REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NOS 70 OF 1976 AND 51OF 1977

AUTO ENGINEERING LTD.....APPELLANT

VERSUS

M GONELLA & CO LTD.....RESPONDENT

JUDGMENT

These are two appeals, which have been consolidated, from a decision by the Business Premises Rent Tribunal on a preliminary point of law raised before them as to the validity of the notice to quit served on the tenant on behalf of the landlord, and from the judgment by that tribunal dated 13th April 1977, whereby possession of the premises at land reference Nos 209/4412 and 4413 was ordered to be delivered up to the landlord by 13th August 1977. The tribunal refused to order a stay of execution pending the appeals to this Court, but their decision on this aspect of the case was reversed by Platt J on terms, on 3rd August 1977, who ordered a stay of the order to vacate, until the determination of the appeals, with the result that the tenant, Auto Engineering Ltd, is still in possession of the premises, which are owned by M Gonella & Co Ltd.

It is common ground, for the purposes of these appeals at least, that the landlord has owned the property for at lease five years before the date of the notice to quit, and that the tenancy is a controlled tenancy within the meaning of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

The first part of the submissions of Mr Esmail, who appears for the tenant, was devoted to attacking the notice to quit, which, in purported compliance with section 7(1)(f) and (g) of the Act, required possession of the premises on the grounds that:

> (a) The landlord intends to carry out substantial repairs to the premises on getting vacant possession.
>
> (b) On completion of the repairs the landlord intends to occupy the premises to carry out its business therein for a period of not less than one year.

Mr Esmail submitted that in the first place the notice to quit, or tenancy notice as it is called in the Act, should not have been given by Messrs Waruhiu & Waruhiu, the landlord's advocates, but the landlord himself, in contrast to the position at common law, and under the proviso to section 106 of the Indian Transfer of Property Act 1882, whereby any such notice can be given by the landlord's duly authorised agent. He argued that the terms of section 4(1) are mandatory, that the tenancy in question may only be determined in accordance with the subsequent, not the preceding, provisions of the Act, that the term "landlord" is strictly defined by section 2, and that section 4(2) specifically mentions the word "landlord".

He further submitted that the term, particularly in view of the words of Wambuzi P in *Waljee v Rose* [1976] Kenya LR 25, 29 (that "where the words of a statute are clear, it is not for the Courts to rewrite the statute") means that the notice shall be given by the landlord and by nobody else before it can be effective. Mr Gautama, who leads the case for the landlord, submitted on the contrary that the word "landlord" is not restrictive and can include his advocate duly appointed for that purpose. He also submitted that the tenant was now estopped from alleging the invalidity of that notice and should have taken the point immediately after the ruling on the preliminary objection was given in July 1976. We say straightaway that we entirely agree with Mr Esmail that no such estoppel arises and that he is in no way precluded from arguing that point now. As to whether it is a good point is, of course, another issue. He also referred to *Lall v Jeypee Investments Ltd* [1972] EA 512, which was relied on extensively by Mr Esmail, and drew to our attention various suggested distinguishing features between that case and this one. In that case the Court differed from Mosdell J in *Abeid v Badbes* [1968] EA 598, and Mr Gautama invited us to follow Mosdell J and not Madan and Miller JJ in the *Jeypee Investments* case.

We observe at this stage, however, that *Abeid v Badbes* was also a case where the time period given to a tenant was involved, but at the very end of his judgment Mosdell J said (at page 605):

> Nor can I agree that Form A in its original form was *ultra vires* the Act. In my view, provided the notice given under the Act contains all that is required by the Act and the regulations made thereunder there has been a sufficient compliance with both the Act and such regulations. This in my view is the position in the instant case. I hold regulation 4 of the regulations to be directory and not imperative. To hold otherwise would entail enslavement to technicality from which the public began to be freed by the Common Law Procedure Act 1852 and from which they have been made progressively free ever since.

Mr Gautama also referred us to *Mulla's Transfer of Property Act* 1882 where the commentary at page 437, after referring to "lame and inaccurate" notices to quit, states that a liberal construction should be put on them, the test of their sufficiency being not what they would mean to a stranger ignorant of the facts and circumstances, but what they would mean to tenants conversant with all those facts and circumstances. Mr Esmail argued that this commentary relates to a completely different statutory provision (ie section 106 of the Transfer of Property Act) which deals with the situation that exists between the lessor and lessee in the absence of a contract or local law to the contrary, and cannot have much relevance to a specialised situation arising under a specific Act set up to regulate tenancies of business premises. However, we note that in *Balbir v Panesar* [1972] EA 94, 98, Trevelyan J expressly adapted this principle to a situation arising under the present Act, holding, *inter alia*, that the alternative periods specified did not nullify the notices of termination.

This point as to the validity of a notice has arisen in England in cases under the Landlord and Tenant Act 1954, mainly in relation to notices given by local authorities. As Mr Esmail pointed out, paragraphs (f) and (g) of section 30(1) of that Act are in almost identical terms to the paragraphs under which the instant notice was purportedly given, except that in the English statute the minimum proposed occupation period of one year by the landlord is absent and, of course, under the English statute the tenant may serve a counter-notice on the landlord. The first case (although the 1954 Act was only incidentally referred to) was *London County Council v Vitamins Ltd* [1955] 2 All ER 229, in which exception was taken to the notice because it was signed by the assistant to the council's valuer and not by the valuer himself, was specified in the tenancy agreement. Denning LJ said, at page 231:

> This point would not in the ordinary way worry the landlords very much, because it could soon be remedied by serving fresh notices on which the valuer, Mr Toole, had written to his own signature. But we are told that the new Landlord and Tenant Act 1954 has since come into operation and will give the tenants considerable security of tenure unless these notices are good. Hence the concern of the landlord to show that they are valid.
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> They admit that Mr Toole did not write his own name on either of the notices. They say that an assistant valuer did it in each case on his behalf. But they contend that this is a sufficient signature by him.

> In the ordinary way, when a formal document is required to be "signed" by a person, it can only be done by that person himself writing his own name on it, or affixing his own signature on it, with his own hand (see *Goodman v J Eban Ltd* [1954] 1 QB 550).
>
> But there are some cases where a man is allowed to sign by the hand of another who writes his name for him. Such a signature is called a signature by procuration, by proxy, "*per pro*" or more shortly "pp".
>
> All of these expressions are derived from the Latin *per procurationem,* which means by the action of another.
>
> A simple illustration is when a man has broken his arm and cannot write his own name. In that case he can get someone else to write his name for him: but the one who does the writing should add the letters "pp" to show that it is done by proxy, followed by his initials so as to indicate who he is.
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> In the present case it is said that Mr Toole signed by the hand of a proxy, the assistant valuer, but the proxy did not add the letters "pp". In order to test the validity of the signature, we have first to inquire whether a signature by proxy was permissible at all: and, secondly, if it was, whether the omission of the letters "pp" was a fatal flaw.

All the members of the court had no doubt that, at common law (which is of course an integral part of Mr Esmail's argument), a person sufficiently "signs" a document if it is signed in his name and with his authority by someone else. But they also held the omission to put "*per pro*" or "pp" (as it is often abbreviated) could well have misled the tenants and that, consequently, the appeals would be allowed and a new trial ordered.

In *London County Council v Farren* [1956] 3 All ER 401, a similar point, involving the same valuer, was involved. The notice was signed by only one person, not two, as was required, and that was the question before the magistrate. The Court of Appeal refused to remit the case to the magistrate for determination of another point, namely whether the valuer was authorised to sign the notice under section 184(2) of the London Government Act 1939, which would have amounted to a sufficient determination of the tenancy by the landlord within the meaning of sections 25(1) and 44 of the Landlord and Tenant Act 1954. Thus, whether or not the term "landlord" would have included his solicitor or other duly authorised agent was not really decided, though it does seem, from the judgment of Singleton LJ (at page 406) that the definition in section 44 of that Act (which is much more extensive than our definition) envisages as landlord someone other than the person who entered into the contract of tenancy. Our definition, "the person for the time being entitled ... to the rents" would cover, for instance, a purchaser from the original landlord.

The only case, that we have been able to discover, where the notice was given by the solicitors acting or purporting to act for the landlord, is *Harmond Properties v Gajdzis* [1968] 1 WLR 1858. It is true that that was not a case under the Landlord and Tenant Act 1954, but the Court held that the notice was valid, notwithstanding that it was given by the solicitors, that it erroneously stated that the person named therein was the landlord, and that there was a misdescription in the tenants' first name.

After due consideration of all Mr Esmail's submissions, including his argument that it is quite in order of the advocate to draft the notice, leaving it to the landlord to communicate it to the tenant, we feel that there is no technical requirement implicit in the definition of "landlord" which precludes his advocates from giving the notice on his behalf. We cannot see that the tenant in this case could in any way have been misled by the notice having been given by Messrs Waruhiu & Waruhiu, and while it is perfectly true that in such cases as these prejudice to the one or other party is not necessarily the criterion, we think that it would be placing an unduly technical and restrictive interpretation on the provisions of the Act to which we have referred, to hold that a notice is invalid simply because it has been given by the advocates of the landlord rather than by the landlord himself. If anything the inclusion of the advocates' name would tend to add force and substance to the notice so that the tenant, or "receiving party" as he is

described in the Act, would be even more aware that the landlord wished to terminate the tenancy and that he should straightaway protect his rights by a reference to the tribunal as was done in the instant case. We therefore decide against Mr Esmail on this point.

We turn now to Mr Esmail's submissions as regards the form of the rest of the notice. First, it is correct that the wording of section 7(1)(f) is "demolish or reconstruct", and not merely to effect repairs. The distinction can of course be important; for while mere repairs may not necessarily mean that the landlord needs possession of the premises, an intended demolition or reconstruction of a substantial part of the premises would in all probability be frustrated if the landlord could not obtain possession, and that is why this provision exists. Mr Esmail submitted with considerable force that we should be alive to the danger of determining this question by reference to the evidence rather than to the notice.

While we agree that forms prescribed by statutes or subsidiary legislation should be adhered to as far as possible, particularly where as here the party giving the notice is legally advised, it does not necessarily follow, in our judgment, that failure to do so renders the instrument concerned void; indeed, section 72 of the Interpretation and General Provision Act provides:

> Deviation from forms
>
> Save as is otherwise expressly provided, whenever any form is prescribed by any written law, an instrument or document which purports to be in such form shall not be void by reason of any deviation therefrom which does not affect the substance of such instrument or document, or which is not calculated to mislead.

Moreover in *Karatina Garments Ltd v Nyanarua* [1976] Kenya LR 94 (which was not a rent case) the Court of Appeal said that Court should lean towards deciding cases on their merits rather than encourage judgments to the parties based on technicalities.

The foregoing would seem to be in conformity with the English practice, for the Landlord and Tenant (notice) Regulations, made by the Lord Chancellor under the Act of 1954 and which set out the various forms to be used, provide that "forms substantially to the like effect" may be used. Can, therefore, paragraph 3(a) of this notice to quite reasonably be regarded as notifying the tenant that the landlord intended to do these things that are specified in section 7(1)(f) (and we recognise of course that the question of his intention is a separate matter).

We do not think here that there has been any suggestion that the notice was calculated to mislead. But did the deviation, from the wording of section 7(1)(f), affect the substance of the document?

It is to be noted that Form A does not itself specify the wording to be used in describing the various grounds for termination in section 7(1). Mr Esmail took us in detail through the wording of section 7(1)(f), indicating that paragraph 3(a) of the notice to quit was defective in that it mentioned neither reconstruction, demolition, nor substantial work of construction, and did not indicate that such work as was intended to be done could not be carried out without obtaining possession of the premises. He referred us to the judgment of Madan J with which Miller J agreed, in *Lall v Jaypee Investments Ltd* [1972] EA 512, 514, 515, in which he stated emphatically that the protection intended to be given by the Act to tenants required that its provisions were to be observed to the letter. The landlord in that case had used the words "We require you within one month after giving of this notice to notify us in writing whether or not you agree ..." to the proposed termination of the tenancy. That was the language used in the 1968 prescribed form. Unfortunately for the landlord in that case, the Act was amended extensively in 1970 before the notice was given. One of the amendments was to substitute "receipt of the notice" for the giving of the notice in section 4(5) of the Act; but Form A itself was not amended until 16th July 1971. Madan J held that there was all the difference between a period of one month beginning with the giving of the notice and one month beginning with its receipt by the receiving party, that the prescribed form (which the landlord used) was not in accordance with the Act at the material time, and that the tribunal's decision that it mattered not whether "giving" or "receiving" was mentioned in the notice (because it was served on the same day as it was written), was wrong. He cited a passage from the judgment of

Danckwerts LJ in *Price v West London Investments Building Society* [1964] 2 All ER 318, 322, from which it is clear that "giving" and "receiving" connote two entirely different situations. The importance of Madan J's remarks becomes even clearer when he refers to the speech of Viscount Dilhorne in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 869, for there it is made clear that the time limits imposed by the Landlord and Tenant Act 1954 must be strictly complied with.

We can well understand that any cutting down of the tenant's rights so far as the period of notice is concerned might make serious inroads into the protection intended to be conferred. For instance, a tenant could be seriously misled if he thought that he had to notify the landlord within one month of giving of the notice (presumably in most cases the date which it bears) whether he agreed to it, rather than within one month of the date of its receipt by him. The dates could differ widely. Obviously, therefore, the time limit imposed by section 4(5) must be strictly construed.

That is what moved Madan J to utter his strictures about the ravages of predatory landlords in *Lall v Jeypee Investments Ltd* [1972] EA 512. For in *Portal Motors Ltd v HFCK* (unreported) (a case which did not depend on the validity of the notice) he said:

> the tribunals have to conduct the proceedings before them to dispense substantial justice without being hidebound by technicalities of a justice-defeating nature.

Section 4(5) is, however, less precise as to what must be stated when the grounds of termination are specified. In that respect the words of the subsection are not as inflexible as Lord Reid said they were in the same case in respect of the time limit. We think in this respect that the test to be applied must be whether the language used in the notice is sufficient to convey to the mind of the receiving party what it is that the landlord intends to do and why he wants vacant possession. Obviously it is safer in all cases, particularly where the party concerned has the benefit of advice from advocates, to stick to the wording of the statute. But we do not think, where there is no cutting down or curtailment of the tenant's rights such as exists if he is given a shorter period to reply than that to which he is entitled), that a deviation from the wording of the salutatory provisions providing the grounds of termination is fatal to the notice provided it 'specifies" those grounds.

In the instant case the tenant acted on the notice he received. Though we have been unable to find on the file any counter-notice moving from the tenant to the landlord (and no point has been taken as to this) nevertheless, before the notice was to take effect on 1st November 1975 the tenant referred the matter to the tribunal and filed it on 28th October 1975. Not only did it do that, but in giving the postal address of the landlord, it inserted "c/o Waruhiu & Waruhiu, Advocates, Electricity House, P O Box 47122, Nairobi", and this is the address to which the tribunal sent their notification of the reference on 29th October 1975, requesting the landlord to attend with the tenant on 12th November 1975 for the purpose of fixing a hearing date. Accordingly, we do not think that there is any substance in that part of Mr Esmail's submissions which related to the identity of the requesting party as defined in section 2. Clearly, the tenant in this case was not misled in any way and, in effect, treated the landlord's advocates as the requesting party. Neither do we think that there is any substance in the other variation to which Mr Esmail also referred us, namely that the notice mentions "give up possession" instead of "comply with the notice".

The two expressions are precisely the same in effect. It is a distinction without a difference. We did not understand Mr Esmail to attack the remaining sub-paragraphs of paragraph 3 of the notice and, clearly in our view, taking the notice as a whole, the tenant must have been aware that the landlord required vacant possession in order to occupy the premises itself. Accordingly, we take the view that the notice in this case was sufficient to comply with the statutory requirements of the Act, and gave reasonable information as to the grounds upon which the landlord relied.

This disposes of the first notice of appeal and grounds 2 to 5 of the second. We now turn our attention to grounds 6 and 7 of the second memorandum of appeal, in so far as they relate to the question of whether the landlord had what has been referred to time and again as a "firm and settled intention" to carry out the developments, of which it produced the plans to the tribunal, and whether these "alterations" amount to

substantial work of construction or construction within section 7(1)(f). The tribunal made no finding on this aspect of the case, holding that whether or not the landlord eventually carried out repairs was "immaterial".

The first authority to which Mr Esmail referred us in connection with this part of his appeal was *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 All ER 78, and he referred us to a passage from the judgment of Morris LJ at page 81, in reference to section 30(1)(f) of the Landlord and Tenant Act 1954, which is as follows:

> There must, therefore, be an intention and it must be an intention which in point of time is related to the termination of the current tenancy. It seems to me that the intention must be to do one of the following things: (i) to demolish the premises comprised in the holding; or (ii) to reconstruct the premises comprised in the holding; or (iii) to demolish a substantial part of the premises comprised in the holding; or (iv) to reconstruct a substantial part of the premises comprised in the holding; or (v) to carry out substantial work of construction on the holding; or (vi) to carry out substantial work of construction on a part of the holding.
>
> If the landlord prove an intention to do one of those things, and to do it on the termination of the current tenancy, he must then prove that he could not reasonably do it without obtaining possession of the holding.

One of the difficulties in that case was that the County Court judge had entertained the view that the landlords had realised that they could not get possession under section 30(1)(g) because they had not owned the premises for five years. They accordingly sought possession under section 30(1)(f). It is clear that it was against this background that the Court of Appeal went into the genuineness of the landlord's intention to reconstruct (as Morris LJ said "Intentions can easily be asserted: their genuineness must be established"), for Denning LJ said, at pages 79, 80:

> The sort of case which I had in mind [ie *Atkinson v Bettizon* [1955] 3 All ER 340 was where a landlord wants to get possession of a shop for his own business and for that reason buys it over the tenant's head a year or so before the lease comes to an end. He knows that he cannot oppose a new lease under section 30(1)(g) because he bought the property less than five years before the end of the tenancy. So he puts forward a case for reconstruction under section 30(1)(f), hoping to get possession on that ground. In such circumstances the Court must be careful to see that section 30(1)(f) is fully satisfied before it allows him to get possession. For this purpose the Court must be satisfied that the intention to reconstruct is genuine and not colourable: that it is a firm and settled intention, not likely to be changed: that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the Court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention. It must also be remembered that the Act is intended for the protection of shopkeepers, and that this protection would be nullified if a big concern could buy the property and get possession by putting in, say a new shop-front. Hence the necessity for the work being substantial.
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> Whilst I adhere to the view that the landlord should not be allowed to circumvent the five-year rule by putting forward a colourable case of reconstruction, nevertheless I think that it is going too far to say that the work of reconstruction must be the primary purpose.
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> The word "primary" is taken from the judgment of this Court in *LW Smart (Modern Shoe Repairs) Ltd v Hinckley & Leicestershire Building Society* [1952] 2 All ER 846. It was perfectly accurate in that connection.

> The leasehold Property (Temporary Provisions) Act 1951 contained temporary provisions which only extended the lease for a year or two, and so a landlord ought not to be allowed to get possession unless there was an overpowering necessity for the work to be done at once. The Act of 1954 contains permanent provisions to which different considerations apply.

Morris LJ also deals with the question of intention (at page 83), holding that primary and second purposes or intentions were subordinate to whether an intention to reconstruct existed under section 30(1)(f). Accordingly we cannot agree with Mr Esmail's contention that the landlord must show that his "only" intention is to construct or reconstruct. The two paragraphs are not, in our view, mutually exclusive.

Mr Esmail next dealt with the question of planning permission, citing passages from *Woodfall on Landlord & Tenant* (27th Edn), Vol 2, and, while eventually conceding that the landlord does not have to show that planning permission has actually been granted with respect to the plans which the tenant produced before the tribunal, nevertheless maintained that he must show a reasonable prospect that it will be, otherwise the landlord cannot be said to have a firm and settled intention to carry them out: see again Madan J in *Portal Motors v HFCK* (unreported) and Platt J in *Kangari v Satation Makutano Bar and Restaurant* (unreported) where he allowed the landlord's appeal against the decision of the tribunal. There are several English decisions on this point, but as it contains the passage most widely approved and acted upon we first turn to *Cunliffe v Goodman* [1050] 1 All ER 720, which was an action for damages for breaches of repairing covenants and was decided well before the 1954 Act. In that case Asquith LJ said (at page 724):

> An "intention", to my mind, connotes a state of affairs which the party "intending" – I will call him X – does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which , in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X cannot, with any due respect to the English language, be said to "intend" a result which is wholly beyond the control of his will. He cannot "intend" that it shall be a fine day tomorrow. At most he can hope or desire or pray that it will. Nor , short of this, can X be said to "intend" a particular result if its occurrence, though it may be not wholly uninfluenced by X's will, is dependent on so many other influences, accidents, and cross-currents of circumstances that not merely is it likely not to be achieved at all, but, if it is achieved, X's volition will have been no more than a minor agency collaborating with, or not thwarted by, the factors which predominately determine its occurrence.
>
> If there is a sufficiently formidable succession of fences to be surmounted before the result X aims at can be achieved, it may well be unmeaning to say that X "intended" that result.

He continued, at page 725:

> Neither project moved out of the zone of contemplation – out of the sphere of the tentative, the provisional and exploratory – into the valley of decision.

It is clear from subsequent decisions given after the Act of 1954, that the requirement of planning permission is not an insurmountable fence in the process of having a genuine intention, and this point was expressly dealt with by Diploc LJ in *Gregson v Cyril Lord Ltd* [1963] 1 WR 41, in relation to the sole point taken on behalf of the tenants that the landlords had not established a reasonable prospect of being able to obtain planning permission. He said, at page 48:

> The Court of Appeal pointed out in a recent case, *Simpsons Motor Sales (London) Ltd v Hendon Corporation* [1964] AC 1088, though dealing with a different subject-matter, that it is quite impossible for a Court to decide what a planning authority or the Minister would decide, for the Court has not before it the materials, such as, for example, the advice or reports of inspectors who have held inquiries and inspected the *locus in quo,* nor the expert knowledge nor knowledge of the general or local background or the relevant national or local policies, all of which matters properly affect the decision of the planning authority or of the Minister, as the case may be. I, therefore, so far, agree entirely with the County Court judge. The test to my mind is entirely different. It is an

> objective test upon the evidence before the Court; have the landlords established, not what the planning authority or the Minister would determine, but the different and practical question: would the reasonable man think he had a reasonable prospect of giving effect to his intention to occupy? On the facts of this case, and subject to one further point mentioned below, this amounts to an inquiry whether the landlords on the evidence have established a reasonable prospect either that planning permission is not required or, if it is, that they would obtain it.

The *dictum* of Asquith LJ was cited with approval by Viscount Simonds in *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1958] 22 WLR 513, 519, 520, when he held that it is a question of fact as to what intention a man has at a given time, difficult though it may sometimes be to ascertain.

In the same case, Lord Simonds said he did not dissent from the observations of Lord Evershed MR in the same case when he said that the adoption of Asquith LJ's language could not be treated as having substituted for the word "intends" the words "is ready and able", and that whether intention has been proved has to be answered by the ordinary standards of common sense. He said that the landlord would not fail to prove intention merely because he could not prove that all steps had been taken to satisfy the conditions. Accordingly, we reject Mr Esmail's contention that the necessity of planning permission is an insurmountable fence in ascertaining the question of intention.

Another fence, which Mr Gonella himself mentioned before the tribunal, was that he could not form the new company with new partners who had the necessary expertise, nor finalise the proposed arrangements with Gema Holdings Ltd, because he could not bind himself until he got possession of the premises.

We think that this is an eminently reasonable point of view. If Mr Gonella had entered into binding agreements with these entities, and then failed to get possession of the premises so as to be able to carry them out, he could lay himself open to serious risk as to actions for damages, and we cannot accept Mr Esmail's submission that the contracts into which Mr Gonella intended to enter should have been made subject to his getting possession.

Unfortunately the plans which were produced by the landlord's managing director at the hearing as evidence of his intentions regarding the premises were mislaid; but after some difficulty the initial plans submitted to the council in respect of land reference No 209/4413 (together with land reference No 209/4825) were produced before us by the building inspector Mr Nyamangware. Mr Nyamangware drew our attention to the various comments made by departments of the council, some of which related to clarification needed and some to various additions required. As a result of these a fresh set of plans (which, as the plans produced to this Court, consisted of four separate drawings) showing the additions and the colourshading of certain areas, were produced. These were not approved until March this year, well after the hearing before the tribunal, and we accordingly exclude the fact of such approval (which we understand constitutes full planning permission) from the considerations which we have to take into account as regards the landlord's intention.

Nevertheless the initial plans, which are stamped "First Submission", thereby envisaging that certain alterations in them might be required, were filed on 10th March 1976, well before the hearing commenced in July. Although Mr Esmail initially said that his recollection was that one, not four, drawings were produced as part of the plans to the tribunal, when the evidence was given we did not understand him to take objection to the plans now produced, which are clearly proper material to place before the Court to enable us correctly to appreciate the issues involved. After careful consideration of these plans, which appear to us to be extensive, taken in conjunction with Mr Gonella's evidence at the hearing, we think even though the original notice was dated 25th August 1975, applying the test stated by Asquith LJ, that on the evidence it was established that the landlord in this case had a firm and settled intention to carry out the work enshrined in those plans. Do those plans involve substantial work of construction on the premises? Applying the test stated, again Lord Evershed MR, in *Bewlay (Tobacconists) v British Bata Shoe Co Ltd* [1958] 3 All ER 652, 655, namely that the Court is entitled to look at the totality of the work and ask if it falls within this part of section 7(1)(f), we think that the totality of the work proposed in this case clearly satisfies that test.

Neither do we agree with the further branch of Mr Esmail's submissions, namely that the landlord cannot succeed if he is only going to occupy the premises through a company which is under his control. This is directly contrary to that which Lord Evershed said in *Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99, 102:

> It is clear that when, as in the present case, the landlord is a limited company, the existence of the intention (and particularly the proof of the quality of the intention, that it is firm and settled) can be established only through the directors or other principal officers of the company.

And it matters not, in our view, that the company is not yet in existence but is the vehicle by which the landlord will carry out his intention to carry out the work. Indeed we think that the formation of a company for the purpose only reinforces the view that the landlord will implement his intention in this way. In this connection we note that section 30(3) of the English Act provides that where a landlord has controlling interest in a company, any business carried on by that company is to be treated for the purposes of section 30(1)(g) as a business carried on by him.

When the hearing of the appeal resumed on 30th October, Mr Esmail enumerated six points, which were largely a summary of what he had earlier said. In particular, he complained that the tribunal in its judgment had placed the burden of proving the negative of the landlord's contentions on the tenant. We do agree with Mr Esmail that the passage:

> According to the evidence before us the tenant could not prove that it was not the intention of the landlord to occupy the premises for a business and for a period of not less than one year.

is unfortunately and, taken by itself, would certainly be a very serious misdirection. However, we also agree with Mr Gautama on this issue, that the preceding paragraph shows that the tribunal had in mind the requirement that they had to be satisfied that the landlord had the requisite intention under the Act, otherwise that preceding paragraph would be meaningless.

We do not think that there is anything in the point that fifteen months had elapsed between the notice and the date of the hearing. Obviously if there was a reference to the tribunal in existence, as there was from the 28th October 1975 onwards, the landlord could hardly be expected to incur further expenditure in surmounting more fences so as to gain approval of the plans, which might prove to be a complete waste of money.

Mr Esmail suggested that the burden on the landlord is heavier under our Act than under the English Act, because here it is the landlord who chooses the moment of termination, whereas in England the tenant can apply to the Court for a new tenancy. It is true that, in England, the tenant may apply to the Court under sections 24 and 29 of the Act for the grant of a new tenancy, and this eventuality is covered by the words "whether the tenant would be willing to give up possession of the property comprised in the tenancy", whereas our section 4(5) only mentions willingness to comply with the notice. Thus, in Kenya, it is the existing tenancy which is extended to cover the tenant's continuance in possession, as distinct from the grant of a new tenancy. We cannot, however, accept the argument that there is any distinction, so far as the burden of proof is concerned, on a landlord serving a notice to quit on one or more of several grounds under the Kenya Act, and opposing the grant of a new tenancy on one or more of similar grounds under the Landlord and Tenant Act 1954. All the authorities in England show that the burden of proof is on the landlord to establish his intention as a matter of fact, which is the position here.

The remainder of Mr Esmial's six points are covered in that which we have already said, or are about to say.

Possessing as we do the powers specified in section 15 of the Act, which are additional to those under section 78 of the Civil Procedure Code, we hold that the tribunal were wrong in holding that the eventual carrying out of the repairs by the landlord, inasmuch as it affected his intention, was immaterial. We are satisfied that there was evidence on which the tribunal should have held that the landlord intended to carry out substantial work of construction of the premises under section 7(1)(f), this issue being raised for

our determination by paragraph 7 of the second memorandum of appeal. We would, accordingly, dismiss the appeal on this ground.

However, Mr Esmail also submitted that there was no evidence before the tribunal that the landlord intended to occupy the premises for not less than one year, Mr Gonella having only touched on the duration of the period necessary for the "repairs", namely six months. It is true that there was no express evidence as to this, but had it been necessary for our decision we should have agreed with Mr Gautama and held that the only reasonable conclusion on the totality of the evidence was that at which the tribunal in effect arrived, namely that the landlord could only do all he was going to do if he occupied the premises for more than one year. The question of whether any compensation for improvements should be given to the tenant was abandoned by Mr Esmail and thus does not fall for our consideration.

Accordingly, for the reasons we have given, we dismiss both appeals with costs. Mr Esmail does not now seek any further extension of the tenancy for his client. Accordingly, we direct that possession be given within a nominal period of seven days from today. We wish to add that we were extremely impressed by the clarity and force of Mr Esmail's arguments, and that the fact that we have taken a contrary view does not imply any disrespect to them.

Appeals dismissed with costs.

Dated and delivered at Nairobi this 30th November 1978.

A.R.W HANCOX **S.K SACHDEVA**

JUDGE **JUDGE**