[2016 Gib LR 71]

SERUYA HOLDINGS LIMITED, DONSULI LIMITED and STYCH v. HALHOUL (or HALOUL)

SUPREME COURT (Jack, J.): February 26th, 2016

Landlord and Tenant—rent—rent control—dwelling "erected" before March 1st, 1959 subject to rent control by Housing Act 2007, s.40(1)(a)—"erected" means "built" and excludes conversion of two existing flats into one—if building "erected" before that date, rent control applies to flats converted into single dwelling after that date

The claimants applied for a possession order against the defendant.

The defendant leased from the claimants two flats in a building called Union House, which he converted into a single unit. The claimants served on him a notice to quit but, on the expiry of that notice, he refused to vacate the premises and they issued possession proceedings.

The court was required to determine as a preliminary issue whether the flats were subject to Part II of the Housing Act 2007 (conferring various protections on tenants), which depended on whether they were a "dwelling that has been erected on or before the 1st March 1959" within the meaning of s.40(1)(a) of that Act. Union House had been built before 1959 but the defendant had converted the two flats into a single unit after 1959.

The Rent Assessor wrote a letter stating that the flats in Union House were not subject to Part II of the 2007 Act by virtue of a decontrol order made in 1988 under s.22 of the Landlord and Tenant Ordinance 1983, as amended. This decontrol mechanism was abolished a year later by the Landlord and Tenant (Amendment) Ordinance 1989, s.3.

The claimants submitted that (a) since the defendant's conversion of the two flats into a single unit changed the identity of the premises, the flats were a "dwelling house that has been erected after the 1st March 1959" within the meaning of s.40(8) of the 2007 Act and were therefore excluded from Part II of that Act; (b) the 1988 decontrol order gave the claimants a subsisting right to hold the premises free from rent control, which was unaffected by the repeal of the decontrol mechanism in 1989 due to s.33(2) of the Interpretation and General Clauses Act 1962 (which provided that the repeal of one statute by another would not affect a right acquired under the repealed statute in the absence of contrary intention); and (c) the Rent Assessor's letter was a conclusive certificate that the premises were not subject to Part II of the 2007 Act under s.40(10) of that Act.

The defendant submitted that (a) the flats did not fall within s.40(8) of the 2007 Act because only a building, and not the individual dwellings within it, could be "erected" and Union House had been erected before March 1st, 1959, with the result that s.40(1)(a) applied and the flats were subject to Part II of the 2007 Act; (b) the Rent Restriction Ordinance 1938, s.6(7) showed that the statutory system of rent control drew a distinction between the erection of a building and the conversion of premises within a building; and (c) the Rent Assessor's letter was not a certificate for the purposes of s.40(10) and could not be conclusive because it was vitiated by a manifest error of law.

Held, making a declaration that Part II of the Housing Act 2007 applied to the flats:

(1) The flats were subject to Part II of the 2007 Act. Although the defendant's conversion of the two flats into a single unit changed the identity of those flats, it did not amount to an "erection" of a dwelling-house after March 1st, 1959 for the purposes of s.40(8). Section 40(1)(a) would be construed as providing that Part II of the 2007 Act would apply to "every dwelling *in a building* that has been erected on or before the 1st March 1959," and since Union House had been erected before March 1st, 1959, the dwellings within it would be subject to the 2007 Act. This construction was supported by (a) the legislative history, which showed that flats converted after March 1st, 1959 had been caught by previous rent control legislation as long as the building containing them had been built before that date; (b) the dictionary definition of "erect," which meant "to . . . build" and a conversion of two flats into a single unit was a structural change rather than the building of a property; and (c) the distinction between "dwelling" in s.40(1)(a) (*i.e.* "domestic premises which are used entirely for residential purposes": s.33(1)) and "dwelling house" in s.40(8) (which was not defined in the legislation but could include premises used in part as business premises), which indicated that, if an individual dwelling came into existence after March 1st, 1959 within a dwelling-house that was built before that date, that dwelling could still be within s.40(1)(a), properly construed, and therefore subject to Part II of the 2007 Act (paras. 46–53).

(2) It was not the case that, once the claimants had obtained a decontrol order under the 1985 iteration of s.22 of the Landlord and Tenant Ordinance 1983, they had a right to hold the premises free from rent control for the purposes of the Interpretation and General Clauses Act 1962, s.33(2). The decontrol order merely meant that the landlord/tenant relationship between the parties ceased to include a restriction on the amount of rent that could be charged and the effect of the Landlord and Tenant (Amendment) Ordinance 1989 was to re-impose rent restrictions on the flats. Even if the claimants did have such a right for the purposes of s.33(2) of the 1962 Act, the fact that it was very common for properties to move in and out of rent control indicated the legislature's intention that the 1989 Ordinance amendment would remove that right (paras. 41–44).

(3) The Rent Assessor's letter was not a conclusive certificate for the purposes of s.40(10) of the 2007 Act because it contained a manifest error of law, in that the decontrol order made in 1988 ceased to have effect once the 1989 amendment to s.22 of the 1983 Ordinance came into force (para. 54).

Cases cited:

(1) *Baygreen Properties Ltd.* v. *Gil*, [2003] H.L.R. 12; [2003] L.&T.R. 1; [2002] 3 E.G.L.R. 42; [2002] 49 E.G. 126; [2002] EWCA Civ 1340, considered.

(2) *Curtis* v. *London Rent Assessment Cttee.*, [1999] Q.B. 92; [1998] 3 W.L.R. 1427; [1997] 4 All E.R. 842; (1997), 30 H.L.R. 733, referred to.

(3) *M.H. Seruya Properties Ltd* v. *Benady*, Supreme Ct., unreported, referred to.

(4) *R.* v. *Bloomsbury & Marylebone County Ct., ex p. Blackburne*, [1985] 2 E.G.L.R. 157; (1985), 275 E.G. 1273, considered.

(5) *Stockham* v. *Easton*, [1924] 1 K.B. 52, considered.

(6) *Street* v. *Mountford*, [1985] A.C. 809; [1985] 2 W.L.R. 877; [1985] 2 All E.R. 289; [1985] 1 E.G.L.R. 128; (1985), 50 P. & C.R. 258, referred to.

(7) *Uratemp Ventures Ltd.* v. *Collins*, [2002] 1 A.C. 301; [2001] 3 W.L.R. 806; [2002] 1 All E.R. 46; (2001), 33 H.L.R. 85; [2001] UKHL 43, referred to.

Legislation construed:

Housing Act 2007, s.40: The relevant terms of this section are set out at para. 23.

s.45(1): The relevant terms of this sub-section are set out at para. 9.

Interpretation and General Clauses Act 1962, s.33(2): The relevant terms of this sub-section are set out at para. 40.

Landlord and Tenant Ordinance 1983, s.22, as amended by the Landlord and Tenant (Amendment) (No. 2) Ordinance 1985, s.3 and the Landlord and Tenant (Amendment) Ordinance 1989, s.3: The relevant terms of this section are set out at paras. 34 and 39.

Rent Restriction Ordinance 1938, s.6(7): The relevant terms of this sub-section are set out at para. 29.

A.B. Serfaty, Q.C. for the claimants;
K. Azopardi, Q.C. and *P. Vasquez* for the defendant.

1 **JACK, J.:** In 1860, the civil population of Gibraltar was confined to an area of less than 110 acres with a population density of over 100,000 per square mile. Such a density was only exceeded in seven wards of London at the time: Constantine, *Community & Identity: The Making of*

Modern Gibraltar Since 1704, at 164 (2009). The consequence was gross overcrowding.

2 The position improved somewhat in the second half of the 20th century, but in the 1960s and 1970s it was still common for newly-weds to have to stay with one spouse's parents due to the unavailability of other accommodation. The sharing of washing, toilet and sometimes kitchen facilities between different families in blocks was common. The most recent statistics show that, on January 31st this year, there were still 1,566 applicants for Government housing: see the Government of Gibraltar website, Housing Statistics 2016 (accessed on February 23rd, 2016).

3 It is against this background that various pieces of legislation designed to protect tenants were passed. Constantine suggests that General Sir Horace Smith-Dorrien, the Governor from 1918 to 1923, made a temporary rent restriction ordinance (*op. cit.*, at 333), but counsel have been unable to find a copy. Instead, the earliest legislation relevant to the current proceedings cited to me was the Rent Restriction Ordinance 1938. This was superseded by the Landlord and Tenant (Miscellaneous Provisions) Ordinance 1959, which also dealt with business tenancies. The residential tenancy provisions in that Ordinance were replaced by the Landlord and Tenant Ordinance 1983, which was amended twice in 1985 and once in 1989. The current legislation is the Housing Act 2007.

Procedural history

4 Mr. Halhoul, the defendant, occupies Flats 1 and 2 on the first floor of 5A John Mackintosh Square. He took a lease of Flat 2 in 1994 and of Flat 1 in 2005. He has converted the two flats into one unit, where he lives with his wife and three daughters, the eldest of whom is currently at university in England. There are various allegations made by the parties as regards a substantial water leak into the flat on February 10th, 2012 and as regards disrepair. On January 15th, 2014, the claimants ("the landlord") served a notice to quit. The notice to quit was accompanied by an offer to grant a new tenancy but at an increased rent. The legal effect of this offer is in dispute but is not an issue for me to determine at this juncture.

5 On expiry of the notice to quit, Mr. Halhoul did not vacate the premises and, on June 12th, 2015, the landlord issued possession proceedings. The return date on the claim form was July 15th, 2015.

6 Mr. Halhoul was originally represented by Mr. Haresh Budhrani, Q.C. On July 13th, 2015, Dudley, C.J. made an order. After reciting that the order was made "upon the application by [Mr. Serfaty, Q.C.] . . . for the claimants and [Mr. Budhrani, Q.C.] on behalf of the defendant," it said:

"IT IS ORDERED THAT:

The claimants do have possession of the residential flats being Flat Nos. 1 and 2 [with a detailed description of the address]

BY CONSENT

that vacant possession be given not later than the 31st day of December 2015;

that the claimants do have judgment for damages for compensation for use and occupation of the said flats at a rate to be assessed if not agreed from the 1st day of August 2014 until the date of giving up of vacant possession;

that the defendant do pay to the claimants costs subject to detailed assessment if not agreed; and

the assessment of damages and any other matters remaining outstanding between the parties be adjourned to a date to be fixed by the Registrar on application by either party."

7 The return date of July 15th, 2015 would have been unlikely to be effective in view of the disputes of fact between the parties. The court would most probably have ordered that the matter proceed by way of the Civil Procedure Rules, Part 7, with a defence and counterclaim to be served. In the event, however, the making of the order of July 13th, 2015 meant the hearing did not proceed. The background to the making of the order two days earlier is that Mr. Halhoul saw Mr. Budhrani in conference on July 10th, 2015. Mr. Budhrani gave advice unfavourable to Mr. Halhoul. Mr. Halhoul had already been considering changing his representation to Mr. Keith Azopardi, Q.C. He says that Mr. Budhrani did not have his authority to agree an order in the form approved by Dudley, C.J. on July 13th, 2015 and that the order was made without his knowledge or consent. The landlord says that Mr. Budhrani would have had at least ostensible authority to agree the order.

8 On November 19th, 2015, by now represented by Mr. Azopardi, Q.C., Mr. Halhoul applied to set aside the order of July 13th, 2015 on the basis that Mr. Budhrani did not have authority to agree the order and that the court in any event should not have made the order. The return date of this application was December 4th, 2015, when the matter came before me. I drew the parties' attention to two decisions of the English Court of Appeal, *R.* v. *Bloomsbury & Marylebone County Ct., ex p. Blackburne* (4) and *Baygreen Properties Ltd.* v. *Gil* (1).

9 These two English cases concerned orders for possession, purportedly made by consent, in the county court against tenants protected by the provisions of the Rent Act 1977 (UK). Section 98(1) of that Act is in very similar terms to s.45(1) of the Housing Act 2007, which provides:

"No order or judgment for the recovery of possession of any dwelling to which this Part applies or for the ejectment of a tenant therefrom shall be made or given, unless the court considers it reasonable to make such an order or give such a judgment and either—

(a) the court has power so to do under the provisions of Schedule 5; or

(b) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

10 The Court of Appeal held that the English provision meant that the court of first instance had no jurisdiction to make a consent order for possession against a Rent Act protected tenant unless the court had satisfied itself that it was indeed reasonable to make the order. If Mr. Halhoul was entitled to the protection of the 2007 Act, it seemed to me that it was arguable that these cases were applicable so as to render the order of July 13th, 2015 liable to be set aside regardless of Mr. Budhrani's authority or otherwise, because the Chief Justice had not been invited to and did not consider reasonableness.

11 Accordingly, on December 4th, 2015, I ordered that the court determine as a preliminary matter whether Mr. Halhoul's two flats are subject to the Housing Act 2007. (It is right to record that Mr. Serfaty does not concede that Dudley, C.J.'s order was made without his considering the reasonableness of making the order and will seek to argue that Mr. Halhoul has, at least impliedly, accepted that he was not protected by the 2007 Act, but he did not object strongly to the determination of the 2007 Act point as a preliminary issue.)

The facts

12 There is very little dispute as regards the facts relevant to whether the flats are or are not protected by the 2007 Act. 5A John Mackintosh Square is the upper part of a building known as Union House. The ground floor consists of commercial premises. In the early 19th century, the site was occupied by Griffith's Hotel, which was visited by Samuel Taylor Coleridge in 1804. The hotel subsequently became the King's Arms Hotel. However, it is unlikely that Union House is the same building as the hotel premises. The exact age of the current building is unknown, but it certainly pre-dates the Second World War and probably pre-dates the First World War.

13 So far as the history of ownership and use is in evidence before me, the ground floor has always been commercial. In 1945, the then owner of the freehold, Mrs. Carmen Rugeroni, granted a 10-year lease of the first,

second and third floors to Prescott Ltd., which was a well-known firm of insurance brokers in Gibraltar. This may have been for commercial use, but there is no evidence for that apart from Prescott Ltd. being a business. On the falling in of that lease, Mrs. Rugeroni granted a 5-year lease to Isabel Paire. Clause 2(e) of the lease contains a covenant on the tenant's part not to assign, under-let or part with possession of the whole or any part of the demise without the permission of the landlord, which was not to be refused in the case of a respectable and responsible person, but there was an absolute prohibition on any sub-letting which would attract the protection of the 1938 Ordinance.

14 The 1960 rating list shows that Mrs. Paire used the first, second and third floors as a private boarding house. On the expiry of that lease by effluxion of time, Mrs. Rugeroni took over the running of the boarding house, whilst living at the premises herself. Mr. Solomon Levy, M.B.E., J.P., F.R.I.C.S., who was the only witness to give evidence to me, recalls her as an elderly but very elegant woman, but he had no professional involvement with her. On November 10th, 1960, Mr. Ernest Russo, a well-known Gibraltarian barrister, wrote to the valuation officer at City Hall on her behalf to ask that the rateable value be altered by reason of the property no longer being leased. Two days later, Mr. M.J. Byrne, A.R.I.C.S., the valuation officer, refused his request on the basis that "a change of occupier does not, *per se*, give rise to an alteration in net annual value of the premises either way."

15 While the property was in use as a boarding house from 1955 to 1965, the evidence suggests that the individual rooms were occupied by boarders as lodgers rather than tenants: *Street* v. *Mountford* (6). Whilst it is possible as a matter of law for an individual room with access to shared kitchen and bathroom to be a dwelling (*Uratemp Ventures Ltd.* v. *Collins* (7)), that was not, I find on the balance of probabilities, the case here. It would have been contrary to the terms of the lease granted to Mrs. Paire and there is no evidence of any change when Mrs. Rugeroni took possession. Further, the upper three floors during this period were always treated as one unit in single occupation for the purpose of assessing their rateable value.

16 In 1965, Mrs. Rugeroni sold the freehold to the Seruya family, who continue to hold the property. The current freeholders are the claimants. After the sale, the Seruyas engaged Mr. Levy to act as their agent in relation to the premises. This was his first professional involvement with the property. He applied for building consent, which was subsequently granted.

17 The works pursuant to the building consent are described in Triay & Triay's letter of December 23rd, 1986:

> "[T]he property underwent extensive structural alterations and additions in 1966 pursuant to a building application no. 4836 for the provision of two self-contained flats on each of the first and second floors of the building and the erection of an additional storey comprising two extra self-contained flats . . . As appears from the parts of the plan relating to the first and second floors, the previously existing single flat on each floor was divided into two separate and self-contained flats as a result of structural alterations which included the removal of existing partitions and the erection of fresh petitions [*sic*] and the opening of doors and the closing up of other doorways in existing partitions.
>
> . . . [T]hese works were completed in 1967.
>
> Subsequently further structural works were carried out whereby the first floor flats were further converted into two self-contained flats and a bed-sitter and on the second floor the then existing two flats were further converted into four smaller self-contained flats.
>
> [T]he two flats on the third floor . . . were at a later date converted into one large dwelling."

18 As regards the third floor, Mr. Serfaty said (without evidence formally being given) that originally that floor would probably have had a wash house with an area for hanging washing out, as was common in Gibraltarian houses of the time. Water would have been pumped (in the early days by hand-pump, latterly by electric pump) from the cistern under the house to a header tank on the third floor. Mr. Azopardi did not disagree.

19 The letter of December 23rd, 1986 was addressed to the Rent Tribunal. The 1985 amendments to the 1983 Ordinance meant that a landlord could apply to the Tribunal for an order that Part III of the 1983 Ordinance should not apply to a particular dwelling. The letter sought such an order. On July 28th, 1988, the Rent Tribunal made an order that the "flats on the first, second and third floor . . . are not subject to Part III of the Landlord and Tenant Ordinance."

20 On March 11th, 2015, Mr. John Baw, the current Rent Assessor, wrote to Triay & Triay and said:

> "I have checked our records and we do not hold originals of the decisions taken by the Rent Tribunal. I can however confirm herewith [*sic*] that all of the flats at 5A John Mackintosh Square are not subject to Part II of the Housing Act 2007 by virtue of the decontrol order dated July 28th, 1988 issued by the Rent Tribunal. I can also confirm that the Rent Assessor's records reflect this."

21 The landlord argues that this is a formal certificate of the Rent Assessor under s.40(10) of the 2007 Act, which is conclusive as to what it declares. I shall come back to this issue.

The Housing Act 2007 and the issues

22 It will be necessary to trace the history of rent control in Gibraltar to understand the parties' arguments. It is convenient, however, first to set out the current legislation, comprised in the Housing Act 2007. If the 2007 Act applies to a dwelling, then the rent payable is the "statutory rent," as assessed by the Rent Assessor: s.41. Likewise, the restrictions on obtaining possession from the tenant in s.45(1), which I have set out above, will apply.

23 Section 40 of the Act provides:

> "(1) Subject to the provisions of this Act, this Part shall apply to dwellings but only to the following extent, namely—
>
> (a) it shall apply to every dwelling that has been erected on or before the 1st March 1959; and
>
> (b) it shall apply to such a dwelling, if but only if it is let as a separate dwelling; and
>
> (c) it shall apply to every part of such a dwelling that is let as a separate dwelling, as if that part were a separate dwelling;
>
> and every such dwelling or part of a dwelling shall be deemed to be a dwelling to which this Part applies.
>
> (2) Any room in a dwelling that is subject to a separate letting, wholly or partly, as a dwelling shall for the purposes of this Part be treated as a part of a dwelling let as a separate dwelling.
>
> (3) The application of this Part to a dwelling house shall not be excluded by reason only of the fact that part of the premises is used as business premises.
>
> (4) Where any land or premises are let together with a dwelling and the rateable value of the land or premises, if let separately, would be less than 25 percent of the rateable value of the dwelling, if let separately, the land or premises shall for the purposes of this Part be treated as part of the dwelling.
>
> (5) Except as provided in subsection (4), this Part shall not apply to a dwelling that is let together with land other than the site of the dwelling.

(6) Where, in order to determine the rateable value of a dwelling, it is necessary to apportion the rateable value of the property in which the dwelling is comprised—

(a) the court may on application by either party make such apportionment as it considers just; and

(b) the decision of the court as to the amount to be apportioned to the dwelling shall be final and conclusive.

(7) 'current year' for the purposes of this section, means the year in which a matter is referred under this Part to the Rent Assessor or to the Tribunal or in any application of the provisions of this Part, the year in which that application was first made.

(8) This Part shall not apply to any dwelling house that has been erected after the 1st March 1959, or to any tenancy to which the former Act did not apply.

(9) This Part shall not apply to a dwelling—

(a) which upon the coming into effect of this Act is vacant;

(b) which upon the coming into effect of this Act was in the occupation of the beneficial owner thereof or where there is more than one beneficial owner, was in the occupation of one of them; or

(c) which has never been the subject of a tenancy to which the former Act applied.

(10) Upon application of the landlord, and upon being satisfied that any of the circumstances described in subsection (8) or (9) exist, the Rent Assessor shall issue a certificate to the effect that the dwelling is a dwelling to which this Part does not apply, and such a certificate shall be conclusive on that issue absent manifest error, but the absence of such a certificate shall not detract from the non-applicability of this Part to such dwelling."

24 The primary issue for determination is whether Flats 1 and 2 (either together or separately) constitute a "dwelling that has been erected on or before the 1st March 1959 . . ." There is no dispute that the first and second floors of the building were erected before that date. Nor is there any dispute that the flats themselves were conversions made after that date. The dispute is as to what is meant by "erected." Mr. Serfaty submits that:

"By virtue of the reconstruction, conversions and additions carried out pursuant to the [1965] building permits . . . all the presently existing flats now situated at [5A John Mackintosh Square] were for

> the first time brought into existence and were erected after March 1st, 1959."

25 Mr. Azopardi submitted that it can only be the building in which the dwelling is to be found which can be "erected." Section 40(1) should be read as meaning a "dwelling *in a building* that has been erected on or before the 1st March 1959."

26 The secondary issue for determination is whether the Rent Assessor's letter of March 11th, 2015 is conclusive under s.40(10). If it is conclusive, then a tertiary issue arises as to whether the letter shows manifest error.

The legislative history

27 The Rent Restriction Ordinance 1938 was closely modelled on the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (UK). A feature of the UK legislation was the importance of the "standard rent." If a dwelling fell within defined rateable values, then the 1920 Act applied. The standard rent was the rent payable on August 3rd, 1914 (or immediately before that date if the dwelling was empty) or, if the dwelling had never thitherto been let, on the first letting of the dwelling to a tenant after that date. Save in defined circumstances (see s.2 of the 1920 Act), the standard rent could not subsequently be raised.

28 It was only the Rent Act 1965 (UK) (now the Rent Act 1977 (UK)) which allowed an increase in the rent. Those Acts provided for the parties to apply to a tribunal (then the Rent Assessment Committee, now (save in Wales) the First-tier Tribunal (Property Chamber) (Residential Property)) for the determination of a "fair rent," which was the market rent adjusted to disregard tenants' improvements and other matters, including the extent to which scarcity drove up rents. Until the decision of the English Court of Appeal in *Curtis* v. *London Rent Assessment Cttee.* (2), a fair rent was very much lower than the market rent. A fair rent is still generally lower than the rent on a flat let on modern terms and conditions in a good state of repair and decoration.

29 Under the 1938 Ordinance (as subsequently amended), the standard rent was that payable initially on January 1st, 1936 and latterly on May 1st, 1940 (with similar provisions to the 1920 Act when the property was empty on those dates). Section 6(7) of the Ordinance (as subsequently amended) excluded from Part II (which imposed the rent restrictions)—

> "[A] dwelling-house erected after or in course of erection on the 31st day of May 1940, or to any dwelling-house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements . . ."

30 Mr. Azopardi argued that the legislature was proceeding on the basis that a conversion of an existing dwelling was different from the erection of a dwelling. Otherwise, he submitted, there would be no need for the two limbs of s.6(7). In my judgment, he is right in this.

31 The 1938 Ordinance was re-enacted in the Landlord and Tenant (Miscellaneous Provisions) Ordinance 1959. This Ordinance for the first time included provisions relating to business tenancies, but made no changes relevant for the purposes of this case to the law relating to residential lettings.

32 These provisions were re-enacted with amendments in the Landlord and Tenant Act 1983. Parts I, II, III and V applied to residential lettings. Part IV was concerned with business tenancies. Section 10(1) in Part III, which dealt with rent control on domestic premises, provided:

> "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 January 1945;
>
> (b) it shall apply to such a dwellinghouse, whenever it is so let, if but only if it is let as a separate dwellinghouse; and
>
> (c) it shall apply to every part of such a dwellinghouse that is let as a separate dwellinghouse, as if that part were a separate dwellinghouse—
>
> and every such dwellinghouse or part of a dwellinghouse shall be deemed to be a dwellinghouse to which this Part applies."

33 The reference to January 1st, 1945 was changed first to a rolling period of 45 years and then to a fixed date of March 1st, 1959: Landlord and Tenant Ordinance 1991, s.6 and Landlord and Tenant (Amendment) Ordinance 2004, s.2 respectively.

34 Section 22 of the 1983 Ordinance, also in Part III, was amended by the Landlord and Tenant (Amendment) (No. 2) Ordinance 1985. The amended section provided:

> "**Reference to Tribunal for decontrol of premises.**
>
> 22. (1) Where, on application by the landlord of a dwellinghouse to which this Part applies, the Rent Tribunal is satisfied that—
>
> (a) structural alterations have been carried out, or are to be carried out, to the dwellinghouse on or after the commencement of this Ordinance; and
>
> (b) the bona fide effect of the structural alterations is or will be, when carried out, to reconstruct the dwellinghouse either—

(i) into a unit that is the same or larger than before the alterations; or

(ii) into 2 or more separate, self-contained flats; and

(c) the structural alterations do not or will not, when they are carried out, have the effect of decreasing the overall housing stock; and

(d) no undue hardship will be caused to any tenant of the dwellinghouse by the structural alterations—

the Rent Tribunal may make an order declaring that this Part shall not apply to the dwellinghouse or to any separate and self-contained units resulting from the structural alterations.

(2) Subject to subsection (3), an order under this section shall have effect from the date, as determined by the Rent Tribunal, on which the structural alterations were completed.

(3) Where an order is made under this section in respect of any structural alterations that are to be carried out, the order shall have effect from the date on which the structural alterations are completed, as certified by the Director of Crown Lands.

(4) When an order made under this section comes into effect, the premises to which it relates shall thereupon cease to be a dwellinghouse or dwellinghouses to which this Part applies."

35 It was pursuant to this provision that Triay & Triay, on December 23rd, 1986, applied to the Rent Tribunal and that the Tribunal made its determination on July 28th, 1988.

36 The purpose of the original s.22 was explained by the then Minister of Housing, the Hon. J.B. Perez, M.H.A., as follows (see Gibraltar *Hansard*, December 7th, 1983, at 45–46):

"What goes on under the old legislation is very simple. What landlords do is this. A flat becomes vacant, and all they do is they partition that particular dwelling-house, not even with a brick wall, in some cases. What they do is that they may build a little shower room on both sides to try and establish that it is self-contained . . . As far as reconversions are concerned, the old law provided a large loophole for landlords because [and he then summarized s.5(5) of the 1959 Ordinance, which is in identical terms to s.6(7) of the 1938 Ordinance]. There is no provision there as to annual rent, and the way it has been interpreted is that you can just have a simple partition of a vacant flat and you have two tenements. In some cases, the landlord has built a shower room or whatever, said those were two self-contained flats, and was able to take those two flats—possibly built

well before 1940—outside the control of the Rent Restriction Acts . . . [W]e are now shifting the onus onto the landlord to try and show that there have been structural alterations—not only a partition."

37 The effect of the 1983 Ordinance (as amended in 1985) is, in my judgment, this. The old dichotomy under the 1938 and 1959 Ordinances between "a dwelling-house erected after [the relevant date]" and a "dwelling-house [converted after the relevant date] into . . . separate and self-contained flats" went. Instead, all dwellings in premises built before the relevant date were subject to rent control, but subject to a landlord's right to apply to the Rent Tribunal to decontrol conversions.

38 This is subject to the converted flat being (prior to the relevant date) in a dwelling-house. An addition, such as the new accommodation on the third floor in the current case, would not be a conversion and such a flat would not have been caught by the 1983 Ordinance because it was on top of, not in, the (pre-relevant date) dwelling-house. This indeed accords with a decision of Alcantara, Ag. J. in *M.H. Seruya Properties Ltd.* v. *Benady* (3). Mr. Serfaty, Q.C., who appeared for the plaintiff and was able to give details of the case, said that it involved the building of a third floor flat in the old wash-house area on that floor, but at 111 Main Street. The judge held that the third-floor addition was not caught by the legislation.

39 Shortly after the Tribunal's decision in 1988, s.22 was amended again: Landlord and Tenant (Amendment) Ordinance 1989, s.3. This amendment abolished the decontrol mechanism and instead gave a landlord who had effected structural alterations a right to demand a higher rent. The new s.22 provided:

"**Revision of statutory rent on ground of structural alterations**

22. (1) Where, on application by the landlord of dwellinghouse to which this Part applies, the Rent Tribunal is satisfied that—

(a) substantial structural alterations have been carried out, or are to be carried out, to the dwellinghouse; and

(b) the bona fide effect of such alterations is or will be, when carried out, to reconstruct the dwellinghouse either—

(i) into a unit that is substantially larger than before the alterations; or

(ii) into 2 or more separate, self-contained flats; and

(c) such alterations do not or will not, when they are carried out, have the effect of decreasing the overall housing stock; and

(d) no undue hardship will be caused to any tenant of the dwellinghouse by such alterations—

> the Rent Tribunal may make an order declaring a new statutory rent taking into consideration the capital expended in the structural alteration and the improved nature of the accommodation provided as the result thereof.
>
> (2) An order made under subsection (1) shall take effect from the date on which the substantial structural alterations to the dwelling-house are certified by the Director of Crown Lands to have been completed in a proper and workmanlike manner in accordance with the requirements of that subsection."

40 The natural meaning of this amendment is that converted flats which had been decontrolled once again became controlled (but potentially liable for a higher rent). Mr. Serfaty submitted that, once the landlord had obtained a decontrolling order, it had a subsisting right to hold the premises free from rent control. He relied on the Interpretation and General Clauses Act 1962, which provides in s.33(2) that: "Where any Act repeals in whole or in part any other Act, then, unless the contrary intention appears, the repeal shall not . . . (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed . . ."

41 I do not accept that the making of a decontrolling order gave the landlord any right or privilege. It merely meant that the relationship of landlord and tenant ceased to include a restriction on the amount of rent which might be charged.

42 Even if I were wrong in that conclusion, however, the 1989 amendment does, in my judgment, show "the contrary intention" for the purposes of the 1962 Act. It is very common for properties to move into and out of rent control. This can be as a result of legislative changes effected for political reasons. Sometimes it results from an assignment of a tenancy from a limited company to an individual, since only individuals obtained Part III protection: see the 1983 Ordinance, s.3(1)(b). (This remains the position under the 2007 Act: see s.34(1)(b).)

43 Sometimes it is happenchance. In England, for example, long leases were usually not subject to the Rent Act 1977 (UK), because the ground rent was less than two-thirds of the rateable value of the property. However, some leases provide for an increasing ground rent. When that occurs in respect of leases granted prior to the coming into force of the Housing Act 1988 (UK), the long lease can, even now, become subject to the Rent Act 1977 (UK), because the new ground rent is more than two-thirds of the rateable value of the property. (The rateable value of a property is still fixed as that in 1972.) This is so even though, in general, new Rent Act protected tenancies cannot be created after the 1988 Act came into force.

44 Accordingly, in my judgment, the effect of the 1989 Ordinance was to re-impose rent restrictions on Flats 1 and 2.

45 This means that it is not necessary to consider Mr. Azopardi's further argument that, even if the 1989 amendment did not bring the two flats back under rent control, nonetheless the flats remained subject to Parts I, II and V of the Ordinance. The relevance of this argument is that s.40(8) of the 2007 Act excludes the application of Part III of the 2007 Act "to any tenancy to which the former Act [*i.e.* the 1983 Ordinance] did not apply." He says that the flats were still subject to the 1983 Ordinance, even if Part II of the Ordinance did not apply. In my judgment, he is right about this, but the question does not arise as I have held Part II did apply once again after the 1989 amendments.

Discussion of the 2007 Act

46 I can now return to my consideration of the 2007 Act. The legislative history which I have recited shows that flats converted after the relevant date were caught by the previous rent control legislation, so long as the building which contained them was pre-1959. There is no indication in the 2007 Act that it intended to put flat conversions which had been subject to the 1983 Ordinance (as amended) outwith the protection of Part II of the new Act. It is unlikely that such an intention existed, given the state of the rented housing market in Gibraltar.

47 Mr. Serfaty argued that the changes made in 1967 had the effect of changing the "identity" of the dwelling. From 1955, the upper three floors were one dwelling. From 1967 onwards, they were eight or more individual self-contained dwellings. He relied on a number of English authorities dealing with the application of the 1920 Act to cases where there had been substantial alterations to properties.

48 These cases are largely concerned with whether the standard rent which applied to the pre-altered property continued to apply to the altered property, or whether the landlord could let at a new (and probably much higher) standard rent. In *Stockham* v. *Easton* (5), on which Mr. Serfaty relied, a five-storey house had been rented out pre-1914 at £60 per annum. The landlord Easton converted the property into four flats and let the first floor to Stockham at a rent of 25s. per week (£65 per annum). Stockham sought to have the £60 per annum rent, which had been the standard rent for the whole of the house, apportioned (as was permissible under the 1920 Act). Had he succeeded, he would have paid very much less than the £65 per annum he was paying for just one of the four flats. Lush, J. in the King's Bench Divisional Court said ([1924] 1 K.B. at 62):

> "The proper view to take in a case of this kind is to have regard to the house as a whole, and if it be found that the structural alterations to the whole house have been such as to cause it as such to lose its

> identity, and directly or indirectly to affect the separate floors or rooms in it, then to treat these floors or rooms as having themselves been altered in a substantial manner, and as being no longer the same as they were in 1914."

The court considered that there was such a change of identity that the landlord was entitled to charge the new standard rent of £65 per annum for the first-floor flat.

49 Although this case and the others deal with a separate issue, namely what the relevant standard rent was, they are useful in showing what constitutes a change of identity. In the current case, there is, in my judgment, an obvious change of identity. The dwellings known as Flat 1 and Flat 2 (and indeed the combined flat comprising those two flats) did not exist in 1959.

50 That, however, does not necessarily mean that the flats were "erected" after 1959. The dictionary definition of the verb "to erect" is relevant. Definition III.8.a in the *Oxford English Dictionary*, 2nd ed. (2009) is "[t]o set up (a building, statue, framework, etc.); to rear, build." A flat conversion would not, in my judgment, fall within this definition. It is a structural change, not the building of a property.

51 The legislation also gives a clue. The legislature draws a distinction between a "dwelling" and a "dwelling-house." (The draftsperson is somewhat haphazard in spelling "dwelling-house" as two words or one, and if the former, hyphenated or not.) "Dwelling" is defined in s.33(1) as "domestic premises which are used exclusively for residential purposes . . ." "Dwelling-house" is undefined, but s.40(3) says that the application of Part II of the Act "to a dwelling house shall not be excluded by reason only of the fact that part of the premises is used as business premises." (Thus the whole of Union House is a dwelling-house, notwithstanding that the ground floor is used for commercial purposes.)

52 Section 40(8) provides that Part II "shall not apply to any dwelling house that has been erected after the 1st March 1959 . . ." This provision would have been otiose if all dwellings which came into existence after that date were already excluded by the terms of s.40(1)(a). This, in my judgment, necessarily implies that a dwelling which only comes into existence after March 1st, 1959 can nonetheless be "erected on or before the 1st March 1959 . . ." The legislature is presumed not to make redundant provisions in legislation.

53 In my judgment, the combination of (a) the legislative history, (b) the natural meaning of the word "erected," and (c) the s.40(8) reference to "dwelling house" means that the construction advanced by Mr. Azopardi should be preferred. Accordingly, s.40(1) should be read as meaning a "dwelling *in a building* that has been erected on or before the 1st March

1959." Accordingly, subject to the last two issues, Flats 1 and 2 are subject to Part II of the Housing Act 2007.

54 I turn to the questions of whether the Rent Assessor's letter of March 11th, 2015, which I have set out in para. 20 above, is a conclusive certificate under s.40(10) and, if it is, whether it shows manifest error. It is convenient to deal with this latter question first. I was referred to no case law as to what constitutes manifest error. However, as I have explained above, any decontrolling order made under s.22 of the 1983 Ordinance in its 1985 iteration ceased to have effect once the 1989 amendment to s.22 came into force. Accordingly, on the face of the letter there is a mistake of law. That, in my judgment, is sufficient to show that the letter does show manifest error. It is accordingly not conclusive as to the status of Mr. Halhoul.

55 That conclusion means that it is not necessary to decide whether the letter of March 11th, 2015 is a "certificate" for the purposes of s.40(10) of the 2007 Act. This seems to me to be a difficult question on which I have not heard much argument. The letter is not expressed to be a certificate and it is unclear whether Mr. Baw thought that he was being asked to give a certificate under s.40(10). In these circumstances, I think it better to leave determination of this issue to a case in which it will be material to the outcome.

Conclusion

56 Accordingly, I declare that Flats 1 and 2 are subject to Part II of the Housing Act 2007.

Orders accordingly.