[2007–09 Gib LR 229]

TRUSTEES OF THE ESTATE OF FRANCIS v. BALBAN

SUPREME COURT (Dudley, Ag. C.J.): June 30th, 2008

Landlord and Tenant—rent—no jurisdiction under Landlord and Tenant Act, s.11 for Rent Tribunal to determine rent of dwellinghouses built 1945–1959—rent determinable by Rent Assessor under s.11A of Act and Statutory (Forty-Five Year Rule) Regulations—s.11A deliberately kept in force for such purpose

The respondent appealed from a decision of the Rent Tribunal fixing the rent payable for his accommodation.

The appellant was the owner of a block of flats built in the early 1950s, one of which the respondent rented for £400 per month. They made a rental agreement on October 1st, 2005 in which both agreed to be bound by s.15(1) of the Landlord and Tenant Act 1983 fixing the rental value at what would have become the statutory rent rate but the agreement was not signed by the Rent Assessor. When the respondent failed to pay rent for four months, the appellant served him with a notice to quit. The respondent applied to the Rent Tribunal to determine the rent of the property and on March 14th, 2007, the Tribunal determined the rent under Schedule 1 to the Act at £45.20 per month excluding rates.

On appeal, the appellant submitted that the Tribunal had no jurisdiction to consider the defendant's application because (a) the property in question was built between 1945 and 1959, and the respondent's application was therefore incorrectly made to the Rent Tribunal under s.11 of the Act, which determined a lower rent under Schedule 1 of the Act and resulted in unfairness to him as the landlord; (b) the respondent should have applied to the Rent Assessor under s.11A of the Act, who would have determined the rent payable at a higher rate under the Statutory (Forty-Five Year Rule) Regulations; and (c) s.11A was added to the Act later in time to apply to all post-1945 dwellinghouses, had not been repealed by the 2004 amendment to the Act and displaced s.11 as the applicable provision to his 1950s dwellinghouse.

In reply, the respondent submitted, *inter alia*, that (a) s.10 of the Act stipulated that any pre-1959 dwellinghouse, such as the present one, should be governed by s.11 and Schedule 1, whilst s.11A provided that it only applied to those dwellinghouses to which s.10 did not apply (*i.e.* post-1959 dwellinghouses), and the rental value was therefore correctly calculated by the Tribunal under Schedule 1 to the Act; (b) s.11A was only left in force to protect pre-existing tenancy agreements signed before the

2004 amendment to the Act and by virtue of s.10 (which was still in force for pre-1959 dwellinghouses), could not relate to his tenancy for a 1950s flat as the agreement was made after the 2004 amendment; (c) this interpretation of ss. 10, 11 and 11A was in keeping with Parliament's intention for the laws relating to the rent payable for dwellinghouses, as s.11A remained in force despite the repeal of the majority of Part III of the Act; and (d) there was no manifest unfairness to the landlord in the rent of the property being governed by Schedule 1 as he had a choice whether to rely on a fixed rental rate by incorporating s.15 into the rental agreement or stipulating otherwise.

Held, allowing the appeal:

(1) The rental value had been incorrectly determined by the Rent Tribunal under s.11 as it had no jurisdiction to consider the respondent's application. The rent should have been determined under s.11A of the Landlord and Tenant Act as the property had been built in the early 1950s and s.11A remained in force for this purpose. The respondent should therefore have applied to the Rent Assessor rather than to the Tribunal for approval of the rent. The former system of rent calculation had not been wholly repealed by the 2004 amendment—pre-1945 dwellinghouses were still governed by s.11 and Schedule 1 of the Act (paras. 17–19).

(2) There was a clear intention to preserve the rights granted to tenants under the former system whilst having a cut-off date to which the system should apply but using 1959 as the new benchmark date as added to s.10 in the 2004 amendment. Statutes should be interpreted cautiously, according to the specific wording of provisions and in keeping with the intentions of the legislature. Consequently, Parliament's intention should not be inferred as intending to change the law dramatically. Where the legal meaning of a statutory provision was in doubt, it should be presumed that the intention was to depart as little as possible from the current state of the law (paras. 17–19).

Legislation construed:

Landlord and Tenant Act 1983, as amended, s.10: The relevant terms of this section are set out at para. 6.

s.11: The relevant terms of this section are set out at para. 6.

s.11A: The relevant terms of this section are set out at para. 6.

J. Restano for the appellant;
H.K. Budhrani, Q.C. for the respondent.

1 **DUDLEY, Ag. C.J.:** The appellant is the owner of Matilde Francis Building in South Barrack Road which was built in the early 1950s. The respondent is the tenant of Flat 10 and took possession of the flat on October 1st, 2005 at a monthly rent of £400.

2 It is said for the appellant that the respondent had agreed to sign an

agreement pursuant to s.15(1) of the Landlord and Tenant Act 1983 ("the Act") under which (had it been signed and approved by the Rent Assessor) the agreed rent would have become the statutory rent. That agreement was (whatever the circumstances) not signed and after the respondent defaulted on the payment of rent for four months, the appellant served a notice to quit. At that stage the respondent made an application for the determination of the rent pursuant to the Act.

3 Following an appearance before the Rent Tribunal on January 5th, 2007, the matter came for hearing on March 14th, 2007 when an application by the appellant for an adjournment was refused and the Tribunal determined the rent payable in respect of the flat as £45.20 per month exclusive of rates.

4 Although the grounds of appeal as contained in the memorandum include an alleged violation of s.1 of the 2006 Gibraltar Constitution, so as to avoid unnecessary costs the determination of that issue was adjourned pending determination of the more prosaic grounds. Before me at this juncture there are essentially two grounds of appeal which fall to be determined—that relating to the refusal to grant an adjournment and, more significantly, whether the Tribunal had jurisdiction to consider the application.

Jurisdiction

5 The appellant contends that although the respondent applied to the Rent Tribunal pursuant to s.11 of the Act, that the application should in fact have been made to the Rent Assessor pursuant to s.11A.

6 It is useful to set out the relevant statutory provisions:

"**Application of Part III.**

10.(1) Subject to the provisions of this Act, this Part shall apply to dwellinghouses but only to the following extent, namely:

(a) it shall apply to every dwellinghouse that has been erected on or before the first day of March 1959 . . .

Statutory rent.

11.(1) Except where otherwise provided in this Act, 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 . . .

Rents of dwellinghouses becoming controlled.

11A. Where a dwellinghouse not being one to which this Part applies, becomes by virtue of the operation of section 10(1)(a) a dwellinghouse to which this Part applies—

(a) the tenant may make application to the Rent Assessor to determine the statutory rent in respect of that dwellinghouse;

(b) notwithstanding any other provisions of this Act, the determination of the rent in relation to a dwellinghouse to which this section applies, shall be made in accordance with the provisions prescribed in regulations by the Governor for this purpose;

(c) references in this Act to 'statutory rent' shall, in respect of a dwellinghouse falling within this section, be interpreted to be references to rent determined in accordance with this section."

7 There is a significant difference between the rent calculated in accordance with Schedule 1 (which was the basis upon which the Tribunal determined the rent in respect of the flat) and rent fixed pursuant to s.11A, fixed by the Rent Assessor in accordance with the Statutory Rent (Forty-Five Year Rule) Regulations 1992 ("the Regulations").

8 As the legislation presently stands, s.11A is, on one possible view, otiose because a dwellinghouse was either erected or not erected before March 1st, 1959. However, properly to understand s.11A and the issue before me, it is necessary to look at the legislative history.

9 Section 10(1)(a) as originally enacted in 1983 applied Part III of the Act to dwellinghouses erected "on or before the 1st day of January, 1945 . . ." In 1991 the Act was amended so that Part III applied to dwellinghouses erected "on or before the 1st January of the year preceding by 45 years the 1st day of January of the current year."

10 At that juncture, s.11A was also introduced. Essentially what was thereby created was a dual system—one in respect of pre-1945 properties governed by s.11 with the power to determine rent vested in the Rent Tribunal, and one in respect of properties coming within Part III by virtue of the rolling provision in respect of which the rent fell to be determined by the Rent Assessor applying the criteria found in the Regulations which is more favourable to the landlord.

11 The Act was amended to its current form in 2004, thereby bringing to an end the rolling provision and fixing the application of Part III to dwellinghouses erected on or before March 1st, 1959. Significantly, s.11A and the Regulations were not repealed.

12 The issue which falls to be determined is whether the rent payable in respect of dwellinghouses erected between 1945 and 1959 is governed by s.11 or by s.11A. The question is particularly stark in this case given that the tenancy was created after the latest legislative amendment and therefore no issue of vested rights can arise.

13 The respondent's fundamental argument is the epitome of simplicity, relying as he does on the literal meaning of s.10. It is submitted that the dwellinghouse that is the subject matter of these proceedings is one to which, by virtue of s.11, Part III applies and that the opening words of s.11A preclude the application of that section to this tenancy/ dwellinghouse.

14 The explanation proffered as to why the legislature have retained s.11A is not quite as simple. It is said that the section may relate to pre-existing tenancies caught by the rolling provision before the 2004 amendment but that, by virtue of s.11, it cannot relate to a tenancy created following that amendment. That explanation does not answer why, in respect of premises of equal age, the legislature would choose to afford a new tenant a lesser rent than a pre-existing tenant. It is an outcome which in my view, without further explanation, would appear illogical.

15 There is however some merit in Mr. Budhrani's argument that on one view, on his interpretation of the Act, there is no manifest unfairness to a landlord because a landlord may choose to organize his lettings by relying upon the provisions of s.15 and thereby fix the rent by agreement (subject of course to the tenant being a Gibraltarian or resident in Gibraltar for 10 years).

16 Mr. Restano's submissions are, out of necessity, more intricate. He argues that if the legislation is to be afforded a literal meaning, such a literal interpretation would not be that urged by Mr. Budhrani but would rather require the application of s.11A, it being the later in time and therefore displacing s.11, and that therefore all pre-1959 dwellinghouses would be caught by s.11A and the Regulations. Although he goes on to accept that such an interpretation, although literal, cannot correspond with Parliament's intention, I think that his literal analysis of the sections ignores the first phrase of s.11A. In my view, the literal interpretation accords with that urged by Mr. Budhrani.

17 But of course, this court must look for the legal as opposed to the literal meaning of the provisions. Mr. Restano brings to the court's attention the debate in the Gibraltar Parliament reported in *Hansard* of Wednesday, March 24th, 2004 on the Bill for the Landlord and Tenant (Amendment) Act 2004, where the promoter of the Bill, the Hon. J.J. Netto, had this to say:

> "Under s.10(1)(a), Part III applies to every dwelling house that has been erected on or before the 1st day of January of the year preceding by 45 years the first day of January of the current year. In ordinary language the effect of that section is that properties enter the ambit of Part III when they reach 45 years of age. By virtue of this provision properties enter the ambit of Part III each year and in due course every property will become subject to Part III. This provision

> was introduced . . . in 1991 . . . Prior to that date the law had been that Part III only applied to dwelling houses erected on or before 1st January 1945, a fixed date. The properties affected by the Ordinance were therefore an established, fixed and identified set of properties. No property became controlled by passage of time. The Government consider it appropriate to return to the pre-1991 principle of a fixed cut-off date.
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> . . .
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> However in reverting to the old system the Government have wished to avoid dispossessing tenants of rights which the existing law has already bestowed on them. Accordingly, clause 2 of the Bill returns to the fixed date system but by reference to March 1st, 1959."

18 It is apparent from this extract that the intention of the legislature was to revert to the principle of a cut-off date whilst preserving rights which had accrued to tenants. In contrast, there is nothing to suggest that the failure to repeal s.11A and the Regulations made thereunder was accidental. Indeed, in my view, the fact that s.11A and the Regulations remain are a clear marker to the effect that, as regards dwellinghouses erected between 1945 and 1959, the intention was for the rent in respect of these to continue to be governed by the Regulations. Regulation 2 is particularly relevant in that it provides:

> "These regulations apply to a dwelling house falling within sections 10(1)(a) not being a dwelling house built on or before 1st day of January 1945 and falling to be dealt with in respect of a statutory rent in accordance with section 11."

19 In the circumstances, although the amendments have led to a poorly drafted Act and indeed an amendment of s.11A would have been desirable, I am of the view that the legal meaning of the provisions is that urged by the appellant and that the alternate system of rent control was not repealed. Pre-1945 dwellinghouses are governed by s.11 and the Schedule whilst those erected between 1945 and 1959 are governed by s.11A and the Regulations. I am fortified in this view by the passage in 44(1) *Halsbury's Laws of England* para. 1436, 4th ed., Reissue, at 875 (1995):

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not be taken as intending to change either common law or statute law otherwise than by measured and considered provisions. Where, therefore, the legal meaning of an enactment is doubtful, it will be presumed, other things being equal, that it was intended to effect the least alteration of the existing law."

20 In the circumstances, the appeal is allowed and it is unnecessary for me to consider the ground of appeal relating to the adjournment sought before the Rent Tribunal.

21 I shall make orders accordingly and I shall hear the parties as to costs.

Appeal allowed.