

NOTES OF CASES

INCREASE OF RENT — CONTRACTUAL OR STATUTORY TENANCY?

*The Great Eastern Life Assurance Co. Ltd. v. Ng Hui Lip*¹

TWO quintessential features of rent control legislation are: firstly, rent cannot be increased except in the circumstances permitted by the statutes and secondly, the landlord is not entitled to recover possession of the premises after the determination of the contractual tenancy; the tenant becomes a statutory tenant and is entitled to remain in possession. These two features of rent control are embodied in sections 7, 14 and 27 of the Control of Rent Act.²

A rather interesting problem has arisen with regard to the interaction of these sections.³ Under the Act, rent can only be increased in certain situations laid down in section 7(1), and section 7(2) provides that:

Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent.

This has been interpreted to require the landlord, if he wishes to apply to the Rent Conciliation Board⁴ (“the Board”) to increase rent, to determine the tenancy first.⁵ At the same time section 27 provides that a statutory tenant is:

any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot by reason of the provisions of this Act be deprived of such possession by his landlord;⁶

It would appear at first sight that if a notice to quit is given to a tenant, even if it is with a view to an application to the Board to increase rent, the

¹ [1986] 2 M.L.J. 325.

² Cap. 58, 1985 (Rev. Ed.).

³ See generally the writer’s “Statutory Tenancy Under The Control Of Rent Act” (1983) 25 Mal.L.R. 295, 2%.

⁴ The Board is established under s.8 of the Act.

⁵ This interpretation was accepted by the Court of Appeal in the instant case, *supra* n. 1, at p. 326. See also *Chiang Yik Mun t/a Bunny Tailor v. CYC Shanghai Shirt Co. Pte. Ltd.* [1983] 1 M.L.J. 14, *Ng Chik Puah v. Chop Hoe Thong* [1962] M.L.J. 349 and *The Happy World Ltd. v. Estate & Trust Agencies (1927) Ltd.* [1958] M.L.J. 155. For cases stating a contrary view, see *Sim Bang Hock v. Lim Kwong Sin* [1970] 1 M.L.J. 124 and *Kong Cheng Whum v. Tengku Besar Zabaidah* [1970] 1 M.L.J. 179.

⁶ In *Khadijah Binte Abdullah v. S.I.A. Alsagoff* [1957] M.L.J. 90, Thomson C.J. listed four conditions which must be satisfied before a tenant can become a statutory tenant, *viz.*,

- (i) he must have been a tenant of the premises;
- (ii) his tenancy must have been determined, not assigned or otherwise;
- (iii) he must have remained in possession of the premises after the determination of his tenancy; and
- (iv) the provisions of the Act must prevent him from being deprived of possession by the landlord of the premises.

tenant would become a statutory tenant. The English Court of Appeal has so decided in *Summers v Donohue*,⁷ and Chua J. has also reached a similar conclusion.⁸ However there are three cases, where the High Court has held that in such a situation, the tenant does not become a statutory tenant but instead a new contractual tenancy arises between the landlord and tenant at the new rent fixed by the Board.⁹ Although there was an appeal to the Court of Appeal in two of these three cases, in one case the appeal was dismissed on a different ground and the Court of Appeal did not comment on this point of law¹⁰ and in the other appeal, there was no reported judgment.¹¹ With this in mind, the Court of Appeal's recent decision in *The Great Eastern Life Assurance Co. Ltd v. Ng Hui Lip*, where the issue once again came into focus, was a good opportunity for the court to resolve this problem once and for all.

The Facts

The facts of the case were simple enough; the appellants were the owners of rent controlled premises, which they leased to one Teo Chwee Geok. They desired to increase the rent and with this object in mind they gave a notice to quit to the tenant. An application was then made to the Board, which increased the rent of the premises, and the tenant continued in possession under the new rent. It would appear that the tenant then sub-let the premises to the respondent. The landlords then commenced proceedings against the respondent to recover the premises; whether they would succeed depended on the status of the tenant at the time of the sub-lease. If the tenant had become a statutory tenant, then the sub-lease was invalid and the sub-tenant would have no right to remain on the premises, whereas if the tenant were a contractual tenant then the sub-tenant would be protected.

The Premise

The premise of the decision, although it was not expressly stated, was that a statutory tenant has no right to sub-let the premises. It is quite surprising that no arguments were proffered on this point because it is by no means a settled point of law. This issue has never been directly considered by the local courts,¹² but the English Court of Appeal decided in *Roe v. Russell*¹³ that a statutory tenant may sub-let part of the premises. This is in contrast with the assignment of a tenancy, where both the English¹⁴ and Singapore courts¹⁵ have decided that a statutory tenant cannot assign the tenancy.

⁷ [1945] K.R. 376.

⁸ In an unreported decision (District Court Appeal No. 82 of 1979) which was noted by Sinathuray J. in *Chiang Yik Mun t/a Bunny Tailor v. CYC Shanghai Shirt Co. Pte. Ltd.*, *supra* n. 5, at p. 16.

⁹ *The Great Eastern Life Assurance Co. Ltd v. Goh Ah Kow* [1980] 1 M.L.J. 277, *Teo Ee Hup v. Syed Hussain bin Abdul Rahmah Alkaff* [1982] 2 M.L.J. 142 and *Chiang Yik Mun v. CYC Shanghai Shirt Co. Pte. Ltd.*, *supra* n. 5.

¹⁰ In *Syed Hussain Bin Abdul Rahman Alkaff v. Teo Ee Hup* [1983] 1 M.L.J. 12.

¹¹ In *Chiang Yik Mun v. CYC Shanghai Shirt Co. Pte. Ltd.*, *supra*, n. 5, it is likely that the appeal was disposed of without any written judgment. Rajah J. at the trial of the instant case referred to the fact that the appeal was summarily dismissed: see [1986] 2 M.L.J. 325, 326.

¹² In *Tan Eng Seng v. Teo Soon Kiat* [1956] M.L.J. 146, the court left the point open. However see the Malaysian case of *United India Fire & General Insurance Co. Ltd v. Jaffnese Co-Operative Society Ltd* [1971] 1 M.L.J. 118.

¹³ [1928] 2 K.B. 117.

¹⁴ See e.g. *Keeves v. Dean* [1924] 1 K.B. 685.

¹⁵ See *Tan Eng Seng v. Teo Soon Kiat*, *supra* n. 12. In *Lloyd, Sir Hugh v. Yeap Lian Seng* [1948-49] M.L.J. Supp. 76, the Singapore Court of Appeal assumed without argument that a statutory tenancy could not be assigned.

There are two reasons for this rule. Firstly, to be a statutory tenant, the person must be in possession of the premises. If he assigns the tenancy then he is no longer in possession. Secondly, a statutory tenant's right "is a purely personal one"¹⁶ and he has no estate or proprietary interest in the premises, and therefore he cannot assign his personal privilege to retain possession. The second reason would be equally applicable to prevent the sub-letting of rent controlled premises, but despite this the English courts have decided that on a construction of their rent control legislation, a statutory tenant could sub-let the premises.¹⁷ Although the writer has suggested elsewhere¹⁸ that this principle should not be followed here, the fact remains that the Court of Appeal should have taken the opportunity to clarify the situation.

In this regard, although the respondent is described in the judgment as a sub-tenant,¹⁹ from the facts there appears to be an assignment rather than a sub-tenancy.²⁰ If this is so, then it could explain why no arguments were proffered on this point.

This case provides one instance where the status of the tenant, *i.e.* whether he is a statutory or contractual tenant, is of importance. There are other situations where this question may also be crucial, because besides the ability to sub-let and assign, the rights and liabilities of a statutory tenant differ from that of a contractual tenant.²¹

The Decision of the Trial Court

Rajah J. who decided two of the three cases referred to earlier not surprisingly rejected the claim of the landlord. Although no reasons were given, it could be assumed that he was of the view that at the time of the sub-lease there was a contractual tenancy between the landlord and Teo Chwee Geok. Because no reasons were given in this case, it is useful to examine his Lordship's judgment in the two previous cases of *The Great Eastern Life Assurance*

¹⁶ *Per* Bankes L.J. in *Keeves v. Dean*, *supra* n. 14, at p. 690.

¹⁷ The decision in *Roe v. Russell* was based on the fact that under s.4(1)(h) of the Rent and Mortgage Interest Restrictions Act 1923 an order for the recovery of the premises could be made against a statutory tenant if he sub-let the whole premises. From this the court inferred that the Act allowed the tenant to sub-let part of the premises, since the landlord could not recover the premises on this ground. Further, in the view of the court, the constant reference in the Act to partial sub-letting and sub-tenancies was an indication that in the opinion of the legislature the statutory tenant could sub-let the premises. Neither of these reasons has any relevance in Singapore.

¹⁸ See *supra*, n. 3, at p. 320.

¹⁹ [1986] 2 M.L.J. 325, 327.

²⁰ It would appear from the facts that Teo Chwee Geok, the tenant, gave up the whole premises and the residue of his interest to the respondent. This is because the action was one for the recovery of possession and had Teo Chwee Geok been a tenant in the true sense of the word, the landlord would not have succeeded in his claim for possession even if the respondent had no rights at all because Teo Chwee Geok would have been protected. In this regard, it is clear that the distinction between an assignment and a sub-lease is one of substance and not form. If a tenant disposes of the whole residue of his estate it amounts to an assignment even though the parties intended it to be a sub-lease. See *Milmo v. Carreras* [1946] K.B. 306.

²¹ For example, since a statutory tenancy is a personal privilege, the statutory tenant does not have any proprietary interest and therefore, if he becomes a bankrupt, the tenancy does not pass to the trustees in bankruptcy. See *Sutton v. Dorf* [1932] 2 K.B. 304. Furthermore, a statutory tenancy would cease on the death of the statutory tenant and cannot be transmitted by will or on intestacy; see *John Lovibond & Sons Ltd v. Vincent* [1929] 1 K.B. 687 and *Tan Khio Soei v. Ban Hin Lee Bank Ltd* [1964] M.L.J. 71. However the members of the family of a statutory tenant are protected by s. 16(c): see *Foo Kok Hui v. Saraswathy* [1961] M.L.J. 91 and *Yeo Seow Inn v. Chan Khit* [1967] 2 M.L.J. 197.

*Co. Ltd. v. GOh Ah Kow*²² and *Teo Ee Hup v. Syed Hussain Bin Abdul Rahman Alkaff*.²³

In the former case, his Lordship refused to follow *Summers v. Donohue* because the provisions of the English Act were different from section 3(1).²⁴ In the latter case, he expressed the view that a tenant in such a situation could not be a statutory tenant because under section 27, a statutory tenant continues to hold the tenancy from month to month on the same terms and conditions as the original tenancy, whereas in a situation where notice to quit was given as a preliminary step to an application for the increase of rent, after the Board has fixed the new rent, the tenant “was not holding the premises on the same terms as before: the most important term in a controlled tenancy, namely rent was not the same.”²⁵

It is submitted that this reasoning is erroneous. It is true that section 28 of the Act states that a statutory tenant shall observe and be entitled to the benefit of all the terms and conditions of his original tenancy, but this does not mean that the rent of the statutory tenancy must be the same as that of the original contractual tenancy. In fact section 7(1) seems to apply equally to both contractual and statutory tenancies, so that the rent of a statutory tenancy can be increased just like a contractual tenancy.

The third decision of the High Court on this point is the judgment of Sinnathuray J. in *Chiang Yik Mun t/a Bunny Tailor v. CYC Shanghai Shirt Co. Pte. Ltd.*,²⁶ where his Lordship also declined to follow *Summers v. Donohue*.²⁷

The Decision of the Court of Appeal

1. *Statutory tenancy results from the notice to quit*

The Court of Appeal was firstly of the opinion that “the notice to quit determined the contractual tenancy and that [the tenant] became a statutory tenant” even though the purpose of the notice to quit was to enable the landlords to obtain an increase in rent.²⁸ This must be right; a notice to quit given to the tenant for whatever reason determines the contractual tenancy and the tenant clearly falls within the definition of a statutory tenant in section 27.

2. *Evidence of intention to create a new contractual tenancy*

However, the court dismissed the appeal because in its view it was clear from the contents of the notice to quit that the landlords intended to grant Teo Chwee Geok a “fresh contractual tenancy” at the new rent to be ap-

²² *Supra*, n. 9.

²³ *Supra*, n. 9.

²⁴ *Summers v. Donohue* concerned s. 3(1), Rent and Mortgage Interest Restrictions (Amendment) Act 1933, which is different from s. 7. However, it was not because of s. 3(1) that the court in *Summers v. Donohue* concluded that the tenant in such a situation became a statutory tenant. The court was laying down a general principle of law.

²⁵ *Supra*, n. 9, at p. 144.

²⁶ See *supra*, n. 5.

²⁷ On the ground that *Summers v. Donohue* is not an authority for the above principle because no arguments were made to the court on this question. The writer has argued elsewhere that this conclusion is doubtful; see *supra*, n. 3, at p. 299.

²⁸ [1986] 2 M.L.J. 325, 327.

proved by the Board. On this basis the court ruled that from the date the Board approved the increase of rent there was a contractual tenancy between the parties. The relevant part of the notice to quit was as follows:

If you desire to remain in occupation of the said premises...we are prepared to grant you *a new tenancy* at a monthly rent of \$130.00 subject to the approval of the Rent Conciliation Board, Singapore, (emphasis added)

This is in fact unequivocal evidence that the parties did intend to create a new contractual tenancy based on the new rent. Therefore the court's conclusion on this point was certainly right.

In addition there seems to be nothing in law which would prevent the parties from converting a statutory tenancy to a contractual tenancy by agreement. In *Bungalows (Maidenhead) Ltd. v. Mason*²⁹ the English Court of Appeal rejected the suggestion that the parties could not by agreement turn a statutory tenancy into a contractual one.

It is also on this ground that the conclusion reached in *Tea Ee Hup v. Syed Hussain bin Abdul Rahman Alkaffis* supportable. In that case, the notice to quit contained a similar offer of "a fresh tenancy" by the landlord to the tenant.³⁰ However, there was no evidence of such an offer in *The Great Eastern Life Assurance Co. Ltd. v. Goh Ah Kow and Chiang Yik Mun t/a Bunny Tailor v. CYC Shanghai Shirt Co. Pte. Ltd.*

3. Time gap between notice to quit and new contractual tenancy

It is interesting to note that in the instant case there was a gap of two months between the date when the notice to quit took effect (*i.e.*, on April 1) and the date in which the order of the Board came into effect (*i.e.*, on June 1). The effect of the Court of Appeal's decision was that the tenant was a statutory tenant at least until the order of the Board became effective, even though the notice to quit was given as a preliminary step to an application for an increase in rent.

However there was no such time gap in either *The Great Eastern Life Assurance Co. Ltd. v. Goh Ah Kow* or *Tea Ee Hup v. Syed Hussain bin Abdul Rahman Alkaff*; the Board's order came into effect on the termination of the contractual tenancy. Therefore if there was sufficient evidence of an intention to create a new contractual tenancy, this would follow immediately on the termination of the old contractual tenancy, and there would have been no period of time when the tenant could have been a statutory tenant. As was submitted, there was such evidence in the latter case, therefore it is factually consistent with the decision of the Court of Appeal in the instant case.

However Rajah J.'s view of his own decision in these two cases was that they established the principle that a notice to quit given with a view to an application to the Board to increase rent "did not *ipso facto* operate to bring about a statutory tenancy".³¹ This seems to suggest that had there been a time gap between the termination of the contractual tenancy and the order

²⁹ [1954] 1 W.L.R. 769.

³⁰ *Supru*, n. 9 at p. 144.

³¹ Rajah J. expressed this view in the instant case; [1986] 2 M.L.J. 325, 326.

of the Board, he would still hold that the tenant remained a contractual tenant during this period. If that was indeed his view, it must now be considered as erroneous.

In *Chiang Yik Mun t/a Bunny Tailor v. CYC Shanghai Shirt Co. Pte. Ltd.* there was also a time gap between the termination of the contractual tenancy and the Board's order; however, Sinnathuray J. did not rule on the status of the tenant during this period of time.

4. *Inference of a contractual tenancy from agreement on new rent*

The decision of the Court of Appeal up to this point is commendable. Unfortunately the court introduced a new dimension when it stated that:

...it is essential to determine the inference that should be drawn from the act the order of the Rent Conciliation Board was a consent order. Plainly, it must be inferred that the appellants and Teo Chwee Geok had, when they appeared before the Board, agreed to the Board fixing the monthly rent of \$120/-. In the context of the appellant's object in sending the notice to quit, which was to obtain a lawful increased rent and not to recover possession of the premises, it is a reasonable inference that the appellants agreed to grant and Teo Chwee Geok agreed to accept a fresh contractual tenancy on the same terms as the original contractual tenancy...³²

This is unfortunate because, firstly, it was unnecessary. There was no need to draw any inference of an intention to create a new tenancy from the consent order of the Board because (as the court noted) the intention was already clearly expressed in the notice to quit.

Secondly, it is submitted that such an inference might not be right if used in other cases where it was not already clear that that was what the parties intended. In a situation involving rent controlled premises, the landlord cannot turn out the tenant except under one of the situations provided in the Act.³³ He may however be able to increase rent in certain situations, and if one of these situations applies he would certainly want to and is entitled to apply for an increase in rent. From the tenant's point of view, if the situation clearly falls within section 7(1), he may not want to dispute the landlord's application. In such a situation, the consent order is no indication that the parties intended a new contractual tenancy. In fact, as far as the landlord is concerned he would probably rather not have the tenant at all. But since he cannot turn out the tenant, the next best thing is to obtain an increase in rent. Such conduct *per se* certainly cannot be inferred as an intention to grant a new contractual tenancy. It is equally consistent with the landlord intending the tenant to continue as a statutory tenant but at a higher rent.

5. *Other conduct which may support the inference of a new contractual tenancy*

In addition to the inference drawn from the consent order, the court also expressed the view that:

The subsequent conduct of the appellants also supports the existence of a new contractual tenancy. The evidence was that from June 1, 1952

³² At p. 327.

³³ See s. 15.

to December 1976, a period of 24 years, the appellants accepted payment of the monthly rents at the rate of \$120/- per month without any reservation that the rents received were in respect of a statutory tenancy and that in their notice to quit [to the respondent] it was stated that Teo Chwee Geok held the premises "on a tenancy from (the appellants)".³⁴

Once again such an inference was not necessary and, in addition, it is questionable. There cannot be many landlords who are saddled with statutory tenants, who would note in the receipts for rents received or elsewhere, that the tenant is a statutory tenant. In any event the law does not require them to do so. Therefore the failure to do this could not be taken as an indication of the status of the tenant, any more than if the tenant was noted as a statutory tenant when in fact he was a contractual tenant.

Further, the fact that in the notice to quit given to the respondent it was stated that Teo Chwee Geok held the premises on a tenancy is an equivocal fact. It could be equally consistent with the fact that the tenant was viewed as a statutory tenant. A statutory tenancy is nonetheless a tenancy and can be correctly described as such.³⁵

It is submitted that the court was reading too much into the acts and conduct of the parties which were perfectly consistent with a less contorted interpretation.

Are there in fact any situations, other than the express offer of a new contractual tenancy in the notice to quit, where the inference that such a new tenancy was intended could be drawn? A good example can be found in *Bungalows (Maidenhead) Ltd. v. Mason*.³⁶ In this case the court held that there was an agreement to enter into a new contractual tenancy based on the fact that the landlord's agent and rent collector called at the premises (after the death of the tenant) with a new rent book, and it was agreed between him and the tenant's daughter, acting as the widow's agent, that the widow should become the new tenant (she having become a statutory tenant after the tenant's death).

Besides this, there could be other situations where the inference could be drawn. Whatever it is, the conduct must be unequivocal and point clearly to the fact that the parties intend a new contractual tenancy.

Conclusion

It is arguable that the inference drawn by the court that there was a new contractual tenancy based on the consent order of the Board, the acceptance of rent without qualification and the description of the relationship as a tenancy is *obiter dicta*. It was not necessary to the decision. It is hoped that this part of the judgment will not be followed. However the principle

³⁴ At p. 327.

³⁵ In s.2 of the Act, "tenancy" is defined as "any lease, demise, letting or holding of premises whether in writing or otherwise, by virtue whereof the relationship of landlord and tenant is created..." More pertinently, a "tenant" is defined to include a statutory tenant. In fact it has been held that the word tenancy when used in the Act includes both statutory and contractual tenancy. See *Foo Kok Hui v. Saraswathy* [1961] M.L.J. 91 and *Yeo Seow Inn v. Chan Kuit* [1967] 2 M.L.J. 197, which concerned the interpretation of s. 16(c). Even in ordinary parlance, it is not incorrect to describe a statutory tenancy as a tenancy. .

³⁶ See *supra*, n. 29.

embodied in this conclusion that certain conduct of the parties may be used to draw an inference that a new contractual tenancy was formed which replaced the statutory tenancy is right and would be useful in future cases.

From these cases, it would appear that the courts are inclined to find a new contractual tenancy even on rather flimsy grounds. With this in mind, landlords are well advised to give their tenants a notice to quit after the Board's order to increase rent, if they want to ensure that the tenant becomes a statutory tenant, as it would be to their advantage to do so.

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