 All E.R at 215), in the context of the Rent Acts (Maximum Fair Rent) Ordinance 1999 in the United Kingdom, "it was for ministers to judge where the balance between the competing interests of landlords and tenants should be struck."

118 It is right to emphasize that the courts have a role if a challenge is made on the basis of a written constitution or an international convention, and in other circumstances where judicial review is sought of a ministerial decision. But, even if the application to a court is appropriate and justified on the facts, the court must approach its task with great caution. Thus, although, as in the present matter, the parties may be able to adduce carefully prepared and cogent evidence, it must be borne in mind that it may be difficult in the context of court proceedings to collect all the relevant material, and that, in any event, the evaluation of that evidence may involve questions of policy with which a court of law is ill-equipped to deal.

119 If one applies these considerations to the present case, it is apparent that the picture that slowly emerged before us was rather different from the stark picture before the Chief Justice. Thus, for example, it is now apparent that there are still a substantial number of vulnerable people who of necessity have to look to the private housing market for affordable housing. The balance between their needs and those of landlords, who may be seriously disadvantaged by the operation of Schedule 1, is a matter for the application of political judgment. Secondly, we are far from clear as to the precise extent of the hardship in Mr. Aidasani's case and whether that might have been mitigated by a prudent adherence to the provisions of s.80A. Indeed, the operation of s.80A in the current housing market remains unclear.

120 The more we looked at this case, the more apparent it became that a just solution to what is a serious problem could not be reached without a full enquiry, which we were not equipped to carry out.

Conclusion

121 Having had the opportunity to consider this matter in some detail, we have come to the firm conclusion that this appeal should be allowed. It has not been demonstrated that Schedule 1 of the 1983 Ordinance, which is the specific provision with which we are concerned, is or ever has been in breach of the Constitution of Gibraltar. The 1983 Ordinance was general legislation passed for the public benefit and its character has not changed.

122 Nevertheless, we are satisfied from the material that has been put before us that the effect of Schedule 1 requires to be reconsidered by the Government and its advisers as a matter of urgency.

123 The Select Committee report in 1983 set out the objectives which the anticipated amendments to the then existing rent control legislation should seek to achieve. Rent control legislation, it was said, should not only protect the interests of tenants but also take into account the interests of landlords. Accordingly, landlords should be able to attain rents that enable them to keep their property in a good state of repair and also allow them to keep a reasonable benefit for themselves.

124 It seems clear that the objectives set out in the Select Committee report are not being achieved. Indeed, it was not seriously disputed by anyone who gave evidence before us that the present rents allowed under Schedule 1 are other than unfair to landlords. In addition, we were impressed by the evidence we received to the effect that residential re-development was being inhibited and that the condition of some of the private housing stock was deteriorating.

125 It may be that if consideration is given to Schedule 1 it would be sensible to look at the other provisions in the 1983 Ordinance, including ss. 11A and 22, which relate to the control of rents in the private housing market. We would also suggest that it might be wise to examine the present effectiveness of the reserve provisions in s.80A.

126 The precise scope of any future enquiry into the present system of rent control will of course be a matter for the Government. However, we do not think that it would be right for us to part from the case without expressing our view that the present disturbing situation should not be allowed to continue indefinitely.

Appeal allowed.