[2013–14 Gib LR 118]

INTERNATIONAL FRANCHISES LIMITED v. BARI PROPERTIES

SUPREME COURT (Dudley, C.J.): March 14th, 2013

Landlord and Tenant—renewal of tenancy—business premises—duration of tenancy—factors for consideration in setting fair term between 5 and 14 years under Landlord and Tenant Act include giving landlord adequate security and giving tenant retailers adequate flexibility in challenging economic climate—not include minor tensions between parties

Landlord and Tenant—renewal of tenancy—business premises—not open to court to use "zoning" methods of valuation in detetmining rent as not prevalent method in Gibraltar

Landlord and Tenant—rent—renewal of business tenancy—minimum 15% annual rent increase removed as "out-of-date" and de facto depriving tenant of security of tenure—minimum RPI increase might be onerous but not unfair or outdated

The claimant brought an action for the grant of a new tenancy under the Landlord and Tenant Act 1983, s.43 of premises leased to it by the defendant.

The claimant traded as a department store from premises on Main Street, which were leased to it by the defendant for 21 years starting in 1989. That lease ended on June 10th, 2010, and while the parties agreed that a new tenancy should be granted, they were unable to agree the terms, including the length of the lease and the rent.

The claimant submitted that (i) the length of the new lease ought to be five years as there was significant animosity between the parties and, given the current economic climate, it was now common for tenants to seek shorter terms to avoid over-payment under upward-only rent reviews, and that a court should generally not award a tenancy longer than the tenant requested; (ii) it ought to be released from its obligation to provide two sureties, either by providing one or none, as it was a well-established business and the one director proposed as surety was a prominent and substantial member of the business community; (iii) the car park, retained by the defendant, should be included as part of the total lettable area by which contributions to the cost of maintaining the communal areas were calculated pro rata; (iv) the prohibitions against internal alterations were unnecessarily onerous, leading to entirely avoidable conflict between the

parties, and should be altered to include a reasonableness element; (v) the prohibition against merging the premises with other units without consent should be altered to reflect the fact that since 1990, the premises had in face been merged with two adjoining units; (vi) the rent review system of RPI, 15%, or rack rental value (whichever was greatest) should be altered to remove the RPI or 15% options as they were unsustainable; (vii) an element of reasonableness ought to be included in the term giving the defendant discretion over what items could be sold in the store; (viii) the position of the air conditioning plant room should be regularized as the claimant had enjoyed the use of it for 20 years under licence rather than lease; and (ix) the claimant should not be required by the terms of the new lease to pay the costs of its drafting, as there was English legislation relieving one party from paying the costs of another in preparing a lease that should not be overridden by the terms of that lease.

As to the rent, the claimant submitted that the rental value was either £21.78 per sq. ft., using the "zoning" method which was prevalent in the United Kingdom, or £35 per sq. ft., using the overall rate method, based on comparison with the three leases making up the Marks & Spencer lease on Main Street, with deductions of 12.5% for physical disabilities and 16% for lease issues.

The defendant submitted, *inter alia*, that the matter concerning the plant room could not be dealt with under the Landlord and Tenant Act 1983, s.51 as it was a matter of licence, not a part of the tenancy; the claimant should not be relieved from its obligation to pay for drawing up the new lease as Gibraltar and English law differed on this matter; and the rent should be £42.50 per sq. ft., with an addition of 5% for fitting and a deduction of 5% for configuration, based on 18 comparable leases, including a bank, on Main Street.

Held, granting a new tenancy:

(1) By virtue of the Landlord and Tenant Act 1983, s.53(1), the court had first to decide upon the terms of the new lease and then determine the rent in light of those terms (para. 3).

(i) The length of the lease would be 9 years. The Landlord and Tenant Act 1983, s.52 required the court to set the term between 5 and 14 years. Five years (the length proposed by the claimant) was too short to provide the defendant with adequate security, but the economic challenges facing retail businesses made a 14-year term (the length proposed by the defendant) overly long. Any tension which may exist between the parties was not a relevant factor. Nine years was a balance which was fair to both parties (paras. 4–8).

(ii) Two sureties would still be required. The well-established business of IFL and the prominence of its director, Mr. Russo, were not sufficient factors to warrant a change in the terms of the tenancy, especially given that IFL had, in the past, defaulted on rent. Alternative surety may be provided as Mr. Russo's brother was no longer a director of IFL, possibly Mr. Russo's partner (paras. 10–11).

(iii) The clause requiring the claimant to pay 8.5% of the maintenance costs had not been enforced in the past, and it had actually been paying around 5.5%. The 8.5% term would not be perpetuated as it would be unfair if actually enforced, but given the lower maintenance costs associated with the car park area it would not be included with other areas in working out a percentage basis. The parties were to agree a rate taking these observations into account (paras. 12–13).

(iv) The issues that had arisen as a result of the prohibition against internal alterations were not sufficient for the claimant to have discharged the burden to justify a departure from the terms of the current lease (paras. 14–15).

(v) The new lease would reflect the fact that the premises had been merged with other adjoining units, subject to its being reinstated in its separate state at the end of the tenancy (para 16).

(vi) The provision allowing for a minimum 15% annual increase in rent would be removed as it would *de facto* deprive the claimant of security of tenure. It was an "out-of-date" provision not reflecting the current economic climate. The minimum increase being in line with RPI, however, may prove onerous but was not unfair or outdated, and would consequently remain in the new lease. A three-year review cycle was commonplace and would also remain (paras. 17–20).

(vii) No reasonableness term would be added to the clause stating that the defendant had absolute discretion over which other items the claimant may sell from the premises. Despite the inherent attraction of allowing request for reasonableness, the term had not caused any issues during the previous tenancy, and it was hard to envisage what wider use than a department store the claimant might wish to use the premises for (para. 21).

(viii) The matter of the air conditioning plant could not be dealt with under s.51 as it was not a holding under the tenancy, and detailed consideration of whether it was a matter which could be dealt with under another section was unnecessary as the parties were confident they could agree terms regularizing the position. If they could not, a substantial discount might be applied to the rent (para. 22).

(ix) The terms requiring the claimant to pay the costs of and incidental to preparing a new lease would remain. There was no equivalent provision in Gibraltar to the English Costs of Leases Act 1958, s.1, which relieved one party from paying the costs of another party in preparing a lease, and therefore no justification for removing the term (para 23).

(2) The annual rent would be £255,000, calculated as £40.50 for each of the 7,620 sq. ft. (£308,610), subject to deductions totaling 17.5% (£54,006.75) giving £254,603.25, which would be rounded up to £255,000 (paras. 40–41).

(i) Notwithstanding their use in the United Kingdom or their possible merits, "zoning" methods of valuation were not prevalent in Gibraltar, and it was not therefore open to the court to use such methods in demining the rental value of the premises (para. 26).

(ii) The proper gross internal rate was £40.50 per sq. ft. Comparable premises on Main Street had values of not exceeding £40.64 per sq. ft, and £40.00 per sq. ft, and though they were smaller units than the premises in question—there being a larger market for smaller units, enhancing their value in comparison with larger premises—the premises in question was unique in its large size, in turn enhancing its value against the more numerous smaller units (paras. 29–34).

(iii) Deductions would be made of 5% for the premises being unusually deep and narrower at the front than the rear; 5% for the frontage not being flush or at a grade with Main Street; 2.5% for the many large and unevenly distributed columns; and 5% for the positive covenant to trade (as the ground floor of a department store, the premises generated substantial shopper footfall on which smaller units depended), totalling 17.5%. Further deductions would be made, possibly very substantial, if the parties failed to agree terms relating to the use of the air-conditioning plant room (paras. 35–39).

Cases cited:

(1) *CBS United Kingdom Ltd.* v. *London Scottish Properties Ltd.*, [1985] 2 E.G.L.R. 125; (1985), 275 E.G. 718, referred to.

(2) *Cairnplace Ltd.* v. *C.B.L. (Property Inv.) Co. Ltd.* [1984] 1 W.L.R. 696; (1984), 47 P. & C.R. 531, distinguished.

(3) *Cardshops Ltd.* v. *Davies*, [1971] 1 W.L.R. 591; [1971] 2 All E.R. 721; (1971), 22 P. & C.R. 499, referred to.

(4) *Ganton House Invs.* v. *Crossman Invs.,* [1995] 1 EGLR 239, *dicta* of Judge Brandt considered.

(5) *Irish Town Holdings Ltd.* v. *Sundersons Ltd.*, Supreme Ct., May 8th, 2003, unreported, *dicta* of Pizzarello, Ag. J. applied.

(6) *O'May* v. *City of London Real Property Co. Ltd.*, [1983] 2 A.C. 726; [1982] 2 W.L.R. 407; [1982] 1 All E.R. 660; (1982) 43 P. & C.R. 351, considered.

Legislation construed:

Landlord and Tenant Act 1983, s. 51(1):

> " . . . [An] order under section 48 for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of that order.

s.52: The relevant terms of this section are set out at para. 4.

s.53(1): The relevant terms of this sub-section are set out at para. 3.

s.54(1): The relevant terms of this sub-section are set out at para. 9.

A. Vasquez, *Q.C.* for the claimant;
J. Levy, *Q.C.* and *J. Santos* for the defendant.

1 **DUDLEY, C.J.:** This is a claim brought by International Franchises Ltd. ("IFL") for the grant of a new tenancy pursuant to s.43(1) of the Landlord and Tenant Act ("the Act") in respect of premises on the ground floor of the ICC Building, at the entrance to Main Street, from which it trades as British Home Stores ("the premises"). IFL occupies the premises under a deed of lease dated January 24th, 1991 by which Bari Properties Ltd. leased them to IFL for a period of 21 years commencing on June 10th, 1989. The parties are agreed that the premises measure 7,620 sq. ft. and are the most substantial part of larger retail and office premises, the remainder of which are held under other leases.

2 On December 9th, 2009, Bari issued a notice to quit, pursuant to s.44 of the Act, terminating IFL's tenancy over the premises on June 10th, 2010. The notice confirmed that Bari would not oppose the grant of a new tenancy. Although the parties are agreed that a new tenancy should be granted, they have been unable to agree the rent, the length of the term, or various other terms.

3 By virtue of s.53(1) of the Act, the court, in determining the rent, must have regard to the terms of the tenancy and fix the rent at what "the holding might reasonably be expected to be let in the open market by a willing lessor," but disregarding—

> "(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding;
>
> (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business);
>
> (c) any effect on rent of any improvement carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord . . ."

It is not in issue that by virtue of the language of s.53(1), the process to be followed is for the court to determine the other terms first and in light of those terms—and the statutory requirements—to then fix the rent (see *Cardshops Ltd*. v. *Davies* (3)).

The lease terms

The length of the term

4 By virtue of s.52, the court may grant a term of not less than five years, and not more than 14 years "as may be determined by the court to be reasonable in all the circumstances." When the claim was first issued, IFL sought a term of 14 years, which is the term proposed by Bari. Matters however changed when IFL amended its claim on January 4th, 2012, and sought a five-year term.

5 It is an unfortunate, albeit palpable, feature of this case that there is significant animosity between the directors of the parties—as evidenced by the numerous actions lodged in court over the past few years—some of which touch upon disputes which can be categorized as relatively trivial. IFL now seeks the reduced five-year term to minimize its exposure to those less than harmonious relations. For Bari, it is said that it would welcome IFL surrendering the premises, and curiously counsel on its behalf made a financial offer to IFL's director, Mr. Nicholas Russo, in open court. I am not persuaded that the tension which may exist between the parties is a particularly relevant factor when determining the length of the term of the new tenancy.

6 The more substantive submission advanced by Mr. Vasquez is premised upon the fact that in the present challenging economic times the situation has reversed, and that unlike in older cases it is now tenants who seek shorter terms to protect themselves from over-rentalization in long leases containing upward-only rent reviews. He relies upon a passage in Woodfall, *Landlord & Tenant*, No. 3, looseleaf ed., release 94, at para. 22.146.3 (2013): "In normal circumstances the court is unlikely to order the grant of a new tenancy for a term longer than that for which the tenant asks . . ." In support of that proposition, the learned authors rely upon *CBS United Kingdom Ltd.* v. *London Scottish Properties Ltd.* (1), unfortunately counsel were not able to trace the report. However, in *Ganton House Invs.* v. *Crossman Invs.* (4) (which is referred to in the same footnote in *Woodfall*), Judge Brandt in the Colchester & Clacton County Court had this to say ([1995] 1 EGLR at 240):

> "The other case which was cited as authority for the proposition in *Woodfall*, is *CBS United Kingdom Ltd.* v. *London Scottish Properties Ltd.* . . . One has only to look at the facts of that case to see what an extraordinary set of facts they were. The judgment, if I may say so with respect, is beyond criticism. But it is a judgment on a very peculiar set of facts and I cannot see that it is worthy of being erected into the general proposition for which it is cited in *Woodfall*."

7 The exercise of the court's discretion in determining the duration of the term involves a balancing exercise between the needs of the landlord and the tenant. Guidance as to the relevant factors which need to be taken account of when undertaking that exercise are also to be found in *Woodfall* at para. 22.146. Of particular relevance in the present case are the following:

(i) the length of the term of the current tenancy;

(ii) the length of time during which the tenant has held over;

(iii) the hardship that will be caused to the landlord or tenant by the grant of a long or short term;

(iv) that the tenancy granted will be subject to the Act and therefore on its expiry the tenant will be entitled to seek the grant of a new tenancy; and

(v) the desirability of a degree of stability in the letting market.

This is a 21-year lease which determined in June 2010. Consequently, IFL has been in occupation for almost 24 years. Although Bari might prefer for IFL to surrender the premises, the commercial reality remains that the five-year term which IFL seeks is insubstantial and would fail to provide Bari with the stability to which it is entitled, particularly when viewed from the perspective of the length of the current tenancy. However, I do not ignore that in the present economic climate, the challenges which retail businesses face and probably will continue to face are substantial, and that an overly long term could become unduly onerous. Not least given that for reasons I shall turn to shortly, I shall be retaining the requirement of two sureties. Ultimately, I must undertake a balancing exercise, which will probably not satisfy either but which is fair to both. In my view in the present circumstances a term of nine years is reasonable.

8 It is open to me to make provision for a break clause—that, however, would be unfair on Bari given that the original term was for 21 years, and that the new tenancy will be for less than half that period. It has also been said for Bari that it would not object to a break clause six months into the tenancy, the effect of which would be that IFL could, at its option, decide to surrender the premises in the very short term. Although Mr. Russo might in his ideal world find alternate premises and consequently an alternative landlord, as I understood the tenor of his evidence, it is not a course of action which is being seriously contemplated, therefore there is no point in including such a provision. If I am wrong in that, and there is a real desire to move premises, I am willing to reconsider this aspect of my decision.

The other terms

9 The provision governing "other terms" of a new tenancy is to be found at s.54(1) of the Act which provides:

> "The terms of a tenancy granted by order of the court under this Part (other than terms as to its duration and as to the rent payable) shall be such as may be agreed between the landlord and the tenant, or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

The manner in which the court is to exercise its power under s.54 is to be found in the House of Lords decision in *O'May* v. *City of London Real Property Co. Ltd.* (6), in which Lord Wilberforce, dealing with s.35 of the

English Landlord and Tenant Act 1954—which is in identical terms to our s.54—had this to say ([1983] 2 A.C. at 747):

> "This section contains a mandatory guideline or direction to 'have regard to' the terms of the current tenancy and to all relevant circumstances. The words 'have regard to' are elastic: they compel something between an obligation to reproduce existing terms and an unfettered right to substitute others. They impose an onus on a party seeking to introduce new, or substituted, or modified terms, to justify the change, with reasons appearing sufficient to the court . . ."

Sureties

10 Albeit not pursued by Mr. Vasquez with great vigour, IFL seeks to be released of its obligation to provide sureties or, alternatively, to have only Mr. Russo as surety. It is not in dispute that IFL has a well-established business and that Mr. Russo is a substantial and prominent member of the local business community. Neither of those factors are, however, in my view, sufficient to discharge the onus on the claimant to modify the terms of the tenancy, particularly as I cannot ignore that, albeit as far back as the late 1990s, IFL defaulted in the payment of rent and Bari had to institute proceedings.

11 The original lease was guaranteed by Mr. Russo and his brother Anthony. The latter is no longer a director of IFL and his release as a surety is sought. Bari does not, in principle, object to a suitable alternative surety being provided. I fear, however, that issues may in due course arise as to the suitability of proposed alternatives and at this stage, if only to pre-empt future conflict, I express the strong tentative view that Mr. Russo's spouse—who is the only other director of IFL—should, unless there are strong countervailing reasons, be considered suitable.

Maintenance rent

12 Clause 3(2) of the lease requires IFL to pay a proportionate part of the maintenance costs of the building, which, by virtue of cl. 3(2)(e) is the equivalent of 8.5% of the total cost. In fact, that provision has not been enforced by Bari, and IFL has paid its contributions towards the maintenance costs in line with the original estimate to be found at cl. 3(2)(i) of the lease at a rate of £2.50 per sq. ft., and which was subsequently increased to £3.00 per sq. ft. The effect of that is that IFL has been paying some 5.5% of the overall maintenance costs, rather than 8.5%. For its part, Bari has retained possession of the multi-storey car park, and by virtue of that, has been making significant contributions towards the maintenance of the building. The area of the car park, however, is not treated as part of the total lettable area used to calculate the 8.5% obligation created by the lease. Although to date the maintenance rent payable may have *de facto*

been structured in a way which has operated fairly, I am of the view that in granting a new tenancy I cannot perpetuate a clause which has not been applied but which if enforced in the future would impact unfairly upon IFL.

13 That said, the proposal advanced by IFL—that the area of the car park be included in the calculation of total lettable area *pari passu* with all other communal areas—cannot be sustained, as the cost of maintaining a car park, and its insurance and reinstatement value, are evidently less than that of other areas. Evidently, the provisions relating to maintenance rent need to be addressed, and the existing clause cannot remain. I proceed upon the basis that the parties will take account of what I have said and agree terms. In the event that they fail to do so, subject to further submissions, I would be minded to refer the matter to conveyancing counsel pursuant to the Civil Procedure Rules, r.40.18.

Lessee's covenants relating to prohibitions against internal alterations

14 The provisions dealing with the prohibition against internal alterations is to be found at cll. 3(17) and 3(18) of the lease. IFL's case is that they are unnecessarily onerous, and have led Bari to impose its will in relation to the most innocuous and insubstantial internal alterations; that this has led to entirely avoidable conflict between the parties; and that the intention is to introduce a test of reasonableness to prevent litigation instigated by Bari. However, Mr. Vasquez in his closing did suggest that more recent advice provided to IFL was to the effect that the clauses are not in fact as onerous as previously believed.

15 It is, I think, undeniable that there have been issues between the parties in relation to internal alterations. The difficulty is that ascertaining the merits of the competing positions would require detailed consideration of those events which arose not only in relation to the premises but also other units in the building demised to IFL. Although some evidence has been adduced in relation to these instances, in the context of this action I am unable to make a determination. Therefore IFL has not discharged the burden to justify a departure from the current lease.

Merger

16 Clause 3(31) of the lease prohibits the merger of the premises with adjoining premises without the consent in writing of the landlord. It is not in dispute that since 1990, the premises have been merged with Unit F18 on the first floor of the ICC building, with which they are connected by a staircase. Since 1991, the premises have also been merged with Units G1 and G2 at the rear of the premises. IFL merely seeks that this reality be reflected in the new tenancy. It is a request for a change which cannot be faulted provided that it is also made subject to the requirement that they

are to be reinstated to their separate state at the conclusion of the tenancies.

Rent review provisions (Schedule 6 of the lease)

17 As presently drafted, the lease broadly provides for upward-only increases in rent every three years, by the amount being the greatest of:

(i) 15%;

(ii) the rate of inflation in the period in question ("RPI"); or

(iii) the rack rental value of the premises.

It is not in dispute that, following an agreement concluded with the Government of Gibraltar for the letting of a very large part of the second floor of the building to the Gibraltar Health Authority to operate as a health centre, Bari agreed not to impose the 15% or RPI increases on any of the ICC lessees. In his evidence, Mr. Solomon Massias made it clear that that agreement only applied during the term of existing leases, but not upon renewal. It is evidence which I accept.

18 Mr. Vasquez relies upon that agreement in support of his proposition that the minimum 15% or RPI link are unsustainable, particularly in the present economic climate, and also that it is an unprecedented clause in the local market. As regards the 15% increases, he cogently advances the argument by demonstrating that had that provision been enforced, the 1989 starting rent of £181,356 (£23.80 per sq. ft.) would by 2007 have increased to £419,487 (£55.05 per sq. ft.). In a rent review effective June 10th, 2007, the annual rack rent was fixed at £220,000 (£28.87 per sq. ft.). In the context of those figures, his submission that the 15% guaranteed increase of rent would *de facto* deprive IFL of the security of tenure which the Act is intended to protect, is a proposition that I accept. Respectfully adopting Lord Wilberforce's language in *O'May* v. *City of London Real Property Co. Ltd.*, it is a provision which, by virtue of the economic downturn, is "out of date" and in my judgment unfair. It is therefore appropriate to order its removal, this notwithstanding that existing tenants within the ICC have agreed new leases in which the provision is retained.

19 The position is not the same as regards the RPI link. RPI is not an arbitrary sum in the way that the 15% is, but rather is inherently linked to the vagaries of the economy and a landlord is perfectly entitled to guard against the impact which inflation may have on his rental income. Whilst it may prove onerous upon IFL if RPI is higher than the increase in the rack rental value of the premises, it cannot remotely be described as an unfair term. Particularly relevant in this context is that the current lease was the result of a free bargain between the parties, whose directors are experienced businessmen who had the benefit of legal advice.

20 The related issue requiring determination is the period during the tenancy (if any) when the rent is to be reviewed. The current lease provides for review on or after every three years. Mr. Massias' evidence clearly shows that a three-year cycle is very common in the Gibraltar retail rental market, and no substantive argument is advanced on behalf of IFL to justify a change. Without hesitation I determine that the new tenancy is to retain the three-year review cycle.

Use

21 The use to which the premises may be put is governed by the Eighth Schedule to the leases which provides:

> "1. To carry on the business and/or trade as a department store.
>
> 2. In addition to the items listed in 1 above the lessee shall be entitled to sell such other items as the lessor may in its absolute discretion in writing determine and then only in accordance with and subject to such conditions as the lessor may see fit to impose."

IFL merely seeks to introduce the element of "reasonableness" into sub-cl. 2. The reason for this request is premised upon an allegation by Mr. Russo of difficulties he has encountered in relation to other premises which IFL leases from Bari. There is a superficial attraction to the proposition in the sense that it is always difficult to impugn a request for reasonableness. However, the business allowed to be carried on from the premises is that of a department store, and although in practice it is likely to be led by women's fashion and men's clothing, it is difficult to envisage a wider user. In those circumstances and given that the alleged difficulties have not arisen in relation to this tenancy I am not persuaded that the change sought is justified by sufficient reason.

The inclusion of the "air-conditioning plant room"

22 In its amended claim form, IFL seeks to regularize the position relating to the air-conditioning plant room the use of which it has enjoyed for approximately 20 years by licence rather than under the lease. Mr. Vasquez very properly conceded that to the extent that the relief was sought under s.51 the argument could not be sustained as the plant room does not constitute part of the holding under the tenancy. Mr. Vasquez however submitted that the argument could be made out under s.54, in that the court, in its discretion, can incorporate terms reflecting lease rights which a tenant has established by means, for example, of a promissory estoppel. Developing and considering that argument would require detailed consideration of the facts and the law so as to determine what rights, if any, have been acquired. It is an exercise which fortunately is unnecessary, as counsel for Bari was confident that the parties would be able to agree the terms of a licence allowing for the continued use of the

plant room—not least given that if the premises do not have the benefit of air conditioning, its rental value would be very significantly compromised.

Cost of drawing up new lease

23 Clause 3(27) of the current lease provides that the lessee will pay the costs of and incidental to the preparation and stamping of the lease. It is submitted on behalf of IFL that this court should not include such a term in the new lease. Reliance is placed upon the English Court of Appeal decision of *Cairnplace Ltd.* v. *C.B.L. (Property Inv.) Co. Ltd.* (2). That case is authority for the proposition that since s.1 of the Costs of Leases Act 1958 had specifically relieved one party of the obligation to pay the costs of any other party in preparing a lease that protection should not be lost by a term to that effect being included in the new lease. The short answer to Mr. Vasquez's submission is that there is no equivalent statutory provision in Gibraltar, and irrespective of whether or not it is customary conveyancing practice in Gibraltar, there is no justification to deviate from the terms of the current tenancy.

Rent

24 Not surprisingly, the single most important issue is the level at which the rent is to be fixed. It is useful in this regard to set out some background. As aforesaid, the annual rent originally fixed by the lease was of £181,356 which, on the basis of 7,620 sq. ft., equated to £23.80 per sq. ft.

25 A rent review effective June 10th, 2004 ("the 2004 rent review") but completed on August 24th, 2005 was undertaken by Mr. G.D. Finn, BSc, FRICS, MCIArb, who the parties agree is highly regarded in his field. In his statement of reasons Mr. Finn found the letting of 2–6 Main Street to S.M. Seruya as the most helpful benchmark. He went on to find that the appropriate ground floor gross internal rate prior to adjustment for physical disabilities or lease terms was of £33.00 per sq. ft. Mr. Finn then went on to make deductions for physical disabilities as follows: frontages 5%; columns 2.5%; configuration 5%, whilst in respect of the lease terms he made a 5% deduction in respect of the positive covenant to trade clause. The upshot was that the rent was increased to £207,500 per annum, being equivalent to £27.23 per sq. ft. It is noteworthy in the context of certain submissions which have been advanced by IFL that when dealing with the reduction for configuration he had this to say:

> "Whilst zoning is not a method of valuation common to the Gibraltar market, it is necessary to recognize that disproportionately deeper and physically compromised space cannot attract an equivalent [gross internal area] rate to the main comparable which is not so afflicted."

A second rent review, effective June 10th, 2007 ("the 2007 rent review") but completed on May 23rd, 2008, was also undertaken by Mr. Finn. On this occasion, Mr. Finn used as his main comparable 191 Main Street/ Mothercare, on the basis that it was the most recent lease renewal for retail premises in Main Street, and that he found that there was no material difference in calibre between that retail pitch and that of the premises. The then rental value of the ground floor area of 191 Main Street/Mothercare was of £35.00 per sq. ft., which he used as the value for the gross internal area. On this occasion, Mr. Finn made the same deductions in relation to the physical disabilities. However, in relation to deductions arising from the lease terms, he did not allow the 5% deduction for the positive covenant to trade clause, because the unexpired term of the lease was short, but he went on to allow a 5% deduction because the unexpired term of three years was short. The upshot on this occasion was that the rent was fixed at £220,000 per annum, that is to say, £28.87 per sq. ft.

26 The experts engaged by the parties have approached their valuations from very distinct perspectives. That much is clear from the figures. Mr. C.J.J. Osmond, MA, FRICS, the expert for IFL, who had previously acted in the two rent reviews before Mr. Finn, on this occasion adopted the novel approach of valuing the premises using the zoning method. It is not in dispute that that is the methodology predominantly used in the United Kingdom for retail properties of this nature. That process led him to opine in his report, with "no hesitation," that the open rental value of the premises was of £166,000, that is to say, £21.78 per sq. ft., a figure below the rent payable in 1989, notwithstanding the elapse of 23 years. Mr. Osmond's contention in relation to zoning is that it is a method which produces fairer valuations, particularly in relation to premises which are large, irregularly shaped and with a relatively small frontage, such as the one the subject matter of this action. That may be, but it is clear from the testimony of both experts that zoning is not a method which has been applied in Gibraltar. It is also implicit in the Gibraltar Chamber of Commerce Annual Report 2011—found at appendix 2 of Mr. Osmond's report—in which when dealing with retail property states:

> "Some members have suggested the application of a more sophisticated (RICS approved) methodology of measuring retail rents by using 'zoning' methods which is predominantly used in the United Kingdom. The rationale that the rental value of a retail premises should be assessed in every 20 foot blocks of space away from the street front façade . . . This would ensure a more equitable way of measuring retail space. Others have suggested that the government consider a reduction in rates . . ."

In determining the market rent of premises, this court must make its assessment applying the prevailing method by which rents are calculated in Gibraltar, and not by arbitrarily importing a method used in another

jurisdiction and which has not been adopted by the market here. To do otherwise would be much the same as valuing gold by the metre rather than the gram.

27 Surprisingly, given that ultimately his opinion is as to market value, Mr. Osmond in his report is able to produce a distinct valuation based on the overall rate method. Adopting what is undoubtedly the prevailing method of valuation, he opines that the rate to be applied to the gross internal area is of £35.00 per sq. ft. As his main comparable, he uses 215a, 215b and 215c Main Street/York Ltd. (t/a Marks & Spencer). Those premises are held through three distinct leases renewed in April 2009 in respect of which the rent payable for the ground floor is of £36.67 per sq. ft., £35.00 per sq. ft. and £34.00 per sq. ft. Mr. Osmond relies upon what he considers the mid-point of the ground floor rent £35.00 per sq. ft. as the comparable figure. (In fact the average ground rent is of £35.22.) From the gross internal rent of £266,700, which such a rate would achieve, he then goes on to deduct 12.5% for physical disabilities and 16% for lease issues resulting in an annual rent of £195,000 per annum, which is equivalent to £25.59 per sq. ft. Although now eight years later, this figure is below Mr. Finn's 2004 rent review, and Mr. Osmond's opinion is all the more surprising in that no comparable has been brought to my attention in which the rent has dropped. Moreover, in the Chamber of Commerce Annual Report 2011, to which I have referred earlier, the following passage, is to be found: "Gibraltar retail rents continued to edge upwards despite these challenging times . . ." In these circumstances I find myself unable to attach any substantial weight to Mr. Osmond's expert opinion.

28 Mr. Nicholas Cook, BSc, MRICS, the expert instructed by Bari, does not base his opinion on any one comparable but rather relies upon 18 transactions which he describes in his report as the most relevant. Premised upon these, he alights upon a rate of £42.50 per sq. ft. for the gross internal area resulting in an annual rate of some £324,000 to which figure he adds 5% for fitting out and then goes on to deduct 5% for configuration and frontage, thereby leaving the gross internal rate unchanged. The weakness in Mr. Cook's analysis in relation to the gross internal rate is that his comparables include a bank and a building society which distort the figures upwards. If those banking premises, and a very small unit at 80–82 Main Street which commands a rent equivalent to £74.18 per sq. ft. (and which is evidently out of kilter) are discounted, then the £42.50 rate is slightly high.

29 The experts in their statement of agreed and disagreed matters agreed the rental evidence in respect of 19 comparable leases, albeit not always managing to agree the rental analysis. With the benefit of the examination and cross-examination of the experts I am of the view that the most relevant comparables are the following, which for ease I tabulate [see appendix]. Where premises are distributed over various floors I only set

out the area of the ground floor and the rent attributed to it. These transactions require some further consideration.

30 The Marks & Spencer premises (215a, 215b and 215c Main Street) comprise of three distinct leases. However, as I understand it, all are held from the same landlord and in combination they are of comparable size (2,706, 3,300 and 3,615 sq. ft., respectively) to the subject-matter of this action. Mr. Finn, in his 2007 rent review, attached little weight to these leases as comparables because the then rent reviews predated the subject review by two years and three months. The Marks & Spencer rent reviews which can now be relied upon date back to April 2009, and themselves will imminently be subject to a rent review. Because of this, like Mr. Finn in 2007, I find that little weight can be placed on these transactions when determining the market rent of the premises. Moreover, Mr. Finn's view in the 2004 rent review was that the location of Marks & Spencer is "meaningfully inferior" to that of the premises. It is a view which I share and therefore also a reason for not attaching too much significance to these transactions.

31 S.M. Seruya at 2–6 Main Street was the comparable which Mr. Finn, in his 2004 rent review, considered by some margin "the most helpful benchmark," as he put it: "This property commands an unrivalled location in Main Street and I would properly expect the valuation of any other retail unit in the street to be at a discount to the rental achieved here." However, in determining what weight to ascribe to this comparable I cannot ignore that its 2012 rent review was agreed at nil. That is indicative of the fact that the rental value of those premises did not in 2012 exceed £40.64 per sq. ft. It does not however provide an accurate indication of where below this figure (if at all) the rental value lies.

32 S.M. Seruya at 139–141 Main Street is in some measure affected by the same issue, in that the 2011 rent review was waived and therefore the rental value establishes a ceiling but not a floor. There is, however, no ignoring the payment by the tenant of a premium of £450,000 upon assignment to it of the lease. In *Irish Town Holdings Ltd*. v. *Sundersons Ltd*. (5), Pizzarello, Ag. J. had this to say (at para. 7):

> "The premium factor cannot be discarded completely . . . because that factor shows that the demand for shop premises is high and that interest does not decrease. It forms also an element in the art of valuation but I do not put it any higher than that."

I respectfully agree. Mr. Russo testified as to the particular circumstances surrounding the acquisition of those premises by S.M. Seruya and how it resulted in the closure of two smaller shops, essentially therefore that this was a rationalization of S.M. Seruya's retail business aimed at reducing overheads. In my view this court can only rely upon the bare bones of transactions involving comparable premises and cannot embark upon the

examination of collateral issues involving non-parties and their commercial decisions.

33 The final relevant comparable is the Mothercare premises. Mr. Finn in the 2007 rent review identified this as the key comparable and made the determination that there was no material difference in the calibre of the retail pitches between the two locations. Mr. Osmond makes the point that the £40.00 per sq. ft. rental is not an accurate representation of the rent payable for the ground floor, given that if the same floor areas are used as agreed for the May 2008 lease renewal, the analysis shows a lower rate of £38.00 per sq. ft. In the register of tenancies of business premises established under the Act, the rent is specified as £40.00 per sq. ft., to look behind this figure would, as with 139–141 Main Street, require determination of collateral issues, which it is inappropriate to do.

34 The S.M. Seruya 2–6 Main Street 2012 nil review would of its own suggest a slow-down in the retail property market. However, such an inference is difficult to reconcile with the S.M. Seruya 139–141 Main Street transaction 10 months earlier, involving the payment of a substantial premium and acceptance by a tenant of what essentially is the highest rent for a Main Street retail outlet. I also cannot ignore the Mothercare transaction given that it involved a negotiated increase in respect of an outlet in a pitch of equal calibre to those of the premises. There is also the added dimension that these three comparables are retail units which are only about one-third of the size of the premises. It is evident that there may be a larger market for smaller units than for a 7,620 sq. ft. shop but there is merit in the countervailing argument that the premises are unique in that there are no other retail units in Main Street of that size held under a single lease and that therefore its rental value is enhanced. Ultimately, valuation is an art rather than a science and guiding myself by the nature of the premises, its pitch and the three comparables I reach the conclusion that the proper gross internal rate to be applied is £40.50 per sq. ft.

Physical disabilities and lease restrictions

35 When dealing with physical disabilities, it is important that account be taken of the physical disabilities affecting comparable premises as otherwise when making a deduction there is a danger of double counting. Unsurprisingly, Mr. Osmond and Mr. Cook adopt opposed positions in relation to both the physical disabilities and the lease restrictions affecting the premises. Fortunately, as counsel suggested, in a sense I have the benefit of a third expert in the form of the rental determinations undertaken by Mr. Finn. Certainly in so far as the physical disabilities and the deductions he makes in respect thereof I find his determination unimpeachable and respectfully adopt it. The 5% deduction in respect of the frontage, which is neither flush with Main Street nor at grade with it, is proper. As is the 5% deduction for configuration on the basis that the

premises are disproportionately deep and unusual in shape, being narrower at the front than at the rear. Also the significant number of large and unevenly distributed columns properly attracts a 2.5% deduction.

36 As regards the lease issues, Mr Osmond opines that the following deductions, totalling 16%, should be made:

(i) 1% review cycle;

(ii) 5% positive covenant to trade;

(iii) 5% personal guarantees;

(iv) 5% alteration restrictions.

It is clear from Mr. Massias's evidence that sureties, three-year rent review cycles and alteration clauses are commonplace in Gibraltar, and indeed are to be found in some of the comparable properties. It is also noteworthy that Mr. Finn did not make a deduction in respect of these items in his rent reviews. I am of the view that no deductions are appropriate in respect of these items.

37 The position is different as regards the positive covenant to trade. There is no evidence to suggest that such a term is commonplace in Gibraltar. In the 2004 rent review, Mr. Finn, dealing with the positive covenant to trade at para. 5.10 of his statement of reasons, said:

> ". . . Were the property a free-standing store in a high street then its closure in apparent breach of the lease's terms would not necessarily impact upon the value of the landlord's reversion. In a shopping centre where the store is the dominant occupier and whose presence generates substantial shopper footfall, as is the case here, rental discount is warranted."

Mr. Finn then went on to allow a 5% discount. In 2007, he modulated his position on the basis that whilst in 2004 there were six years unexpired on the lease, in 2007 the relatively short unexpired term meant that the obligation was not sufficiently onerous to justify the discount. On the basis that I am granting a nine-year term, I conclude that a 5% deduction in respect of this clause is appropriate. Evidently I do not accept Mr. Cook's opinion that the discount is not appropriate because the premises do not anchor the rear of the scheme. In my view it is apparent from the distribution of retail units on the ground floor of the ICC and supported by the evidence, that in significant measure these smaller units depend on the footfall generated in the premises.

38 The other factor which is capable of attracting a discount is the unexpired term of a lease, it being suggested by the experts that both an unduly short or long term could justify it. Given my determination that the term is to be of nine years, the issue does not, in my view, arise.

39 Mr. Cook, for Bari, opines that that the premises should be valued on a fitted basis and 5% added to the rental value to reflect this benefit. It is not something which appears to have been argued before Mr. Finn in either of the rent reviews undertaken by him. Although there may have been an obligation on IFL to undertake the improvements, these were effected almost 25 years ago and any value which they may have added to the premises can now be properly discounted.

40 The annual rent payable under the tenancy to be granted by this court is calculated as follows:

Gross internal area: 7,620 sq. ft., at £40.50 per sq. ft. = £308,610

Deductions:

(i) Configuration: 5%

(ii) Frontage: 5%

(iii) Columns: 2.5%

(iv) Positive covenant to trade: 5%

Total allowances: 17.5% (£54,006.75)

£308,610 – £54,006.75 = £254,603.25

Rounded to: **£255,000**

Conclusion

41 The upshot is that I grant a term of nine years at an annual rent of £255,000, with rent reviews every three years. However, the determination of the rental value of the premises is dependent upon the parties' agreeing terms in relation to the air-conditioning plant room. In the event that they fail to do so I shall hear submissions in relation to the further percentage deduction which would be appropriate by virtue of the unavailability of air conditioning. Given the nature of the premises, the use to which they may be put and Gibraltar's climate, my tentative view is that it would be a very substantial deduction.

42 I shall hear the parties in relation to the drafting of an appropriate clause dealing with the maintenance rent; whether the new rent is to be recoverable from a date prior to the order; the precise terms of my order and as to costs.

Orders accordingly.

Appendix

Address	Tenant	Transaction date	Lease terms	Area (sq. ft.)	Rent (per sq. ft.)
215a Main Street	York Ltd. (Marks & Spencer)	April 2009	20 years, with effect from April 1st, 2009, subject to four-yearly upward-only rent reviews.	2706	£38.50
215b Main Street	York Ltd. (Marks & Spencer)	April 2009	20 years with effect from April 1st, 2009, subject to four-yearly upward-only rent reviews.	3300	£35.00
215c Main Street	York Ltd. (Marks & Spencer)	April 2009	20 years with effect from April 1st, 2009, subject to four-yearly upward-only rent reviews.	3615	£34.00
2–6 Main Street	SM Seruya	Rent review February 1st, 2009. 2012 rent review agreed at nil.	12 years from February 1st, 2003.	2303	£40.64
139–141 Main Street	SM Seruya	Assigned to Seruya in April 2011, premium £450,000. 2011 rent review waived.	15 years, with effect from April 1st, 2008.	2127	£42.31
191 Main Street	IFL (Mothercare)	May 2011 rent review.	6 years, from May 1st 2008, subject to three-yearly upward-only rent reviews.	1521	£40.00