

Last Orders at *La Pentola*

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The Court of Appeal handed down a strange decision in *Bacchiocchi v Academic Agency Ltd* [1998] 2 All ER 241. This was a business tenancy case where the legal meaning of the relevant enactment was perfectly clear and pointed in the landlord's favour. The relevant authorities were also perfectly clear, and pointed the same way. The justice of the matter pointed that way too. A practitioner advising either party beforehand would have had no hesitation in saying the tenant's cause was hopeless. At first instance, Judge Bursall QC, sitting as a judge of the High Court in Bristol, agreed. Yet the Court of Appeal unanimously reversed him.

Such an extraordinary decision gives the commentator a chance to hold forth, but it affords him no pleasure. Setting the law on its head, it can only bring it into disrepute. It confounds the practitioner who seeks to give clients reliable advice, as all practitioners should.

So what went wrong? In the first part of this article I explain how, as it seems to me, the law applied to the case and produced a clear result. In the second part I shall attempt to describe the Court of Appeal's reasoning and where it went wrong.

The facts

The facts of the case were straightforward. In 1974 Glauco Bacchiocchi decided to open a little restaurant in Bath. It was to be a simple place so he called it *La Pentola*, the cooking pot. It was located in the basement and cellars at 14 North Parade. His tenancy was one to which our old friend Part II of the Landlord and Tenant Act 1954 applied.

Time passed, and *La Pentola* flourished. Then in May 1994 the tenant, having been in the restaurant business for nearly 40 years, decided it was time for him to retire. As so often in cases under Part II of the 1954 Act, the chronology is vital. I will set out the salient events.

4 October 1993	Landlord served a notice under s 25 of the Act to determine the tenancy on 8 April 1994.
3 November 1993	Tenant served counter-notice stating he was not willing to give up possession.
8 December 1993	Tenant applied to Bath County Court under s 24 of the Act for a new tenancy.
11 May 1994	Tenant discontinued his application for a new tenancy. As a result, by virtue of s 64 of the Act, the old tenancy would terminate on 11 August 1994. However the tenant's solicitors mistakenly thought the termination date under the Act was 29 July.
9 June 1994	Tenant's solicitors wrote to landlord's solicitors saying "our client will be leaving at the end of July".
24 June 1994	Tenant's solicitors wrote to landlord's solicitors saying "rent is due up to 29 July".
5 July 1994	Landlord's solicitors wrote to tenant's solicitors pointing out that the tenancy would actually end on 11 August, adding "If your client is saying that he will

give possession at
the end of this
22 July 1994

month and wants to consider with our client whether he is prepared to forego the rent if early possession is given, we will take our client's instructions". Tenant's solicitors wrote to landlord's solicitors saying "our client proposes vacating on 29 July providing he is released from any further liability for rent". There was no response to this letter.

23 July 1994
29 July 1994

La Pentola closed. Tenant spent the next six days cleaning the premises. Tenant vacated the premises, removing all his possessions, and handed over the keys to his solicitors for return to landlord. The premises stood empty until the true end of the tenancy on 11 August 1994, a period of twelve days. (I will call these the twelve blank days.)

The point at issue

The point at issue in the case concerned compensation for disturbance. In the circumstances which had happened, s 37 of the Act provided, subject to the lease, for the payment by the landlord to the tenant of such compensation. The amount of this, if it turned out to be payable, was agreed at ,15,030.

The hurdle facing the tenant was that clause 4(7) of the lease provided that no compensation under s 37 should be payable. However s 38(2) of the Act renders void such an exclusionary clause where a certain condition, which I will call the qualifying condition, is fulfilled. In the language of s 38(2), the qualifying condition is that "during the whole of the five years immediately preceding the date on which the tenant . . . is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes".

So if that condition was fulfilled, the exclusionary clause was void and the tenant got his compensation. If that condition was not fulfilled, the exclusionary clause was valid. Was the condition fulfilled? Let us examine it in more detail.

In our case, the tenant and the occupier were the same person. So without altering the essential statutory language, we can simplify the qualifying condition so that it reads as follows-

- (1) during the whole of the five years immediately preceding the date on which the tenant is to quit the holding, namely 11 August 1994
- (2) premises comprised in the holding, namely the basement and cellars at 14 North Parade, Bath
- (3) have been occupied for the purposes of a business carried on by the tenant.

Three vital phrases

I stress that this rewriting does not in any way change the vital statutory phrases of the enactment falling to be construed, which are "during the whole", "the five years immediately preceding the date on which the tenant is to quit the holding" and "have been occupied for the purposes of a business carried on by the tenant". As I have often said when writing on statutory interpretation, it is helpful for the avoidance of error to carry out a small rewriting exercise of this kind. It concentrates the mind and avoids confusion. It might well have saved the Court of Appeal from error in the present case.

Let us start with the the second of the three vital phrases, "the five years immediately preceding the date on which the tenant is to quit the holding". There was no dispute that the quitting date was 11 August 1994. The five years "immediately preceding" the quitting date obviously included the day before that date, and the day before that, and so on throughout the twelve blank days. When a parliamentary drafter uses the phrase "immediately preceding" the intention is to indicate that there must be not the slightest gap in time. As the Oxford English Dictionary (2nd edn) says, it must be "without any delay or lapse of time; instantly,

directly, straightway; at once". That is what "immediately" means. It means nothing else. The drafter, by definition a careful soul, endeavours to use the English language correctly. Courts should appreciate this.

Now take the first phrase, "during the whole". The required occupation has to endure during the entirety of the period of five years which ends on 11 August 1994. Clearly that word "whole" is put in for emphasis. The meaning would have been the same if the drafter had left it out and just said "during the five years immediately preceding the date on which the tenant is to quit the holding". But the drafter wished to leave no doubt on the point. Every single day of the five years was meant to be included, including of course the twelve blank days in our own case. No part of the period was to be omitted. If a part is missing, you do not have "the whole".

The third phrase is "have been occupied for the purposes of a business carried on by the tenant". The only business in question here was the running of the restaurant. This ceased on 23 July 1994, when *La Pentola* closed. Arguably (though the argument is thin) one might say it continued until 29 July, when the tenant vacated the premises, removing all his possessions, and handed over the keys to his solicitors for return to the landlord. It cannot be said to have continued after that date, when the premises lay empty and unused and the worthy Mr Bacchiocchi had started on his no doubt well-earned retirement.

Premises are not "occupied for the purposes of a business" if they are not occupied at all. These premises were not occupied at all during the twelve blank days. If they had been occupied by the tenant during those days, it would not have been for the purposes of his business because his business had previously ceased. So the legal position was for once crystal clear on the statutory language.

The authorities

The position was also also crystal clear on the authorities. Although the Court of Appeal considered a number of cases, the only really relevant decision was *Department of the Environment v Royal Insurance plc* [1987] 1 EGLR 83. Here in essentials the wording of the relevant enactment was identical to our qualifying condition, though the period was the longer one of fourteen years. On the facts the difference was that the gap lay at the beginning of the relevant period rather than the end: the tenants had entered into possession one day late. Falconer J held that this single missing day was enough to mean that they had not occupied for "the whole" of the relevant period. He said (at 88)-

" . . . it seems to me that Parliament has made its intention perfectly clear. It provides for a period of 14 years and . . . it says: 'During the whole of the fourteen years immediately preceding', emphasising in my mind that there must be a complete 14 years."