[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

CYPRUS CINEMA & THEATRE CO. LTD.,

Appellants-Defendants,

v.

CHRISTODOULOS KARMIOTIS,

Respondent-Plaintiff.

(*Civil Appeal No.* 4576).

Landlord and Tenant—Contract of lease—Breach of covenant in contract to pay rent—Eviction of tenant—Premises occupied by military forces—Performance—Impossibility of performance—Frustration of lease—Test for impossibility of performance—Doctrine of frustration—A contract of lease may become impossible of performance on rare occasions—No eviction by title paramount—Nor landlord responsible for eviction of tenant—Tenant not free, by reason of the eviction, from liability under the covenant—Provisions of section 56 (2) *of Contract Law, Cap.* 149 *applicable in present case.*

Contract — Contract of lease — Performance — Impossibility of performance—Frustration—See under "Landlord and Tenant" above.

Contract Law, Cap. 149, *section* 56 (2)—*Performance—Impossibility—See under "Landlord & Tenant" above.*

Frustration—Doctrine of frustration—See under "Landlord & Tenant" above.

Words & Phrases—Construction of expression "ἀνωτέρα βία" *and "injury or damage" occurring in contract of lease.*

Construction of documents—Contract of lease—Expressions "ἀνωτέρα βία" *and "injury or damage" in contract of lease.*

The appellant in this appeal complains against the judgment of the trial Court in two consolidated actions whereby he was adjudged to pay the amount of £810.—as arrears of rent. The dispute between the parties arose out of a contract of lease (the material parts of which appear at pp. 48 - 49 of the judgment *post*) by virtue of which the appellants leased from the respondent certain cinema premises known as "Regal cinema" for a period

of two years from the 1st January, 1963 to the 31st December, 1964. The tenant paid all the rents from the 1st January, 1963, to the 31st March, 1964, but he failed to pay any rent thereafter. The appellant's case before the trial Court was that he was not liable to pay the rent claimed for the reason that the lease had been frustrated for two reasons : (a) Owing to the proximity in locality of the cinema-hall to the Turkish quarter of Limassol town it had become impossible to hold performances as from the 20th December, 1963, as a result of the Turkish disturbances; and (b) as from the night of the 12th February, 1964, and continuously for the remaining period of the lease, that is, up to the 31st December, 1964, the demised premises were occupied by military forces of the Republic and thereby no cinema performance could be held at all. The trial Court came to the conclusion that the lease had not been frustrated and gave judgment for the landlord.

The appeal was mainly argued on the following grounds :

(a) That the tenant was discharged from the obligation of paying any rent under the express provision of the contract of lease, as the premises were occupied by military forces, and (b) in any event, the performance of the contract became impossible, that is, the peaceful enjoyment and fitness of the premises for cinema performances became impossible and that consequently, under the provisions of section 56(2) of the' Contract Law Cap. 149, the contract became *void*, and the tenant was discharged from his obligations.

Section 56 of the Contract Law, Cap. 149 provides :

"56(1). An agreement to do an act impossible in itself is *void*.

(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes *void* when the act becomes impossible or unlawful.

"(3) ....."

Held, (1) *per Josephides, J., Loizou J., concurring :*

(1) Having given our best consideration to counsel's submission, we are not prepared to accept the construction placed by him on clause 6 of the contract. In the first place, what is provided in clause 6 is that if any "injury or damage" is caused by fire or "ἀνωτέρα βία" to the premises which would prevent the

holding of cinema performances, the tenant has two options : (a) either to rescind the contract—and in the present case there is not rescission or disclaimer of the lease; or (b) to continue the lease without payment of any rent for the period during which the premises will be under repair (the landlord having covenanted to carry out such repairs) or, during the period that such premises will be closed. Supposing that there was a fire which had caused damage to the premises, then, under the provisions of clause 6, if the tenant had not chosen to disclaim the lease but had opted to continue, he would not be bound to pay any rent during the period that the landlord would be carrying on repairs to make the premises fit again for the holding of performances. In that case it could not be argued that the expression "injury or damage" in clause 6 did not refer exclusively to structural damage. Can it be said that in the case of "ἀνωτέρα βία" the expression "injury or damage" refers not only to structural damage but also to the occupation of the premises by military forces which prevented the holding of cinema performances? If we were to hold so it would be straining the meaning of the words in their context in clause 6 beyond breaking point. We lay stress on the meaning of the words in their context, and in this case the expression "ἀνωτέρα βία", following the word "fire" in clause 6 can only mean an Act of God, that is, the operation of uncontrollable natural forces, such as an earthquake, flood, storm or lightning, which could not happen by the intervention of man. For these reasons we hold against the appellant on the first ground.

(2) Having given the matter our best consideration we are of the view that the provisions of section 56 (2) of our Contract Law apply to the present case which has to be decided on that basis alone. It is, therefore, a matter of construction of that section which was judicially considered in the case of *Della Tolla* v. *Kyriakides* (1955) 20 C.L.R. Part II, page 89 at page 92. Although section 56 varies the common law to a large extent, it was held in the *Della Tolla* case that the spirit of the English authorities should be followed and that section 56 (2) only applies to an impossibility which destroys the foundation of the contract. Hallinan C.J. in delivering the judgment of the Court in that case referred to the English doctrine of an implied term.

(3) Reverting to section 56 (2) of our Contract Law and relying on the test laid down in the *Davis* case (1956), we are of the view that the proper test for impossibility of performance

should be : If the literal words of the contract were to be enforced in the changed circumstances, would this involve a significant or radical change from the obligation originally undertaken? In formulating a test with particular reference to contracts of lease we would rule that on rare occasions a contract of lease may become impossible of performance, as, for instance, if some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea (as suggested by Viscount Simon and Lord Wright in the *Cricklewood* case). But this is not the case in the present appeal. The tenant is bound to pay the rent as, by his own contract, he has created such a duty or charge on himself, notwithstanding that occupation of the premises was taken over by a military force of volunteers and members of the National Guard of the Republic from the 12th February, 1964, until the expiry of the lease on the 31st December, 1964, without any legal requisition order; because the tenant might have provided against such eventuality by his contract. There was no eviction by title paramount nor was the landlord in any way responsible for the eviction of the tenant; and in these circumstances the performance of the obligation, that is to say, the payment of the rent, was not rendered impossible, and, therefore, the tenant was not freed, by reason of the eviction, from liability under the covenant in the contract of lease. He bound himself to pay rent and it is no excuse that circumstances which he could not control and for which the landlord was not responsible, had happened and prevented his compliance. For these reasons the appeal fails.

(4) Considering the circumstances of this case we think it would be appropriate to quote and adopt the observations made by Lord Carson in the *Matthey* case (ibid. at page 12) in more or less similar circumstances :

> "It is greatly to be regretted that two subjects, equally innocent of any wrongful act, should be driven to undertake this very expensive litigation by events arising out of the action of the military authorities, over which they had no control, and for which they were not responsible".

(5) In the result the appeal is dismissed with costs.

Held, (II) *per Stavrinides, J. :*

(1) I concur in the result, but I would briefly give my own reasons for this.

(2) In my opinion the argument that the occupation of the premises by an armed force discharged the tenants from the obligation of paying rent because of the provisions of clause 6 of the lease is plainly untenable. It is clear that that clause is solely concerned with such "fire or force majeure" as would render the holding of performances impossible by causing "injury or damage"; and the "injury or damage" referred to can only mean physical injury or damage to the premises or the installations necessary for the holding of performances and nothing else. It is not concerned with discontinuance of performances, or the impossibility of holding performances, due to the proximity of danger to the area where the premises are situate or dispossession by an armed force.

(3) I now come to the argument based on s. 56 (2) of the Contract Law. The former Supreme Court in *Vincent Della Tolla* v. *Kyriakides* accepted the view stated in Pollock and Mulla's Indian Contract and Specific Relief Acts that the provision constitutes a departure from the English common law, but held that "the spirit of the English authorities should be followed". No doubt in considering the English cases one should not overlook the possibility that they may be based on principles which do not obtain in this country; but the judgment of Lord Buckmaster in *Matthey* v. *Curling*, in which two of the four Law Lords who sat with him concurred, was based on principles which, whatever the difference, if any, between English law and the law of this country as regards the legal effect of a lease(as to which I express no opinion) are as applicable here as they are in England. Accordingly the appellants must fail on s. 56 (2) as well.

Appeal dismissed with costs.

Per curiam : We express the hope that the competent authorities will now consider this matter with a view to paying compensation to the party who has suffered loss as a result of the occupation of the premises in question for defence or security purposes.

Cases referred to :

Baily v. *De Crespigny* [1869] L.R. 4 Q.B. 185;

Taylor v. *Caldwell* [1863] 3 B. & S. 826;

Krell v. *Henry* [1903] 2 K.B. 740 C.A;

Matthey v. *Curling* [1922] 2 A.C. 180; [1922] All E.R. Rep. 1;

Eyre v. *Johnson* [1946] 1 All E.R. 719;

Narasu v. *P.S.V. Iyer* (1953) Mad. 381 A.I.R. 1953 Mad. 300;

Cricklewood Property and Investment Trust Ltd. v. *Leightons Investment Trust Ltd.* [1945] A.C. 221;

Satyabrata v. *Mugneeram*, A.I.R. 1954, S.C. 44, 49;

Kontou v. *Parouti* (1953) 19 C.L.R. 172 at p. 175;

Della Tolla v. *Kyriakides* (1955) 20 C.L.R. Part II, p. 89 at p .92;

Tamplin S.S. Co. v. *The Anglo-Mexican Petroleum Products Co.* [1916] 2 A.C. 397. at p. 406 per Lord Haldane L.C.;

Davis Contractors Ltd. v. *Fareham* U.D.C. [1956] A.C. 696 per Lord Radcliffe at p. 729;

Swift v. *McBear* [1942] 1 K.B. 375;

Simper v. *Coombs* [1948] 1 All E.R. 306.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Georghiou D.J.) dated the 28th March, 1966, (Actions No. 1507/64 and 2601/64—consolidated) whereby the defendants were ordered to pay to the plaintiff the sum of £810.— as arrears of rent.

Chr. P. Mitsides, for the appellants.

G. Platritis, for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the following Judgment delivered by:

JOSEPHIDES, J. : This is an appeal by the tenant against the Judgment of the District Court of Nicosia, for arrears of rent, given in favour of the landlord (respondent). The Judgment was given in two consolidated actions as follows :

(1) Action No. 1507/64 : arrears of 4 months' rent from 1.4.64 to 31.7.64, at £90 a month £360

(2) Action No. 2601/64; arrears of 5 months' rent from 1.8.64 to 31.12.64, at £90 a month £450

The main grounds of appeal are (*a*) that the tenant was discharged from the obligation of paying any rent under the express provision of the contract of lease, as the premises were occupied by military forces, and (*b*) in any event, the performance

of the contract became impossible, that is, the peaceful enjoyment and fitness of the premises for cinema performances became impossible and that, consequently, under the provisions of section 56 (2) of the Contract Law, Cap. 149, the contract became void, and the tenant was discharged from his obligations.

The facts, which are not in dispute, were as follows : The landlord (respondent) is the owner of the cinema premises in Limassol known as "Regal Cinema". Under a written agreement dated 14th June, 1962, he leased the said premises to the tenant (appellant) for a period of two years, from the 1st January, 1963, to the 31st December, 1964, at the agreed rent of £90 a month, payable every two months in advance. The tenant paid all the rents from 1st January, 1963, to the 31st March, 1964, but he failed to pay any rent thereafter.

The tenant, on the same day of the signing of the aforesaid agreement with the landlord, sublet the aforesaid premises on the same terms and conditions to a person from Limassol, who was originally a defendant in these proceedings, but the claim against him has been dismissed and there is no appeal against that Judgment. The material parts of the agreement are clauses 1, 5, 6 and 9. We give below an English translation of those clauses (prepared in the registry of this Court) and the original Greek text of clause 6.

> "1. The landlord hereby leases to the tenant his cinema-theatre at Limassol known under the name 'Regal' with the relevant operation licences thereof and the electric and water installation found therein which should be always kept in good working condition, as well as the 'buffet', cabins, W.C., one shed, without any furniture chairs or machinery".
>
> ... ...
>
> "5. The landlord undertakes to deliver the said cinema-theatre to the tenant together with the required licences of operation thereof as cinema-theatre *i.e.* with the licences of the Municipal Corporation, the Police and the Public Works Department as well as any other licences in accordance with the Law, which the landlord is in any case bound to have always and in any way in force and renew same at their expiration".
>
> ... ...

"6. In the event of the demised premises being destroyed or having suffered such injury or damage by fire or by (ἀνωτέρα βία) that the operation thereof for cinema and theatrical performances may not be possible, the tenant will either be entitled to rescind this contract or to continue with the tenancy without payment of any rent to the landlord in respect of the days or the period of the repairs—which the landlord shall be bound to execute—or in respect of the time during which the premises will be closed".

... ...

"9. The tenant will be liable for any injury or damage to the premises the tenant being liable to deliver the said premises at the expiration of this tenancy in the same good condition he took delivery thereof unless such damage or waste is due to natural wear and tear and/or force majeure and/or the causes referred to in the aforementioned clause 6 of this contract".

«6. Εἰς περίπτωσιν καθ' ἣν τὸ ἐνοικιαζόμενον κτῆμα ἤθελε καταστραφῇ ἢ ἤθελε ὑποστῇ τοιαύτην ζημίαν ἢ βλάβην ὥστε νὰ μὴ εἶναι δυνατὴ ἡ λειτουργία του διὰ κινηματοθεατρικὰς Ἐπιχειρήσεις ἐκ πυρκαϊᾶς ἢ ἀνωτέρας βίας ὁ Ἐνοικιαστὴς θὰ ἔχῃ τὸ δικαίωμα εἴτε νὰ ἀκυρώνῃ τὸ παρὸν συμβόλαιον εἴτε νὰ ἐξακολουθῇ τὴν ἐνοικίασιν ἄνευ πληρωμῆς οἱουδήποτε ἐνοικίου πρὸς τὸν Ἰδιοκτήτην κατὰ τὰς ἡμέρας ἢ τὸ χρονικὸν διάστημα τῶν ἐπιδιορθώσεων—τὰς ὁποίας θὰ εἶναι ὑπεύθυνος νὰ ἐκτελῇ ὁ Ἰδιοκτήτης—ἢ τοῦ χρόνου καθ' ὅν θὰ εἶναι τοῦτο κλειστόν».

The troubles broke out in Cyprus on the 21st December, 1963, but the sub-tenant continued cinema performances in the "Regal" premises until the 19th January, 1964, when he closed the cinema as, according to him, it was situate within the dangerous zone of Limassol town. He left Cyprus for Greece with his family on the 10th February, 1964, and he waited for the situation to improve in order to return to Cyprus and reopen the cinema. In fact he did not return until the 24th March, 1964. In the meantime on the night of the 12th February, 1964, the premises were occupied by a certain military force composed of volunteers who (according to their Commander's evidence) were appointed Special Constables under the provisions of section 30 of the Police Law, Cap. 285. They were not members of the regular Cyprus Army. Three of the persons involved in the occupation of the premises in question gave evidence

in this case before the trial Judge and they were the Commander of the Force (Aristos Chrysostomou) the Captain (Christakis O. Varravas), and the Lieutenant who actually took possesion of the premises on that night (Andreas Violaris). He stated that he was a member of the second sector of the 7th Regular Group serving in Limassol under the command of Captain Varravas. Their duty was to protect and defend Eleftheria Street in Limassol, which abuts on the Turkish quarter. The "Regal" cinema is situate in Makedonia Street, which is a side-street of Eleftheria Street. Bands of illegally armed Turks had trenches and gunposts a few yards away from Eleftheria Street and the Regal cinema was chosen by the Major-in-charge as a camping place for Violaris's group. On the major's orders Violaris took possession of the keys of the cinema from the "buffet-keeper" and agent of the sub-tenant. The agent at first refused to hand the keys but after some pressure from Violaris and after consulting the sub-tenant's brother he delivered the keys.

It was the version of the aforesaid three volunteers, which was not disputed, that the situation on that night had become critical, that the Greek section of Limassol town was about to be attacked by illegally armed Turks at any moment, and that it was in those circumstances that the cinema premises were occupied on the night of the 12th February, 1964, by the military force which used the whole premises for keeping therein their army equipment and other articles, and later on as sleeping quarters as well as for drilling. In fact, fighting in Limassol started on that night and it lasted for less than a week; but there were later occasional skirmishes.

The position with regard to the status of this military force remained the same until June 1964 when the National Guard Law 1964 (Law 20 of 1964) was enacted. That Law is entitled "a Law to provide for the establishment and organisation of the National Guard and matters incidental thereto". The preamble states "Whereas recent events have rendered the establishment of a separate force necessary in order to assist the regular forces of the Republic, namely, the army and the security forces of the Republic, in all the necessary measures for its defence....." The Law was published on the 2nd June, 1964, the formation of the National Guard was ordered by the Council of Ministers on the 4th June, 1964, and the first age groups were called up on the 9th June, 1964, for enlistment on the 15th June, and later on the 29th June, 1964, (see Official *Gazette*, Supplement No. 3, dated 4th, 9th and 22nd June, 1964, pages 109, 117 and 153).

The aforesaid volunteers took the prescribed oath under the Law in July, 1964. Violaris's group was converted in September, 1964 into the 351 Battalion of the National Guard and they continued occupying the cinema premises until 4th November, 1964, when they were demobilised. They then delivered the Keys of the premises and occupation thereof to the Cyprus Regular Army which in its turn occupied the premises until after the expiration of the period of the lease (31st December, 1964).

The said premises were at no time legally requisitioned by the Government of the Republic of Cyprus or by any other lawful authority under the provisions of the Requisition of Property Law, 1962 (Law 21 of 1962), or any other law or enactment of the Republic. Needless to say that from the 12th February, 1964 to the 31st December, 1964, no cinema performance was held in the premises in question nor was it possible to hold such performance owing to the occupation of the premises by the aforesaid military force. Neither the tenant nor the sub-tenant took any steps either to recover possession of the premises from the military force or to require the appopriate Government authority to make an order of requisition under the provisions of the law; nor did they claim any rent either from the military force or the Government of the Republic of Cyprus, and no rent or compensation has been paid to either of them.

The defence set up by the tenant before the trial Court was that he was not liable to pay the rent claimed for the reason that the lease had been frustrated for two reasons : (*a*) owing to the proximity in locality of the cinema-hall to the Turkish quarter of Limassol town it had become impossible to hold performances as from the 20th December, 1963, as a result of the Turkish disturbances;and (*b*) as from the night of the 12th February, 1964, and continuously for the remaining period of the lease, that is, up to the 31st December, 1964, the demised premises were occupied by military forces of the Republic and thereby no cinema performance could be held at all.

The learned trial Judge in a long and detailed Judgment came to the conclusion that the lease had not been frustrated and gave judgment for the landlord.

The first ground of appeal is really a matter of construction of the contract of lease. Mr. Mitsides for the appellant in addressing us on this point maintained that the contract itself

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CYPRUS CINEMA
&
THEATRE CO. LTD.,
v.
CHRISTODOULOS
KARMIOTIS
—
Josephides, J.,

provided under clause 6 that, should the premises suffer by "force majeure" (ἀνωτέρα βία) such injury or damage that the holding of cinema performances could not be possible, the lessee would be discharged of the obligation to pay any rent for the whole of the period of the discontinuance of such performance; and that on the findings of the trial Court it was clear that the premises had suffered such injury or damage as to be unfit for cinema and theatrical performances from the 12th February, 1964, to the end of the lease. He further submitted that the words "injury or damage" did not mean structural damage only, because the lease was not for the building or the land only, but it included also the obligation on the part of the landlord to keep it fit and provided with the necessary licences for cinema and theatrical performances, and the further obligation of the landlord to have always in force, and to renew, the requisite licences.

Having given our best consideration to counsel's submission, we are not prepared to accept the construction placed by him on clause 6 of the contract. In the first place, what is provided in clause 6 is that if any "injury or damage" is caused by fire or "ἀνωτέρα βία" to the premises which would prevent the holding of cinema performances, the tenant has two options : (*a*) either to rescind the contract—and in the present case there is no rescission or disclaimer of the lease; or (*b*) to continue the lease without payment of any rent for the period during which the premises will be under repair (the landlord having covenanted to carry out such repairs) or, during the period that such premises will be closed. Supposing that there was a fire which had caused damage to the premises, then, under the provisions of clause 6, if the tenant had not chosen to disclaim the lease but had opted to continue, he would not be bound to pay any rent during the period that the landlord would be carring on repairs to make the premises fit again for the holding of performances. In that case it could not be argued that the expression "injury or damage" in clause 6 did not refer exclusively to structural damage. Can it be said that in the case of "ἀνωτέρα βία" the expression "injury or damage" refers not only to structural damage but also to the occupation of the premises by military forces which prevented the holding of cinema performances? If we were to hold so it would be straining the meaning of the words in their context in clause 6 beyond breaking point. We lay stress on the meaning of the words in their context, and in this case the expression "ἀνωτέρα βία", following the word "fire" in clause 6 can only

mean an Act of God, that is, the operation of uncontrollable natural forces, such as an earthquake, flood, storm or lightning, which could not happen by the intervention of man. For these reasons we hold against the appellant on the first ground of his appeal.

The second ground of appeal was that the performance of the contract by the tenant became impossible and that under the provisions of section 56 (2) of the Contract Law, Cap. 149, such impossibility of performance discharged the tenant from the obligation of the payment of rent. Section 56 reads as follows:

"56. (1) An agreement to do an act impossible in itself is void.

(2) A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

(3) ....."

In support of his case appellant's counsel cited the following extract from the notes to section 56 of the Indian Contract Act (which corresponds to our section 56) by Pollock and Mulla, 8th Edition, page 344, where the effect of the English Common Law is stated :

"By the common law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words; there are conditions which may be implied from the nature of the transaction; and in certain cases where an event making performance impossible 'is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made' (*Baily* v. *De Crespigny* [1869] L.R.4 Q.B. at p. 185, etc.) performance, or further performance of the promise, as the case may be is excused. On this principle a promise is discharged if without the promisor's fault, (1) .....; (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced (*Taylor* v. *Caldwell* [1863] 3 B. & S. 826, etc.) or an event or state of things

assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible (*Krell* v. *Henry* [1903] 2 K.B. 740 C.A. etc.)....."

The case of *Baily* v. *De Crespigny*, quoted above as authority for the proposition that performance of furher performance of a promise is excused where an event making performance impossible is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, was considered by the House of Lords in *Matthey* v. *Curling* [1922] 2 A.C. page 180 (now reported also in [1922] All E.R. Rep. 1), where it was held that the fact that it has become difficult, or even impossible, for the tenant to pay rent or to perform the covenant does not relieve him from the obligation of paying damages. In considering *Baily's* case in *Matthey* v. *Curling*, Lord Buckmaster said ([1922] 2 A.C. at page 228):

> "I find myself unable to think that this has any application to a covenant entered into by a lessee, either to pay rent or to deliver up the premises. He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance.
>
> In that case, the tenant was held liable on his repairing covenant although circumstances which he could not control had happened and prevented his compliance. So that here, even assuming circumstances beyond the tenant's control which prevented his compliance, I am satisfied that it is not a defence to this action for damages".

See also *Eyre* v. *Johnson* [1946] 1 All E.R. 719, where this case was considered and applied.

With regard to the principles stated in the extract from Pollock and Mulla, quoted above, that is, that a promise is discharged if without the promisor's fault a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed or fails to be produced, the learned authors refer, *inter alia*, to the Indian case of *Narasu* v. *P.S.V. Iyer* (1953) Mad. 381, A.I.R. 1953 Mad. 300, in which D., a cinema owner, agreed to exhibit a film produced by P. as long as the weekly net collections did not fall below a certain figure. After a few weeks part of the rear wall of the cinema collapsed following

heavy rain, and the police authorities condemned the building. D. pleaded section 56 with success. Pausing there, it will be observed that that case did not concern a contract of lease of premises but an agreement to exhibit a film; and when the foundation of the contract, that is to say, the existence of the cinema hall in which the film was to be exhibited, was partly demolished and rendered unusable, it was held that under the provisions of section 56 of the Indian Contract Act (which corresponds verbatim to our section 56) the act agreed upon became impossible after the contract was made, as the cinema owner did not have suitable premises in which to exhibit the film as agreed by him.

Having regard, however, to the unqualified language of section 56, which lays down a positive rule of law and does not leave the matter to be determined according to the intention of the parties it is useless to enter at length on the distinctions observed in English law. The word "impossible" in section 56 (2) has been construed by the Supreme Court in India in its practical rather than its literal sense (Pollock and Mulla, at page 346).

With regard to the doctrine of frustration the position in England is that that doctrine does not apply to leases. When that question was last considered by the House of Lords in the well-known case of *Cricklewood Property and Investment Trust Ltd.* v. *Leightons Investment Trust Ltd.* [1945] A.C. 221, although it was held unanimously that on the facts there was no frustration of a 90 years' building lease and the liability for rent continued uninterrupted, the House was divided on the question whether the doctrine of frustration could ever conceivably apply to a lease. Viscount Simon L.C. and Lord Wright thought that on rare occasions a lease may be frustrated, as, for instance, if some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea; or where, in the case of a building lease, subsequent legislation permanently prohibited private building on the site; but Lord Russell of Killowen and Lord Goddard expressed the opinion that a lease is more than a contract in that it creates an estate in the land vested in the lessee, and that this estate in the land could never be frustrated, even though some contractual obligation under the lease may be suspended by wartime regulations. Lord Porter expressed no opinion on the point.

In India the doctrine seems never to have been applied to a lease. It appears also that it does not apply to a mere agreement

to lease, where no interest in the property leased passes (Pollock and Mulla, at page 351); but the doctrine applies to a contract to sell land, as in India, unlike England, a mere contract to sell land does not create any estate in the buyer (*Satyabrata* v. *Mugneeram*, A.I.R. 1954, S.C. 44, 49; Pollock and Mulla, at page 352). It would seem, however, that in Cyprus a lease does not create an estate in land vested in the lessee but only a contractual right (see section 4 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, which was originally enacted as section 3 of Law 8 of 1953, soon after the decision of the Supreme Court of Cyprus in the case of *Kontou* v. *Parouti* (1953) 19 C.L.R. 172, at page 175).

Having given the matter our best consideration we are of the view that the provisions of section 56 (2) of our Contract Law apply to the present case which has to be decided on that basis alone. It is, therefore, a matter of construction of that section which was judicially considered in the case of *Della Tolla* v. *Kyriakides* (1955) 20 C.L.R., Part II, page 89 at page 92. Although section 56 varies the common law to a large extent, it was held in the *Della Tolla* case that the spirit of the English authorities should be followed and that section 56 (2) only applies to an impossibility which destroys the foundation of the contract. Hallinan C.J. in delivering the judgment of the Court in that case referred to the English doctrine of an implied term. The following is the relevant extract from his judgment :

> "In our view whether a Court applies the statutory rule concerning impossibility of performance contained in s. 56 (2) or applies the English doctrine of an implied term, in order that a supervening impossibility of performance should excuse the non-performance of a contract, the underlying principle for not enforcing the contract is the same. This principle was stated by Lord Haldane in *Tamplin S.S. Co.* v. *The Anglo-Mexican Petroleum Products Co.* ([1916] 2 A.C. 397 at 406): 'The occurrence itself' (*i.e.* the occurrence preventing the performance of the contract) 'may yet be of a character and an extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared and the contract itself has vanished with that foundation'. We consider that the spirit of the English authorities should be followed and that section 56 (2) only applies to an impossibility which destroys the foundation of the contract".

It should be stated, however, that following the *Della Tolla* case (1955) the House of Lords in 1956, by a majority of three members, rejected the implied term theory laid down in the *Tamplin* case (1916) which was relied upon in the judgment of Hallinan C.J. This was in the case of *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696. Lord Radcliffe at page 729 said :

> ".....frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do....There must be .....such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".

With regard, however, to leases there are a number of decisions before the *Cricklewood* case in which courts, without relying solely on the doctrine that a lease can never be frustrated, have held certain leases to be not frustrated in the given circumstances. In *Matthey* v. *Curling* [1922] 2 A.C. 180 ([1922] All E.R. Rep. 1), during the currency of the lease of a house, the military authorities took possession and occupied the demised premises for the whole of the unexpired portion of the lease and over. The lease contained the usual covenants to insure and expend the insurance money on renovating the premises if damaged or destroyed by fire. About seven weeks before the expiry of the lease the house was destroyed by fire. In an action by the landlord against the tenant for a quarter's rent and damages for breaches of the covenants to repair, deliver up in repair, insure etc., it was held by the House of Lords that :

> "eviction by title paramount meant an eviction by a title superior to that of the lessor and lessee and was not eviction by an authority acting under statute which the tenant could not withstand; in the circumstances the performance of the covenants had not been rendered impossible; and, therefore, the tenant was not freed by reason of the requisition from liability under the covenants in the lease".

And Lord Atkinson held that—

"Where a party by his own contract creates a duty or charge on himself, he is bound to make it good if he may, notwithstanding any accident by invevitable necessity, because he might have provided against it by his contract". ([1922] All E.R. Rep. 1).

Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent. Eviction by the lessor himself is with equal reason an answer to the claim upon the covenant, and in such cases the question is whether there is an eviction in fact, and whether the lessor was a party to it. But mere eviction has never been held to have this effect. The question for consideration is how far the lessor has been deprived of the benefit of his covenant, and an act lawfully or unlawfully done, for which he is in no way responsible, cannot have that effect, unless the covenant can be construed as excluding the event (see *Matthey* v. *Curling*, at page 5 of the All E.R. Rep.). The proposition is well established that the lessee remains liable on his covenants in the lease, notwithstanding that he has been deprived of the term by the exercise of legal powers (*ibid.* page 6). Lord Buckmaster in that case said :

> "It is said that performance had become impossible and that consequently it must be excused. Impossibility of performance is a phrase which is often lightly and loosely used in connection with contractual obligations. There is no question here of performance having become impossible owing to its prohibition by statute, because no law has prohibited performance, although enjoyment of the premises has been interfered with by legal powers". *Matthey* v. *Curling*, at page 6).

If a lessee enters into a covenant either to pay rent or to deliver up premises he has bound himself to do these definite acts and it is no excuse that circumstances which he could not control have happened and have prevented his compliance (see extract from *Matthey's* case, quoted earlier in this judgment).

It has also been held that the doctrine of frustration does not apply to the letting of a furnished house which is subsequently requisitioned by the Government (*Swift* v. *McBean* [1942] 1 K.B. 375), or destroyed by a flying bomb (*Simper* v. *Coombs* [1948] 1 All E.R. 306).

Reverting to section 56 (2) of our Contract Law and relying on the test laid down in the *Davis* case (1956), we are of the view that the proper test for impossibility of performance should be : If the literal words of the contract were to be enforced in the changed circumstances, would this involve a significant or radical change from the obligation originally undertaken? In formulating a test with particular reference to contracts of lease we would rule that on rare occasions a contract of lease may become impossible of performance, as, for instance, if some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea (as suggested by Viscount Simon and Lord Wright in the *Cricklewood* case). But this is not the case in the present appeal. The tenant is bound to pay the rent as, by his own contract, he has created such a duty or charge on himself, notwithstanding that occupation of the premises was taken over by a military force of volunteers and members of the National Guard of the Republic from the 12th February, 1964, until the expiry of the lease on the 31st December, 1964, without any legal requisition order; because the tenant might have provided against such eventuality by his contract. There was no eviction by title paramount nor was the landlord in any way responsible for the eviction of the tenant; and in these circumstances the performance of the obligation, that is to say, the payment of the rent, was not rendered impossible, and, therefore, the tenant was not freed, by reason of the eviction, from liability under the covenant in the contract of lease. He bound himself to pay rent and it is no excuse that circumstances which he could not control and for which the landlord was not responsible, had happened and prevented his compliance. For these reasons the appeal fails.

Considering the circumstances of this case we think it would be appropriate to quote and adopt the observations made by Lord Carson in the *Matthey* case (*ibid.* at page 12) in more or less similar circumstances :

> "It is greatly to be regretted that two subjects, equally innocent of any wrongful act, should be driven to undertake this very expensive litigation by events arising out of the action of the military authorities, over which they had no control, and for which they were not responsible".

We express the hope that the competent authorities of the Republic will now consider this matter with a view to paying

compensation to the party who has suffered loss as a result of the occupation of the premises in question for defence or security purposes.

In the result the appeal is dismissed with costs.

STAVRINIDES, J. : I concur in the result, but I would briefly give my own reasons for this.

In my opinion the argument that the occupation of the premises by an armed force discharged the tenants from the obligation of paying rent because of the provisions of clause 6 of the lease is plainly untenable. It is clear that that clause is solely concerned with such "fire or force majeure" as would render the holding of performances impossible by causing "injury or damage"; and the "injury or damage" referred to can only mean physical injury or damage to the premises or the installations necessary for the holding of performances and nothing else. It is not concerned with discontinuance of performances, or the impossibility of holding performances, due to the proximity of danger to the area where the premises are situate or dispossession by an armed force.

I now come to the argument based on s. 56 (2) of the Contract Law. The former Supreme Court in *Vincent Della Tolla* v. *Kyriakides* accepted the view stated in Pollock and Mulla's Indian Contract and Specific Relief Acts that the provision constitutes a departure from the English common law, but held that "the spirit of the English authorities should be followed". No doubt in considering the English cases one should not overlook the possibility that they may be based on principles which do not obtain in this country; but the judgment of Lord Buckmaster in *Matthey* v. *Curling*, in which two of the four Law Lords who sat with him concurred, was based on principles which, whatever the difference, if any, between English law and the law of this country as regards the legal effect of a lease (as to which I express no opinion) are as applicable here as they are in England. Accordingly the appellants must fail on s. 56 (2) as well.

LOIZOU, J. : I concur with the judgment delivered by my brother Josephides, J., which I had the advantage of reading in advance, and I have nothing to add.

Appeal dismissed with costs.