

[2001–02 Gib LR 193]

**BARI PROPERTIES LIMITED v. PETAMAX LIMITED and  
SIMCHOWITZ**

SUPREME COURT (Schofield, C.J.): January 24th, 2002

*Landlord and Tenant—termination of tenancy—repudiatory breach by tenant—measure of damages—damages based on contractual rent for balance of term, including automatic rent increases specified in lease—discount given for early payment according to market conditions (actual and anticipated interest rates) or judgment—credit given for likely income for balance of term based on assumed lease, or difference between rent due under lease and amount paid by new tenant*

The claimant brought an action against the defendants for damages for the repudiatory breach of three leases.

The first defendant stopped paying rent under three leases with the claimant and the second defendant, who was the guarantor, left Gibraltar at the same time. The claimant claimed damages for the repudiatory breach of the leases and sought arrears of rent and maintenance rent for the balance of the terms of the leases. The court made an “unless” order in respect of the arrears and payment which was not complied with, and the claimant sought judgment in terms of the order.

**Held**, making the following award:

The defendants would be ordered to pay the claimant damages. The quantification of damages on the repudiation of a lease was the same as the assessment of compensation where liquidators disclaimed a lease on the winding up of a company. The automatic increases in rent provided for in the residual period of the lease would be taken into account in calculating damages, but a discount would be allowed for early payment or (as in this case) judgment, to be calculated according to market conditions, notably actual and anticipated interest rates. Credit would then be given for the likely income from the residual period of the lease, based either on an assumed lease or the difference between the rent under the lease and the amount actually paid by new tenants (paras. 8–14).

**Case cited:**

- (1) *Park Air Services plc., In re*, [1996] 1 W.L.R. 649; [1996] 1 BCLC 547; on appeal, *sub nom. Christopher Moran Holdings Ltd. v. Bairstow*, [2000] 2 A.C. 172; [1999] 1 All E.R. 673, applied.

*J. Restano* for the claimant.

1 **SCHOFIELD, C.J.:** On April 3rd, 2001, I made an “unless” order against the two defendants, the terms of which have not been complied with. The claimant now seeks judgment in accordance with the terms of that order.

2 The defendants had filed a document headed “conditional claim in reconvention,” which I assumed was in the nature of a defence and counterclaim. In my order of April 3rd, 2001, I ordered that they file and serve an amended defence and counterclaim within 21 days thereof and that failure on their part to do so would result in the “conditional claim in reconvention” being struck out. The defendants have failed to file an amended defence and counterclaim and the appropriate order will follow the event.

3 The claimant is the lessor of the commercial building adjacent to Casemates known as the International Commercial Centre. The first defendant entered into three separate agreements to lease for a term of 21 years three of the units in the I.C.C. building, namely Units F1, F13 and F22. The second defendant guaranteed payment of the rent under the three lease agreements.

4 At the beginning of 1996, the first defendant stopped paying rent for the three units and, indeed, abandoned them. The second defendant left Gibraltar at about the same time. It is claimed by the claimant, and there is now no defence on file to the claim, that the first defendant committed a repudiatory breach of the three lease agreements and that the claimant has accepted such repudiation. The claimant now claims arrears of rent, arrears of maintenance rent and damages in respect of the amount of rent due for the remainder of the period left on the three lease agreements.

5 The amended particulars of claim were filed on June 29th, 2000. The claimant particularized arrears of rent totalling £75,722.50 in respect of the three leases. It also particularized arrears of maintenance rent, totalling £12,584.37, in respect thereof. Judgment is accordingly entered for those two amounts.

6 According to cl. 3(6) of each lease agreement, it was the responsibility of the first defendant to register the leases pursuant to the Land Titles Ordinance. It failed to do so and the claimant had to so register the leases. It incurred fees of £1,016.38 in connection therewith and has claimed that amount as against the defendants. Judgment is also awarded in that amount.

7 In respect of each lease, the claimant claims damages by reference to the total amount of rent due for the remainder of the term of each lease, less amounts received. Mr. Restano, for the claimant, has made submissions on the manner of computation of such damages, which I accept.

8 The quantification of the damages involves the same exercise as the assessment of compensation in the case of loss or damage sustained by a lessor as a result of a disclaimer of a lease by the liquidators on the winding up of a company (see *In re Park Air Services plc.* (1) ([2000] 2 A.C. at 180, *per* Lord Hobhouse)). Mr. Restano applies the formula for assessing such damages laid down by Ferris, J. in *In re Park Air Services* at first instance, which was approved by the House of Lords. This is that the amount due for the remainder of each lease should be computed by taking into account the automatic increases in rent provided for in the leases. A discount should be allowed for early payment or judgment, which is ascertained in accordance with market conditions, notably actual and anticipated interest rates. Credit against this amount should be given for what is left to the landlord as from the date the premises were vacated, calculated by reference to an assumed lease. In this case, as rent arrears are claimed up to the end of June 2000, the calculation of damages should take place from July 2000.

#### **Unit F1**

9 The lease agreement in respect of Unit F1 expires on November 1st, 2010 and the income stream should thus be calculated from July 2000 to November 2010 inclusive, a total of 10 years and 5 months. Initially the rent was £11,178 per annum but by the terms of the lease agreement was raised, at the last increase, to £12,854.70. The total rent at that amount for 10 years 5 months would thus be £133,903.12. The lease allows for automatic rent increases, but the claimant has discounted the claim by these amounts to take account of early payment or judgment. Service charges have not been claimed, partly on an assumption that they would be paid by a new tenant and partly as a concession to the defendants.

10 From the claim of £133,903.12, the likely income from the residual amount of the lease should be deducted. The evidence of the valuer, Solomon Levy, is that the unit could be re-let for £5.50 per square foot per annum, on an assumption that the market continues roughly as at present. The value of the discount at this rate is £35,578.13. The claim in respect of Unit F1 is thus for damages of £98,324.99.

#### **Unit F13**

11 The lease agreement in respect of Unit F13 expires on January 1st, 2011 and the income stream calculated from July 2000 is for a total of 10 years and 7 months. The rent was £9,532 per annum. There are tenants currently in occupation who, from March 1997, have paid rent, subject to increases, in accordance with the valuation of Solomon Levy of £3,792 per annum. The claimant seeks the difference between the rent of £9,532 less the amount paid by the existing tenants of £3,792 per annum for the

10 years and 7 months, which comes to £10,748.33. Again, the automatic 15% increases in rent provided for in the lease agreement are not to be applied to take account of early payment or judgment and service charges are not claimed.

#### **Unit F22**

12 The lease in respect of Unit D22 expires on November 1st, 2010. At the last increase the rent was raised to £19,623.60 per annum. For a total of 10 years and 5 months, the claim is therefore for £204,412.50. From this must be deducted the likely income which, according to Solomon Levy, would be £5.50 per square foot per annum. The computation of the discount is £54,312.50, which brings the damages down to £150,100. Again, the automatic increases in rent provided for in the lease agreement and the service charges are not being claimed.

13 In accepting the above computation, I therefore assess damages as follows: Unit F1 £98,324.99; Unit F13 £60,748.33; Unit F22 £150,100.00, making a total of £309,173.32

14 Judgment is therefore entered as follows:

- (1) The defendants' "conditional claim in reconvention" is struck out.
- (2) The defendants shall pay the claimant—
  - (a) £75,722.50 arrears of rent;
  - (b) £12,584.37 arrears of maintenance rent;
  - (c) £1,016.38 for registration charges; and
  - (d) £309,173.32 in damages.
- (3) Interest will be paid on the above amounts at the rate of 8% per annum.
- (4) The costs of this application are awarded, which are summarily assessed at £1,550.

*Order accordingly.*

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