

[2005–06 Gib LR 66]**ATTORNEY-GENERAL v. RISSO**

SUPREME COURT (Schofield, C.J.): September 7th, 2005

Housing—death of tenant—new tenancy—entitled person—tenant’s son, sharing premises without landlord’s consent, in breach of tenancy agreement, not person entitled to new tenancy under Housing (Special Powers) Ordinance, s.11A on tenant’s death—by s.2, must previously have been lawfully “living” with tenant, though not required by Ordinance to meet all criteria for eligibility for initial allocation of housing

The claimant applied to recover possession of Government housing from the defendant.

The defendant’s mother was the tenant of a Government flat in which she lived until her death. The tenancy agreement prohibited sharing of the property without the landlord’s consent. The defendant separated from his wife and moved into the property with his mother. After seven years, he informed the Housing Department of his residence in the flat and asked that he be allowed to remain there in the event of his mother’s death. They responded with a request that he provide them with certain documents in relation to his separation and advised that, in the meantime, he was not authorized to live in the property. The defendant took no action and, following his mother’s death, the Housing Department required him to return the keys and vacate the premises. He failed to do so and the claimant commenced the present proceedings to recover possession of the flat.

The claimant submitted that (a) the defendant was not permitted to remain in the property since he was not living there with the consent of the Housing Department and was therefore not an “entitled person” within the meaning of the Housing (Special Powers) Ordinance, s.2; and (b) in any event, in order to qualify for Government housing, the defendant had to meet all of the criteria for eligibility, which he did not do.

The defendant submitted in reply that (a) since he had been living with the deceased tenant for more than 12 months prior to her death, he became an “entitled person” under the Ordinance, s.2 and therefore the Housing Manager was obliged, by s.11A, to enter into a tenancy agreement with him; and (b) the rules governing the allocation of housing did not apply to the grant of a new tenancy pursuant to s.11A.

Held, granting the application:

(1) The Housing Department was not obliged to grant a tenancy to the defendant under s.11A of the Ordinance. Since he was sharing the premises with his mother without the consent of the landlord, in contravention of the tenancy agreement, he was not lawfully “living” there for the purposes of s.2. He was not therefore an “entitled person” under s.2, since the requirement that he be living with the tenant for not less than 12 months prior to her death was to be interpreted as a condition that he be lawfully so living (paras. 13–14).

(2) There was nothing in the Ordinance that required that an “entitled person” seeking a new tenancy under s.11A meet all the criteria for eligibility for the initial allocation of Government housing (para. 12; para. 14).

Legislation construed:

Housing (Special Powers) Ordinance (1984 Edition), s.2: The relevant terms of this section are set out at para. 10.

s.11A: The relevant terms of this section are set out at para. 9.

R. Pilley for the claimant;

A. MacDonald for the defendant.

1 **SCHOFIELD, C.J.:** The defendant, Harry Risso, is retired and is 63 years of age. He separated from his wife of 30 years in 1997. He moved out of the matrimonial home and moved in with his mother, Mrs. Risso, at the time of the separation. Mrs. Risso occupied a Government flat at 53 Governor’s Meadow House, Alameda Estate as an “entitled person,” pursuant to the Housing (Special Powers) Ordinance, following the death of her husband, Mr. Risso’s father. I am uncertain of the date of the death of Mr. Risso Snr., but it was certainly before Mr. Risso moved in with his mother in 1997.

2 Neither Mr. Risso nor his wife made any move towards divorce until Mr. Risso was advised to do so for tax purposes. Accordingly, he filed a petition for divorce on October 29th, 2004, on the ground of five years’ separation. This petition is not being defended by his wife. Mr. Risso has deposed that from the date of his separation, it was his intention to transfer the former matrimonial home at 12A Library Gardens to his wife and children and that a financial settlement in that connection is at present being formalized. It is Mr. Risso’s evidence that he is not a wealthy man and on final settlement with his wife will not have the wherewithal to purchase a property in Gibraltar and will not be able to obtain a mortgage, given his age. It is Mr. Risso’s intention, and he claims he is entitled, to remain in the premises. The Government of Gibraltar, his landlord, seeks to have him evicted by order of this court.

3 Mr. Risso says that he has lived in the premises since his separation from his wife in 1997 and from the evidence before me I accept that as a fact. Again, I accept his evidence that he paid the rent and utilities for the premises. There was a time in 2003 when the rent fell into arrears. Mr. Risso had given his mother the rent money but due to her deteriorating physical and mental health, she had forgotten to pay it. Mr. Risso paid the arrears and, it seems, took over payment of the rent and utilities directly thereafter.

4 Mrs. Risso died on August 26th, 2004. According to Mr. Risso, a few months prior to her death, friends told him to register with the Housing Department so that when his mother died the tenancy could be passed on to him. Mr. Macdonald wrote to the Housing Department on Mr. Risso's behalf in the following terms:

“Re: Harry Risso

I represent the above client and write to inform you that since my client separated from his wife in September 1998, he has not lived at the former matrimonial home situated at 12A Library Gardens, as his ex-wife continues to live in the said property. Mr. Risso has, since the separation, lived with his mother at 53 Governor's Meadow House, Alameda Estate, Gibraltar, his mother's Government flat.

Further, I can confirm that divorce proceedings are in the process of being instituted by the wife and that there is no hope of reconciliation. It is highly likely that the wife will retain the former matrimonial home and therefore I would request that you consider favourably Mr. Risso's application, in due course, to remain in his mother's Government flat in the event that his mother should pass away.”

5 The Housing Allocation Officer replied, on June 11th, 2004, in the following terms:

“Re: Harry Risso

Further to your letter dated May 28th, 2004, please be advised that your client, Mr. Risso is required to provide us with copies of the separation papers and deed of sale or transfer of their property to his ex-wife's sole name, to be able to apply to be included in his mother's tenancy at 53 Governor's Meadow House.

In the meantime, Mr. Risso is not authorized to reside at 53 Governor's Meadow House and will therefore not acquire any rights to the property in the event that his mother should pass away.”

6 Of course, there still exist no “separation papers” or deed of sale or transfer of Mr. Risso's former residence, and none certainly existed at the

date of the letter from the Housing Allocation Officer, nor, indeed, at the date of Mrs. Risso's death. Mr. Risso took no action on the letter of June 11th, 2004, in part, he says, because he was upset by his mother's death. On October 13th, 2004, the Ministry of Housing again wrote to Mr. Risso seeking a return of the keys to the premises. A further letter was written by the Ministry on November 29th, 2004, and when the keys were not returned, a threat of legal proceedings followed. A notice was served on me, pursuant to the Administration of Estates Ordinance, s.11, determining the tenancy of the late Mrs. Risso on January 6th, 2005, and this claim for possession of the premises was filed on February 7th, 2005, following the usual letters to Mr. Risso instructing him to vacate the premises.

7 The position of the Ministry of Housing is that Mr. Risso was not living at the premises with the permission of the Ministry at the time of his mother's death and therefore is not entitled to remain in occupation of the premises pursuant to the Housing (Special Powers) Ordinance. A determination of this issue requires consideration of the tenancy agreement for the premises and consideration of the relevant provisions of the Ordinance.

8 The original tenancy agreement was between Nicholas Risso, Mr. Risso's father, and the Housing Manager, and is dated June 30th, 1975. Clauses 2(4) and 2(6) are relevant and read:

"2. The tenant hereby agrees with the landlord as follows:

...

(4) Not to share assign underlet or part with the possession of the said premises or any part thereof without first obtaining the written consent of the Landlord.

...

(6) Not to permit more than . . . persons to sleep on the said premises without the previous consent in writing of the Landlord."

9 Mrs. Risso was not a signatory to the original tenancy agreement but became a tenant on her husband's death by virtue of the Ordinance. Section 11A of the Ordinance reads:

"Where a tenant has died the Housing Manager shall if the entitled person so requires and complies with the provisions of any rules governing the entering into of such new agreement, enter into an agreement with the entitled person in respect of the premises on the same terms and conditions as the agreement with the deceased tenant or such other terms and conditions as the committee may approve."

10 By s.2 of the Ordinance—

“‘entitled person’ means—

- (a) the widow or widower as the case may be of the deceased tenant living with the tenant at the time of death;
- (b) where the deceased tenant leaves no widow or widower or if such widow or widower was not living with the tenant at the time of death, the father, mother or child over the age of 18 years (in that order and where there is more than one such child the eldest such child) of the deceased tenant, provided that such person had been living with the deceased tenant for not less than 12 months immediately prior to the tenant’s death.”

11 There is no dispute that Mrs. Risso was an “entitled person” and was in lawful occupation of the premises and, although no written agreement was ever entered into between Mrs. Risso and the Housing Manager, she became the new tenant of the premises on the same terms and conditions as her deceased husband. It is Mr. Risso’s contention that as he had been living with his mother, “the deceased tenant,” for more than 12 months immediately prior to her death, he became an “entitled person” and, pursuant to s.11A, the Housing Manager is obliged to enter into a tenancy agreement with him on the terms and conditions which hitherto existed in the original agreement with Mr. Risso’s father.

12 Section 11A requires the “entitled person” to comply with the provisions of any rules governing the entering into of such new agreement. I have been referred to rules governing the allocation of housing, but I have been referred to no rules which govern a new tenancy agreement pursuant to s.11A, and in the circumstances I take it that no such rules exist.

13 There can, in my view, be no doubt that Mrs. Risso was sharing the premises with her son, Mr. Risso. It was not the case that Mr. Risso spent the odd night, or odd week, in the premises or that he was spending some time there whilst he found alternative accommodation. Mr. Risso moved into the premises and for some seven years stayed there, contributing to or paying wholly the rent and utility bills. This was clearly a sharing of the premises and, accordingly, Mrs. Risso was obliged to seek the written consent of the landlord for such sharing pursuant to cl. 2(4) of the lease agreement. When Mr. Risso sought such consent, he was asked by the landlord for proof that he was separated from his wife and proof that he was not entitled to possession of the former matrimonial home. Pending the provision of such proof, consent was not forthcoming from the landlord and Mrs. Risso was sharing the premises with Mr. Risso in contravention of the terms of her lease agreement.

14 I agree with Mr. Pilley that the requirement that the “entitled person” had been living with the tenant for not less than 12 months should be interpreted as meaning that that person shall have been “lawfully living” with the tenant, otherwise the result would be nonsensical and mischievous. I do not, however, agree with his submission that I should read into the legislation that an “entitled person” must meet all the criteria for allocation of housing by the Government. That is a matter which can be remedied by rules under s.11A, if the legislature so wishes. My decision is that, on the facts of this case, Mr. Risso was not sharing the premises with the written consent of the landlord and could not be said to have been “living” in the premises so as to make him an “entitled person” under s.2 of the Ordinance. It cannot have been the intention of the legislature that an adult child of a tenant can share premises with his parent/tenant against the wishes of the landlord so as to acquire rights under the Ordinance on the parent/tenant’s death.

15 In the circumstances, the claimant is entitled to the orders he seeks. That being said, I have some sympathy with Mr. Risso’s plight, particularly as he has produced proof of ill-health. I understand that he has applied for alternative Government housing and I trust that his application will be given sympathetic consideration.

Application granted.
