1978 February 15

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

DORA A. GEORGHIADOU,

Appellant-Plaintiff,

v.

THEODOSSIOS LAMBRIDES AND ANOTHER,

Respondents-Defendants.

(*Civil Appeal No.* 5713).

Rent Control Law, 1975 (*Law* 36/75)—*Rent—Reduction by* 20%—*May be effected by the tenant himself—Burden of proof that he was entitled to do so, because he is a person substantially affected by the abnormal situation, lies on him—And the Court has to make a finding in this respect—Section* 15 (1) *of the Law.*

Rent Control Law, 1975 (*Law* 36/75)—*Recovery of possession—Breach of covenant prohibiting use of premises as a dwelling house—Principles governing construction of such covenant—Refusal to order eviction notwithstanding the breach—Trial Judge's discretion—Section* 16 (1) (*b*) *of the Law—Principles on which Court of Appeal will interfere with Judge's discretion—Relevant discretion exercised by taking into account all surrounding circumstances—Not exercised wrongly.*

Landlord and Tenant—Recovery of possession—For failure to pay rent and for breach of covenant—Section 16 (1) (*a*) *and* (*b*) *of the Rent Control Law,* 1975 (*Law* 36/75).

The appellant-plaintiff, who is the owner of a ground floor dwelling-house at Nicosia, sued the respondents-defendants, who are her tenants under a contract of tenancy, and claimed an order of eviction on the ground (a) that the tenants have failed to pay the rent which was lawfully due in respect of the premises concerned, and (b) that the tenants have committed a breach of covenant by allowing the said premises to be used as a dwelling house, in breach of clause 9 of the contract of tenancy which provided that the premises would be used by the tenants as an

architect's premises. The appellant's claim was based on section 16 (1) (a) and (b)* of the Rent Control Law, 1975 (Law 36/75).

Regarding ground (a) above the trial Judge has held that the tenant was entitled to reduce the rent of the premises in question by 20% in accordance with the provisions of section 15** of the above Law and that he has paid all the rent which was lawfully due and payable. The trial Judge, has not, however, made any finding, as envisaged by the second proviso to section 15 (1)***, to the effect that the tenant had been substantially affected by the abnormal situation.

Regarding ground (b) above the trial Judge, after taking particularly into account that the persons who were allowed to reside temporarily in the premises were refugees, that those who were still living there when the action was tried were an old couple, both of them refugees and relatives of the tenant who was deriving no profit whatsoever from their presence in the premises but, instead, he was helping them financially, and that they were not to stay there in perpetual breach of the relevant covenant but they were expecting to move out as soon as Government would make available to them other accommodation, notwithstanding the breach of covenant, decided to exercise his relevant discretionary powers under the said section 16 (1) (b) and refused to order the eviction of the tenant because of such breach.

The plaintiff appealed.

Held, (1) that section 15 (1) does not prevent a tenant from proceeding, at his own risk, to reduce the rent payable by him by 20%, but if the matter is taken before a Court then the burden of proving that he was entitled to do so, because he is a person substantially affected by the abnormal situation, undoubtedly lies on him, and the Court has to make a finding in this respect; and that, accordingly, in the present case it was not open to the trial judge to hold, without first finding that the tenant had been substantially affected by the abnormal situation, that the rent due and payable to the appellant was

* Quoted at pp. 249–50 *post.*

** Quoted in full at p. 251 *post.*

*** Quoted in full at pp. 251–52 *post.*

not as provided for in the tenancy agreement but reduced by 20%, and that the tenant was not in arrears concerning the payment of the rent.

(2) that the part of this case, relating to appellant's claim for an eviction order because of failure to pay the rent due, will be retried by another judge.

(3) (*After stating the principles governing the construction of the covenant in question and the principles on which the Court of Appeal will interfere with exercise of discretion by a trial Judge vide p. 255 post*) that though there was a breach of the covenant prohibiting use of the premises as a dwelling house the relevant discretion of the trial judge under s. 16 (1) (b) of Law 36/75, was exercised by taking into account all surrounding circumstances (see *Western Bank Ltd.*, v. *Schindler* [1976] 2 All E.R. 393 at pp. 400, 401); and that such discretion has not been exercised wrongly (pp. 255–56 *post*).

Appeal partly allowed.

Cases referred to:

Luke v. *Inland Revenue Commissioners*, [1963] 1 All E.R. 655 at p. 664;

Artemiou v. *Procopiou* [1965] 3 All E.R. 539 at p. 544;

Western Bank Ltd., v. *Schindler* [1976] 2 All E.R. 393 at p. 399;

Lapithis v. *Stavrou* (1972) 1 C.L.R. 144;

M'Gregor v. *Underwood*, 1 T.L.R. 285;

R. v. *Brighton and Area Rent Tribunal.* Ex parte *Slaughter and Another* [1954] 1 All E.R. 423;

Levermore and Another v. *Jobey* [1956] 2 All E.R. 362;

Economou v. *Economou* (1977) 3 J.S.C. 320 at pp. 332, 335 (to be reported in (1976) 1 C.L.R.);

Neophytou and Another v. *Papasolomontos and Another* (1977) 4 J.S.C. 480 at pp. 485, 486 (to be reported in (1977) 1 C.L.R.);

Paphitis v. *Bonifacio* (1978) 1 C.L.R. 127.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (HjiConstantinou, S.D.J.) dated the 5th May, 1977, (Action No. 107/76) whereby her claim for an order of posses-

sion, C£144.- as arrears of rent and damages and mesne profits was dismissed.

C. Velaris, for the appellant.

G. Mitsides, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES P.: By this appeal the appellant—who was the plaintiff before the Court below—complains about the dismissal of an action which she instituted against the respondents, as defendants. By means of such action she claimed an order for possession of her premises at Mycalis street, No. 4, Nicosia, C£144 as arrears of rent for the months of July, August, September and October, 1975, and, also, damages and mesne profits as from November 1, 1975, until vacant delivery of the premises to her.

The material facts of this case, as they have been found by the trial Court, are as follows:

The appellant is the owner of a ground floor dwelling-house at the above address in Nicosia.

By a contract of lease, signed on December 4, 1971, the said dwelling-house was let to the respondents at the annual rent of C£600, payable quarterly in advance.

In the said contract the tenants, that is the respondents, are stated to be Theodossios Lambrides and Erving & Jones, of Nicosia, but, for the purposes of this case, we are only concerned really with the respondent Lambrides who is, in fact, the only tenant who has taken up possession of the premises in question and has, at all material times, been occupying and using them as his office as an architect; he will, therefore, be referred to, from now onwards in this judgment, as the "tenant".

Clause 9 of the contract of lease provided that the dwelling-house would be used by the tenant as an architect's office.

As from the commencement of the tenancy and until the Turkish invasion of Cyprus, in July 1974, the tenant has always been using the premises as his office, he was paying regularly his rent and was employing 4 or 5 employees.

Some time after, and because of, the Turkish invasion, the tenant left Cyprus and went to Athens, where he stayed with his daughter, who is married to an army officer who was, at the time, serving in Cyprus. On leaving Cyprus the tenant gave the keys of his office to his said son-in-law.

His son-in-law, with the knowledge and consent of the tenant, allowed, at about the end of August or the beginning of September 1974, two families of relatives of the tenant, who were refugees from Morphou, to enter his office and to use it as a residence.

The appellant came to know of this some time in September 1974, when she returned to Nicosia, after she had gone away too due to the Turkish invasion.

The tenant returned from Athens in December 1974 and he was visited then by the appellant who asked for payment of the rent for two quarters which was in arrears, and, also, inquired about the refugees who were staying in the premises. The tenant requested some time in order to pay the rent and promised to arrange everything; and, actually, by the end of June 1975, he had paid off all arrears of rent and, also, six of the refugees had left the premises.

There remained there, and are still residing in the premises, an old couple, who are the brother of the wife of the tenant and his wife; they are very poor and, therefore, they cannot afford to pay any rent for other premises; they are staying in the office of the tenant without paying any rent to him and they are awaiting to be offered by the Government a place of residence as refugees. The tenant is giving them financial assistance in view of the fact that they are relatives of his.

Both before and after the enactment, on July 11, 1975, of the Rent Control Law, 1975 (Law 36/75), the appellant and the tenant had several meetings in order to discuss the amount of rent which was due and payable. The tenant maintained that he ought to be discharged of any obligation to pay rent for a period of two months as from July 20, 1974, and that, thereafter, the rent should be reduced by 20% in accordance with the provisions of section 15 of Law 36/75.

They failed to reach an agreement and on November 3, 1975, the appellant sent to the tenant, through her advocate, a letter

informing him that she had terminated the tenancy because the premises were being used as a dwelling-house, in breach of an express term of the contract of tenancy, and she asked the tenant to deliver vacant possession of her premises within three weeks. Moreover, the tenant was asked to pay, within the same period, the sum of C£200, by way of arrears of rent, for the months of July to October, 1975.

The tenant replied, on November 7, 1975, by a letter of his advocate, in which it was contended that Law 36/75 was applicable to the premises; consequently, there was sent a cheque for C£56 in full satisfaction of all rents, up to December 31, 1975.

By a letter of November 20, 1975, the advocate of the appellant informed the advocate of the tenant that the said cheque had been received towards the appellant's claim as contained in the letter of November 3, 1975.

On December 30, 1975, the tenant sent, through his advocate to the advocate of the appellant, a cheque for C£120, in full satisfaction of all rents due for the period of January to March, 1976. This cheque was returned by the appellant's advocate who, by means of a letter dated January 5, 1976, informed the advocate of the tenant that the whole matter was being taken to Court; actually, the action, in which the appealed from judgment was given, was filed on January 8, 1976.

By means of her action the appellant claimed an order of eviction on the ground, first, that the tenant had failed to pay the rent which was lawfully due in respect of the premises concerned, and, secondly, that the tenant had committed a breach of covenant, namely of clause 9 of the contract of tenancy, by allowing the aforementioned refugees to reside in the premises.

The relevant legislative provisions are paragraphs (a) and (b) of subsection (1) of section 16 of Law 36/75, which read as follows:-

"16.-(1) Οὐδεμία ἀπόφασις καὶ οὐδὲν διάταγμα ἐκδίδεται διὰ τὴν ἀνάκτησιν τῆς κατοχῆς οἱασδήποτε κατοικίας ἢ καταστήματος, διὰ τὸ ὁποῖον ἰσχύει ὁ παρὼν Νόμος, ἢ διὰ τὴν ἐκ τούτου ἔξωσιν ἐνοικιαστοῦ, πλὴν τῶν ἀκολούθων περιπτώσεων:

(α) εἰς περίπτωσιν καθ ἣν οἱονδήποτε νομίμως ὀφειλό-

μενον ἐνοίκιον καθυστερεῖται ἐπὶ εἴκοσι μίαν ἢ περισσοτέρας ἡμέρας μετὰ τὴν ἐπίδοσιν ἐγγράφου εἰδοποιήσεως ἀπαιτήσεως εἰς τὸν ἐνοικιαστὴν καὶ δὲν ὑπάρξει οἱαδήποτε προσφορὰ τούτου πρὸ τῆς ἐγέρσεως τῆς ἀγωγῆς:

Νοεῖται ὅτι ἐνοίκιον θὰ θεωρῆται ὡς προσφερθὲν δυνάμει τῆς παραγράφου αὐτῆς, ἐὰν τοῦτο ἐστάλη διὰ συστημένης ἐπιστολῆς εἰς τὸ πρόσωπον τὸ δικαιούμενον νὰ εἰσπράξῃ τοῦτο. ἢ

(β) εἰς περίπτωσιν καθ' ἣν οἱαδήποτε ὑποχρέωσις τῆς ἐνοικιάσεως πλὴν τῆς πληρωμῆς ἐνοικίου (εἴτε δυνάμει τοῦ ἐνοικιαστηρίου συμβολαίου, εἴτε δυνάμει τῶν διατάξεων τοῦ παρόντος Νόμου), ἐφ' ὅσον ἡ ὑποχρέωσις εἶναι σύμφωνος πρὸς τὰς διατάξεις τοῦ παρόντος Νόμου, ἠθετήθη ἢ δὲν ἐξετελέσθη ὑπὸ τοῦ ἐνοικιαστοῦ καὶ τὸ Δικαστήριον θεωρεῖ λογικὴν τὴν ἔκδοσιν τοιαύτης ἀποφάσεως ἢ τοιούτου διατάγματος.

..

("16.–(1). No judgment and no order for the recovery of possession shall be made in respect of any dwelling-house or shop to which this Law applies or for the ejectment of a tenant therefrom except in the following cases:–

(a) where any rent lawfully due is in arrears for twenty-one days or more after the service on the tenant of a written notice of demand and if there is no tender thereof before the institution of the action:

Provided that rent will be deemed to have been tendered under this paragraph if it has been sent by registered post to the person entitled to receive it; or

(b) where any obligation of the tenancy, other than the payment of rent (either under the contract of tenancy, or under the provisions of this Law) which is consistent with the provisions of this Law, has been broken or not performed by the tenant and the Court considers it reasonable to give such a judgment or make such an order.

.....").

It has not been disputed that the tenant was entitled, under section 14 of Law 36/75, to be relieved from the payment of rent for the period of two months immediately after July 20, 1974, when the Turkish invasion of Cyprus commenced.

It has, however, been disputed that the tenant is entitled, under the provisions of section 15 (1) of Law 36/75 to reduce by 20% the rent payable for the premises under the tenancy agreement. The said provisions read as follows:–

"15.–(1) Διαρκούσης τῆς ἐκρύθμου καταστάσεως καὶ ἐν πάσῃ περιπτώσει οὐχὶ πέραν τῆς 31ης Μαρτίου 1978 ἅπαντα τὰ καταβαλλόμενα ἐνοίκια δι' ἀκίνητα μειοῦνται ἀπὸ τῆς 20ῆς Ἰουλίου 1974 κατὰ εἴκοσι τοῖς ἑκατὸν καὶ ὁ ἐνοικιαστὴς ἀπὸ τῆς ἡμερομηνίας ταύτης θὰ καταβάλλῃ τὸ οὕτω μειούμενον ποσὸν πρὸς πλήρη ἐξόφλησιν τῶν πρὸς τὸν ἰδιοκτήτην ὑποχρεώσεών του:

.....

Νοεῖται περαιτέρω ὅτι οὐδὲν τῶν ἐν τῷ παρόντι ἄρθρῳ διαλαμβανομένων ἐφαρμόζεται –

(α) ἐκτὸς ἐὰν ὁ ἐνοικιαστὴς ἀποδεδειγμένως ἔχῃ ἐπηρεασθῇ οὐσιωδῶς ἐκ τῆς ἐκρύθμου καταστάσεως. ἢ

(β) εἰς ἣν περίπτωσιν ὁ ἰδιοκτήτης ἀποδεδειγμένως ἔχει οὐσιωδῶς ἐπηρεασθῇ ἐκ τῆς συνεπείᾳ τῆς ἐκρύθμου καταστάσεως ἐφαρμογῆς τῶν διατάξεων τοῦ παρόντος Νόμου·

....."

("15.–(1). During the abnormal situation, and in any case not after March 31, 1978, all rents in respect of immovables are reduced, from July 20, 1974, by twenty per cent and from such date the tenant will pay the thus reduced amount in full satisfaction of his obligation to the landlord:

.....

Provided further that nothing in this section contained shall apply –

(a) unless it is proved that the tenant has been substantially affected by the abnormal situation; or

(b) in the case it is proved that the landlord has been substantially affected by the application, due to

the abnormal situation, of the provisions of this Law.

.....").

As a matter of fact the tenant has, also, instituted separate proceedings, namely application No. 210/76 in the District Court of Nicosia, by means of which he is seeking a decision that the rent payable by him under the tenancy agreement has to be reduced by 20% by virtue of the provisions of section 15(1) of Law 36/75. This application is still pending and is not relevant to the outcome of this appeal.

The learned trial Judge has found as follows in this respect in his appealed from judgment:-

" In my opinion section 15 (1) of Law 36/75 has a universal application, and unless and until it is established before the Court that it should be rendered inoperative because of any one of the reasons stated in the two provisos, the effect of the section is that the rent payable should be the reduced by 20% rent. If the plaintiff believed that the provision of section 15 (1) should be rendered inoperative in the case of this defendant, the plaintiff should proceed and establish before the Court that the defendant has not been substantially affected by the emergency.

.....

Having found as above I come to the conclusion that on 3.11.75 the only amount of rent lawfully due and payable was the sum of £56.000 mils which was promptly paid and was received by the plaintiff, and I consider it unnecessary to deal with the question whether or not the written notice of demand was a valid notice. Consequently the claim for possession on the ground that the defendant failed to pay lawfully due rent after a 21 days' notice of demand made in writing fails."

As regards the issue of the breach of a term of the contract of tenancy the Judge has held as follows:-

" In the case under consideration the following matters deserve particular attention:

The plaintiff had shown her polite feelings and good understanding by crediting the defendant with time to put everything in order. The defendant did in fact manage

and by end of June, 1975 paid all arrears of rent and sent away six of the eight persons who had made his office their dwelling-house. On 3.11.75 the plaintiff was simply complaining of the two persons that remained living in the premises. It is noteworthy that such persons have entered into the premises as refugees, during the defendant's absence, that they are related to the defendant who is not being paid any rent nor does he receive anything from them in exchange of his suffering them to live where he has his office, but instead he helps them financially. The old couple living in the premises are doing so temporarily awaiting for free Government accommodation. The premises were let on terms not expressly excluding their use for residential purposes, whereas they are constructed and designed for use as a dwelling-house. The use of the premises as made by the defendant were and still continue to be as an architect's office.

Thus, applying all the aforementioned authorities to all the facts and surrounding circumstances of the case under consideration and having particularly noted my above findings of fact I have arrived at the conclusion that the defendant can hardly be said to be in breach of his covenant as to the use of the premises let. However, in any case, on the basis of the considerations aforesaid, I do not think that it would be reasonable on this ground to make the order sought by the plaintiff. Consequently, the second ground on which the plaintiff has based her claim for an order for possession also fails."

Counsel for the appellant has complained that the trial Judge has held that the tenant was entitled to reduce the rent of the premises in question by 20%, without having made any finding, as envisaged by the second proviso to section 15 (1) of Law 36/75, to the effect that the tenant had been substantially affected by the abnormal situation.

It is correct that the tenant in his evidence did allege that he had been so affected, but it is, also, a fact that the trial Judge did not make any finding either way in this connection; nor can it be deduced from his judgment that he accepted as reliable in every respect the evidence of the tenant.

In our opinion section 15 (1) does not prevent a tenant from

proceeding, at his own risk, to reduce the rent payable by him by 20%, but if the matter is taken before a Court then the burden of proving that he was entitled to do so, because he is a person substantially affected by the abnormal situation, undoubtedly lies on him, and the Court has to make a finding in this respect.

In interpreting in this way the provisions of section 15(1), above, we have borne duly in mind the need to construe such provisions in a manner consistent with the object of Law 36/75 and to avoid producing any unreasonable result (see, *inter alia*, *Luke* v. *Inland Revenue Commissioners*, [1963] 1 All E.R. 655, 664, *Artemiou* v. *Procopiou*, [1965] 3 All E.R. 539, 544 and *Western Bank Ltd.* v. *Schindler*, [1976] 2 All E.R. 393, 399); and we do believe, indeed, that the construction which we have placed on the said provisions is both in accordance with their clear wording and with the object of Law 36/75, and that it does not lead, in any way, to any unreasonable result.

It follows from the above that in the present case it was not open to the trial Judge to hold, without first finding that the tenant had been substantially affected by the abnormal situation, that the rent due and payable to the appellant was not as provided for in the tenancy agreement but reduced by 20%, and that, therefore, the tenant was not in arrears concerning the payment of the rent.

We have considered what was the most appropriate course for us to adopt in the circumstances and we have decided that as it is not possible for us to say, without having seen the tenant testifying, that we believe him that he is a person substantially affected by the abnormal situation, this case has to be retried by another Judge as regards that part of it which relates to the claim of the appellant for an eviction order because of failure to pay the rent due; therefore, to that extent this appeal succeeds and the relevant part of the order of the Court below is set aside.

The next aspect of this case concerns the claim of the appellant for recovery of possession of her premises on the ground that the tenant has committed a breach of a term of the tenancy agreement, namely clause 9 thereof, which has been referred to already earlier on in this judgment.

The construction of such a covenant has to be made in the context of the tenancy agreement and in the light of all the surrounding circumstances (see, *inter alia*, our own case of *Lapithis* v. *Stavrou*, (1972) 1 C.L.R. 144, as well as the English cases of *M'Gregor* v. *Underwood*, 1 T.L.R. 285, *R.* v. *Brighton and Area Rent Tribunal. Ex parte Slaughter and another*, [1954] 1 All E.R. 423 and *Levermore and another* v. *Jobey*, [1956] 2 All E.R. 362).

We have no difficulty in concluding that clause 9 of the tenancy agreement in question excluded the use of the premises concerned as a residence and that, therefore, the tenant has committed a breach of the said clause; and counsel for the respondent has, actually, very fairly, conceded that this is so; also, as a matter of fact, the wording of the relevant passage of the judgment of the trial Judge, which we have quoted already in this judgment, indicates that he was inclined, too, to find that there was a breach of the aforementioned clause, even though such breach was only of a technical nature.

Notwithstanding the breach of covenant the trial Judge decided to exercise his relevant discretionary powers under section 16 (1) (b) of Law 36/75 and refused to order the eviction of the tenant because of such breach.

No doubt the Judge had to exercise his discretion judicially and we can only interfere with his decision in this respect if we are satisfied that he has done so wrongly (see, *inter alia*, the cases of *Economou* v. *Economou*, (1977) 3 J.S.C. 320, 332, 335*, *Neophytou and another* v. *Papasolomontos and another*, (1977) 4 J.S.C. 480, 485, 486** and *Paphitis* v. *Bonifacio*, (1978) 1 C.L.R. 127).

In the present instance the Judge took particularly, though not exclusively, into account that the persons who were allowed to reside temporarily in the premises were refugees, that those who were still living there when the action was tried were an old couple, both of them refugees and relatives of the tenant who was deriving no profit whatsoever from their presence in the premises but, instead, he was helping them financially, and that they were not to stay there in perpetual breach of the

* To be reported in (1976) 1 C.L.R.

** To be reported in (1977) 1 C.L.R.

relevant covenant—clause 9 of the tenancy agreement—but that they were expecting to move out as soon as Government would make available to them other accommodation as refugees.

In a case of this nature the relevant discretion has to be, and was, exercised by taking into account all surrounding circumstances (see, by way of useful analogy, the case of *Western Bank Ltd.*, *supra*, at pp. 400, 401); and we have not been satisfied that such discretion has been exercised wrongly; therefore, in this connection, this part of the appeal has to be dismissed.

In the result this appeal is partly allowed and partly dismissed for the reasons set out hereinabove; so, we have decided to make no order as to its costs.

Appeal partly allowed.
No order as to costs.