

Judgment 16/2009

**Cotterill v Le Marquand – Court of Appeal (Civil Appeal
404) – 24 March 2009**

Landlord and tenant – appeal from order for eviction from dwelling – Rent Control (Guernsey) Law, 1976 – whether s.14 engaged – tenant’s application for rent to be assessed – s.14(1) did not apply to premises which did not have an assessed rent at the date that the eviction proceedings were begun – landlord therefore not prevented from commencing eviction proceedings – Rent Officer’s statutory duty to proceed with an assessment notwithstanding the eviction proceedings – appeal dismissed

IN THE COURT OF APPEAL IN THE ISLAND OF GUERNSEY

Civil 404

The 24th March, 2009 before Jonathan Philip Chadwick Sumption, OBE, QC, presiding, Sir John Nutting, QC and Sir Philip Bailhache.

SUSAN COTTERILL

(Appellant)

V

DAVID MICHAEL LE MARQUAND

(Respondent)

In the matter of the appeal by the above Appellant from the eviction order made against her by the Royal Court on 17 February 2009;

THE COURT having on 23 March 2009 heard the Appellant in person and Advocate P T R Ferbrache for the Respondent thereon, this day DELIVERED JUDGMENT in the terms attached hereto and: -

1. HELD that s14 (1) of the Rent Control (Guernsey) Law, 1976 did not protect a tenant who had a pending application to the Rent Officer at the time of the proceedings;
2. DISMISSED the appeal and AFFIRMED the order of the Royal Court; and
3. ORDERED that the Appellant shall not be charged Court Fees in respect of the Appeal, and otherwise MADE NO ORDER as to costs.

K H TOUGH

Registrar of the Court of Appeal

Approved Judgment
24 March 2009

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
(CIVIL DIVISION)**

Tuesday 24 March 2009

Before:

Jonathan Philip Chadwick Sumption OBE QC (President)
Sir John Nutting QC
Sir Philip Bailhache

Between:

SUSAN COTTERILL

(Appellant)

v

DAVID MICHAEL LE MARQUAND

(Respondent)

Miss Susan Cotterill was unrepresented
Advocate P T R Ferbrache for the Respondent

Texts

The Rent Control (Guernsey) Law 1976

JUDGMENT

THE PRESIDENT: This is the judgment of the Court on Miss. Susan Cotterill's appeal against an eviction order made against her by the Ordinary Court on 17 February 2009.

2. Flat 1, 8 Park Street is a residential flat in a building owned by the Respondent, David Le Marquand. It was let to Miss. Susan Cotterill under an agreement dated 1 January 2008, with effect from 1 February 2008, at £600 per calendar month payable monthly in advance, until termination by either party on one full month's notice from the rent due date. In a letter dated 28 November 2008, the landlord gave Miss. Cotterill two months' notice to quit, expiring on 1 February 2009. The letter was left under her door on 29 or 30 November 2008. Subsequently, on 3 December 2008, a formal notice to quit was served on her by the Deputy Sergeant.

3. It is common ground that the flat was a controlled dwelling for the purposes of the

Rent Control (Guernsey) Law 1976 (as amended). Section 3 of the Law provides that (subject to certain conditions which are not material for present purposes) the tenant of a controlled dwelling may apply in writing to the Rent Officer to assess a fair and reasonable rent. The Rent Officer is then required, ‘as soon as may be’, to consider the application and after making such investigation as the circumstances require, to assess or re-assess a ‘basic rent’: Section 3(4). This means a rent which takes no account of the payment of rates or the provision of furniture or household effects. The assessed basic rent is then recorded by the Rent Officer in a register of rents, and applies to the premises in question irrespective of any changes in their ownership or occupation until it is changed upon a periodical review by the States Cadastre Committee, or reassessed by the Rent Officer, or until five years has elapsed from the entry of the original assessed rent in the register: Section 3A. Controlled rents are subject to an automatic annual review by the Cadastre Committee under Section 11. There is also a right under Section 8 to apply to the Committee for a review of any specific decision of the Rent Officer, and under Section 10 a right of appeal on a point of law from the decision of the Committee on such a review to the Ordinary Court.

4. At the time of the delivery of the landlord’s letter of 28 November 2008, there was no assessed rent for Miss. Cotterill’s flat. So, on 2 December 2008, she applied to the Rent Officer to assess one. On 23 December 2008, the Rent Officer replied that he would not proceed to assess a rent, because her application had been made after she was first asked to vacate the flat by the landlord. The Rent Officer described this as the ‘current policy’. He appears to have thought that by assessing a rent in these circumstances, he would be taking sides in a dispute between the landlord and the tenant, and that he should not do so unless and until the ‘present issues’ between them were amicably resolved. The upshot was that no action was taken on Miss. Cotterill’s application. At the beginning of February 2009, when she was still in the flat, Mr. Le Marquand began eviction proceedings in the Ordinary Court. The order was made on 17 February 2009. Its effect is that she must vacate Flat 1, 8 Park Street, St. Peter Port, with a stay of execution for three months until 17 May 2009, subject to her continuing to pay rent at the current rate and to perform the terms of the lease during the period of the stay.

5. Miss. Cotterill’s first point can be dealt with quite shortly. It is that the Claimant in these proceedings, Mr. Le Marquand, is not the landlord, because the original tenancy agreement was signed by Mrs. Carol Le Marquand in that capacity. Miss. Cotterill candidly accepted that this was not her strongest point, and we agree. There was undisputed evidence before the Ordinary Court that Mr. Le Marquand was the sole owner of the building and that his wife acted as his agent for lettings. It follows that Mr. Le Marquand was entitled to intervene to enforce the terms of the tenancy agreement.

6. We therefore turn to the real point at issue, which concerns the effect on Mr. Le Marquand’s eviction proceedings of Miss. Cotterill’s application to the Rent Officer.

7. Guernsey law offers only limited protection to tenants against an eviction which is in accordance with the terms of the tenancy agreement. There are no statutory tenancies and no statutory security of tenure. A periodic tenancy determinable on notice may be brought to an end in accordance with its terms if notice to quit has been served by the Sergeant, or without notice on the ground of non-payment of rent or other material breach. If the tenant remains in possession after the landlord has become entitled to possession, the landlord may bring proceedings for eviction, and is entitled as of right to an eviction order, subject only to the Court's power to stay the order. A limited discretion to stay the order has existed by custom for many years. But since 1946 it has been enlarged and regulated by statute. Section 2 of the Law Giving the Court Increased Power to Stay Execution in Actions for Eviction empowers the Court to stay execution during such time and on such conditions as it thinks reasonable. Section 3 of the Law sets out a number of factors which the Court is required to take into account in exercising that power.

8. The only statutory provision which protects a tenant with rights under the Rent Control (Guernsey) Law 1976 is Section 14 of that law. As amended, this provides:

14. (1) No proceedings shall be commenced in the Ordinary Court by the landlord of a controlled dwelling in respect of which a reference or application has been made under the provisions of this Law for the eviction of the tenant of such dwelling within twelve months of the date of the latest assessment, re-assessment or review of the decision of the Rent Officer in respect of the basic rent thereof or, if an appeal has been lodged in respect of the basic rent of the dwelling under section ten of this Law, within twelve months of the determination or abandonment of such appeal.

(2) The provisions of the foregoing subsection shall not apply if the Ordinary Court is satisfied that the eviction proceedings are founded upon matters wholly independent of the operation of this Law.

9. In the Ordinary Court, most of the argument and evidence on Mr. Le Marquand's application turned on Section 14(2). Miss. Cotterill's evidence was that in September 2008 she had an altercation with Mr. Le Marquand, in the course of which he was abusive to her and she threatened to apply for an assessed rent. Her case was that that was why Mr. Le Marquand had given her notice nearly three months later. In his own evidence, Mr. Le Marquand denied this. He said that he had no knowledge of Miss. Cotterill's intention to apply to the Rent Officer until early December, after he had decided to give her notice and told her so. He said that his reason for wanting her to go was that she was in arrears with her rent and behaved unreasonably. The Bailiff conducted the hearing on the footing that that was the critical question. However, at the conclusion of the argument, instead of referring the issue to the jurats, as the judges of fact, he decided the proceedings entirely on the law. The relevant part of his judgment reads as follows:

Having regard to the provisions of Section 14, and particular regard to sub-section 2 of Section 14, of the Rent Control Law 1976, I note that you accept that notice was properly given of more than one month. Also you admit that there have been periodic arrears and that there is some money outstanding in arrears. Mr. Le Marquand was entitled to rely on that, and therefore I hold that there should be an eviction.

The Bailiff then referred to the jurats the question whether there should be a stay, and if so for how long.

10. We agree that in this case the eviction order was rightly made, although not for the reason given by the Bailiff. There are, as it seems to us, two problems about the way in which he dealt with the matter.

11. The first is that he appears to have regarded the issue as turning on Section 14(2), and to have had little if any regard to Section 14(1). Section 14(2) is a proviso to Section 14(1), which is relevant only if Section 14(1) would otherwise apply. The Bailiff's starting point should therefore have been Section 14(1). The effect of that sub-section is to prevent the landlord from commencing eviction proceedings within twelve months of the assessment or the latest re-assessment or review of a controlled rent. It cannot therefore apply to premises such as Flat 1, 8 Park Street, which have never had an assessed rent. At the time when Mr. Le Marquand commenced his eviction proceedings, Miss. Cotterill had made an application for an assessed rent, but there is no provision in the Law which protects tenants who have a pending application to the Rent Officer at the time of the proceedings. The Law does not even protect tenants who have a controlled rent at the time of the judgment, if it was assessed after the proceedings had begun. It follows that in this case the tenant is not protected by Section 14(1). There is therefore no scope for the operation of the proviso in Section 14(2).

12. That is enough to decide the present case. Since, however, there is some paucity of authority in this area, we think that we should say that in our judgment the Bailiff's approach to Section 14(2) was equally flawed. In a case where Section 14(1) would otherwise protect the tenant, the effect of Section 14(2) is that it will not protect her if the landlord's eviction proceedings are 'founded upon matters wholly independent of the operation of this Law.' Read literally, these words suggest that Section 14(1) can apply only where the eviction proceedings are 'founded upon' the operation of the Rent Control Law. However, it cannot really mean that. There are no circumstances in which the operation of the Rent Control Law ever could be the foundation of a right to evict, unless perhaps the tenancy agreement expressly provided for termination upon the tenant applying for or obtaining a statutory assessment of the rent. That is of course a possibility, but it is rather a remote one. We do not think that the draftsman of a provision such as Section 14 for the protection of tenants can have intended to limit its application to agreements in those terms. It is clear, in our judgment, that the purpose of Section 14(2) is to restrict the operation of section 14(1) to cases where the landlord is seeking an eviction in order to deprive the tenant of the benefit of a statutory controlled rent. If the Court is satisfied of that, then the tenant obtains a twelve month respite after the registration of an assessed, reassessed or reviewed rent, during which he can occupy the premises without having eviction proceedings brought against him. That involves an enquiry into the landlord's motives for seeking to evict the tenant, which is a question of fact. It follows that the Bailiff was in error in treating the operation of Section

14(2) as entirely a question of law. If Section 14(2) had arisen for decision (which in this case it did not), the Bailiff would have been required to refer to the jurats the question whether, when Mr. Le Marquand decided to terminate Miss. Cotterill's tenancy, he was aware of the risk that she would apply to the Rent Officer for an assessed rent and, if so, whether that was the real reason, or one of the real reasons, for his decision. The application of section 14(2) would have depended on their finding about that.

13. Miss. Cotterill has complained before us that the refusal of the Rent Officer to take any action on her application has deprived her of at least part of the protection of the Law of 1976. There is some force in this. We have not, of course heard from the Rent Officer, who is not party to these proceedings. But on the face of it he had no right to defer acting on her application on the ground that she was in dispute with her landlord or that there was an outstanding notice to quit, and if this is indeed 'current policy' it appears to be contrary to law. The Rent Officer has a statutory duty to proceed with an assessment (or, as the case may be, a re-assessment) 'as soon as may be' after receiving an application. The fact that the tenant has received notice to quit does not relieve the Rent Officer of this duty. Indeed, under Section 3(2A) he is empowered to assess or re-assess a rent even if the tenancy has actually come to an end since the application was made. There is no reason to regard a rent assessment after a notice to quit as pointless and it certainly does not constitute taking sides. If the assessment results in a reduced rent, the existing tenant will enjoy the benefit of the reduction for what remains of her notice period, and for whatever further period of occupation she may enjoy as a result of any stay of an eviction order. If it results in an increase, the landlord will enjoy the corresponding benefit for the same periods. The assessed rent will, moreover, apply to future tenancies for up to five years from its registration. This, however, is a matter for Miss. Cotterill to take up with the Rent Officer and the Housing Department. Mr. Le Marquand was plainly entitled to an eviction order, and no objection can be taken to the jurats' decision about the duration of the stay.

14. It is of course entirely a matter for the States, and not for us, what degree of protection it is thought right to grant to tenants. But we are bound to say that in its current form, Section 14(1) is arbitrary in its application and Section 14(2) is obscure in its language. If this legislation comes to be reviewed, these matters would benefit from some attention.

15. The present appeal, however, must be dismissed and the order of the Ordinary Court affirmed.