[2001–02 Gib LR 6]

RENT TRIBUNAL v. AIDASANI

COURT OF APPEAL (Neill, P., Glidewell and Staughton, JJ.A.):
March 2nd, 2001

Civil Procedure—execution—stay of execution pending appeal—on balance of convenience, stay may be granted to preserve status quo in case raising issues of wide public and constitutional importance, e.g. validity of statutory rent control scheme

Civil Procedure—judgments and orders—declaratory judgment—no interim declaration of rights permissible when application merely for stay of proceedings pending appeal

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.

The appellant submitted that (a) on the balance of convenience, the Supreme Court's order should be stayed because its interference with the rent control system was causing considerable public disquiet and uncertainty (including several landlords serving notices to quit), which should not be prolonged; and (b) its constitutional importance required that the order not be implemented until the Court of Appeal had reviewed the matter. The respondent submitted in reply that (a) a stay of execution was not appropriate, since the applicant was seeking an interim declaration of rights by way of an interlocutory injunction, to the effect that the law was constitutional when it had already been declared to be unconstitutional; and (b) if the court allowed the appeal and ruled that the rent control provisions in the Landlord and Tenant Ordinance were not unconstitutional, no harm would have been done, as judgment should be

given within six months of the Supreme Court's judgment, and by then, according to the Landlord and Tenant Ordinance, s.75, no notice to quit would have taken effect.

Held, allowing the appeal in part:

(1) No stay would be granted of the Supreme Court's decision that ss. 11 and 30 of and Schedule 1 to the Landlord and Tenant Ordinance were contrary to s.1 of the Constitution. The appellant was seeking in effect an interim declaration of rights by way of an interlocutory injunction, which was beyond the scope of the court's inherent jurisdiction to stay the execution of a judgment or order, which could only be exercised on grounds relevant to a stay of the enforcement proceedings themselves, and not to matters which might operate as a defence in law or relief in equity. In this situation a stay was not an appropriate remedy, as the order could not be rendered temporarily of no account (para. 14; paras. 16–17).

(2) The position was different, however, with regard to the order setting aside the decision of the Rent Tribunal. The effect of this order was to entitle the landlord to serve a notice to quit on his tenant, which he had done. As the case raised issues of wide public and constitutional importance, the balance of convenience was strongly in favour of the grant of a stay and accordingly one would be granted (paras. 18–20).

Case cited:

(1) *Clifton Secs. Ltd.* v. *Huntley*, [1948] 2 All E.R. 283; (1948), 64 T.L.R. 413, followed.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.31(1): The relevant terms of this sub-section are set out at para. 3.

s.75: The relevant terms of this section are set out at para. 15.

Gibraltar Constitutional Order 1969 (Unnumbered S.I. 1969, p. 3602), s.1:

"It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist . . . subject to respect for the rights and freedoms of others and for the public interest . . .

(c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation . . ."

R.R. Rhoda, Q.C., Attorney-General, for the Rent Tribunal;
A.A. Vasquez for the respondent.

1 **GLIDEWELL, J.A.:** The respondent to this appeal, Mr. Deepa Aidasani ("the landlord") is the owner of a building in Gibraltar which contains commercial premises and four residential flats. For about 20 years one of the flats has been let to and occupied by Mr. Mohammed

Nadi ("the tenant"). Since 1994 the tenant has paid an agreed rent for his flat of £20 per week.

2 There is in Gibraltar a statutory system of control of the rents of residential premises, contained in Part III of the Landlord and Tenant Ordinance 1984, as amended. It applies only to premises over 45 years old, a category which includes the landlord's building. Section 11 of the Ordinance provides for statutory rents of dwelling houses to which Part III of the Ordinance applies to be calculated in accordance with Schedule 1. Section 7 establishes a Rent Tribunal, and under s.30 either a landlord or a tenant of premises to which Part III applies may apply to the Rent Tribunal to determine "the correct amount of the statutory rent payable in respect of the dwellinghouse." By Schedule 1, the statutory rent of the flat let to the tenant was to be calculated at the rate of £60 per 100 square feet of floor space per annum, exclusive of rates. This figure has not been altered since the Ordinance was enacted and, save for possible increases for the cost of repairs or reconstruction which are not here relevant, Schedule 1 does not contain any provision for increase or escalation.

3 Section 31(1) of the Ordinance provides:

> "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."

In addition, s.18 contains provisions giving the tenant of rent-controlled premises security of tenure, except in the circumstances set out in the section.

4 In February 2000, the tenant, Mr. Nadi, applied to the Rent Tribunal to determine the statutory rent of his flat. On July 24th, 2000, the Rent Tribunal decided that the statutory rent calculated in accordance with Schedule 1 is £33.10 per month, which is less than one third of the contractual rent.

5 The landlord appealed under s.74 of the Ordinance to the Supreme Court against the Rent Tribunal's decision. The proceedings in the Rent Tribunal were, of course, between the landlord and the tenant. However, at the hearing of the appeal to the Supreme Court, r.36 of the Supreme Court Rules permitted the Rent Tribunal to appear and be heard, which it did, by the Attorney-General. At that hearing there was no challenge by the landlord to the calculation made by the Rent Tribunal under Schedule 1. The case for the landlord was, and is, that the rent control provisions in Part III of the Ordinance, and in particular ss. 11 and 30 and Schedule 1, contravene ss. 1 and 6 of the Gibraltar Constitution Order 1969, and thus have no legal validity.

6 In a judgment delivered on January 31st, 2001, Schofield, C.J. concluded that the rent control provisions of the Landlord and Tenant Ordinance did not contravene s.6 of the Constitution Order, but that they were contrary to s.1. He said at the conclusion of his judgment:

> "I find that the impugned provisions provide for a deprivation of the landlord's 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.
>
> I accordingly allow the appeal and set aside the rent determined as the statutory rent by the Rent Tribunal."

7 The Rent Tribunal appealed to this court by notice of appeal dated February 9th, 2001. The hearing of the appeal is to be listed to commence on May 22nd, 2001. The final order made by the Supreme Court against which the appeal lies is in the following terms: "That the decision of the Rent Tribunal of July 24th determining the statutory rent in respect of the premises known as Flat 52/1–2 Turnbull's Lane, Gibraltar be hereby set aside." Then there is provision for the Attorney-General to pay the landlord's costs of the appeal.

8 By notice of motion of February 23rd, 2001, the Attorney-General on behalf of the Rent Tribunal applied for a stay of the order made by the learned Chief Justice pending our hearing of and decision on the appeal. The order which we are invited to make is in the following terms:

> "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,
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> be stayed pending the judgment of the Court of Appeal in this matter."

9 The notice of motion is supported by an affidavit sworn by Mr. Aurelio Falero, the Managing Director of Land Property Services, who deposes that the Supreme Court judgment has caused great disquiet and concern amongst tenants, that there is uncertainty about the respective rights of landlords and tenants pending our decision on this appeal, and that some landlords have served notices to quit upon protected tenants.

10 From the draft grounds of appeal, it appears that the issues in the appeal will be, or include, the following questions:

(a) Does s.1 of the Constitution Order grant the landlord what the Attorney-General describes as a "free-standing" right which can be directly enforced?

(b) Is a statutory restriction on the rent which a landlord may recover from a tenant of residential premises a "deprivation of property", or might it be such a deprivation?

(c) Can legislation which accords with constitutional rights when enacted later come to contravene such rights as a result of changed circumstances resulting from, *e.g.* the passage of time and/or inflation?

11 Obviously these are questions of great importance, not only to this landlord and tenant, but to many landlords and tenants, and indeed to the inhabitants of Gibraltar generally.

12 In support of the application for a stay, the Attorney-General refers to the conclusion of the learned Chief Justice that ss. 11 and 30 of and Schedule 1 to the Landlord and Tenant Ordinance, which he describes as "the core of the statutory rent provisions for Gibraltar," contravene s.1 of the Constitution Order.

13 He submits that the demolition of the system of rent control in Gibraltar has caused much public disquiet and uncertainty. He points to the evidence that some landlords are now issuing notices to quit. He emphasizes the constitutional importance of the decision, and because of it invites us to stay not merely the actual order made by the Supreme Court, but also the Chief Justice's decision as to the conflict between the Constitution and ss. 11 and 30 and Schedule 1 of the Landlord and Tenant Ordinance. He submits that on the balance of convenience a stay is required. He concludes his skeleton argument by saying:

> "[S]uch a stay would cause only a slight delay to those landlords who would wish to issue notices to quit, whilst the absence of such a stay would perpetuate the present situation of anxiety and uncertainty amongst tenants."

14 Mr. Alfred Vasquez, for the landlord, submits that we should not order a stay for two reasons. First, a stay of execution of the Chief Justice's judgment is not appropriate to the present proceedings. Indeed, it is misconceived. He refers us to 17 *Halsbury's Laws of England*, 4th ed., para. 451, at 270, which contains the following passage:

> "The court does not, however, have an inherent jurisdiction over all judgments or orders which it has made under which it can stay execution in all cases. On the contrary, the court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to

> matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself."

Mr. Vasquez also relies on a passage in the judgment of Denning, J., as he then was, reported in *Clifton Secs. Ltd.* v. *Huntley* (1). That was a landlord and tenant case in which the trial judge made an order for possession, but granted a stay. This was superseded when the landlord served another notice to quit, which expired. The tenants had nevertheless sought to rely on the stay and indeed had issued a counterclaim for damages against the landlord. They claimed that they were entitled by virtue of the stay to remain in possession of the premises. Denning, J. said of that ([1948] 2 All E.R. at 284):

> "A stay of execution only prevents the plaintiffs from putting into operation the machinery of law—the legal processes of warrants of execution and so forth—in order to regain possession. It does not take away any other rights which they have. It does not prevent their exercising any right or remedy which they have apart from the process of the court."

In his skeleton argument Mr. Vasquez says:

> "In effect the applicant seeks not a stay of execution, but an interim declaration of rights by way of an interlocutory injunction against the whole world, to maintain a fiction that a law deemed by the court to be unconstitutional, is in fact constitutional and enabling tenants to apply for determination of statutory rent, which had been adjudged unlawful."

15 Mr. Vasquez's second argument is that on the balance of convenience, the uncertainty as to the correct legal relationship of landlords and tenants of premises, which fall within Part III of the Landlord and Tenant Ordinance, is the inevitable result of the Rent Tribunal having appealed to this court and will continue until this court gives its judgment on the appeal. As to the evidence that some landlords have served notices to quit, and the possibility that others may do so, Mr. Vasquez refers us to the provisions of s.75 of the Landlord and Tenant Ordinance, which is in the following terms:

> "Subject to the other provisions of this Ordinance, but notwithstanding any agreement to the contrary, no periodical tenancy shall be determinable by less than six months' notice of intention to terminate the tenancy."

He submits therefore that if this court allows the appeal and rules that the rent control provisions in the Landlord and Tenant Ordinance are not contrary to the Constitution, no harm will have been done, since it can be

anticipated that we shall give judgment within six months of the Chief Justice's judgment, and no notice to quit will by then have taken effect.

16 I have no doubt that a stay is not appropriate, and indeed is not a remedy we have any power to grant, in relation to the Chief Justice's reasoning. I agree with Mr. Vasquez's submission that what is being sought under head 2 of the Attorney-General's proposed order is a declaration of rights. In relation to the reasoning in the Chief Justice's judgment, central though it was to the relief granted in the action, a stay is not a remedy which can be applied.

17 That is not to say that, on the hearing of the appeal, we may not disagree with the Chief Justice's reasoning. We may or we may not do so. What we cannot do is to render it of no account temporarily.

18 As to the order made by the Chief Justice, however, setting aside the decision of the Rent Tribunal of July 24th, 2000, the position is different. That is an order the effect of which is to entitle the landlord in these proceedings, Mr. Aidasani, to serve a notice to quit on his tenant (as indeed we are told, without objection, he has done). At the expiry of that notice if the Chief Justice's order remains undisturbed the landlord will be able to apply for possession if his tenant does not quit, or agree a new rent. In my view a stay is appropriate in relation to an order which has this potential, indeed probable, effect.

19 This leads to the question, should we grant a stay in the present case? As counsel have said, this depends on the balance of convenience. If this were simply a dispute between this landlord and this tenant, which affected nobody but them, I might conclude that, for the reasons advanced by Mr. Vasquez, on balance we should not grant a stay. But as I have said, this case raises issues of wide public and constitutional importance. Although we cannot make orders which directly affect any other landlords or tenants, we can properly express our view that, pending our decision on the appeal, it is desirable that the situation which existed before the Chief Justice's judgment should not be disturbed, so far as that is still possible. To reinforce that message, I take the view that in this case the balance of convenience is strongly in favour of the grant of a stay.

20 I would therefore order 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, be stayed pending the judgment of the Court of Appeal in this matter.

NEILL, P. and **STAUGHTON, J.A.** concurred.

Appeal allowed in part.