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THE HOLY MONASTERY OF AYIOS NEOPHYTOS PAPHOS
v.
YIANNAKIS NEOKLI ANTONIADES

[VASSILIADES, P. TRIANTAFYLLIDES, JOSEPHIDES, JJ.]

THE HOLY MONASTERY OF AYIOS NEOPHYTOS, PAPHOS

Appellant-Defendant,

v.

YIANNAKIS NEOKLI ANTONIADES,

Respondent-Plaintiff.

(Civil Appeal No. 4589).

Contract—Lease of ecclesiastical land—Option to the lessee to purchase land—Severability—Breach of contract—Damages—Pre-estimated damages—Discretion of the Court—Section 74(1) of the Contract Law, Cap. 149—Lease of ecclesiastical land with option to the lessee to purchase the property at the end of tenancy—Prohibition of alienation of land by virtue of the Charter of the Church of Cyprus, Article 128, without the approval in that behalf of the Holy Synod—Validity of the aforesaid contract—Allegation by the Monastery-owner that the contract is null and void because sale of ecclesiastical property cannot be effected except only in accordance with Article 128 of the Charter of the Church as aforesaid—Allegation untenable—Severability of lease agreement from option to purchase—In other words the contract in question is severable—And its part constituting the tenancy upon which the claim of the lessee for damages in this action is based is severable from the other part providing for the option to the lessee to purchase the land at the end of the tenancy of twenty years agreed upon—In the result the first part constituting the tenancy is enforceable in law regardless of whether or not the second part relating to the option to purchase were to be held (a point not decided in this case) unenforceable because of the provisions in Article 128 of the Charter of the Church—Provisions in that Article 128 requiring approval by the Holy Synod in cases of alienation by transfer of ecclesiastical property not applicable to contracts of lease—See, also, herebelow.

Contract—Severability of contract—Principles applicable—The question whether or not a contract is severable is a matter primarily dependent on the construction to be placed on the particular contract—And to a certain degree on the nature of the agreement—Options to purchase inserted in leases.

Severability—Severability of contract—See above.

Contract—Breach of—Damages—Pre-estimated or liquidated damages agreed upon in the agreement—Discretion of the Court to award the full or a lesser amount—Section 74(1) of the Contract Law, Cap. 149—Section 74 of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1889—Iordanous v. Anyftos 24 C.L.R. 97, at p. 104 per Zekia J., applied.

Damages—Pre-estimated damages stipulated in the agreement—See above.

Pre-estimated damages—Section 74(1) of the Contract Law, Cap. 149—See, above.

Ecclesiastical Properties—Prohibition of alienation by transfer except only in accordance with the provisions in Article 128 of the Charter of the Church—Such provisions not applicable to contracts of lease—See, also, above.

Charter of the Church of Cyprus—Article 128—See above and herebelow.

Church of Cyprus—Autocephalous Greek-Orthodox Church of Cyprus—Article 110 of the Constitution—Alienation of ecclesiastical property—Article 128 of the Charter of the Church—See above.

Monasteries—"Stavropigiaka" Monasteries—Separate legal entities forming part of the Greek-Orthodox Church of Cyprus.

Lease—Contract of lease coupled with option to lessee to purchase at the end of the tenancy—Severability—See above.

Landlord and Tenant—Lease coupled with option to purchase—Severability—See above.

Option—Option to purchase in contracts of lease—Severability—See above.

This is an appeal against the judgment of the District Court of Paphos in Action No. 599/65 awarding the plaintiff (now respondent) £5,000 damages for breach of contract. The contract was for the lease of 88 donums of land, owned by the appellants, the Monastery of Ayios Neophytos, to the respondent for a period of 20 years at the annual rent of £200, with an option to the lessee to buy the property at the end of the lease, on the terms and con-

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ditions provided in the contract. Clause 3 of the contract provides specifically that £5,000 damages have to be paid to the respondent-lessee by the appellants landlords in case of non-delivery of possession of the property at the commencement of tenancy.

The Monastery of Ayios Neophytos—the appellants—is an ecclesiastical institution, several centuries old, with a legal entity, forming part of the Greek-Orthodox Church of Cyprus. In fact the Ayios Neophytos Monastery is one of the three "stavropigiaka Monasteria" of Cyprus.

On behalf of the Monastery the contract was signed by the then Abbot and two Monks, constituting its Administration Council under Regulation 37 of its internal Regulations. During the period between the signing of the contract (on the 27th October, 1963) and the date stipulated for delivery of possession to the lessee (the 1st July, 1964), the Abbot who signed the contract was succeeded by a new Abbot who informed the lessee that the Monastery no longer intended to deliver to him possession of the leased property. And eventually confirmed this intention to rescind by a letter dated May 29, 1965 in the following terms: "As I have already and repeatedly orally stated to you, the Holy Monastery of Ayios Neophytos denies any liability with regard to the said contract, which was made in contravention of the relevant provisions of the Charter of the Church of Cyprus and the Regulations of the Monastery".

In fact the property was never delivered to the lessee respondent; and it is common ground in this case that the appellants advisedly and deliberately declined performance of the contract on the ground that the said contract was in law unenforceable, in that it is null and void as it amounts in effect to alienation of ecclesiastical immovable property the sale of which cannot be effected except only in accordance with the pre-requisities and formalities provided by Article 128 of the Charter of the Church of Cyprus, the essential requirement to that effect being the approval of such alienation by the Holy Synod of the Greek-Orthodox Church of Cyprus--which approval is missing in the present case.

As a result the respondent-lessee filed the present action with a claim of £5,000 the agreed damages provided in

the contract for such breach. This claim was mainly defended, as already stated, on the gound that the written agreement sued on is null and void and not binding on the Holy Monastery of Ayios Neophytos—the defendants—on the aforesaid ground based on the alleged contravention of Article 128 of the Charter of the Church of Cyprus regarding alienation of immovable ecclesiastical property *(supra)*. The contract is thus attacked by the defendants-appellants on the contention that it is a contract of alienation of such ecclesiastical property by sale, which the Administration Council of the Monastery, could not do without the approvals provided for in the Charter of the Church of Cyprus, Article 128, the defendants counterclaiming on the same contentions for a declaration that the contract in question is null and void and of no effect whatsoever.

The trial Court found that the contract is severable; and that the part thereof relating to the lease can be severed from the part relating to the agreement to sell under the option in the contract; and can be partly enforced accordingly. And the District Court awarded £5,000 agreed damages for breach of contract. In doing so *i.e.* in awarding the full amount agreed upon the trial Court exercised its discretion under section 74(1), of the Contract Law, Cap. 149, which sub-section is fully set out *post* in the judgment of the Supreme Court. At the end of their judgment the trial Court dismissed the counterclaim as a matter of a natural consequence to their finding that the contract as enforced was not in conflict with Article 128 of the Charter of the Church. Against this judgment the defendant Monastery took this appeal.

In dismissing the appeal the Court:-

Held, (1). The question whether or not a contract is severable is a matter primarily dependent on the construction to be placed on the particular contract, in the light of all relevant considerations; bearing in mind, of course, that "the Court will not make a new contract for the parties whether by re-writing the existing contract, or by basically altering its nature" (see Chitty on Contracts, 22nd ed. Vol. 1, paragraph 891).

(2)(*a*) In the present case we are not faced with the allegation that the option to purchase, in the contract before us, is illegal; appellant's contention is that the contract

is void mereley for lack of competence on the part of one of the contracting parties to enter into such contract.

(*b*) Nevertheless, it is useful, we think, to refer to some cases dealing with the principles developed and applied in relation to the severability of partly illegal contracts. We think these principles are equally applicable in a case of this nature; and may form a good guide in deciding the present case. See *Goldsoll* v. *Goldman* [1914-1915] All E.R. Rep. 257; *Attwood* v. *Lamont* [1920] All E.R. Rep. 55, at pp. 59-60 per Lord Sterndale, M.R., and at pp. 67-68 per Younger L.J; *British Reinforced Concrete Engineering Co.* v. *Schelff* [1921] All E.R. Rep. 202, at p. 210, per Younger L.J.; *Ronbar Enterprises Ltd.* v. *Green* [1954] 2 All E.R. 266, at p. 269 per Jenkins L.J.

(*c*) It will be seen from the above cases that the nature of an agreement is a material factor to be weighed in deciding the question of severability. It is, therefore, most relevant to note that where options to purchase have been inserted in leases such options have been treated as separate covenants, severable from the part relating to the lease in the same contract. See *Woodall* v. *Clifton* [1904-1907] All E.R. Rep. 268 at p. 271, per Romer L.J.; *Sherwood* v. *Tucker* [1924] 2 Ch. 42 at p. 44 per Astbury J.; *Griffith* v. *Pelton* [1957] 3 All E.R. 75, at p. 84, per Jenkins L.J.; *Beesly* v. *Hallwood Estates Ltd.* [1960] 2 All E.R. 314, at p. 321 per Buckley J.; *Re Button's Lease* [1963] 3 All E.R. 708, at p. 713; Halsbury's Laws of England (3rd Edn. Vol. 23 paragraph 109) *considered.*

(*d*) Thus, an option, to purchase, presents an instance of a contractual obligation to keep an offer open for acceptance by the other party by exercising an option. Until this happens, however, the contract to sell visualized by the parties is not formed.

(*e*) And in the case of an option to buy land in Cyprus the contract formed by the exercise of the option on the part of the buyer is an agreement to buy on the part of the purchaser, and an agreement to sell on the part of the owner; but it is not a sale of property resulting in the transfer of ownership from seller to buyer (see sections 40(1) and 41(4) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224).

(3)(*a*) In the light of the foregoing and looking into the various clauses of the contract sued on in the present case, we find ourselves in agreement with the conclusion reached by the trial Court that the contract in question is severable; and that the part constituting the tenancy upon which the claim in this action is based, is severable from the part providing for the option to purchase. And that the right of the respondent to delivery of possesion of the property at the commencement of the tenancy, under clause 1(*a*), and to the compensation in the form of liquidated damages provided in clause 3 in case of default, can be enforced.

(*b*) We agree with that conclusion of the trial Court, even if we were to assume (without deciding it) that any part of the contract relating to the option to purchase were to be held invalid and unenforceable because of the provision in Article 128 of the Charter of the Church or the internal Regulations of the Monastery. It is, therefore, unnecessary for us to deal with the parts of the contract outside the lease and beyond the provision for compensation in case of default in delivering possession on the agreed date.

(4) We are clearly of opinion, on the other hand, that the provisions for approval by, inter alia, the Holy Synod in case of alienation by transfer of ecclesiactical property do not apply to contracts of lease; nor are the relative internal Regulations of the Monastery in question applicable to leases.

(5)(A) What then remains to be decided next, is whether or not the amount of £5,000 provided in clause 3 by way of liquidated damages for breach of clause 1(*a*) *(supra)*, which constitutes the claim in this action, should have been awarded in full; or, any lesser amount should have been awarded to the respondent-plaintiff by way of reasonable compensation.

(B)(*a*) Section 74(1) of our Contract Law, Cap. 149 which is applicable in this connection reads as follows: "74(1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved

to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for

A stipulation for increased interest from the date of default may be a stipulation by way of penalty"

(*b*) Section 74(1) is identical to section 74 of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1889 As stated in Pollock and Mulla on the Indian Contract and Specific Relief Acts, 8th edn pp 480-481, these provisions in India were intended to get rid of the distinction in English law between liquidated damages and penalties, and to carry the tendency in the English case law on the subject to its full consequences

(*c*) This is in accord, also, with the views of Zekia J in *Iordanou* v *Anyftos* 24 C L R 97, at p 104 (Note The passage is quoted in full in the judgment of the Supreme Court, *post*)

(*C*) Bearing in mind the relevant legal position and bearing also in mind the nature of the property leased in this case, and the annual rent under the contract, together with other relevant factors (such as enjoyment of the property for 20 years on rent), we are of opinion that the stipulated amount of £5,000 in the contract (clause 3) was agreed upon as an estimate of the damages, and amounts to a reasonable compensation in the sense of section 74(1) of Cap 149 (*supra*) We, therefore, affirm the decision of the trial Court on this point also

(6)(*a*) Coming now to the appeal against the dismissal of the counterclaim, we are clearly of the opinion that the counterclaim, to the extent that it goes beyond the defence to the claim for damages for the breach of the contract by non-delivery of possession for the purposes of the lease, constitutes a cross-action which is premature to be heard and determined in these proceedings one way or the other Indeed, in the circumstances it is not necessary to decide the validity of the option provided in the part of the contract held to be severable from the lease, and which option could only come into play twenty years later

(*b*) We therefore, decided that the part of the counter-

claim which goes beyond the defence, should be struck out; and be disposed of accordingly.

(7) In the result the appeal is dismissed with costs; and the counterclaim in relation to the option to purchase to the effect that such option is invalid as contravening Article 128 of the Charter of the Church, is struck out.

Appeal dismissed with costs. Counterclaim to the extent as aforesaid struck out.

Cases referred to:

Goldsoll v. *Goldman* [1914–1915] All E.R. Rep. 257;

Attwood v. *Lamont* [1920] All E.R. Rep. 55, at pp. 59-60 per Lord Sterndale M.R., and at pp. 67–68 per Younger L.J.;

British Reinforced Concrete Engineering Co. v. *Schelff* [1921] All E.R. Rep. 202, at p. 210, per Younger L.J.;

Ronbar Enterprises Ltd. v. *Green* [1954] 2 All E.R. 266, at p. 269 per Jenkins L.J.;

Woodall v. *Clifton* [1904–1907] All E.R. Rep. 268, at p. 271, per Romer L.J.;

Sherwood v. *Tucker* [1924] 2 Ch. 42, at p. 44 per Astbury J.;

Griffith v. *Pelton* [1957] 3 All E.R. 75, at p. 84 per Jenkins L.J.;

Beesly v. *Hallwood Estates Ltd.* [1960] 2 All E.R. 314, at p. 321 per Buckley J.;

Re Button's Lease [1963] 3 All E.R. 708, at p. 713;

Iordanous v. *Anyftos* 24 C.L.R. 97, at p. 104 per Zekia J., *applied.*

Appeal.

Appeal against the judgment of the District Court of Paphos (Loizou P.D.C. & Stavrinakis D.J.) dated the 18th July, 1966 (Action No. 599/65) whereby the plaintiffs were awarded £5,000 as damages for breach of contract.

G. Tornaritis, for the appellant.

Sir P. Cacoyiannis with *F. Galatopoulos*, for the respondent.

Cur. adv. vult.

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The judgment of the Court was delivered by:—

VASSILIADES, P.: This is an appeal against the judgment of the District Court of Paphos in action 599/65 awarding the plaintiff (respondent in this appeal) £5,000 damages for breach of contract.

The contract between the parties was apparently the result of considerable negotiations; it was put in legal form by the parties' legal adviser; and it was duly signed on the 27th October, 1963. It is a contract for the lease of 88 donums of land, owned by the appellants, the Monastery of Ayios Neophytos, to the respondent, for a period of 20 years, commencing on the 1st July, 1964, at the annual rent of £200, with an option to the lessee to buy the property at the end of the lease, on the terms and conditions provided in the contract. The purchase price in the event of the lessee exercising his option, was agreed at £200 per donum; and the manner of exercising the option, also provided in the contract, was by giving or delivering to the Abbot of the Monastery at least three months' notice in writing, prior to the termination of the lease.

The Monastery of Ay. Neophytos is an ecclesiastical institution, several centuries old, with a legal entity, forming part of the Greek-Orthodox Church of Cyprus.

On behalf of the Monastery the contract was signed by the then Abbot and two Monks, constituting its Administration Council under Regulation 37 of its internal Regulations. The Monastery is referred to in the contract as the "owner" of the property.

The making of the contract is not denied. What is denied by the appellants, is the validity of the contract on the ground—according to the defence, para. 6—that the contract is *null* and *void* as it amounts in effect "to alienation of ecclesiastical immovable property the sale of which cannot be effected except only according to the prerequisites and formalities provided by Article 128 of the Charter" of the Church of Cyprus.

The contract is thus attacked on the contention that it is a contract of alienation of ecclesiastical immovable property by sale, which the Administration Council of the Monastery could not do without the approvals provided for in the Charter of the Church where the Monastery be-

longs. On the same allegations and contentions, the appellants counterclaimed for a declaration that the contract in question is "*null* and *void* and not binding on the Holy Monastery and of no effect whatsoever".

When the contract was negotiated and signed by the parties, the property in question was mortgaged to the Bank of Cyprus; and it was part of the agreement, expressly stated in the contract, that the "owner" undertook to deliver to the lessee the property free of any mortgage or other encumbrance, and to keep it free of any such obligation during the period of the lease.

During the period between the signing of the contract (on the 27.10.63) and the date stipulated for delivery of possession to the lessee (the 1.7.64) the Abbot, who signed the contract, was succeeded by a new Abbot who informed the lessee that the "owner" no longer intended to deliver possession of the property. And eventually confirmed this intention to rescind by a letter to respondent's advocate dated May 29, 1965, (*exhibit 4*), to the same effect.

"As I have already and repeatedly orally stated to you" —the Abbot said in his letter—"the Holy Monastery of Ay. Neophytos denies any liability with regard to the said contract, which was made in contravention of the relevant provisions of the Charter of the Church of Cyprus and the Regulations of the Monastery".

In fact the property was never delivered to the lessee; and it is common ground in this case, that the appellants advisedly and deliberately declined performance of the contract on the ground that it was unenforceable.

As a result, the respondent filed the present action with a claim of £5,000, the agreed damages provided in the contract for such breach. This claim was mainly defended, as already stated, on the ground that the written agreement in question "is *null* and *void* and of no effect..." (para. 6 of the defence).

The case was strenuously fought both in the District Court and here in the appeal, on the issue of the validity of the contract. A lot of argument was advanced on behalf of the parties on the question of the effect of the provisions of the Charter of the Church of Cyprus (and particularly of Article 128 thereof, regarding alienation of immovable pro-

perty) and of the internal Regulations of the Monastery, on the validity of the contract in question. Considerable part of the judgment of the District Court also deals with this matter.

The trial Court found that the contract is severable; and that the part thereof relating to the lease can be severed from the part relating to the agreement to sell under the option in the contract; and can be partly enforced accordingly. It is quite clear, in our opinion,—and it has not been really disputed—that Article 128 of the Charter of the Church of Cyprus (assuming that it were to be found applicable to the case) relates only to alienation of immovable property; and that the relevant provision of the internal Regulations of the Monastery (regulation 56(f)) requiring the approval of the whole Brotherhood for a decision of the Administration Council, refers only to sales of Monastery property; and not, also, to leases of such property.

The question whether or not a contract is severable is a matter primarily dependent on the construction to be placed on the particular contract, in the light of all relevant considerations; bearing in mind, of course, that the Courts will not make a new contract for the parties whether by rewriting the existing contract, or by basically altering its nature" (see Chitty on Contracts, 22nd Ed., Vol. I, para. 891).

Considerable part of the case law on the severability of contracts has developed in relation to contracts found to be partly illegal. In the present case we are not faced with the allegation that the option to purchase, in the contract before us, is illegal; the appellant's contention is that the contract is void for lack of competence on the part of one of the contracting parties to enter into such contract. Nevertheless, it is useful, we think, to refer to some cases dealing with the principles developed and applied in relation to the severability of partly illegal contracts. We think these principles are equally applicable in a case of this nature; and may form a good guide in deciding the present case.

In *Goldsoll* v. *Goldman* [1914-1915] All E.R. Rep. 257, the Court of Appeal dealing with a contract in restraint of trade, held that a covenant in such a contract fixing the geographical area and nature of business to which the restraint of trade would apply, was unreasonable, regarding the area, and too wide regarding the nature of the business;

but that the doctrine of severability applied and that the covenant, once it was properly limited, was enforceabe. In doing so the Court of Appeal acted on the view that the doctrine of severability of contracts was well established in the law.

In *Attwood* v. *Lamont* [1920] All E.R. Rep. p. 55, the Court of Appeal held that an undertaking in a contract, by an ex-employee not to trade in competition to his employers, was illegal to the extent of affecting the whole contract, as it was not possible to sever any part thereof without altering entirely the scope and intention of the agreement.

Lord Sterndale, M.R., had this to say on the question of severability at pp. 59-60:

> "The doctrine of severability has been much criticised by Moulton, L.J., in *Mason* v. *Provident Clothing and Supply Co., Ltd.*, ([1913] A.C. at p. 745) and by Neville, J., in *Goldsoll* v. *Goldman* ([1914] 2 Ch. at p. 613). These criticisms, however, were not accepted by the Court of Appeal: see per Kennedy, L.J., in *Goldsoll* v. *Goldman* ([1915] 1 Ch. at p. 299), or by Sargant, J., in *Nevanas & Co.* v. *Walker and Foreman* ([1914] 1 Ch. at p. 423). I think, therefore, that it is still the law that a contract can be severed if the severed parts are independent of one another, and can be severed without the severance affecting the meaning of the part remaining. This has been sometimes expressed, as in the present case by the Divisional Court, that the severance can be effected when the part severed can be removed by running a blue pencil through it. This is a figurative way of expressing the principle, and like most figurative expressions may quite possibly lead to misunderstanding. I prefer the statement of principle by Sargant, J., in *Nevanas & Co.*, v. *Walker and Foreman* when he thus expresses it. After referring to the remarks of Lord Moulton in the case which I have already cited of *Mason* v. *Provident Clothing and Supply Co. Ltd.*, he says ([1914] 1 Ch. at p. 423):
>
> 'I do not think that those remarks were intended to be applicable to cases where the two parts of a covenant are expressed in such a way as to amount to a clear severance by the parties themselves, and as to be substantially equivalent to two separate covenants' ".

In the same case, Younger L.J., is reported to have said (at pp. 67-68).

> "The learned judges of the Divisional Court I think, took the view that such severance always was permissible when it could be effectively accomplished by the action of a blue pencil. I do not agree. The doctrine of severance had not, I think, gone further than to make it permissible in a case where the contract contains what is not really a single covenant, but is in effect a combination of several distinct covenants In that case, and where the severance can be carried out without the addition or alteration of a word, it is permissible. But in that case only".

In British Reinforced Concrete Engineering Co., v. *Schelff* [1921] All E.R Rep. p. 202, Younger L J., reverted again to the doctrine of severability. He accepted part of an agreement as being severable; but he rejected the contention that another part of the same agreement could be also severed In doing so he is reported to have said (at p 210):—

> "Its application does not authorise the making of a new contract for the parties; and the particular clause now in question is really a principal, if not the main, approach to the business of the sale of road reinforcements, all access to which it is the purpose of the covenant to bar so as to prevent the covenantors from having any part or lot whatsoever in it during the period of restriction. Like the covenant in Attwood v. Lamont it is merely a part of one entire covenant in mosaic, and to permit the severance asked would, I think, be to go further than has ever yet been permitted in such a case".

In Ronbar Enterprises Ltd v *Green* [1954] 2 All E.R. p. 266, the three cases referred to above were considered by Jenkins L J., in the following passage of his judgment (at p. 269).

> "On the question whether such a severance is allowable, we were referred to *Goldsoll* v *Goldman*, where there was a covenant, in connection with the sale of a business, not to
>
> ' .. carry on or be engaged or concerned or interested in or render services (gratuitously or otherwise) to the business of a vendor of or dealer in real

or imitation jewellery in the county of London, England, Scotland, Ireland, Wales, or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man or in France, the United States of America, Russia or Spain'

"or certain other places. In that case the business concerned was one confined to artificial jewellery, and not including real jewellery, and it was argued that the covenant was wider than was reasonably necessary for the plaintiff's protection as it extended to a subject-matter, viz. real jewellery, which was not included in the business sold. It was also attacked as being too wide in point of area owing to the long string of countries to which the restriction was expressed to extend. It was held by the Court of Appeal that the covenant was severable both as regards the areas mentioned and also as regards the reference to real or imitation jewellery.

A similar view on a comparable question of severance was expressed in British Reinforced Concrete Engineering Co., Ltd. v. Schelff. In that case a restriction was imposed in connection with the sale by the defendants to the plaintiffs of a business concerned in the sale, but not manufacture, of road reinforcements. The restriction restrained the defendants from being concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom, and, again, it was held that the businesses to which the covenant related could be severed, and that, while the covenant would be unreasonable as regards a business in the manufacture of road reinforcements (in which the vendor had never been concerned), there would not be the same ground for holding it unreasonable in respect of the sale of road reinforcements. So that, although in that case the particular restriction was held to be too wide on other grounds, the objection based on the fact that it applied to manufacture as well as sale was surmounted by means of severance.

We were also referred to *Attwood* v. *Lamont*, which, at first sight, is inconsistent with the other two authorities that I have mentioned inasmuch as it was a case in which there was a covenant not to carry on any of a long enumeration of different trades and businesses.

There it was held by the Court of Appeal that the covenant could not be severed so as to make it equivalent to a string of independent covenants each dealing with a different business. The explanation of the different conclusion reached in Attwood v. Lamont as compared with Goldsoll v. Goldman and the British Reinforced Concrete case, appears to be that Attwood v. Lamont was a case as between master and servant, whereas the other two cases were cases as between vendor and purchaser, as is the present case. I think it can be regarded as settled that the court takes a far stricter and less favourable view of covenants in restraint of trade entered into between master and servant than it does of similar covenants between vendor and purchaser".

It will be seen, from what has been said above, that the nature of an agreement is a material factor to be weighed in deciding the question of severability. It is, therefore, most relevant to note that where options to purchase have been inserted in leases such options have been treated as separate covenants, severable from the part relating to the lease in the same contract.

In Halsbury's Laws of England (3rd Ed. Vol. 23, para. 1090) one finds the principle stated as follows:

> "A lease may confer upon the tenant an option to purchase the interest of the landlord in the demised premises. This usually takes the form of a covenant by the landlord that, if the tenant within a specified period shall give to the landlord notice in writing of a specified length of his desire to purchase the fee simple, or other interest of the landlord in the premises, the landlord will on payment of a specified purchase price, and of any arrears of rent, convey the demised premises to the tenant. Such an option is collateral to, independent of and not incident to the relation of landlord and tenant".

In *Woodall* v. *Clifton* [1904-1907] All E.R. Rep. p. 268, Romer L.J., had this to say about the nature of an option to purchase in a contract of lease (at p. 271):

> "The covenant is one aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy, or its terms".

In *Sherwood* v. *Tucker* [1924] 2 Ch. p. 42 Astbury J. had this to say on the point at (p. 44):

> "An option in a lease to purchase the reversion is not one of the terms of the tenancy. It is a collateral provision wholly outside the terms regulating the relations between the landlord and tenant as such".

In *Griffith* v. *Pelton* [1957] 3 All E.R. p. 75, Jenkins L.J., after referring, *inter alia*, to *Woodall* v. *Clifton* (*supra*) stated (at p. 84):

> "An option contained in a lease for the lessee to purchase the freehold differs from an option in gross only in the respects that the grantor and the grantee stand in the relationship of landlord and tenant, and that the contract creating it is made part of the terms on which the lease is granted. However, albeit collateral to the lease, it is in itself a distinct contract possessing all the essential characteristics of an option in gross....."

Also "An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case".

The matter as put by Jenkins L.J. in *Griffith* v. *Pelton* (*supra*) was carried even further in *Beesly* v. *Hallwood Estates Ltd.* [1960] 2 All E.R. p. 314, where it was held that an option to purchase was not a contract at all. Buckley J. referring (at p. 321) to the above quoted dictum of Jenkins L.J. in *Griffith* v. *Pelton* said:

> "I think that Jenkins, L.J., cannot have meant by the expression 'conditional contract' to describe a concluded contract under which the rights and liabilities of the parties were dependent on a condition, but a state of affairs capable of resulting in a concluded contract on a certain contingency".

And this view was affirmed in *Re Button's Lease* [1963] 3 All E.R. p. 708 at p. 713.

Thus, an option to purchase, presents an instance of a

contractual obligation to keep an offer open for acceptance by the other party by exercising an option. Until this happens, however, the contract to sell visualized by the parties is not formed.

And in the case of an option to buy land in Cyprus, the contract formed by the exercise of the option on the part of the buyer is an agreement to buy on the part of the purchaser, and an agreement to sell on the part of the owner; but it is not a sale of property resulting in the transfer of ownership from seller to buyer (see sections 40(1) and 41(4) of the Immovable Property (Tenure, Registration & Valuation) Law, Cap. 224).

In the light of the foregoing, we now come to consider the question of the severability of the tenancy agreement from the option to purchase in the contract between the parties before us.

It is quite clear that clause 1 of the contract which contains 7 different sub-clauses, constitutes the tenancy part of the agreement. It is correct that sub-clause (f) is intended to safeguard the rights of the respondent in case he would decide eventually to exercise the option to purchase; but it is still a term of the tenancy, because it restrains the appellants from embarking during the duration of the tenancy upon certain courses of action which might tend to affect or disturb peaceful possession by the tenant.

Clause 2 of the contract is devoted to the option to purchase granted to the respondent. It contains four sub-clauses and it is significant to note sub-clause (*a*) which provides expressly that the notice of the exercise of the option will constitute the agreement to sell the property with the improvements and additions therein prescribed; which indicates that no such agreement between the parties could exist until the option had been exercised.

Clause 3 provides specifically about the damages to be paid to the respondent by the appellants in case of non-delivery of possession of the property at the commencement of the tenancy.

Clause 4 provides about the damages payable in case of breach of any of the terms of the contract other than clause 1(*a*) which (latter clause) relates to the non-delivery of the property at the commencement of the tenancy for the breach

of which specific provision is made in clause 3.

Clause 5 deals with the position in case the respondent-lessee would not exercise the option to purchase.

As already said earlier in this judgment, the trial Court came to the conclusion that the contract in question is severable; and that the part constituting the tenancy upon which the claim in this action is based, is severable from the part providing for the option to purchase. And, that the right of the respondent to delivery of possession of the property at the commencement of the tenancy, under clause 1*(a)*, and to the compensation in the form of liquidated damages provided in clause 3 in case of default, can be enforced.

After due consideration of the matter, we find ourselves in agreement with the conclusion reached by the trial Court, even if we were to assume (without deciding it) that any part of the contract relating to the option to purchase were to be held invalid and unenforceable because of the provisions in Article 128 of the Charter of the Church or the internal Regulations of the Monastery. It is, therefore, unnecessary for us to deal with the parts of the contract outside the lease and beyond the provision for compensation in case of default in delivering possession on the agreed date.

As already stated we are clearly of opinion that the provisions for approval by, *inter alia*, the Holy Synod in case of alienation by transfer of ecclesiastical property do not apply to contracts of lease; nor are the relative internal Regulations of the Monastery in question applicable to leases. Learned counsel in the case have not been able to give us one single instance where such provisions have been applied to leases which are the most usual way in which ecclesiastical property is put into use. There must have been hundreds, if not thousands, of leases of such property from ecclesiastical institutions subject to the Church of Cyprus, during the period of more than half a century since the Charter before us came into force.

It has not been seriously disputed that the appellants are guilty of breach of clause 1*(a)* of the contract. What then remains to be decided next, is whether or not the amount of £5,000 provided in clause 3 by way of damages for breach of clause 1*(a)*, which constitutes the claim in this action, should have been awarded in full; or, any lesser amount

should have been awarded to the respondent by way of reasonable compensation.

Section 74(1) of our Contract Law (Cap. 149) which is applicable in this connection reads as follows:

> "74.(1) When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> A stipulation for increased interest from the date of default may be a stipulation by way of penalty".

It is identical to section 74 of the Indian Contract Act, 1872, as amended by the Indian Contract Act Amendment Act, 1889. As stated in Pollock and Mulla on the Indian Contract and Specific Relief Acts, 8th ed. pp.480-481, these provisions in India were intended to get rid of the distinction in English law between liquidated damages and penalties; and to carry the tendency in the English case law on the subject to its full consequences.

This is in accord, also, with the views of Zekia J. in *Iordanous* v. *Anyftos* 24 C.L.R. p. 97 (at p. 104) which have been quoted in the judgment of the trial Court and are as follows:

> "It is clear from the wording of the section itself that whether the sums stipulated are in the nature of a genuine pre-estimate of damages or in the nature of penalty, that makes no difference as to the discretion of the Judge to award as reasonable compensation to the party entitled thereto, a sum not exceeding the amount stipulated. No doubt when the amount named in the contract is in the nature of pre-estimated damages, that will carry weight with the Judge in fixing the amount of damages but in either case a Court is precluded from awarding damages beyond and in excess of the amount named in the contract".

Bearing in mind the relevant legal position and bearing also in mind the nature of the property leased in the case

under consideration, and the annual rent under the contract, together with other relevant factors, (such as enjoyment of the property for 20 years on rent), we are of the opinion that the amount of £5,000 provided in clause 3 of the contract was agreed between the parties as an estimate of the damages; and amounts to a reasonable compensation in the sense of section 74(1) of Cap. 149. We, therefore, affirm the decision of the trial Court on this point also.

There remains one further point to deal with and this is appellants' appeal against the dismissal of their counterclaim for a declaration that the contract in question, and particularly the option to purchase provided therein, is invalid and of no legal effect whatsoever.

At the end of their judgment, the trial Court dismissed the counterclaim as a matter of natural consequence to their finding that the contract was not in conflict with Article 128 of the Charter of the Church, and of the internal Regulations of the Monastery; and was, therefore, valid and enforceable.

Having come to the conclusion that the right of the respondent, to delivery of possession of the land leased to him, was severable and enforceable, we cannot but find that to that extent the counterclaim was rightly dismissed.

We have considered whether or not the dismissal of the rest of the counterclaim calls for a decision in this appeal. And, in such a case, whether dealing with the validity of the option to purchase *vis-a-vis* Article 128 of the Charter and the relevant provisions in the internal Regulations of the Monastery, we should hear further argument on the point from the Holy Synod as the governing body of the Church of Cyprus, and, also, from the other two "Stavropigiaka Monasteria" referred to in the Charter, the appellant being another one of them.

We have, however, found it unnecessary to go to that length. The claim in the action is for the liquidated damages of £5,000 for the breach of the contract by non-delivery of possession for the purposes of the lease. The trial Court found that this claim for damages could succeed on the part of the contract which created a valid tenancy, severable from the part which gave the lessee the option to buy the property at the end of the lease, 20 years later; and this decision of the trial Court has now been affirmed on appeal. In the

circumstances it is not necessary to decide on the counterclaim the validity of the option provided in the part of the contract held severable from the lease, which, as already said, could only come into play 20 years later.

For the aforesaid reasons we are clearly of the opinion that the counterclaim, to the extent that it goes beyond the defence to the claim, constitutes a cross-action which is premature to be heard and determined in these proceedings. We, therefore, decided that the part of the counterclaim which goes beyond the defence, should be struck out; and be disposed of accordingly.

In the result the appeal is dismissed with costs; and the counterclaim in relation to the option to purchase is struck out.

Appeal dismissed with costs. Counterclaim mentioned above struck out.