[WILSON, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

CHARIS E. GEORGHALLIDES,

Appellant (Plaintiff),

v.

CHRISTOFIS THEODOULOU,

Respondent (Defendant).

(Civil Appeal No. 4364).

Civil Procedure—Writ of possession—Civil Procedure Rules, 0.43A, r.1 (1) and (2)—The Civil Procedure Law, Cap. 6 section 14(2)—Stay of—Civil Procedure Rules, 0.40 r. 7 (b) and r. 11—Whether case in which writ of possession was issued is a "pending action" within section 20 of the Control of Rent (Business Premises) Law, 1961.

Rent Control—"Pending action" within section 20 (supra)—Landlord and tenant—Implied tenancy—Creation of—Requirements therefor.

Estoppel—Estoppel by record—Consent order—Mode of setting aside—Only by action.

Trespasser—Cannot confer a better title than he has.

Constitutional Law—Practice—Trials and Judgments—Should be concluded and judgments delivered without undue delay—Article 30.2 of the Constitution.

In an action brought by the appellant-plaintiff (the landlord) for the recovery of possession of a shop, a consent order was made on the 4th January 1960, by the District Court directing the respondent-defendant (the tenant) to deliver up possession on or before the 1st October 1960. The respondent having failed to comply with that order, the appellant applied for, and on the 4th November 1960, obtained by consent, the issue of a writ of possession under the Civil Procedure Rules, 0.43A to be executed not earlier than the 15th February 1961, the respondent-defendant undertaking to pay £28 monthly as damages for the use of the shop.

Now, the defendant having failed to deliver up possession of the shop, a bailiff was instructed to proceed with execution on the 2nd March 1961, but was prevented from executing it by a threatening crowd who gathered outside the premises.

On the following day, *i.e.*, on the 3rd March, 1961 the res-

pondent-defendant, filed an application which is the subject matter of this appeal, and prayed that the District Court stay the execution of the writ of possession. This application was based on the Civil Procedure Rules, Order 40, rules 1, 4, 7(b) and 11 ; Order 43A, rule 1 ; Order 48, rules 1 and 2 ; and the Civil Procedure Law, Cap.6, section 14(2). The grounds on which the application was based, which were given in the affidavit in support of the application sworn by the defendant-tenant on the 3rd March, 1961, were

(a) that in spite of his efforts the tenant was unable to secure alternative premises for his business ;

(b) that as he was a grocer it would take him over a month to remove the groceries from the shop, in question ;

(c) that he had been a tenant of the shop, the subject matter of the application, for the past 20 years, that he had three children and family to support, and that he owned no property whatsoever.

After several adjournments the hearing began on 17th June 1961. On that day the respondent-defendant filed a further affidavit dated the 3rd March, 1961, and raised for the first time in the proceedings the question that an implied monthly tenancy had been created in October 1960. The case was concluded on the 27th July 1961, and judgment delivered on 30th December, 1961. In the meantime, namely on the 17th October 1961, the provisions of the Rent Control (Business Premises) Law, 1961, (Law 17 of 1961) published on the 28th April 1961, came into operation by virtue of Law 39 of 1961 and the Judge mainly based his judgment on that Law holding that a case such as the present one in which a writ of possession was issued was a "pending action" within the provisions of section 20 of Law 17 of 1961. The High Court in an earlier case *Georghallides v. Constantinides*, (Civil Appeal No. 4362, reported in this volume at p. 99, *ante*) held that proceedings such as the present do not come within the ambit of section 20 of Law 17 of 1961 (*supra*).

It was argued on behalf of the respondent-defendant before the High Court that the order staying execution of the writ should be affirmed on two grounds : first, that a new contractual tenancy was created and, secondly, that the provisions of Order 43A, rules 1(1) and (2) of the Civil Procedure Rules, regarding the issue of a writ of possession, had not been com-

plied with namely that notice of the application for the issue of the writ was not served on the respondent's alleged partner.

Held : (1) No contractual tenancy was created by implication as there is no evidence of any unequivocal payment of rent or any unequivocal acceptance of such rent after judgment nor is there any other evidence of any correspondence or even conversation having taken place between the parties after judgment as to form the basis of a new tenancy.

(2) A party is bound by a consent order which constitutes an estoppel and unless all the parties agree, a consent order, when entered, can only be set aside by a fresh action brought for that purpose.

(3) As the respondent-defendant admitted on the date of the order for possession that he was a trespasser and as there was no evidence that the appellant had consented to any assignment or sub-lease of the premises in question at any time nor was the respondent entitled to assign or sublet, nor was the appellant notified of the formation of the partnership in 1956 or at any time. The tenant being a trespasser could not give any better title to his partner or any other person.

(4) In any event from the facts of the case it transpires that the respondent's partner had ample notice of these proceedings and the Court is satisfied that the appellant did not intentionally conceal any material fact from the Court nor was the Court misled in any way by appellant.

(5) Following *Georghallides v. Constantinides* (reported in this Volume on p. *ante*) this case is not a "pending action" within the provisions of section 20 of the Rent Control (Business Premises) Law, 1961.

Appeal allowed. Order of the District Court staying execution set aside.

Cases referred to :

Emeris v. Woodward (1889) 43 Ch.D. 185.

Ainsworth v. Wilding (1896) 1 Ch.D. 673.

Georghallides v. Constantinides 1961 C.L.R. 95.

Georghallides v. Constantinides, reported in this Volume on p. 99, *ante*.

1962
June 20, 21

CHARIS E. GEORGHALLIDES
v.
CHRISTOFIS THEODOULOU

Per curiam : (1) Since it is the constitutional right of every person to have his case heard within a reasonable time it is highly desirable that judgments reserved by the Courts should generally be delivered without any delay.

(2) In cases where legislation or other factors are likely to prejudice the rights of the parties it is the duty of the Judge to see that there is no undue delay in the hearing of the case and delivery of judgment.

Appeal.

Appeal against the order made by the District Court of Nicosia (Ch. K. Pierides, D.J.) dated the 30/12/61 (Action No. 3428/59) ordering stay of execution of the writ of possession issued in the action for so long as Law No. 17/61 is in force in its present form.

The appellant in person.

S. Devletian for the respondent.

The judgment of the Court was delivered by :—

JOSEPHIDES, J. : This is an appeal by the plaintiff against the order of the District Court of Nicosia directing that the execution of the writ of possession issued on the 4th November, 1960, be stayed for so long as the Control of Rent (Business Premises) Law, 1961 (Law 17 of 1961) is in force in its present form.

In order to appreciate the points raised in this appeal it is necessary to go into the history of these proceedings. The writ of summons was issued on the 10th September, 1959, and after the statement of claim and defence were filed and delivered a consent possession order was made on the 4th January, 1960. That order is in the following terms :

"This action coming on for hearing in the presence of Mr. L. Clerides, counsel for the plaintiff and Mr. X. Clerides, counsel for the defendant, and the action having been settled on the following terms and conditions, namely :—

"1. Defendant admits that he is a trespasser and agrees to evacuate the premises, the subject matter of this action on or before 1.10.1960.

"2. Defendant to continue paying the same rent till evacuation of the said premises.

"3. Defendant is entitled upon giving a month's notice in writing to evacuate the said premises earlier than the 1.10.1960.

"THIS COURT DOTH HERLBY ORDER AND ADJUDGE that the defendant do evacuate and deliver up vacant possession of the premises, the subject matter of this action, a shop situate at Ledra Street, No. 208, Nicosia, to the plaintiff on or before the 1.10.1960.

"No order as to costs".

The defendant-tenant not having delivered possession of the premises by the 1st October, 1960, the plaintiff-landlord applied to the District Court on the 4th October, 1960, for the issue of a writ of possession. Although the Rules provide that the writ may be issued by leave of the Court, obtained *ex parte* (Order 43A, rule 1 (1)), plaintiff nevertheless applied by summons, and notice was duly served on the other side. The defendant's (tenant's) opposition was filed on the 22nd October, 1960, supported by an affidavit sworn by him on the same date. In the affidavit it was stated that in or about July 1956, the defendant-tenant had entered into a general partnership with a certain A. Ashikalis, of Nicosia, to run a grocery shop, and that the said partner had been in actual possession of the shop in question together with the defendant. It was further stated by the defendant in his affidavit :—

"5. On the 19th October, 1960, I have, in the same way as I have so far been doing, deposited into the Bank of Cyprus the sum of £28.— being the rent for the month of October, 1960, and the said bank has accepted same in the usual manner.

"6. In view of the allegations made in paragraph 5 hereof I contend that the plaintiff has through his agent accepted the rent in respect of the shop concerned for the month of October, 1960, and that not only am I, subject to paragraphs 3 and 4 hereof, a tenant from month to month, but that the plaintiff has expressly and/or impliedly waived or abandoned the judgment involved and, therefore, he is not entitled to apply for a writ of possession as demanded or at all".

Both parties appeared before the Court on the 14th October, 1960, when the hearing of the application was adjourned to the 22nd October, 1960. On that day (when the opposition and the defendant's affidavit, to which I have referred, were filed), the plaintiff stated : "I deny that I had accepted money as rents after the judgment for evacuation, but I accepted money as mesne profits or compensation for the use of the shop by defendant".

The hearing of the application was again adjourned, and on the 4th November, 1960, defendant's counsel stated that defendant consented to evacuate the shop not later than the 15th February, 1961, and he submitted to the issue of a writ of possession to be executed not later than the 15th February, 1961, but without costs to either party. The plaintiff agreed and the Court gave leave for a writ of possession to issue but not to be executed before the 15th February, 1961 ; and the Judge then added this note : "Defendant undertakes to deposit with the Bank of Cyprus, Nicosia, the sum of £28.— monthly as damages for the use of the shop until the day of the evacuation".

The tenant did not deliver the premises by the 15th February, 1961, and a bailiff was accordingly instructed to proceed with the execution of the writ of possession. In fact, he did proceed to the shop in question on the 2nd March, 1961, and attempted to execute the writ, but he was prevented from executing it by a threatening crowd which gathered outside the premises.

On the following day, *i.e.* on the 3rd March, 1961, the defendant (present respondent) filed his application for stay on which the order, which is the subject of this appeal, was made. That application prayed the Court for a stay of execution of the writ of possession and it was based on the Civil Procedure Rules, Order 40, rules 1, 4, 7(b) and 11 ; Order 43A, rule 1 ; Order 48, rules 1 and 2 ; and the Civil Procedure Law, Cap.6, section 14(2). The grounds on which the application was based, which were given in the affidavit in support of the application sworn by the defendant-tenant on the 3rd March, 1961, were.

(a) that in spite of his efforts the tenant was unable to secure alternative premises for his business ;

(b) that as he was a grocer it would take him over a month to remove the groceries from the shop in question ;

(c) that he had been a tenant of the shop, the subject matter of the application, for the past 20 years, that he had three children and family to support, and that he owned no property whatsoever.

The plaintiff (appellant) filed an opposition and an affidavit in support. In his affidavit the plaintiff, *inter alia*, stated :—

"4. Defendant on more than one occasions has declared to me that he has no intention of quitting the said premises, that he is going to occupy them for ever, always concluding with the expression "Try and you will see". The previous statements and manifestations of his bad faith about not submitting to the Order of the Court, were made to me before and after the leave to issue a writ of possession was granted to me by the Hon. Court.

"5. To the best of my knowledge, information and belief the bailiff who on the 2nd of March, 1961, attempted to execute the writ of possession was prevented from the execution of his duties by a threatening crowd which gathered outside the premises in question at the said time and date.

"6. To the best of my knowledge, information and belief defendant is trying to gain time so that a new Bill by the House of Representatives will protect him from any further legal steps of eviction.

"7. Until present date no compensation as agreed, for the possession of my premises by the defendant, has been paid to me, as from the 1st October, 1960".

The application first came on for hearing before the trial judge on the 11th March, 1961, when it was adjourned to the 18th March, then to the 1st April, 1961, and eventually to the 17th June, 1961, when the hearing of the application began. On that day (the 17th June) the defendant-tenant (respondent) filed a further affidavit in support of his application dated the 3rd March, 1961. For the first time in the proceedings under appeal he raised the question that a monthly tenancy had been created in October, 1960. Paragraph 4 of his affidavit reads as follows :

"From documents and/or receipts traced only recently it has been ascertained that :—

"(a) on the day when the above-mentioned application was made by the plaintiff, i.e. the 4th October, 1960, I had already paid to the plaintiff the rent of the premises involved up to the 31st October, 1960, and the plaintiff had accepted same and therefore I was at the time at least a tenant from month to month. This tenancy was never determined by the plaintiff and consequently under the circumstances no writ of possession could be issued in this case.

"(b) On the 4th November, 1960, when leave to issue writ of possession was granted, the rent up to the 30th November, 1960, had already been paid and consequently I could have been considered a tenant from month to month until the 30th November, 1960. This tenancy has never been determined by the plaintiff".

It is pertinent here to observe that the defendant-tenant had previously put forward the contention that he was a tenant from month to month. This was contained in his affidavit dated the 22nd October, 1960, in opposition to the issue of the writ of possession (quoted earlier in this judgment); but, in spite of that contention, he subsequently, *viz* on the 4th November, 1960, consented to the issue of the writ of possession.

The defendant's (respondent's) application was heard on the 17th June, 1961, and it was adjourned to the 26th June, 1961, and subsequently to the 27th July, 1961, when the evidence was concluded. The addresses were made on the 28th July, 1961, when the judge reserved his judgment which he delivered on the 30th December, 1961.

In the meantime, that is between the day when the judgment was reserved and the delivery of the judgment, namely, on the 17th October, 1961, the provisions of the Control of Rent (Business Premises) Law, 1961, (Law 17 of 1961) which was published on the 28th April, 1961, came into operation by virtue of Law 39 of 1961, and the Judge mainly based his judgment on that Law, that is to say, he held that the case in which the writ of possession was issued by consent was a "pending action" within the provisions of section 20 of Law 17 of 1961, although the parties were not given an opportunity of being heard on that point.

We have already held in another case (*Georghallides* v

Constantinides, Civil Appeal No. 4362, dated 18th June, 1962) (reported in this Volume on p. 99, *ante*) that the present proceedings do not come within the ambit of section 20 of Law 17 of 1961.

The Judge further based his judgment on a second ground *i.e.* that Law 17 of 1961 was applicable to this case because the respondent (defendant) was a statutory tenant. The respondent did not support that ground before this Court and, consequently, it is not necessary for us to deal with it in this appeal.

It was contended on behalf of the respondent before us that the order staying execution of the writ should be affirmed on two grounds : first, that a new contractual tenancy was created and, secondly, that the provisions of Order 43A, rules 1(1) and (2) of the Civil Procedure Rules, regarding the issue of a writ of possession, had not been complied with.

In considering this case the following salient points have to be borne in mind :—

(a) That on the 4th January, 1960, the tenant (respondent) admitted in Court that he was a trespasser ;

(b) on the same day a possession order was issued by consent for delivery of the premises by the 1st October, 1960 ; and

(c) a consent order for the issue of a writ of possession was made by the Court on the 4th November, 1960.

As to the first point taken by the respondent, that is, that a contractual tenancy was created by implication, we think that it is sufficient to say that here we are concerned with the execution of a consent judgment, and there is no evidence of any unequivocal payment of rent or any unequivocal acceptance of such rent after judgment, so that a new tenancy may be created. There is no receipt or other document by the landlord, nor is there any evidence of any correspondence or conversation having taken place between the parties after judgment as to form a basis of any tenancy. The respondent's allegation is that a new tenancy was created in October, 1960, when the tenant suddenly discovered in June 1961 that he had made certain payments to the Bank before the 4th November, 1960, which he appropriated, as he said, to the rents for October and November, 1960, and that,

consequently, when the writ of possession was issued on the 4th November, 1960, there was a monthly tenancy in existence and the writ was wrongly issued. But, although the same contention regarding the creation of a monthly tenancy had been put forward earlier in the respondent's affidavit sworn on the 22nd October, 1960, filed in opposition to the issue of the writ of possession, the respondent, nevertheless, on the 4th November, 1960, consented to an order directing the issue of a writ of possession. On the authorities, a party is bound by a consent order which constitutes an estoppel and, unless all the parties agree, a consent order, when entered, can only be set aside by a fresh action brought for that purpose : *Emeris* v. *Woodward* (1889) 43 Ch. D. 185; *Ainsworth* v. *Wilding* (1896) 1 Ch. D. 673.

The second point taken by respondent was that the appellant failed to comply with the provisions of rule 1(1) and (2) of order 43A, *i.e.* that he failed to give notice of the application for the issue of the writ of possession to the respondent's partner who was stated to be in actual possession of the premises. Although the Rules provide that the application may be made *ex parte* the appellant applied by summons on the 4.10.60, and notice was served on the respondent (tenant) who, as already stated, at first opposed the application but eventually consented to the issue of a writ of possession, which was to be executed some three-and-a-half months later.

The respondent (tenant) in this case admitted on the date of the possession order that he was a trespasser ; and there was no evidence that the appellant (landlord) had consented to any assignment or sub-lease of the premises in question at any time, nor that the respondent (tenant) was entitled to assign or sublet, nor that the appellant (landlord) was notified of the formation of the partnership in 1956 or at any time. The tenant being a trespasser he could not give any better title to his partner or any other person.

By the respondent's affidavit, dated the 19th October 1960, filed in opposition to the application for the issue of the writ of possession, the Court had notice of the allegation that the respondent's partner (A. Ashikalis) was in possession of the premises, and if the Judge considered it necessary he could have directed that notice of the proceedings should be given to the partner. But the Court, nevertheless, proceed-

ed on the 4th November, 1960, to make an order, by consent of both parties, directing the issue of the writ of possession. Furthermore, from the facts of this case it is abundantly clear that the respondent's partner had ample notice of the proceedings, and we are satisfied that the appellant did not intentionally conceal any material fact from the Court, nor was the Court misled in any way by the appellant.

On the facts of this case we are of the view that the stay granted by the trial judge was unjustified, and we accordingly set aside his order and allow the appeal with out-of-pocket costs in favour of the appellant.

Before concluding our judgment we think that we ought to re-iterate the observations made by this Court in a previous appeal (*Georghallides* v. *Constantinides*, Civil Appeal No. 4335, now reported in 1961 C.L.R. 95) concerning the tenant of the adjoining premises, that is to say, "we have not been impressed with the attitude and conduct of the defendant throughout these proceedings. He has delayed and obstructed as far as he could the landlord from recovering possession of the property to which the Court has already declared that he is entitled".

Finally, we would like to observe that, as it is the constitutional right of every person to have his case heard within a reasonable time, it is highly desirable that judgments reserved by Courts should, generally, be delivered without any delay. Moreover, in cases where legislation or other factors are likely to prejudice the rights of the parties it is the duty of the Judge to see that there is no undue delay in the hearing of the case and delivery of the judgment.

Appeal allowed. Order of the District Court staying execution of the writ set aside. Out-of-pocket costs here and in the Court below in favour of the appellant.

Appeal allowed.
Order of the District Court staying execution set aside.