REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO 162 OF 1977

RAMANBHAI FULABHAI PATEL.....1ST APPELLANT

MULJIBHAI SOMABHAI PATEL.....2ND APPELLANT

RAOJIBHAI FULABHAI PATEL.....3RD APPELLANT

VERSUS

GENERAL EQUIPMENT CORPORATION LTD.....RESPONDENT

JUDGMENT

The appellant landlords appeal against the decision of the Business Premises Rent Tribunal given on 10th November 1977. By that decision, the tribunal had held that the preliminary point raised by the landlords (that the lease was for more than five years and that, therefore, the tribunal had no powers under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act) could not be sustained.

The admitted facts were that an original lease had been granted by the landlords to the tenant for a term of five years commencing from 1st January 1967. The lease contained an option clause (which has been set out by Scriven J) which allowed the tenant to opt for a further three years. He did so. Then, before the expiration of this three years, the landlords gave the tenant notice to terminate the lease at the end of three years. The tenant filed a reference in opposition.

The general question was whether the option operated as extending the lease, so that it became an eight-year lease, or whether there were two separate leases of five years and three years. The tribunal thought that the original lease, being for a term of five years, was therefore caught by the definition in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act of a “controlled tenancy”. That is to say, that the lease was reduced to writing and was for a period not exceeding five years. It operated in fact for a period of less than five years. The tribunal further held that, despite the option to renew the lease for a further period of three years, “we cannot treat the two leases as one in order to remove the matter from the jurisdiction of tribunal”. It followed that the premises were held under a controlled tenancy and the tribunal had jurisdiction.

Mr Satish Gautama appealed on the grounds that the premises were held under a controlled tenancy. He urged us to uphold his view that (ground 2):

> the [landlords] had granted to the [tenant] a right to continue as a tenant in the premises for a period of eight years, that is to say the period of five years set out in the lease and a further period of three years if the [tenant] wished to avail itself of the option ...

Therefore, in reality, the lease was for a period exceeding five years.

The effect of an option is a vexed question in its application to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. But, before I deal with that aspect, I should define what appears to be the possible approaches to this problem. As far as I understand it, the tribunal was not so much concerned with the nature of this option (that is whether it allowed the original lease to be extended or whether a fresh lease and demise was created after the first lease came contractually to an end) as with the application of the Act to the immediate demise of five years, regardless of the option. The other approach, which exercised counsel, depended on the nature of the option itself, so that if the effect was to create one single lease that lease fell outside the ambit of the Act. I consider that the tribunal's approach was far more fundamental than was allowed by counsel. Indeed, the Court pointed out the difficulties in applying this option at all to a controlled tenancy because of the terms of section 4 of the Act. But out of deference to both counsel, I will answer their approach and later pass on to what seems to be the approach of the tribunal.

There are few reported decisions on the nature of an option in the local reports. There is *Habib Punja v Agas* [1968] EA 160. That was a case where the parties had gone out of their way to provide that a new lease would be granted after the exercise of the option. A contract was made in accordance with the precedent given in the *Enyclopaedia of Forms and Precedents* (3rd Edn). Here counsel referred to a passage in *Megarry and Wade's Law of Real Property* (4th Edn) page 578 dealing with an option to purchase, and not particularly with an option to renew (not always quite the same thing). As far as textbooks are available here, *Hill & Redman's Law of Landlord & Tenant* (15th Edn) pages 63, 64 and 167 gives the fullest description of an option to purchase, to renew, or terminate, together with references to a wealth of case law to which I am indebted.

Where a lease contains a covenant on the past of the lessor that he will, at the end of the term or at same period within the term, grant a renewal of the lease if so required by the lessee, such a lease confers on the lessee an immediate term with a right to the further term. The option is an irrevocable offer, to be accepted or not by the tenant (see *Stromdale & Ball Ltd v Bruden* [1952] Ch 223, *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314 and other cases cited to the Court).

When the offer is accepted there is an agreement for a lease, and the lease (if executed) will tend in general (as a renewal) to be a new lease. This is because the general idea of the renewal is to grant a further term after termination but, as the agreement is made before the termination, it has been thought necessary to imply a surrender of the first term to make sure that the landlord has title to pass to the tenant for the second term. Such a new lease is seen in *Habib Punja v Agas* [1968] EA 160. It may, however, not result in a fresh lease being granted. *Gardner v Blaxile* [1960] 2 All ER 457 and *Baker v Merckel* [1960] 1 All ER 668 offer illustrations of the case where the option operated to extend the original lease. Very clear words were used to effect that purpose. As far as the demise itself is concerned, the option is collateral; but in some sense it may be a part of the agreement on the strength of which the lease was oranted (*Grifith v Pelton* [1958] Ch 205 (an option to purchase case) and *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314 (an option to renew case).

The landlords relied on the decision in *Rex Hotel Ltd v Jubilee Insurance Co Ltd* [1972] EA 211 by analogy. That case concerned a deed of variation extending a lease. Originally the lease was for ten years with a break at five years, the tenant being given the option to terminate at that time. It seems that the period for exercising the option passed and, in the eighth year, a deed of variation was executed which set out the desired effect of extending the term from ten to fifteen years; the rent was reduced; any increase in rates was to fall on Rex Hotel; otherwise the covenants and conditions contained in the original lease were to continue. A majority held that the original lease had been extended; the President of the Court of Appeal, however, held that there had been a fresh lease from the date of the variation with an implied surrender of the original lease, and the option which no longer existed, did not apply.

Looking at the English decisions, this was a curious result, as may be seen from the line of cases *Re Savile Settled Estates, Savile v Savile* [1931] 2 Ch 210, *Baker v Merckel* [1960] 1 All ER 668 and *Jenkin R Lewis & Son Ltd v Kerman* [1970] 3 All ER 414. Russell LJ gave judgment for the court, and included these comments at page 419 :

> If, for example, a tenant holds a lease of land for twenty years and he and his landlord wish the period of his right to hold the land to be extended by a further twenty years, their object can be achieved by the landlord granting the tenant a reversionary lease to take effect on the expiry of the existing lease, but if they wish a single term for the extended period to come into being, the result can only be achieved if the existing term is surrendered and a new term is created. It is not possible simply to convert the existing estate in the land into a different estate by adding more years to it, and even if the parties use words which indicate that this is what they wished to achieve the law will achieve the result at which they are aiming in the only way in which it can, namely by implying a fresh lease for the longer period and a surrender of the old lease.

(He referred to *Savile's* and *Baker's* cases. I should add that the same consideration did not apply necessarily to a variation in rent, or other terms.) On this basis the minority view seems right. Of course, we are bound by the majority, and it is possible that the decision will be explained in due course as a deliberate departure. As far as is known it is not because of anything contained in the Transfer of Property Act (see sections 108 and 111; Gour: *The Law of Transfer in British India* (5th Edn) Vol 111, pages 2045 et seq 2104 et seq). The result is that, as the case turned on a construction of the deed of variation as read with the original lease, indicating the views of the parties, one can only suppose that it was the phrase "shall be and is hereby extended for a further period to include up to 31st August 1970", which gave rise to "an extension of the term". That construction is sought to be applied to this present case.

Scriven J has set out the clause in question. It contains three phrases around which the construction of the clause is to be made. First, there is the introduction to the option: the lessee shall give the lessors "notice in writing of its desire to extend the term". The second is the operative direction: "in such case the lessors shall grant to the lessee a further lease". Thirdly, there is the self-description of the clause "the present proviso for renewal".

Supposing that the *Rex Hotel* case is applicable to an option to renew the lease as well as to a deed of variation (a matter which was pointed out in argument to be far from self-evident) and that the word "extend" imports the idea of an extension without the grant of a fresh lease, the desire to extend is not a phrase of such right, as the direction that the lessor shall grant a further lease. Nor is the fact that the clause is called a proviso for renewal, to be left out. The idea of renewal is according to *Gardner v Blaxill* [1960] 2 All ER 457 to "make afresh". The general sense from the words used is that a fresh lease is to be granted, or so it seems to me. There are no compelling words of continuance here.

This intention was carried out in fact. A new lease was granted, as Scriven J has pointed out. There is no connection between the two leases in this case, as there ought to have been to support the construction contended for by the landlords. The result is that there were two leases. There were also other facts of time which indicated separation.

But the Act seems to me to leave no room for the exercise of this type of option in the case of a controlled tenancy. By definition a controlled tenancy is one in which the tenancy has not been reduced into writing; or, where it has, it is for a period not exceeding five years, or contains provision for termination within five years from its commencement. This latter provision might have been of importance in the *Rex Hotel* case, but discussion on the proper interpretation of it was put aside, because the option clause was held to be extinguished by the deed of variation. It might have been simply spent. The option clause in the present case is not an option for terminating the tenancy but one attempting to extend the tenancy. Whatever may be the true view of a "provision for termination within five years" (ie whether the period itself as terminated must be within five years, or the provision for termination must be exercisable within five years), in the present case if the option is exercised the aim would be to enlarge the period or at least to allow the first period of five years to end either in completion of the tenancy or in pursuance of a further lease. There may be other aspects, also, of the phrase, but I doubt whether the implied surrender on a renewal was meant to be included. I think that the option in this case would not come within that part of the definition. If the first lease came under a controlled tenancy at all, it is that the demise was for five years. *Prima facie*, therefore, the Act applies. If it does, then under section 4 it cannot terminate or be terminated otherwise than in conformity with the Act.

Section 4(1) provides:

> Notwithstanding the provisions of any other law or anything contained in the terms and conditions of a controlled tenancy, no such tenancy shall terminate or be terminated, and no term or condition in or right or service enjoyed by the tenant of, any such tenancy shall be altered, otherwise than in accordance with the following provisions of this Act.

To terminate a controlled tenancy notice must be given under section 4(2) of the Act.

It is necessary then to notice what a tenancy is. It means:

> a tenancy created by a lease, or under-lease, by an agreement for or assignment of a lease or under-lease, by a tenancy agreement or by operation of law and includes a subtenancy but does not include any relationship between a mortgagor and mortgagee as such.

Here the tenancy is created by a lease. Next, supposing the option is exercised (as it was), there will be an agreement for a lease. That is also a "tenancy". There will for some time be overlapping tenancies, as there could be during the agreement for a lease and a common law tenancy arising out of occupation and payment of rent. As far as this case is concerned, the first stage was that there was a tenancy by the lease for five years with an option. Can it be said at that stage to have been anything more than a tenancy for five years? There are several approaches to that problem. One is that the Act takes effect upon the first completed type of tenancy. That seems to have been the tribunal's approach. Another is that one must look at the general interest of the landlords and ascertain what they gave away. I hope that it will be in order to class Mr Satish Gautama's submissions generally under this approach. He stressed, it seemed to me, that the landlords had in effect irrevocably given away an eight-year lease which the tenant could leave at five years if he did not exercise the option. Another possible approach might be that one should look at the situation at the end of the day (whether or not the parties should have exercised an option, whether or not a demise for five years attracted the protection of the Act; or whether the agreement for the lease, with terms implied by the schedule in the Act if necessary, operated to attract the Act) and observe the final situation. The option was exercised by the tenant which gave him a further lease. Then one should see whether the parties had finally acted, as they could have acted *ab initio* in executing a lease for eight years, which would have been outside the Act, or whether a new lease for three years had been created within the Act.

It is of course, to be understood that the Act does not aim at entire control. It is aimed at protecting the tenure of the shorter-term tenancies; for five years or less. One can understand the controversy that the option gives rise to, because it poses an intermediate position between a clear shortterm tenancy and a clear long-term tenancy over five years. One can see circumstances where it may be hard on either side not to apply the Act clearly on first principles to the first "tenancy" which attracts the Act. Otherwise there may be overlapping confusion. It is for this reason that I think that the reaction of the tribunal provides the most attractive solution. The position here really is that the landlords had not divested themselves of their rights under a "tenancy" within the Act, of more than the demise of five years under the lease. The definition of a tenancy in the Act comprises of two sorts of transactions; those on the one hand, which arise by the agreement of the parties and those which arise by operation of law. The offer in an option, by itself, is not a concluded agreement. That is an agreement between the parties to be able to agree later on. As such, it is not an agreement giving rise to a "tenancy" within the definition, nor does it provide one by operation of law. In this context it is collateral to the demise. If the definition of "tenancy" had been intended to cater for the tenant's equitable rights under the option, it could have done so. There is also a ready precedent in section 28 of the English Landlord and Tenant Act 1954 whereby tenancies can be renewed by agreement and surrenders in this way accepted (see *Woodfallon Landlord and Tenant* P*ermanent Supplement* Vol 1 (*Business Premises*) pages 19,20 and 27). What has been provided instead, is section 3 (6) of the Act, which reads:

> Any agreement relating to or condition in, a controlled tenancy shall be void in so far as it purports to - (a) preclude the operation of this Act; or (b) provide for the termination or surrender of the tenancy in the event of the tenant making an application to a tribunal under this Act; or ...

[the rest is not material]

The narrow protection of paragraph (b) above, which might appear to leave open other agreements for the termination or surrender of a tenancy, is amplified by paragraph (a), if one reads sections 3(6) (a) and 4(1) together. The result is that an agreement for a tenancy to terminate or be terminated without notice is void. This strikes at the operation of an option clause for a new lease in a controlled tenancy, unless notice is given to terminate the contract. If this should be found difficult or cumbersome the answer is either to make sure that the first lease is for a term over five years, or to provide the parties with some legitimate room, at least for renewing leases without onerous provisions. The result in my view in this case is that the Act applied to the first tenancy by virtue of the demise in the lease for five years, and the exercise of the option and the new lease do not affect that position. They may be void depending on whether notice under section 4 was given. I should specially leave open the position whether the option allows the parties to continue the lease without creating a fresh lease, because it would be *obiter*.

It follows that I would also dismiss the appeal, and affirm the decision of the tribunal that the first lease attracted the protection of the Act. Hence the preliminary point taken was properly dismissed and the record must now be remitted to the tribunal to continue with the matter, any other procedural or substantive questions being open to the parties. The tenant will have the costs of this appeal and the costs before the tribunal will be costs in cause.

Scriven J. By a lease dated 3rd April 1967 the landlords granted to the tenant a lease of premises in Nakuru for the period of five years from 1st January 1967. That lease included the following clause 4(d):

> If the lessee shall on or before 1st October 1971 give to the lessors notice in writing of its desire to extend the term hereby created and if at the date of such notice there shall not be any breach on the part of the lessee of any of the several conditions, restrictions covenants and stipulations herein contained and on its part to be performed and observed then and in such case the lessors shall grant to the lessee a further lease of the described premises for a term of three years from 1st January 1973 [*sic*] subject to the same rent and covenants, conditions restrictions and stipulations as are herein contained with the exception of the present proviso for renewal.

On 15th February 1974 the landlords granted the tenant a further lease of the same premises for a period of three years from 1st January 1972. Apart from the shorter period and the absence of the provision for renewal, the covenants and provisions in the latter lease were identical to those in the former.

The question which came before the tribunal and which has come before us is whether these two leases should be read as providing an uninterrupted term of eight years? If it did, the jurisdiction of the tribunal constituted under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, which is restricted to dealing with controlled tenancies (as defined) and which I shall call “the Act”, might not extend to this transaction, since by section 2(1) of the Act a “controlled tenancy” means one which is for not more than five years (section 2(1) (b)) or is terminable (other than for breach of covenant) within five years. If the tenant has the protection of the Act then the tenancy can only be determined by notice in the prescribed form and for one of the grounds set out in section 7 (1) of the Act.

In this case the landlord during the term of the further lease served a notice purporting to be so served (under section 4(2) of the Act) on the following grounds set out in the notice:

> 2(a)Your extended aggregate term of eight years expires on 31st December 1974 without any option for you to call for its further extension.
>
> (b)The premises are required by the lessors/landlords for their own business use.

This form does not follow the wording of Form A prescribed by the regulations made pursuant to section 16 of the Act. The notice is headed “without prejudice” and clause 2(a) (which I have quoted above) is not one of the grounds specified by section 7(1) upon which the landlords are entitled to seek an order for possession; and further the landlords have gratuitously added the following words to the prescribed

wording:

> 3. Entirely without prejudice to the lessors' right to challenge any protection which you may claim as being available to you under the provisions of the above mentioned act ... you are required ... [thereafter following the prescribed form]

and then the final paragraph says:

> 4. Further, entirely without prejudice to the lessors' right to challenge any reference which you may make (if at all) to the afore-mentioned tribunal or other such rights which the lessors may have and possess in law for immediate possession of the premises upon expiry of your said term, this notice may be treated to have been given under the provisions of section 4(2) of the said Act.

Whilst, surprisingly, there is no point for decision by us raised by the tenant as to the validity of the notice, it clearly does not follow the prescribed wording of Form A to which I have referred; any notice so prescribed may be saved from failure by section 72 of the Interpretation and General Provisions Act, provided that it is not defective in substance or is not calculated to mislead. It is true that by winnowing the notice hard the words surplus to the requirement of the prescribed Form A can be shaken out, but I do not think that a form which adds argument and is labelled "without prejudice" can be said in substance to comply with the Act. In my judgment a landlord having such doubts as are manifest in the form should clearly have instituted proceedings for possession, or for a declaration in the High Court. This is, however, not a matter which either party has asked us to adjudicate upon and in view of the time which has elapsed since the matter was referred to the tribunal great hardship would be caused by deciding this appeal on the form of the notice; so I propose to make no finding and to assume, solely for the purpose of this appeal, that a proper reference was taken before the tribunal, and to deal now solely with their finding that the premises were comprised within a "controlled tenancy" within the meaning of the Act.

Mr Satish Gautama appeared for the landlords to ask this Court to find that the tribunal's decision on this preliminary point was wrong and that the two leases should be read together as giving one uninterrupted tenancy of eight years; his arguments are really based on the construction he contends for in the original lease, namely that the intention of the parties to be spelled out from that document show that they envisaged an uninterrupted period of eight years. If the documents should properly be so read together, then the tenancy thus created falls clearly outside the Act.

I have quoted the words of the option contained in the original lease and Mr Gautama seeks to extract from the words "extend", and "lessors will grant a further lease", and from the contractual effect of the option the construction which he says is the true one. There is, he says, no direct authority on the point before us but he seeks assistance from the decision of the Court of Appeal in *Rex Hotel Ltd v Jubilee lnsurance Co Ltd* [1972] EA 211.

In that case there was an original lease for ten years with an option for the tenant to determine after five years; but after eight years the parties entered into a deed of variation extending the period of the lease to fifteen years. The High Court judge held that the deed of variation created not a new lease but an extension of the original lease. By a majority of two to one, the Court of Appeal upheld the judge at first instance and agreed that no new lease was created.

From that decision Mr Gautama puts forward the argument that, if in that case those two documents should properly be read together, then so should the two leases in the present case.

With respect to Mr Gautama I cannot agree; any document can be varied by the original parties if they agree so to do and then it must, *ab initio*, be a different document from that originally entered into and, possibly, create different legal relations from those originally created, and the original lease will be of no further force or effect. In this case, however, there is on the face of it no variation of the original lease by the new lease, and the original remained in existence for the duration of its term. What has happened is that in the original lease the landlords have, as Mr Muite pointed out, put forward an offer in the option clause; unless and until that offer is accepted the original lease will expire with effluxion of time (unless

forfeited). Whilst it is true, as Mr Gautama says, that from the time the original lease came into being the landlords put it out of their power to prevent the tenant "extending", that does not automatically create the further lease provided for; the tenant may not wish to carry on his business, rents might have dropped (as historically they have occasionally done) or, more cynically, the tenant might forget to exercise his option, leaving the term to fall in on expiry.

I have to observe that there is what is probably a mistake in the option clause under consideration but which has not been considered before by the tribunal and it is this. The option agreement provides for a new lease to be granted from 1st January 1973. The period of five years granted by the original lease was from 1st January 1967 and would thus have expired on 31st December 1971. I do not know what transpired between the parties or whether they perhaps agreed that this was a mistaken expression of their true intention, but in the absence of such evidence a landlord such as these appellants would have been in a strong position to argue that if the tenant wanted a new lease he had to wait for one year after the expiry of the original lease before having it. At all events, when the new lease was granted it was expressed to run from 1st January 1972, so that there was no hiatus in fact. It is perhaps of some significance that the second lease was not granted until 15th February 1974, when the period granted thereby was already two-thirds expired: that must be a factor which militates against continuity since there was thus a period of over two years when the tenant was in possession without the benefit of a formal lease and thus without the marketable asset of an assignable interest for a term of years which the lease constituted.

In my judgment the second lease in this case cannot by any method of construction be said to vary the original lease or to extend it; at no time did the tenant have an eight-year period to dispose of, the second lease is a completely independent instrument, it does not flow directly from the *habendum* to the landlords' covenants in the original lease, the only nexus being the offer by the landlords as one of the contractual provisions to the original lease, that is to say apart from the *habendum*, *reddendum* or covenants. If the landlords had failed to grant the new lease the tenant's remedy would not have been for breach of covenant on the landlord's part, but for damages for breach of contract and an action only maintainable after the tenant had formed the contract and accepted the landlords' offer recorded in the original lease. It is true that the wording of the option clause says "if the lessee shall ... give to the lessors notice in writing of its desire to extend the term hereby created ..." and that those words alone could, if appropriately drafted, have led on to a provision that, on the exercise of the option and without further instrument, the term thereby created should be extended. But that is not the expressed intent of this particular option clause, because it goes on to say that, if properly exercised, "the lessors shall grant to the lessee a further lease ..." so that there can never be one extended instrument, there must (in the absence of any further agreement) be a subsequent instrument as indeed there is, so that not only was there the hiatus between 31st December 1971 and 15th February 1974 (during which the lessee's remedies were purely contractual) but as from 15th February 1974 the parties' rights and obligations were contained in and evidenced solely by the second lease.

The first lease was a spent force and an expired term of years, the option (and contract) for a new lease having merged in the new lease.

For these reasons, I hold that the first lease here cannot be read with the second, as one instrument and that the facts of this case show a situation which is in law the complete antithesis of those occurring- in *Rex Hotel Ltd v Jubilee Insurance Co Ltd.* Having found that each instrument must be regarded as creating a separate interest, I hold further that at the material time (that is the date of expiry of the second lease on 31st December 1974) it was solely the rights and interests of the parties to that instrument which are relevant to decide whether they amount to a "controlled tenancy" as defined by the Act and, in my judgment, the tribunal was correct to find that a controlled tenancy exists.

The appeal therefore fails and the matter should be remitted to the tribunal with a direction to proceed on the assumption that the landlords have served an adequate notice under section 4(1) of the Act and to determine whether the landlords have proved that the premises are required by the landlords for their own business use. Costs of this appeal to the tenant.

Appeal dismissed with costs.

Dated and delivered at Nairobi this 31st day of May 1979.

G.H PLATT

JUDGE

SCRIVEN

JUDGE