[2024 Gib LR 533]

K 520 LIMITED v. BEN MUSSA

SUPREME COURT (Yeats, J.): October 14th, 2024

2024/GSC/038

Landlord and Tenant—possession—action for possession—landlord's action for possession following tenant's non-payment of rent refused—tenant acknowledged obligation to pay rent—landlord could only end periodic tenancy by giving 6 months' notice to quit under Housing Act 2007, s.69

The claimant sought possession of premises.

The claimant was the freehold owner of a property which comprised a number of old tenements including flat 51/3 ("the premises"). The defendant had been in occupation of the premises for some 34 years. The defendant had failed to pay rent since April 2019. In August 2023, the claimant issued a claim form pursuant to CPR r.55 seeking possession of the premises together with payment by the defendant of unpaid rent, mesne profits, interest and costs.

The defendant agreed that he owed outstanding rent and claimed to have put aside money to pay it. His excuse for not paying rent since April 2019 was that in early 2019 Land Property Services Ltd. changed the numbering of the premises from 51/8 to 51/3 but he was not properly informed of the change. He had not paid the invoices that were presented to him because they were made out to what he thought was a wrong address.

Section 45(1) of the Housing Act 2007 provided:

> "45.(1) 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—
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> (a) the court has power so to do under the provisions of Schedule 5; or
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> (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."

Paragraph (c) of Schedule 5 to the Act provided:

> "The court shall, for the purposes of section 45, have power to make or give an order or judgment for the recovery of possession of any dwelling to which Part II applies . . . if—
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> . . .

(c) the tenant has given notice to quit, and, in consequence of that notice, the landlord has contracted to sell or let the dwelling . . ."

The claimant submitted *inter alia* that (a) it had a right under Part II of the Act to claim possession of the premises in the case of the non-payment of rent; (b) the right to seek possession arose when any of the circumstances set out in Schedule 5 to the Act applied, which included the non-payment of rent; (c) s.61 (which provided "The court shall have jurisdiction to hear and determine any action for the recovery of possession of a dwelling to which this Part applies") conferred jurisdiction on the court; (d) para. (c) of Schedule 5 conferred a standalone right to seek possession; and (e) alternatively, the non-payment of rent was a breach of an implied condition of the tenancy giving it the right to forfeit the tenancy under common law.

The defendant submitted that (a) the claimant did not have a right to seek possession of the premises because his tenancy was subsisting; (b) he did not occupy the premises pursuant to any written agreement and therefore there was no express forfeiture clause enabling the claimant to bring the tenancy to an end on account of the non-payment; (c) s.45 of the Act did not give a landlord the right to apply for possession; it regulated how the court determined an application for possession if the landlord had a right to forfeiture and the application to the court was made; and (d) the only way that the claimant could apply for possession was if the tenancy had previously been determined but the tenancy was only determinable by the landlord giving him six months' notice to quit pursuant to s.69 of the Housing Act 2007, which the claimant had not done.

Held, refusing the application for possession:

(1) The claimant could not rely on the Housing Act 2007 to seek possession. Section 45(1) simply regulated how the court dealt with an application for possession when a landlord had the right to apply. It did not give a landlord the right to seek possession without having first brought a tenancy to an end. Section 61 conferred jurisdiction on the court but only when a right of action existed in the first place. Paragraph (c) of Schedule 5 did not confer a standalone right to seek possession: the giving of notice by a tenant would confer the right (paras. 8–19).

(2) It was common ground between the parties that a landlord could forfeit a lease when there had been a breach of either an express or an implied condition of the lease by the tenant. The only example, under the common law, of a breach of an implied condition which could give rise to forfeiture was denial of a landlord's title by a tenant. In the present case the defendant had purposely withheld rent but on the facts there had been no denial of the claimant's title. The defendant's assertion that he had been putting aside the rent payable so that payment could in due course be made negated any possible suggestion that he had denied the claimant's title to the premises. Even if the defendant had not actually set the money aside, saying that he had done so indicated that he acknowledged his obligation

to pay rent for the premises. There had therefore been no breach of the implied condition of the tenancy (paras. 20–31).

(3) Notwithstanding the non-payment of rent, the only way in which the claimant could bring the periodic tenancy to an end was by giving the defendant six months' notice to quit in accordance with s.69 of the Act. The defendant was however in arrears of rent. This was payable and judgment would be entered in the sums that were outstanding (paras. 32–33).

Case cited:
(1) *Whitehead* v. *Pittman* (1833), 2 N. & M. 673, referred to.

Legislation construed:
Housing Act 2007, s.45(1): The relevant terms of this subsection are set out at para. 8.
s.45(9): The relevant terms of this subsection are set out at para. 15.
s.61: The relevant terms of this section are set out at para. 11.
s.69: The relevant terms of this section are set out at para. 17.
Schedule 5, para. (c): The relevant terms of this paragraph are set out at para. 13.

G. Stagnetto, *K.C.* with *J. Lavarello* (instructed by TSN) for the claimant;
I. Watts (instructed by Watts Law) for the defendant.

1 **YEATS, J.:** The claimant is the freehold owner of the property situate at 47–53 Main Street, Gibraltar. The property is comprised of a number of old tenements including a flat known as 51/3 Main Street ("the premises"). The defendant has been in occupation of the premises for some 34 years.

2 On August 11th, 2023, the claimant issued a claim form pursuant to CPR, r.55 seeking possession of the premises together with payment by the defendant of unpaid rent, mesne profits, interest and costs. The basis for the claim is that the defendant has failed to pay rent since April 1st, 2019. The amount of the arrears as at the date of the hearing stood at some £1,300.

3 The defendant agrees that he owes the outstanding rent and wishes to pay the same and remain in occupation. The somewhat spurious excuse that he has proffered for having failed to pay rent during this five-year period is this. In early 2019, Land Property Services Ltd. changed the numbering of the premises from 51/8 to 51/3 but he had not been properly informed of this change. He had not paid the invoices that were being presented to him as they were made out to what he thought was a wrong address. (The assertion that he was not informed of the change is denied by the claimant.)

4 Notwithstanding the defendant's offer to now pay the outstanding rent, the claimant seeks possession of the premises. The claimant further says that the court should not grant relief against forfeiture.

5 In his defence, the defendant asserts that the claimant does not have a right to seek possession of the premises because his tenancy is subsisting. The defendant does not occupy the premises pursuant to any written agreement and therefore there is no express forfeiture clause enabling the claimant, as landlord, to bring the tenancy to an end on account of the non-payment of rent (or for any other breach of the tenancy). The defendant says that the only way that the claimant can apply for possession is if the tenancy has previously been determined. His case is that the tenancy is only determinable by the landlord giving him six months' notice to quit pursuant to s.69 of the Housing Act 2007 ("the Act"). The claimant has not done so.

6 The claimant says that this is not a correct proposition. The claimant relies on Part II of the Act as providing it with a statutory right to claim the possession of the premises in the case of, amongst other things, the non-payment of rent. In the alternative, the claimant says that the non-payment of rent, in the circumstances of this particular case, is a breach of an implied condition of the tenancy and this gives a landlord the right to forfeit the tenancy under the common law.

7 I shall deal with both of these arguments in turn. Before I do, I will record that on July 12th, 2023 the claimant's solicitors gave the defendant a notice said to be made pursuant to s.14 of the Conveyancing Act 1881 of England and Wales (which is applied to Gibraltar by the English Law Application Act). The defendant was told that he was in arrears of rent and was given 14 days to make payment together with a sum for the claimant's costs. It is now agreed that this was of no effect as a s.14 notice only applies if there is a written lease.

The Housing Act 2007

8 Section 45(1) of the Act provides as follows:

> "45.(1) 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—
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> (a) the court has power so to do under the provisions of Schedule 5; or
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> (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."

(Section 45 is contained in Part II of the Act. That Part applies to dwellings erected on or before March 1st, 1959. The premises is such a dwelling.)

9 It is said for the claimant that the right to seek possession arises when any of the circumstances set out in Schedule 5 of the Act apply. The non-payment of rent is listed in Schedule 5.

10 Mr. Watts' submission on behalf of the defendant is that s.45 is not a provision which gives a landlord the right to apply for possession. It is a provision which regulates how the court determines an application for possession if the landlord has a right to forfeiture and the application to the court is made.

11 Mr. Stagnetto, K.C. made a number of points in response. The first that s.61 of the Act confers on the court jurisdiction. This section states as follows:

> "The court shall have jurisdiction to hear and determine any action for the recovery of possession of a dwelling to which this Part applies."

Jurisdiction being conferred by s.61, s.45(1) then sets out the circumstances in which possession can be applied for.

12 It does not seem to me that this would be the effect of s.61. This section confers jurisdiction upon the court but that must be only when a right of action arises in the first place.

13 Mr. Stagnetto also referred to para. (c) of Schedule 5 to the Act. This provides as follows:

> "The court shall, for the purposes of section 45, have power to make or give an order or judgment for the recovery of possession of any dwelling to which Part II applies . . . if—
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> . . .
>
> (c) the tenant has given notice to quit, and, in consequence of that notice, the landlord has contracted to sell or let the dwelling . . ."

14 The submission was made that para. (c) relates to the ordering of possession but does not involve forfeiture nor the giving of a notice to quit by a landlord. It therefore confers a standalone right to seek possession and this lends support to the submission that the Act can be relied upon on its own by the landlord to seek possession. I do not agree. It seems to me that it is the giving of notice by the tenant which confers the right. The tenant would have himself brought the tenancy to an end.

15 Another submission made on behalf of the claimant was that s.45(9) of the Act expressly states that no notice to quit is necessary when a landlord obtains an order for possession. This subsection provides as follows:

> "(9) Notwithstanding anything to the contrary in the original contract of tenancy, or in any other provision in this Part, a landlord who obtains an order or judgment for the recovery of possession of a dwelling to which this Part applies, or for the ejectment of the tenant, shall not be required to give any notice to quit to the tenant."

16 It seems to me that all that this subsection does is say that no notice to quit is required once possession is ordered. It does not deal with what requirements need to be met *before* such an order for possession is made. Neither does it provide support for the proposition that s.45(1) stands alone in giving a landlord the right to seek possession without having first brought the tenancy to an end.

17 The final point made related to s.69 of the Act, which is headed "Notices to quit." This section says:

> "Subject to the other provisions of this Act, but notwithstanding any agreement to the contrary, no periodical tenancy shall be determinable by less than 6 months' notice of intention to terminate the tenancy."

18 Mr. Stagnetto relied on the words "Subject to the other provisions of this Act." He submitted that there is no need to serve a notice to quit when some other provision of the Act applies, for example s.45(1).

19 I have struggled to make sense of s.69. It is not, in my opinion, happily worded. If it is intended to mean what Mr. Stagnetto says it does, then perhaps it would have read "Except as otherwise provided for in this Act, no periodical tenancy shall be determinable . . ." That said, even if that is what is meant, I do not agree with the submission being made on behalf of the claimant. Whilst there may or may not be other provisions in the Act which allow for the termination of a periodical tenancy, it does not seem to me that it can include s.45(1). I agree with Mr. Watts that s.45(1) simply regulates how the court deals with an application for possession when a landlord has the right to apply. This is apparent from the wording. In effect it can be paraphrased as "possession shall not be ordered unless X." This does not confer the right to apply for possession.

Breach of implied condition

20 It is common ground between the parties that a landlord can forfeit a lease when there has been a breach of either an express or implied condition of the lease by the tenant. It is also agreed that the only example, under the common law, of a breach of an implied condition which can give rise to forfeiture is where there has been a denial of the landlord's title by the tenant. This is set out in *Woodfall's Law of Landlord and Tenant*, vol. 1, para. 17.059, at 17/23–17/24, in the following terms:

> "A forfeiture may be incurred either by the breach of an express condition, or by breach of an implied condition which goes fundamentally to the relation of landlord and tenant.
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> It is an implied condition of a tenancy that the tenant will acknowledge the landlord's title. The origins of the condition lie in the oath of fealty which a tenant owed to his lord . . . Breach of the condition is usually referred to as denial of title."

21 The claimant's position is that the defendant's failure to pay rent since 2019 is such a breach. The defendant on the other hand says that an agreement to pay rent is a *covenant* that the tenant enters into and not a *condition* of the lease, and that the distinction is obviously material. At my invitation, further submissions on this were made by the parties in writing after the hearing.

22 In his written submissions, Mr. Stagnetto says that there is ambiguity in respect to what constitutes a condition of the lease and what constitutes a covenant. He relies on *Halsbury's Laws of England*, 5th ed., vol. 62, para. 529, at 607 (2022), where the learned authors say:

> "A lease will be determinable without an express proviso for re-entry on the happening of the event specified in a condition subject to which the term was created.
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> If, however, the clause which is put forward as terminating the term constitutes only an agreement on the part of the tenant to do or not do a specific act, and it is not a condition, the landlord may not re-enter for a breach of it except under an express proviso for re-entry. The question whether the provision in question is a condition (breach of which automatically ends the lease) or a covenant (breach of which gives the landlord an option to end the lease with the possibility of relief against forfeiture being granted to the tenant) is a matter for determination according to the precise words used in the lease and the intention of the parties. It may be possible for a provision to have the dual character of a covenant and a condition."

Nevertheless, as I have indicated, it is agreed on behalf of the claimant that the only example of a breach of an implied condition in common law is that of denial of the landlord's title.

23 It is said that what is important is to establish whether the obligation that is said to be an implied condition goes to the heart of the relationship between the landlord and the tenant. That the non-payment of rent, in the particular circumstances of this case, constitutes a breach of the relation of landlord and tenant. This is because in the absence of any written tenancy agreement, it is the payment of rent that created the relationship between the claimant and the defendant. Without payment, the relationship came to

an end. It is also said on behalf of the claimant that the non-payment of rent over such a prolonged period amounts to a disregard of the claimant's rights and "nullifies the relationship that exists between landlord and tenant. It is akin to a repudiation."

24 The claimant also says that the defendant's stated reason for not paying rent is a denial of title because the defendant in effect took the view that the claimant was not entitled to receive rent for the premises. Although I have already alluded to the defendant's reasons for not paying rent, I shall set out the relevant paragraph of his defence for reference (subpara. (d) of para. 5, which deals with relief against forfeiture):

> "The defendant fell into arrears of rent due to his confusion over a re-numbering exercise undertaken by Land Property Services Ltd in February 2019 (as Crown agents) over 51 Main Street, Gibraltar, whereupon the premises became 51/3, from 51/8 Main Street. The defendant is of limited understanding and this led to his inability to comprehend that his payment of the rent was for the same premises, and that he was not losing his rights."

The claimant says that this amounts to a denial of the claimant's title to the premises. That since the re-numbering exercise, the defendant has not accepted the claimant to be the landlord of the premises.

25 To make good the point, Mr. Stagnetto referred to an extract from the Practical Law UK Practice Note entitled "Examples of acts which have constituted a denial of title." The note says: "[T]he tenant refused to pay rent to the landlord on the instruction of a third party." The note cites a 19th century authority in support, namely *Whitehead* v. *Pittman* (1). In the very brief note of the case which is available it is recorded that the court held that the tenancy had been disclaimed by the tenant when she had refused to pay rent on a third party's instructions.

26 On behalf of the defendant, Mr. Watts submitted that the agreement to pay rent is a covenant. In this case, in the absence of a written agreement, it is an implied covenant. *Woodfall*, *op. cit.*, para. 11.061, at 11/31 states that:

> "Those covenants which are implied by law from the fact of the demise all have reference to the subject-matter of the lease, and so run with the land."

The text then gives the payment of rent as an example of covenants which run with the land.

27 More importantly, in relation to the argument that the non-payment of rent for the reasons articulated by the defendant amount to a denial of title, Mr. Watts made the valid point that this did not form the basis of the

claimant's claim when proceedings were instituted. Then, it was simply a claim for possession on the basis of the non-payment of rent.

28 The defendant in any case rejects the assertion that he denied the claimant's title to the premises. Although no evidence has been filed by him to this effect, it is said that it was just a case of being concerned that the claimant was taking away the right to his home and that the situation was brought about by "his limited understanding." Mr. Watts also pointed to how the claimant, through its managing agent, continued raising invoices for rent payable by the defendant up until proceedings were issued. The claimant must have done so on the basis that the defendant continued to be the tenant of the premises. If there was a breach by the defendant, then the demand of rent amounted to a waiver of the breach by the claimant.

29 The evidence of Karina Khubchand, a director of the claimant, is that the defendant claimed to be putting aside the rent payable so that payment could in due course be made—although she was clearly sceptical about the veracity of that claim. At para. 13 of her witness statement dated September 13th, 2023, Ms. Khubchand said as follows:

> "The Defendant claims to have been paying the corresponding amounts in rent to an account held with the post office but has not hitherto evidenced that he has sums in that account corresponding to the amount of the rent arrears, which he states to specifically use for the purposes of settling the rent arrears . . ."

30 In my judgment, the assertion by the defendant that he had been putting money aside for the rent negates any possible suggestion that he has denied the claimant's title to the premises. Even if the defendant was not actually setting the money aside, saying that he was indicates that he was acknowledging his obligation to pay rent for the premises.

31 This is a case where the defendant has purposely withheld rent. However, on the facts there has been no denial of the claimant's title. There has therefore been no breach of the implied condition of the tenancy.

32 Notwithstanding the non-payment of rent, the only way that the claimant landlord could bring the periodic tenancy to an end was by giving the defendant tenant six months' notice to quit in accordance with s.69 of the Act. Had such notice been given, the court would then have dealt with any application for possession of the premises by applying the provisions of Part II of the Act.

33 The defendant is in arrears of rent. This is payable and judgment will be entered in the sums that are outstanding.

Conclusion

34 For the reasons set out in this judgment, the claimant's application for possession of the premises is refused. I shall hear the parties on the exact amount of rent and mesne profits that the defendant should be ordered to pay, whether interest is payable, and on costs.

Judgment accordingly.
