[2012] UKPC 14
Privy Council Appeal No 0066 of 2011

JUDGMENT

Lamusse Sek Sum & Co *v* Late Bai Rehmatbai Waqf

From the Supreme Court of Mauritius

before

Lord Hope
Lord Brown
Lord Mance
Lord Dyson
Lord Sumption

JUDGMENT DELIVERED BY LORD HOPE ON

23 May 2012

Heard on 29 March 2012

Appellant	*Respondent*
Ghansiamdas Bhanji Soni R Saha Y Moonshiram S Gigabhoy	Anwar Moollan Kamlesh Domah
(Instructed by S B Solicitors)	(Instructed by Streathers Solicitors LLP)

LORD HOPE

1. This case raises a short but important point about the meaning and effect of the Second Schedule to the Landlord and Tenant Act 1999, as amended by section 11 of the Landlord and Tenant (Amendment) Act 2005. That section repealed the Second Schedule to the principal Act and enacted in its place the Second Schedule set out in the Schedule to the 2005 Act. The effect of this amendment was to replace the formula which could be used to determine the amount of the increase of rent permitted by section 9(4) of the principal Act with a new formula. It also added a provision as to the date when any increase in rent resulting from its application was to take effect. The dispute between the parties is as to the meaning of the words in the Schedule which identify the date as from which the increased rent becomes payable.

2. Section 9(4), as amended by the 2005 Act, provides:

> "Where any business premises were let to a tenant on or before 1 July 2005, the landlord shall be entitled to and may increase the rent payable by an amount determined in accordance with the Second Schedule."

3. The Second Schedule to the 1999 Act, as amended, is in these terms:

> "1. For the purpose of section 9(4), the rent may be increased every year, starting from the date of the request for increase of rent up to 30 June 2012, in the amount calculated as follows –
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> Amount of increase = 15% x (A – B)
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> 2. In paragraph 1 of this Schedule -
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> "A" means
>
> (a) the market rent of the business premises as agreed upon by the landlord and the tenant; or
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> (b) where there is no agreement under paragraph (a), the market rent of the business premises as determined by the Fair Rent Tribunal; and

"B" means the rent payable under the existing tenancy as at the date of the agreement on, or determination of, the market rent, as the case may be.

3. The rent may be increased, in accordance with the formula set out in paragraph 1, every year, starting from the date of the agreement on, or determination of, the market rent, as the case may be, up to 30 June 2012."

The proceedings

4. The appellant is the tenant of business premises at 2 Farquhar Street, Port Louis, owned and let by the respondent. Prior to 1 July 2005 the monthly rent payable by the appellant was Rs 3,861 (excluding VAT). By letter dated 12 August 2005 the respondent informed the appellant that it had decided to increase the monthly rent to Rs 16,145 on the basis that the market rental for the premises was Rs 85,760 per month. Reference was made to the provisions of the 2005 Act which, it was said, permitted this increase. The appellant did not agree with the amount of the market rent as assessed by the respondent, so the respondent applied to the Fair Rent Tribunal for the determination of the market rent.

5. On 11 March 2008, while the application for the determination of the market rent was still under consideration by the Tribunal, the respondent lodged a plaint in the District Court of Port Louis in which it claimed arrears of rent due from 1 August 2005 to the date of the plaint amounting to Rs 724,756 with interest to the date of payment and repossession of the premises for non-payment and or irregular payment of rent. In its plea in reply the appellant denied that the sum claimed was due and submitted that the action was premature. It explained that it had not paid the sum claimed as the rent was disputed and as a case for the determination of the market rent was presently pending before the Fair Rent Tribunal. Evidence was led before HH Mrs Jannoo-Jaunbocus. After the appellant's case was closed counsel for both parties sought a postponement as the case pending before the Fair Rent Tribunal was nearly over. The magistrate granted the postponement. The Fair Rent Tribunal delivered its findings on 15 October 2009. It fixed the market rental value of the premises at Rs 60,000 and recommended that the parties apply the Second Schedule to the Act.

6. The magistrate delivered her judgment on 4 December 2009. She said that there were two issues to be determined: as from what date did the increase operate, and whether it was reasonable to make the order prayed for. She held that the increased rent was payable from the date when it was claimed by the landlord. The tenant could not ignore section 11(4) of the 1999 Act and say that it would pay only from the date of the determination. The power to order a refund in section 11(5) confirmed this interpretation, as there would be no need of such a provision if the tenant was asked to pay only the rent he was actually paying pending the

determination. As the rent due had not been paid, there had been a breach of the obligation and it was reasonable to make a possession order.

7. Section 11 of the 1999 Act sets out the jurisdiction and powers of the Fair Rent Tribunal. Subsections (4) and (5) are in these terms:

> "(4) Notwithstanding the lodging of an application before the Tribunal, the tenant shall pay the rent claimed by the landlord.
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> (5) The Tribunal may, on making the determination, order that any amount in excess of the fair rent paid by a tenant shall be –
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> (a) refunded to him by the landlord; or
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> (b) applied in satisfaction of rent payable in the future at such rate and over such period as it thinks fit."

8. The appellant appealed against the decision of the magistrate to the Supreme Court. On 15 July 2010 the Supreme Court (Chui Yew Cheong and Beesoondoyal JJ) dismissed the appeal. It held that sections 11(4) and (5) of the 1999 Act showed that it was the clear intention of the legislature that the increase to which the landlord was entitled in accordance with the prescribed formula was payable from the time when the request for the increase was made. Reference was made in support of this interpretation to a statement by the Minister of Housing and Lands when introducing the Landlord and Tenant (Amendment) Bill at Second Reading in the Legislative Assembly. In his opening statement he said that the increase would start from the date of the request for the increase. The court acknowledged that a first reading of paragraph 3 of the Second Schedule would tend to support the view that the increase would take effect from the determination of the fair rent by the Tribunal. But in its view that interpretation would be contrary to the general scheme of the Act, so it should be restricted to situations where the parties are agreed that the increase should be dependent upon the determination of the Tribunal. As for the issue of reasonableness, the court held that the magistrate should have exercised her discretion to allow the appellant the opportunity to pay the arrears. It substituted an order ordering the appellant to quit the premises unless an amount representing the increase in rent for the period from July 2005 to October 2009 was paid by the end of July 2010.

9. The appellant has appealed as of right against that decision to the Judicial Committee. The Board was told that the amount referred to in the judgment of the Supreme Court has now been paid and that the issue of repossession does not now arise. It was however addressed by counsel on the issue as to the date as from which the increase claimed by the landlord become payable. As can be seen from

the foregoing narrative, the courts below accepted the argument for the respondent that the answer is to be found in the provisions of section 11(4) and (5) of the 1999 Act. It is however necessary to look beyond those provisions to understand the part they now play in the system for permitted increases in rent as a result of the amendments which were made by the 2005 Act.

The old system

10. The effect of the amendments made by the 2005 is best seen in the context of the provisions regulating the old system which they replaced. Part III of the 1999 Act set out a system of rent control. In simple terms, the rent payable was to be a fair rent for the premises let by the landlord. Section 6 provided that, until and unless it was varied by an increase permitted by section 9 or by a determination of the Tribunal, it was, in the case of premises such as those in this case which were let on or before 15 August 1999, the rent agreed upon by the landlord and the tenant (see the definition of "rent" in section 2) which was lawfully due or actually paid as rent at that date. The only increases that were permitted were those set out in section 9. The relevant provision for present purposes was that set out section 9(4), which provided:

> "(4) Where any business premises, other than industrial premises, were let to a tenant on or before 15 August 1999, the landlord shall be entitled to and may increase the rent payable by an amount determined in accordance with the formula set out in the Second Schedule."

11. The Second Schedule set out the following formula to determine the increase in rent permitted by section 9(4):

> "1. For the purpose of section 9(4), the formula shall be –
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> 10% x A x B
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> 2. In paragraph 1 of this Schedule –
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> "A" means –
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> (a) the rent payable on 1 December 1993; or
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> (b) in the case of a letting which started after 1 December 1999, the rent payable at the date of the commencement of the letting;
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> "B" means the number of years of tenancy which shall not exceed 5."

It should be noted that no reference was made in this formula to the market rent for the premises. The effect of the Second Schedule was that the amount of the permitted increase could be determined by means of a simple arithmetical calculation based on facts that were readily ascertainable without the need to apply for a determination by the Fair Rent Tribunal.

12. As already noted, the jurisdiction and powers of the Fair Rent Tribunal are set out in section 11 of the Act. Under the old system its jurisdiction was confined to the determination of a fair rent for the premises. Section 11(1) provided:

> "(1) The Tribunal shall, notwithstanding any other enactment, have exclusive jurisdiction, on an application made to it by a landlord or a tenant, to –
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> (a) determine the fair rent of any premises let after 15 August 1999;
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> (b) subject to section 14, review, maintain, vary or set aside any determination made under paragraph (a); and
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> (c) subject to section 4, review, maintain, vary or set aside any agreement referred to in that section in so far as it relates to any matter provided for in this Part."

The only place where expression "market rent" appeared in the 1999 Act under the old system was in section 13(f), where one of the circumstances that the Fair Rent Tribunal could take into account in determining the fair rent of any premises was the market rent of similar premises in the neighbourhood. Section 14 provided that, subject to certain exceptions, the Tribunal was not to review a determination made by it until the lapse of three years after it was made. Section 4 provided that nothing in the Act was to prevent the landlord and the tenant from entering into a written agreement and that any rent so agreed was to be deemed to be the fair rent for the premises.

13. Section 11(3)(b) gave power to the Tribunal to order that the rent of any premises was to gradually increase over a period not exceeding 48 months from the date of its determination in order not to cause excessive hardship to the tenant. The implication of this provision was that, unless an order to that effect was made, the whole amount of any increase was payable as from the date of the determination. Sections 11(4) and (5) were in the terms set out in para 7, above. Section 11(4) laid down a rule of general application that, notwithstanding the lodging of an application before the Tribunal to determine the fair rent of the premises, the tenant was to pay the rent claimed by the landlord. Section 11(5)

provided for what was to be done if the fair rent determined by the tribunal was less than the amount paid by the tenant in accordance with section 11(5).

14. The main point to notice about these provisions is that they were all designed to fit in with the jurisdiction of the Fair Rent Tribunal which, under the old system, was to determine the fair rent for the premises.

The new system

15. As has already been seen, the 2005 Act replaced the formula set in the Second Schedule of the 1999 Act with a new formula which introduced a new concept that had not previously been used as the yardstick for the determination of permitted increases in the rent payable for business premises. This was the concept of the market rent. Section 9(4) was amended so that it now reads:

> "(4) Where any business premises were let to a tenant on or before 1 July 2005, the landlord shall be entitled to and any increase the rent payable by an amount determined in accordance with the Second Schedule."

Section 11(1)(a) was also amended, so that it now reads:

> "(1) The Tribunal shall, notwithstanding any other enactment, have exclusive jurisdiction, on an application made to it by a landlord or a tenant, to –
>
> (a) determine the fair rent of any premises let after 15 August 199; or the market rent of business premises let on or before 1 July 2005."

Section 11(3)(b) was amended by excluding business premises from the power to order that the rent was to increase gradually. Section 11(5), which enabled an amount paid in excess of the fair rent to be recovered, was not extended to include cases where an amount was paid in excess of that which was recoverable by way of an increase calculated by reference to the market rent under the new formula. No change was made to section 13(f), which continues to provide that the market rent of similar premises in the neighbourhood is one of the factors among several that may be taken into account in the determination of a fair rent.

Discussion

16. The differences between the old system and the new that this survey reveals are of critical importance for a proper understanding of what is meant by paragraph 3 of the Second Schedule under the new system. Paragraph 3 provides that the rent may be increased in accordance with the formula every year "starting

from the date of the agreement on, or determination of, the market rent, as the case may be." As already noted, the Supreme Court recognised that a first reading of those words would tend to support the view that, in the absence of agreement, the increase takes effect from the date of the determination of the market rent by the Tribunal. It was diverted from this conclusion because it appeared to the court that such an interpretation would be contrary to the general scheme of the Act, and in particular from the scheme indicated by section 11(4) and section 11(5). For the following reasons, the Board has concluded that the Supreme Court's interpretation of the general scheme of the Act was mistaken. Far from being contrary to the meaning that a first reading of the words in paragraph 3 tended to indicate, the general scheme of the Act, as amended, is entirely consistent with it.

17. First, the amended provisions must be read in the light of the fact that the expressions "fair rent" and "market rent" mean different things. The fair rent is a creature of statute, to be determined by the Tribunal on an application made to it under section 11. The market rent, as section 13(f) indicates, is one of the circumstances that may be referred to in the determination of the fair rent. It will be an important factor in determining what is fair as between the landlord and the tenant, and if the premises to which it relates are truly comparable it may be taken to be the best evidence. But the use of these two expressions in the same section indicates that they must not be taken, for the purposes of the statute, to mean the same thing.

18. Second, the fact that they must not be taken to mean the same thing is confirmed by section 11(1)(a), which uses both expressions in the same paragraph. The reason for this is that they refer to two different exercises. On the one hand, there is the determination of the fair rent of any premises, which is to be done by applying the principles set out in section 13. On the other, there is the determination of the market rent of business premises for the purposes of the Second Schedule, to which the principles set in section 13 do not apply. As the words of section 13 indicate, those principles apply to the first exercise, not the second. It may be that the Tribunal will wish to apply the same principles when it is carrying out the second exercise. But it is not required by the words of the statute to do so.

19. Third, section 11(4) must be read in the context of the amended provisions of the Act. Account must also be taken of the fact that section 11(5) was not amended to include a reference to the determination of market rent for the purposes of the Second Schedule. Taken together, these subsections are concerned only with the situation where an application is made to the Tribunal for the determination of a fair rent for the premises. In that situation section 11(4) operates as a holding provision. The tenant must pay the rent claimed by the landlord, even if he claims that it is more than the fair rent. He has his remedy under section 11(5) if it turns out that he was right and he has been paying an amount in excess of the fair rent.

20. If paragraph 3 of the Second Schedule is given the meaning that the Supreme Court was inclined to give to it before it was diverted from this by what it regarded as the general scheme of the Act everything falls into place. Any increase in rent produced by an application of the formula will become payable from the date of the agreement, if the matter is agreed, or from the date of the determination of the market rent if it is not. In the meantime the tenant is not required to pay any increase on the amount previously payable. Section 11(4) must be taken not to apply, because it was designed for use only in cases where there is an application for the determination of a fair rent for the premises. Section 11(5) plainly does not apply, because it refers only to the payment of an amount in excess of the fair rent and because, if paragraph 3 is given its natural meaning, the situation to which it refers cannot arise in cases where the increase in rent is determined in accordance with the Second Schedule.

21. If confirmation is needed that this is what paragraph 3 of the Second Schedule was intended to mean, reference may be made to the way the matter was dealt with by the Minister of Housing and Lands in the legislative assembly. Glover J observed in *Madelen Clothing Co Ltd v Termination of Contracts of Service Board* [1981] MR 284, 287 that Mauritian law has always permitted reference to debates before the legislature as travaux préparatiores to determine the intention of the legislator. His prediction that the English Courts will gradually adopt a more flexible approach on this subject by extending it to enactments generally, not just to those giving effect to an international treaty, has now been realised. But the rules laid down in *Pepper v Hart* [1993] AC 593 are less flexible that the approach which Mauritian law favours which is derived from French law, and it is the Mauritian approach which the Board would apply in this context. Glover J was careful to add at p 288 that this approach should be used only where the law is ambiguous or self-contradictory and then only with the utmost circumspection. The controversy that has given rise to this case has been sufficiently acute to justify its use here. As for the requirement of utmost circumspection, it can be met by paying more careful attention to the way the debates progressed as the Bill received its second reading and progressed to the committee stage than appears to have happened when the Minister's words were examined in the Supreme Court.

22. The Supreme Court quoted, in support of its conclusion, words used by the Minister when opening the debate at second reading when the wording of the second Schedule was not yet in its final form. He said then that the increase would start from the date of the request for the increase. But at the end of what had been a vigorous debate he indicated that he had changed his mind. He said this:

> "As for the amendment that I am going to propose, previously we had 'from the date of the request for increase'. We believe that it is very fair that we replace it by 'from the date of the agreement on or determination of the market rent'."

An amended version of the Second Schedule which included these words in paragraph 3 was brought forward as promised, and it was approved when the Bill was considered at the committee stage. That is the version of it that passed into law when the Bill was enacted. It is plain that the intention that had been expressed previously was departed from in favour of the words that are now to be found in the Schedule which is now in force. The Minister's explanation of what his intention was are entirely consistent with the meaning that, for the reasons set out above, the Board would give to the words used in paragraph 3.

23. The Board appreciates of course that, just as this interpretation favours the tenant, it will be seen to be unfair to the landlord who will not be able to obtain the benefit of any increase until the Tribunal has been able to determine the market rent for the premises. The problem is one of delay. Among the amendments that the 2005 Act made to the 1999 Act was the addition to section 12 of a new subsection (10), which provides that the Tribunal shall make a determination not later than 12 weeks after the start of the hearing of an application to it under section 11. This amendment recognised the need, in fairness to landlords, for the determination of fair rents and market rents to be dealt with as soon as possible. But it did not address the delays in getting a Tribunal hearing in the first place. It may be that any solution to the problem requires more resources to be provided to enable the Tribunal to hear the applications that are made to it more quickly. If so, that is a matter requiring urgent attention.

24. This observation must not be read in any way as a criticism of the Tribunal. The fact is that the effect of the 2005 Act was greatly to increase the work it has to do with regard to business premises as the new formula cannot be made to work, if there is no agreement, without the determination of the market rent. This is in addition to the Tribunal's responsibility to respond as quickly as it can to requests for the determination of a fair rent for all manner of premises. It is to be hoped that due account will be taken of the effect of this judgment as soon as possible by providing more money for it to do its work, and if necessary by increasing the membership of the Tribunal so that it can handle this much increased workload.

Conclusion

25. For these reasons the appeal will be allowed, the order made by the Supreme Court set aside and the respondent's action dismissed. The respondent must pay the costs in the courts below and of the appeal to the Board.