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

MARGARITA IKOSI,

Appellant-Plaintiff,

v.

ANDREAS KARAYIANNIS AND OTHERS,

Respondents-Defendants.

(*Civil Appeal No.* 4716).

Landlord and Tenant—Rent restriction—Non-occupying tenant—Sub-letting of premises by contractual tenant—Does not amount to abandonment or surrender of tenancy—Tenant continues being contractual tenant and as such entitled to be in due course in possession—Tenant wrongfully deprived of possession by the landlord and other wrongdoers some time prior to the expiry of his contractual tenancy—Without such wrongful interference the tenant would have regained possession of the premises a short time before expiry of said contractual tenancy—Tenant being entitled in the circumstances of this case to the immediate possession of the premises at the time (i.e. *shortly before such expiry of his contractual tenancy*)*—The landlord and other wrongdoers not entitled to take advantage of their own wrong and invoke the provisions of the Rent Control (Business Premises) Law,* 1961 (*Law No.* 17 *of* 1961) *by setting up the tenant's lack of physical possession of the premises in question—Therefore, considering that the tenant* (*now appellant*), *had she not been wrongfully excluded from the premises by the landlord and other wrongdoers at the time as aforesaid, would have been a tenant in possession prior to the expiry of her contractual tenancy and, thus, she would have become a statutory tenant of the premises on expiry of her said contractual tenancy—It follows that she is entitled to an order for possession (and damages) as claimed—See section* 15 (1) *of the Rent Control (Business Premises) Law,* 1961 (*Law No.* 17 *of* 1961 *as amended by Law No.* 39 *of* 1961).

Rent control—Rent restriction—See supra.

Landlord and Tenant—Eviction of tenant without order of the Court—Remedies—Landlord liable in damages—Measure of such damages—Trial Court's award held to be inadequate having regard to the circumstances of the case.

Eviction—Wrongful eviction of tenant—Remedies—Damages—Measure of—See supra.

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Delay—Delay in applying to the Court for relief—Whether sufficient to deprive plaintiff of her rights—Principles on which the Courts should act.

Statutes—Construction—"Possession" in section 15 (1) *of the Rent Control (Business Premises) Law,* 1961 (*Law No.* 17 *of* 1961).

Words and Phrases—"Possession"—"Right of possession"—"Legal possession"—"Possession in law"—"Right to possess"—"Constructive possession".

In this case the appellant—the contractual tenant of a shop—was wrongfully prevented from regaining possession of the shop by the landlord and other wrongdoers. This happened shortly before the expiry of the appellant's said contractual tenancy, with the result that on such expiry she (the appellant-tenant) was not in physical possession of the premises in question. That being so, it was argued on behalf of the respondents (the landlord and other wrongdoers) that the appellant-tenant did not become on such expiry as aforesaid the statutory tenant of the premises under the relevant provisions of the Rent Control (Business Premises) Law, 1961, and, therefore, she could not invoke the protection of that Law. Reversing the judgment of the trial Court, the Supreme Court, allowing the tenant's appeal, held that the respondents-wrongdoers are not entitled to take advantage of their own wrongful acts and, therefore, cannot be heard saying that the appellant-tenant was not in possession of the premises at any material time ; and the Supreme Court granted an order for possession and awarded increased damages. The facts of the case are briefly as follows :

The appellant was the contractual tenant of a shop situate at Nicosia, Ledra Street, belonging to the landlord, respondent No. 2. The contractual tenancy in question commenced on April 1, 1960, and expired on December 31, 1964. The tenant (appellant) did not actually occupy the shop in question at the time, but she sub-let it on November 12, 1960, to the sub-tenant (respondent No. 1) for a period of one year. The sub-tenant continued in occupation after the expiration on November, 1961, of the said contractual sub-tenancy ; he became thus a statutory tenant (sub-tenant) as from November 12, 1961, under the provisions of the Rent Control (Business Premises) Law, 1961 (Law No. 17 of 1961) and the amending Law No. 39 of 1961.

On the 1st September, 1964, the sub-tenant by a letter addressed to the tenant (appellant) determined his statutory sub-tenancy and expressed his intention to quit the premises on the 11th October, 1964 (see section 10 (1) (*e*) of the aforesaid Rent Control etc. etc. Law of 1961). However, on the 7th of October, 1964, the sub-tenant wrote another letter to the tenant (appellant) informing her that he intended remaining in possession until the 31st December, 1964. The tenant protested and on October 20, 1964, instituted her action against the sub-tenant claiming possession, damages etc. etc. The sub-tenant remained in possession of the shop until the 28th December, 1964, when he delivered possession not to the tenant but to a third person (respondent No. 3) on the express instructions of the landlord and on the strength of a contract of lease entered into on the 7th October, 1964, between the landlord and the new tenant (respondent No. 3).

It was the contention of the tenant (appellant) that this was a concerted plan set up by the landlord, the sub-tenant and the new tenant with the object of preventing her (the appellant) from regaining possession on or before the 31st December, 1964 (*viz.* on or before the date of expiration of her contractual tenancy *supra*) so that she would become a statutory tenant as from the 1st January, 1965. The tenant-appellant finally contended that this was a high handed action on the part of the landlord (respondent No. 2) who should not be allowed to take advantage of his own wrong.

Be that as it may, the tenant-appellant instituted on January 21, 1965, her second action against the landlord (respondent No. 2) and the new tenant (respondent No. 3) claiming possession, damages etc.

The trial Court held that, as a result of a number of wrongful acts on the part of the respondents, the tenant-appellant was prevented from regaining possession of the shop in question before the 31st December, 1964, *viz.* before the expiry of her contractual tenancy (*supra*), to which possession she was entitled both against the landlord (respondent No. 2) and the sub-tenant (respondent No. 1). However, the trial Court went on to hold that " because the tenant (appellant) was wrongfully prevented from entering into possession of the subject premises before the 31st December, 1964, she lost the protection of the Rent Control (Business Premises) Law 1961 *i.e.* she lost the statutory tenancy which

she would otherwise have had "; and after quoting the opening words of section 15 (1) of the said Law (*infra*), they go on to say : " In other words the protection is only afforded to someone in possession and it would be immaterial that the lack of possession is due to the wrongful acts of other persons including the landlord himself. In such a case the appropriate remedy would be damages against the wrong doers, the persons responsible for the loss of the possession ". And the trial Court awarded £180 damages against the respondents jointly and severally.

Section 15 (1) of the Rent Control (Business Premises) Law, 1961 (Law No. 17 of 1961) reads as follows :

> " 15 (1). A tenant who under the provisions of this Law, retains possession of any business premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Law, and shall be entitled to give up possession of the business premises only on giving such notice as would have been required under the original contract of tenancy."

Allowing the appeal, setting aside the judgment of the trial Court and granting an order for possession as well as increasing the damages awarded, the Supreme Court :—

Held, (1). The question we have to decide is whether the tenant (appellant) has " retained possession " within the meaning of section 15 (1) of the Rent Control (Business Premises) Law, 1961 (*supra*). Then, and then only, she is entitled to be called a statutory tenant, and then, and then only, she is bound by, and enjoys, the benefit of the terms and conditions of the original contract of tenancy, so far as they are applicable. But the question is, does she now retain possession? If the tenant (appellant) seeks to rely on section 15 (*supra*), she must at least show that she retains " possession ", that is, possession of a nature and character sufficient to support her action (cf. *Thompson* v. *Ward* [1953] 2 Q.B. 153, C.A., at p. 162, *per Evershed, M.R.*).

(2). We are of the view that the case of *Denman* v. *Brise* [1949] 1 K.B. 22 is on all fours with the present case. Having

regard to the principles enunciated in that case we hold that the tenant (appellant) :—

(*a*) was a contractual tenant up to the 31st December, 1964, and as such entitled to be in possession of the shop in question ;

(*b*) that she was wrongfully deprived of possession by the landlord, the sub-tenant and the new tenant (*i.e.* by the three respondents), to which possession she was entitled as a contractual tenant ;

(*c*) that the landlord and other wrongdoers were not entitled to take advantage of their own wrong and invoke the provisions of the Rent Control (Business Premises) Law, 1961 by setting up the tenant's lack of possession ; and

(*d*) that the tenant (appellant) would have been (under the provisions of section 15 (1) of the Law (*supra*)), a statutory tenant in possession on expiry of her contractual tenancy on the 31st December, 1964, if the landlord and other wrongdoers had not excluded her from the premises (*viz.* the shop in question).

(3). Consequently, the tenant (appellant-plaintiff) is entitled to an order for possession and damages.

(*N.B.* The damages awarded by the trial Court (£180 *supra*) were increased to £400 with interest as from the date of the judgment of the trial Court).

Appeal allowed with costs.

Cases referred to:

Keeves v. *Dean* [1924] 1 K.B. 685, C.A., at p. 694, per Scrutton, L.J. ;

Brown v. *Brash and Ambrose* [1948] 2 K.B. 247 ;

Denman v. *Brise* [1949] 1 K.B. 22 ;

Baker v. *Turner* [1950] A.C. 401, at p. 416 ;

John M. Brown Ltd. v. *Bestwick* [1951] 1 K.B. 21, C.A. ;

Skinner v. *Geary* [1931] 2 K.B. 546, C.A., at p. 562, per Scrutton, L.J. ;

Dixon v. *Thomas* [1952] 1 All E.R. 725, C.A. ;

U.S.A. and Republic of France v. *Dollfus Mieg et Cie. S.A. and Bank of England* [1952] A.C. 582, at p. 605, per Viscount Jowitt ;

Towers and Co. Ltd. v. *Gray* [1961] 2 Q.B. 351, at p. 361, per Lord Parker, C.J. ;

Thompson v. *Ward* [1953] 2 Q.B. 153, C.A., at pp. 158–159 and 162, per Evershed, M.R. ;

Cruise v. *Terrell* [1922] 1 K.B. 664, C.A., at p. 670 ;

Remon v. *City of London Real Property Co., Ltd.* [1921] 1 K.B. 49, C.A. ;

Whitham v. *Kershaw* [1885] 16 Q.B.D. 613, at p. 618.

Appeal and cross-appeals.

Appeal and cross-appeals against the judgment of the District Court of Nicosia (Ioannides, Ag. P.D.C. and Demetriades, D.J.) dated the 10th April, 1968 (Action Nos. 2462/64 and 217/65, consolidated) whereby the Court refused to grant an order of possession in respect of a shop at Ledra Str., Nicosia, in favour of the plaintiff and the defendants were adjudged to pay the sum of £180 as damages.

Fr. Markides with *A. Triantafyllides*, for the appellant.

S. Nikitas, for respondent No. 1.

E. Tavernaris, for respondents Nos. 2 and 3.

Cur. adv. vult.

The judgment of the Court was delivered by :—

JOSEPHIDES, J.: On the 30th March, 1971, we allowed the plaintiff's appeal and dismissed the cross-appeals of the respondents in the following terms, and we intimated that we would give our reasons later :—

"(1) Plaintiff's *appeal* allowed as follows :—

(*a*) Amount of damages awarded by the District Court against all three respondents increased from £180 to £400 with interest from 10.4.1968 (the date of judgment of the District Court) to payment. (This is in addition to the sum of £37 awarded against the first respondent and not appealed against) ;

(*b*) *Possession Order* in favour of appellant against all three respondents. Delivery of vacant possession on or before 31st July, 1971 ;

(2) The cross-appeal of the first respondent, having been abandoned, is hereby dismissed ;

(3) The cross-appeal of the second and third respondents is hereby dismissed ;

(4) All three respondents to pay the costs of this appeal in addition to the costs before the trial Court".

We now proceed to give the reasons for our judgment.

On the 20th October, 1964, the appellant instituted an action (No. 2462/64) in the District Court of Nicosia against the first respondent claiming possession of business premises, injunction for trespass and damages and/or *mesne* profits. Some three months later, the same appellant instituted a second action (No. 217/65) against the second and third respondents for a declaration that she was the lawful tenant of the aforesaid premises and for a possession order and damages.

For convenience we shall refer to the appellant as " the tenant ", the first respondent as " the sub-tenant ", the second respondent as " the landlord ", and the third respondent as " the new tenant ".

The two actions were consolidated and heard together with a third action (No. 2541/64), which was instituted on the 27th October, 1964, by the landlord against the tenant and the sub-tenant ; but the latter action was withdrawn and dismissed at the conclusion of the landlord's evidence in the course of the hearing. The District Court, after hearing the matter before them, delivered their reserved judgment refusing a possession order in favour of the tenant but adjudging the landlord, the sub-tenant and the new tenant, to pay to the tenant jointly and severally the sum of £180 damages ; and adjudging further the sub-tenant to pay to the tenant the sum of £37 for *mesne* profits for the period 12th October, 1964 to the 11th November, 1964. At the same time the Court made an order for costs in favour of the tenant.

The tenant appealed against the refusal of the District Court to grant her an order for possession and against the quantum of damages as being manifestly inadequate. The landlord and new tenant cross-appealed against the award of damages against them ; and the sub-tenant, while not challenging the award of £37 as *mesne* profits against him, cross-appealed against the rest of the judgment, but later abandoned his cross-appeal in the course of the hearing before us.

The following facts were either agreed between the parties or undisputed. For a number of years prior to 1959 the tenant had been a lessee in possession of business premises at No. 153 Ledra Street, Nicosia, which belonged to the landlord. Up to the 31st December, 1958, statutory tenants of business premises were protected under the provisions of the Rent (Control) Laws, 1954 and 1955; but as from the 1st January, 1959, such premises were exempted absolutely from the operation of such Laws. In the year 1959 the landlord brought an action against the tenant claiming possession as he intended demolishing and reconstructing such premises. The action was settled between the parties and this settlement was recorded in the aforesaid action on the 27th April, 1959, by a District Judge. Under the settlement the tenant agreed to deliver possession of the old premises to the landlord by the 15th May, 1959, on condition that the landlord would demolish and reconstruct the premises and deliver a new shop to the tenant on or before the 1st May, 1960. It was further agreed that the tenant would then become a "tenant" of the new shop for a period of two years at the rent of £28 per month, "subject to the usual terms of the tenancy", and that at the end of the two years the tenant would be entitled to exercise an option to have the tenancy renewed until the 31st December, 1964, under the same terms but at an increased rent of £32 per month, on giving to the landlord two months' notice in writing. Finally, it was agreed between the landlord and the tenant that the latter would deliver up vacant possession of the new premises to the landlord on the 31st December, 1964.

Pursuant to that agreement the tenant delivered up possession of the old premises to the landlord and possession of the reconstructed new premises was delivered to the tenant on the 1st April, 1960. The tenant did not actually occupy the new premises herself at the time, but she sub-let them on the 12th November, 1960, to the sub-tenant under a contract of lease of the same date. Under the terms of that contract the sub-tenancy would be for a period of one year at the rent of £36 per month with an option to the sub-tenant to have it renewed until the 30th November, 1964, at a rent of £37 per month, on giving three months' notice to that effect. The sub-tenant accordingly entered into possession of the said premises on the 12th November, 1960.

About a year later, namely, on the 17th October, 1961, business premises were again brought under statutory control, and tenants of such premises were given protection

from eviction under the provisions of the Rent Control (Business Premises) Law, 1961 (No. 17 of 1961) and the amending Law No. 39 of 1961.

The sub-tenant did not exercise his option to renew his sub-tenancy which expired on the 11th November, 1961, and subsequently, he became a statutory tenant as from the 12th November, 1961.

Reverting to the position between the landlord and the tenant, at the expiration of the original term of two years stipulated in their agreement of the 27th April, 1959, the tenant exercised her option and had her tenancy renewed until the 31st December, 1964.

Pausing there, there is no doubt that the tenant was a contractual tenant by virtue of the settlement which was recorded in Court on the 27th April, 1959, and that there was nothing in that agreement to prevent her from sub-letting the premises. In fact, the trial Court held that the sub-tenancy made by the tenant to the sub-tenant was legally valid. Although this was at first challenged by the landlord and the new tenant, in the course of the hearing of this appeal it was conceded by them that the sub-tenancy by the tenant was valid.

On the 1st September, 1964, the sub-tenant by a letter addressed to the tenant determined his sub-tenancy by notice to quit. In that letter the sub-tenant expressed his intention to quit the premises on the 11th October, 1964 (see section 10 (1) (*e*)) of the Rent Control (Business Premises) Law, No. 17 of 1961). However, on the 7th October, 1964, the sub-tenant wrote another letter to the tenant informing her that he intended remaining in possession until the 31st December, 1964.

It is significant that on the very same day (7th October, 1964) when the sub-tenant notified the tenant that he intended retaining possession of the premises until the 31st December, 1964, a contract of lease was signed by the landlord and the new tenant for a period of four years as from the 1st January, 1965. The witnesses to that lease were the sub-tenant himself and Mr. E. Tavernaris, the advocate who acted throughout for the landlord and the new tenant. It is the contention of the tenant that this was designed to give possession to the new tenant who must be presumed to have had knowledge of all relevant facts.

On the 17th October, 1964, the sub-tenant's advocate wrote a letter to the tenant disputing the latter's title to sub-let to him (the sub-tenant) ; and on the same day the

landlord's advocate (Mr. Tavernaris) wrote a letter to the tenant that the latter by sub-letting the premises was in breach of her agreement and that the landlord reserved his rights to claim damages on that ground. Thereupon, the tenant instituted her first action (No. 2462/64) against the sub-tenant on the 20th October, 1964, claiming possession, etc., as stated earlier in this judgment. Although before the District Court the sub-tenant maintained the position that he was entitled to retain possession until the 31st December, 1964, in the course of this appeal it was conceded on his behalf that he was bound to deliver possession of the premises to the tenant on the 11th October, 1964, and that, consequently, he was a trespasser after that date.

On the 21st October, 1964, the landlord, through his advocate Mr. Tavernaris, sent a notice to the tenant determining the tenancy, on the ground that the tenant by sub-letting the premises was in breach of her agreement, and demanding possession of the premises. Six days later, on the 27th October, 1964, the landlord brought an action (No. 2541/64) against the tenant and sub-tenant, for a declaration that the tenant's contractual tenancy had been duly determined for breach of covenant against sub-letting, and claimed recovery of possession of the premises and damages. But, as already stated, this action was withdrawn by the landlord and dismissed at the conclusion of his evidence before the trial Court.

To revert to the sequence of events : The sub-tenant remained in possession of the premises until the 28th December, 1964, when he delivered possession to the new tenant, with the landlord's authority, on the strength of the contract of lease entered into on the 7th October, 1964, between the landlord and the new tenant. On the 31st December, 1964, the landlord's advocate wrote a letter to the tenant in which he stated that the new tenant was already in possession of the premises and that he, the landlord, recognised the new tenant as his lawful tenant. It is the contention of the tenant that this letter shows that the landlord had full knowledge of the facts and that he recognised that the new tenant was already in possession before the 31st December, 1964 ; and that, further, this was a concerted plan to prevent the tenant from regaining possession by the 31st December, 1964, so that she would become a statutory tenant as from the 1st January, 1965. The tenant finally contended that this was a high-handed action on the part of the landlord who should not be allowed to take advantage of his own wrong.

On the 7th January, 1965, the tenant wrote to the new tenant claiming immediate possession of the premises as the lawful tenant ; and on the 9th January, 1965, the new tenant replied, through his advocate Mr. Tavernaris, denying that the tenant was the lawful tenant. Two weeks later, on the 21st January, 1965, the tenant instituted her second action (No. 217/65) against the landlord and the new tenant claiming possession, damages, etc.

This concludes the facts of this case.

The District Court held that " the tenant, *vis-a-vis* the landlord, was entitled to possession of the subject premises under the terms of " the agreement embodied in the settlement of 1959, " not having forfeited her rights as a result of the breach alleged by the landlord " ; that the sub-tenant's holding over after the 11th October, 1964 (the date of the expiry of the notice to quit) was unlawful and an act of trespass ; and that the tenant evinced her intention to regain possession of the premises before the expiry of of her contractual tenancy on the 31st December, 1964, by instituting her first action (No. 2462/64) in October, 1964, against the sub-tenant, of which action the landlord had also notice as it appears from the statement of claim (paragraph 7) in the landlord's action (No. 2541/64).

The trial Court further held that the tenant was prevented from regaining possession of the premises before the 31st December, 1964, to which possession (as explained earlier) she was entitled both against the sub-tenant and the landlord as a result of the following wrongful acts :

" (i) originally of sub-tenant, in holding over beyond the 11.10.64 ;

(ii) of the sub-tenant in delivering possession to the new tenant shortly before the 31.12.64 (*i.e.* on 28.12.64) ;

(iii) of the landlord in authorising and/or instructing the sub-tenant to deliver possession to the new tenant ;

(iv) of the new tenant in obtaining possession shortly before the 31.12.64 (*i.e.* on 28.12.64), since a person entitled to immediate possession can maintain an action for trespass against anybody who entered without his permission (Scrutton, L.J. in *Keeves* v. *Dean* [1924] 1 K.B. 685, at page 694)."

However, the trial Court held that " because the tenant was wrongfully prevented from entering into possession of the subject premises before the 31.12.64, she lost the protection of the Rent Control Law, 1961, *i.e.* the statutory tenancy which she would otherwise have had " ; and, after quoting the opening words of section 10 (1) of the said Law, they go on to say " in other words the protection is only afforded to someone in possession and it would be immaterial that the lack of possession is due to the wrongful acts of other persons including the landlord himself. In such a case the appropriate remedy would be damages against the wrong doers, the persons responsible for the loss of the possession."

The main complaint of the tenant in the present appeal is against this conclusion of the trial Court. It is her case that the landlord wrongfully prevented her from regaining possession by the 31st December, 1964, when she would become a statutory tenant as from the 1st January, 1965 ; and that the landlord should not be allowed to take advantage of his own wrong. This is the corner-stone of the tenant's appeal.

In the course of the hearing of this appeal it was conceded on behalf of the landlord that he was not entitled to possession of his premises on the 31st December, 1964, although he contended that he honestly believed that he was so entitled. This was in answer to the tenant's contention that there was a concerted plan to prevent her from regaining possession before the 31st December, 1964. It was the landlord's case that the tenant was not entitled to a statutory tenancy as from the 1st January, 1965, because she was not in physical occupation of the premises and that, therefore, she was not protected under the Law. The landlord further contended that the tenant was neither a contractual nor a statutory tenant when she instituted her action No. 217/65 in January 1965 ; and that " rightly or wrongfully " she lost her rights as a statutory tenant, because the law protects the tenant in physical occupation and not legal possession of the premises. For this proposition the landlord relied on *Brown* v. *Brash and Ambrose* [1948] 2 K.B. 247, in which it was held that a " non-occupying " tenant *prima facie* forfeits his status as a statutory tenant under the Rent Restriction Acts, but the term " non-occupying tenant " cannot cover every tenant who, for however short a time, or however necessary a purpose, or with whatever intention as regards returning, absents himself from the

demised premises. But absence may be sufficiently prolonged or unintermittent to compel the inference *prima facie* of a cesser of occupation. The issue is one of fact and of degree. It should be observed that the principle laid down in *Denman* v. *Brise* [1949] 1 K.B. 22, demolishes completely the argument for the landlord in the present case. However, *Denman's* case was not cited by either counsel to the trial Court or to us on appeal. We shall have occasion to revert to this authority later in our judgment.

In the present case we are concerned with the construction of the expression " possession " occurring in section 15(1) of the Rent Control (Business Premises) Law, No. 17 of 1961, which reads as follows :

> " 15. (1) A tenant who, under the provisions of this Law, retains possession of any business premises shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Law, and shall be entitled to give up possession of the business premises only on giving such notice as would have been required under the original contract of tenancy : "

It has been said that a statutory tenant has a right which avails against all the world (*Keeves* v. *Dean* [1924] 1 K.B. 685, at page 694, C.A., cited with approval in *Baker* v. *Turner* [1950] A.C. 401, at page 416). There cannot be a statutory tenancy unless at the time when the contractual tenancy comes to an end the person in whom the tenancy is vested is residing in a dwelling-house (*John M. Brown Ltd.* v. *Bestwick* [1951] 1 K.B. 21, C.A.), or unless the absence is purely temporary (*Skinner* v. *Geary* [1931] 2 K.B. 546, C.A., at page 562, per Scrutton, L.J. ; and *Dixon* v. *Tommis* [1952] 1 All E.R. 725, C.A.).

We are indebted to Mr. Frixos Markides, counsel for the tenant, for inviting our attention to Winfield on Tort, 7th edition, page 360 *et. seq.*, regarding the meaning of the expression " possession " in this connection. We give below a summary on this point based on what is stated in Winfiled on Tort, 8th edition, pages 325 to 330. The following phrases often occur in the reports and some of them are often used interchangeably :— Possession, right of possession, legal possession, possession in law, right to possess, constructive possession, physical possession. Possession is of two kinds—possession in fact and possession in law, and the first of these has not the same degree of legal protection as has the second.

It is quite possible to have *de facto* possession of a thing without any bodily contact with it. Possession in law is also known as legal possession. Possession in fact is *prima facie* evidence of possession in law but it is not conclusive evidence of it, for possession in law is something more. The distinction between possession in fact and possession in law lies in the presence of a certain mental element. Whether this intent exists or not must generally be a question of fact. For possession in law there must be a manifest intent not merely to exclude the world at large from interfering with the thing in question, but to do so on one's own account and in one's own name (see Pollok & Wright in "Essay on Possession in the Common Law" (1888), at page 17).

The terms "possession", "right of possession", "legal possession", and "possession in law" generally mean the same thing—full legal possession. Even the "right to possess" has been equated with "possession" (U.S.A. and Republic of France v. *Dollfus Mieg et Cie.* S.A. and Bank of England [1952] A.C. 582, at page 605, per Viscount Jowitt). "Right to possess" and "constructive possession" generally mean the same thing. It has been said that the meaning of "possession" depends upon the context in which it is used (*Towers & Co. Ltd.* v. *Gray* [1961] 2 Q. B. 351, at page 361, per Lord Parker, C.J.). "It is necessary to bear in mind that before the rent restriction legislation an action for trespass was only maintainable at the suit of him who was in possession of the land, using the word 'possession' in its strict sense and including a person entitled to immediate and exclusive possession" (per Evershed, M.R. in *Thompson* v. *Ward* [1953] 2 Q.B. 153, C.A., at pages 158-159).

Reverting now to section 15 (1) of our Law, the question which we have to decide is whether the tenant has "retained possession" within the meaning of that section. Then, and then only, he is entitled to be called a statutory tenant and then, and then only, according to the section, he is bound by, and enjoys, the benefit of the terms and conditions of the original contract of tenancy so far as they are applicable. But the question is, does he now retain possession? If the tenant seeks to rely on section 15, she must at least show that she retains "possession", that is, possession of a nature and character sufficient to support her action (cf. *Thompson* v. *Ward*, *supra*, at page 162, per Evershed, M.R.).

We are of the view that the case of *Denman* v. *Brise* [1949] 1 K.B. 22, is on all fours with the present case. The headnote reads as follows :

> " A house within the Rent Restriction Acts was destroyed by enemy action in 1940. The tenant accordingly ceased to occupy the premises, but there was no evidence of abandonment or surrender of the tenancy. The landlord built a new house on the site, and the tenant thereupon approached him with a view to occupying it. It was fit for occupation on February 17, 1948, but the tenant was unable to gain possession because the landlord withheld the key. The landlord then determined the contractual tenancy on April 30, 1948, by a notice to quit dated March 9. In an action by the tenant for possession,
>
> *Held*, that, as there was no evidence of abandonment or surrender of the lease, and as the contractual tenancy had not been determined when the new house became fit for occupation, the tenant on that date became the lawful tenant of it and entitled, as such, to occupy it ; that the tenant's claim to possession was not defeated by the principle that the Rent Restriction Acts are for the protection of tenants in possession, for his claim was not primarily made under the Acts but was simply for possession of which he had been wrongfully deprived on February 17 and to which on that date he was entitled as contractual tenant ; that the landlord was not entitled to take advantage of his own wrong and invoke the Acts by setting up the tenant's lack of possession ; and that, as the tenant would have been a statutory tenant in possession on expiry of the notice to quit if the landlord had not excluded him from the house, he was entitled to an order for possession. "

Having regard to the principles enunciated above, we hold that the tenant—

(*a*) was a contractual tenant up to the 31st December, 1964, and as such entitled to be in possession of the premises in question ;

(*b*) that she was wrongfully deprived of possession by the landlord, the sub-tenant and the new tenant, to which possession she was entitled as a contractual tenant ;

(*c*) that the landlord and other wrong doers were not entitled to take advantage of their own wrong and

invoke the provisions of the Rent Control (Business Premises) Law, 1961, by setting up the tenant's lack of possession ; and

(*d*) that the tenant would have been (under the provisions of section 15 (1) of the Law), a statutory tenant in possession on expiry of her contractual tenancy on the 31st December, 1964, if the landlord and other wrongdoers had not excluded her from the premises. Consequently, the tenant is entitled to an order for possession and damages.

As was stated by Tucker, L.J., in *Denman* v. *Brise*, *supra*, (at page 26), if the tenant would not be entitled to claim the benefit of his tenancy " such a position would be contrary to all ideas of justice and equity. I think that any Court must have power in circumstances such as the present to order that the landlord shall restore the tenant to the position in which he should have been on the relevant date . . . . . That disposes of the argument for the landlord that on the facts of this case the only proper inference as a matter of law was that there had been an abandonment or a surrender, and that in any event the tenant, not having been in actual physical occupation, cannot claim the right of possession".

Delay : Counsel for the respondents (the landlord etc.) contended that, even if the tenant would normally be entitled to a possession order, such an order should not be granted by this Court in the present case as the tenant delayed in applying to the Court for relief. " Delay in applying to the Court, although it excites the diligence of the Court to ascertain whether the plaintiff has stood by and voluntarily suffered his right to be infringed, is not sufficient to deprive the plaintiff of his right, if it can be satisfactorily explained, and the right is not statute barred. Moreover, the Court will not on light grounds act against the rights of parties ; there must be fraud or such acquiescences as, in the view of the Court, would make it a fraud afterwards to insist on the right ; but long abstention from the assertion of his right, coupled with an alteration of the condition of other parties, may render it unconscientious on the plaintiff's part to enforce it " (21 Halsbury's Laws, 3rd edition, page 361, paragraph 755). A party seeking a mandatory injunction should apply promptly, but mere delay is not a bar if it can be satisfactorily accounted for. A mandatory injunction will not, however, be granted where the plaintiff is guilty of unreasonable delay in applying for it and the granting of it would cause the defendant serious damage (ibid., at page 364, paragraph 762).

In the circumstances of the present case, we are of the view that not only the tenant did not delay in applying to the Court for a possession order and other relief but, on the contrary, she did so promptly ; she instituted her first action against the sub-tenant on the 20th October, 1964, that is, only nine days after the day that he was bound to deliver possession of the premises to her ; and she instituted her second action against the landlord and the new tenant on the 21st January, 1965, that is, only three weeks after the expiration of her contractual tenancy when she was wrongfully prevented by the landlord and the other two respondents from regaining possession of the premises to which she was in law entitled.

Remedies for eviction of tenant without order of Court :

In Megarry's Rent Acts, tenth edition, volume 1, page 257, it is stated that " when a tenant is protected by the Rent Acts, the landlord will be liable in damages if without an order of the Court he evicts the tenant either forcibly or peacefully. This is so even if one of the specified grounds for possession exists and the landlord succesfully counter-claims for possession, for the order of possession does not relate back so as to validate the unlawful entry ; and if no such ground for possession exists, the tenant may obtain an injunction ".

This statement of the law in *Megarry* is partly based on the case of *Cruise* v. *Terrell* [1922] 1 K.B. 664, C.A. ; and *Remon* v. *City of London Real Property Co., Ltd.* [1921] 1 K.B. 49, C.A. In *Cruise* v. *Terrell, supra*, Lord Sterndale, M.R., in the course of his judgment, said (at page 670) :—

> " The landlord acted under an erroneous claim of right. The learned judge then proceeded to assess the damages at £60. I am sorry to say he gives no reason to show how he arrived at that sum. I cannot see how this sum can be justified on the evidence. It is not usually desirable to interfere with the judgment of a Court on a question of damages, but when it is found that there is no evidence of aggravation vindictive damages ought not to be given. Here the plaintiffs were deprived for some three or four months of the use of the cottage, a matter of only £3 or £4. They gave no evidence of any special damage in having been put to expense in finding other cottage accommodation. The judge's finding means that there were no aggravated circumstances. In that case the amount of the damages

cannot be justified, and I think we should be treating the plaintiffs very liberally in awarding them £10.

In *Whitham* v. *Kershaw* [1885] 16 Q.B.D. 613, 618, Bowen, L.J., said : 'I wish to add that nothing we have said must be understood as in any way derogating from the principle that, when a wrongful act is done by a trespasser, or by a tenant to the property of his reversioner, under circumstances which call for vindictive damages, the jury may give vindictive damages. There is, however, nothing of that kind in the present case' ".

Damages : In refusing to grant a possession order to the tenant, the District Court awarded her the sum of £180 by way of damages against all three respondents (the sub-tenant, the landlord and the new tenant). The following is their reasoning for this award :

> " What would then be the measure of damages to which the tenant is entitled for the loss of her statutory tenancy. Undoubtedly she is entitled to damages for trespass and the measure would be the loss which resulted namely, the loss of the premises for the purpose of carrying on business. We have no evidence as to what that loss to the tenant is. We said earlier that we cannot rely on her evidence as to the alleged loss resulting from the purchase of certain goods and further, we have no evidence as to what the value of the goodwill of her intended business would reasonably be anticipated to be. One measure, however, would be the difference between the rent payable by her, *i.e.* £32 per month and the rent at which the subject premises were actually leased to the new tenant, *i.e.* £42 per month. On the other hand, had the tenant remained in possession as statutory tenant, the landlord would have had the right to apply for an increase under section 7 of the Rent Control Law, 1961, and he would propably have obtained such an increase in view of the fact that the subject premises were leased at that rent and there is no evidence that this was excessive. However, some time would have elapsed until he had applied for and obtained such an increase which we consider that of 18 months. Therefore, the tenant is entitled to the difference of £10 per month for 18 months, *i.e.* the sum of £180."

The sub-tenant on appeal conceded that he was liable to pay damages for the loss which resulted to the tenant

but contended that the latter had failed to prove any damage with regard to loss of business or goodwill, etc. It is a fact that as from the 1st April, 1960, the tenant was in legal possession but she did not carry on business there at all. Furthermore, the findings of the trial Court, as regards the tenant's alleged loss resulting from the purchase of certain goods and the value of the goodwill, were open to them on the evidence before them and we do not think that they can be disturbed.

The landlord and the new tenant, while disputing that they were wrong doers, accepted the amount of damages (£180) awarded by the trial Court in favour of the tenant.

On the basis of what we have held earlier in this judgment, all three respondents, that is, the sub-tenant, the landlord and the new tenant, were guilty of a wrongful act for which the tenant is entitled to damages in addition to a possession order.

Measure of Damages : Having regard to the circumstances of this case, we do not think that the sum of £180, awarded as damages in the present case, is adequate. In considering this matter we have taken into account the following matters :

(*a*) That the tenant was deprived of the possession and use of the premises from the 1st January, 1965, to the 30th March, 1971 (subject to paragraph (*d*) below) ;

(*b*) that no special damage has been proved by the tenant ;

(*c*) that there is no evidence of aggravated circumstances ; and

(*d*) that under section 7 of the Rent Control (Business Premises) Law, 1961, the landlord would be entitled to apply to the Court for an increase of the rent payable by the tenant, which would at some point of time counter-balance the initial difference in rent of £10 per month which the tenant would be benefiting.

Here the tenant was deprived for a period of time of the use of the shop for which she would be paying £10 less than what the new tenant agreed to pay, *i.e.* she would be paying £32 a month instead of £42 a month, which she would have to pay for similar premises. The tenant, however, gave no evidence of any special damage in having been put to expense in finding other business premises,

and there were no aggravated circumstances. The trial Court's finding was that there was no evidence as to what was the tenant's loss. The trial Court held that—

(*a*) they could not rely on her evidence as to the alleged loss from the purchase of certain goods ; and

(*b*) that there was was no evidence as to what the value of the goodwill of her intended business would reasonably be anticipated to be. Consequently, the damages must be limited to the actual damages proved (cf. *Cruise* v. *Terrell*, *supra*, at page 673, per Scrutton, L.J.).

For these reasons we assessed the damages payable by all three respondents jointly and severally at £400 and we accordingly raised the sum of £180 awarded by the District Court to £400 against all three respondents, with interest thereon from the date of the judgment of the District Court.

In addition, having regard to the circumstances of this case, we held that the appellant (tenant) was entitled to a possession order of the premises against all three respondents (the sub-tenant, the landlord and the new tenant) to take effect four months later, namely, not later than the 31st July, 1971 ; and, generally, we made the orders and gave judgment in the terms stated in the opening paragraph of the present judgment.

Appeal allowed with costs.