Last Orders at *La Pentola* - II

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In the first part of this article I described how, as it seems to me, the law in the business tenancy case of *Bacchiocchi v Academic Agency Ltd* [1998] 2 All ER produced a clear result which the Court of Appeal declined to implement. Now I shall attempt to describe the Court of Appeal's reasoning and where it went wrong.

The point at issue concerned the Landlord and Tenant Act 1954 s 38(2), which entitled the tenant to compensation agreed at ,15,030 if, but only if, the qualifying condition was fulfilled 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". There were twelve blank days from 29 July 1994, the date on which the tenant vacated the holding and handed over the keys, and 11 August, the date when under the Act the tenant was due to quit the holding. The tenant had actually ceased to carry on business on 23 July, when the restaurant closed its doors.

Lord Justice Simon Brown

The leading judgment was delivered by Simon Brown LJ. He did not, as one would expect, carry out an analysis such as that in the first part of this article and then ask himself if there was any reason why it should not prevail. Instead, he devoted considerable attention at the outset to authorities thought to bear on the question whether during the twelve blank days the premises were in law occupied or unoccupied. In my submission this was not a question that in fact arose: there was no doubt that they were unoccupied.

Simon Brown LJ did not explain why the question arose; for some reason not stated he simply assumed it. Having assumed it he was able to find dicta to the effect that the concept of occupation of premises is not a legal term of art and can in some cases give rise to difficulty. He showed that in what Cross J called "distinctly a border-line case", *I & H Caplan Ltd v Caplan* [1963] 1 WLR 1247, that judge held that premises continued to be occupied for a tenant's business even where the tenant temporarily vacated them while a new tenancy was being litigated. He showed how in *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 1 WLR 533 Scarman LJ followed this decision where fire-damaged premises had to be rebuilt and so could not for a time be physically occupied. However decisions of this sort do not cast the slightest doubt on the fact that for the twelve blank days the premises in *Bacchiocchi* were unoccupied.

When he came to consider what he called (at 247) "the authority closest in point", namely *Department of the Environment v Royal Insurance plc* [1987] 1 EGLR 83 (discussed at the end of the first part of this article), Simon Brown LJ held that there was no distinction whatever between the two cases. He said (at 248): "If the *Department of the Environment* case was rightly decided, then the present appeal too must

fail." He went on to hold that the *Department of the Environment* case was not rightly decided because the tenants there were actually in occupation from the start. He said (at 249)-

> "If, as one would readily have inferred in the *Department of the Environment* case, it suited the tenants for business reasons to go into occupation a day late - perhaps because architects or fitters could not conveniently attend earlier - that seems to me no less an incident of the overall business use of the premises during the period of the lease than had mid-term repairs taken a day longer for the same reason."

Here we have the absurdity that tenants are in law able to "go into occupation" a day late even though they are already deemed to be in occupation!

Simon Brown LJ ended by holding that the court in the *Department of the Environment* case "to my mind paid too much attention to the words 'immediately preceding'". The suggestion here is that courts in such cases should ignore words that Parliament has carefully included in its Act, and meant to be acted on. This breaks the most elementary rule of construction. Without compelling reason, it is not the function of courts to ignore such words. No compelling reason was cited.

Nor is it the function of an appellate court to imagine "what must have happened" when there is no evidence to support it. This seems to be the explanation for the following passage in the judgment of Simon Brown LJ (at 250)-

> ". . . it seems plain that, having planned for some time on vacating the premises in late July through a misunderstanding of when the lease was to end, the appellant [tenant] found it commercially sensible to stick to this plan though ultimately he obtained no rent rebate (which no doubt is why he left the keys with his solicitors instead of giving immediate vacant possession to the respondents [landlord])."

In the absence of evidence on the point, a more plausible explanation of why the tenant gave the keys to his solicitors on 29 July rather than to the landlord was simply that they were dealing with the landlord in the matter and it was natural to hand the keys to them.

Lord Justice Ward

Ward LJ was unhappy at allowing the appeal. He said (at 251)-

> "[The] question poses a dilemma for me. On the one hand, successfully to argue that quitting 12 days early has the effect of breathing life into what, as the decades rolled by, must have seemed an increasingly moribund cl 4(7) [of the lease], is to achieve the triumph of technicality over merit. On the other hand there is a remorseless compulsion to the literal construction of s 38(2) adopted by the judge. I have not found it an altogether easy matter to decide."

It is submitted that there is no dilemma. Clause 4(7) of the lease was moribund only on the (improper) assumption that the vital words "during the whole of the five years immediately preceding the date on which the tenant . . . is to quit the holding" would inevitably be complied with. However until the terminal date had been reached it could not possibly be known whether or not they would be complied with. There is no merit in failing to comply with a necessary condition, and there is no technicality about enforcing such a condition.

Ward LJ held that the case must turn upon the meaning given to the third of our vital phrases, "have been occupied for the purposes of a business carried on by the tenant". He held that the blank twelve days were an interruption caused for the purpose of quitting the premises. He said-

> "It is an affront to common sense to require a pot and pan to be left on the premises till the clock strikes midnight on the last day. Common sense surely dictates that there be an allowance for reasonable leeway."

If one is to talk of common sense here, then one might better argue that it is not common sense to say that a tenant who on a particular day took his possessions out of the premises, locked the door, handed over the keys, and departed with the intention of shaking the dust of the place off his feet and never in his life returning to it, ***and has kept to that***, is in any credible sense in occupation of the premises on the next day, or the following day, or the day after that, and so on for twelve days. Suppose it had been twenty days, or fifty. Where does one stop?

Mr Justice Moore-Bick

The third appeal judge was Moore-Bick J. He said (at 254)-

> "The likelihood is that a prudent businessman will ensure that the arrangements he makes for the removal of stock and equipment will result in the premises being substantially vacated ***before*** the very last day of the term. Unless he leaves some possessions in the premises for purely symbolic purposes, therefore, it is unlikely that he will remain in physical occupation until the last moment, though he will continue to have a right of access and to be responsible for the safety of the premises as well as for outgoings such as rent, rates, insurance and so on."

It might also be said that a prudent businessman will ensure that a condition upon which his right to a substantial sum in compensation depends is carefuly complied with. As for the facts of the present case, it has to be pointed out that there is a mental element in the concept of occupation, at least to this extent. If the businessman has not only removed himself and his possessions lock, stock and barrel from the premises ***but has also manifested a corresponding mental state of relinquishment of possession*** then he cannot possibly be said to remain in occupation.

Moore-Bick J went on to cite without criticism *Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103, where the tenant was held to have gone out of occupation of premises of which he retained the lease because he had moved his business to other premises. If the principle of this case applies where the tenant moves his business, it must also apply where he has closed down his business.

Then Moore-Bick J said (at 256) that if the landlord's argument was right a tenant, where he cleared the premises a few days before the terminal date (as it would be quite natural to do), would "invariably lose the protection of s 38(2) . . . however long he had been in occupation before the business closed". He added: "I find it difficult to accept that is what Parliament intended". Of course it was not what Parliament intended, but in truth it does not apply. If the tenant had been able to show that, even though he had removed his possessions a few days before, he retained his intention to occupy, and the means of doing so (the keys), right until the end then the qualifying condition would undoubtedly be satisfied.

Moore-Bick J ended by holding that "as a matter of ordinary usage" the tenant here remained in possession right until the terminal date. One can only say with respect that this finding is perverse.

Why the perverse ruling?

When the Court of Appeal goes off the rails in such an extraordinary way one has to ask why this happened. In this case the commentator is at a loss, because none of the three judges explained why they were acting as they did. Certainly none of the three attempted to give a coherent reason expressed in terms related to the accepted rules, presumptions, principles and linguistic canons which govern statutory

interpretation. None of these was even mentioned!

Attempting to gather by implication from the judgments what, if they had attempted to state it, the justification might have been, I have come up with the following.

> To give the qualifying condition a literal construction would be unfair to the tenant. It would not be a purposive construction, because the purpose of Parliament was to protect tenants. It would be over-technical to deprive the tenant of such a large sum in compensation for failing to do the simple things required to retain occupation until the crucial date.

Such reasoning will not stand up, as I have shown. It is the function of the courts to uphold and apply the law, and the law here was plain. It is contrary to legal policy to overturn established authorities without adequate reason. The law is intended to be predictable and certain. Above all the courts are required to carry out the intention of Parliament.

There is one more point to make. On the facts as revealed in the report, the tenant's failure to maintain occupation until the crucial date seems to have been simply due to the fault of his solicitors in negligently miscalculating the relevant period and so giving him mistaken advice. It appears that the tenant's proper remedy for loss of his compensation was not what should have been a fruitless action against his landlord. It was what should have been a successful action against his solicitors. Why did not the Court of Appeal even consider this point?

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