

1983 April 21

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

SAVVAS OLYMBIOU, TRADING UNDER THE NAME  
SAVVAS SHOES,

*Appellant-Defendant*

v.

KYRIAKOULLIS KYRIAKOULLI AND ANOTHER,

*Respondents-Plaintiffs*

(*Civil Appeal No. 6240*)

*Civil Procedure—Appeal—Notice of Appeal—Appeal against judgment  
awarding damages for trespass to property—Grounds of appeal  
based on assessment of rent arising out of a tenancy—Provisions  
of rule 4 of Order 35 of the Civil Procedure Rules not complied  
with.*

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At the commencement of the hearing of the appeal counsel  
for the respondent objected to arguments being raised on grounds  
1, 2 and 3 of the notice of appeal for the reason that there had  
been no compliance with rule 4\* of order 35 of the Civil Proce-  
10       dure Rules. The trial Court after finding that there had been  
no lease of the property, subject-matter of the proceedings and  
that the appellants were trespassers thereon, it proceeded to  
assess the damages which it styled as mesne profits. A perusal  
15       of the grounds of appeal showed that they were framed on the  
basis that the issues emanated from the assessment of rent arising  
out of a tenancy and not from the assessment of damages pay-  
able in respect of trespass and wrongful occupation of property.

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*Held*, that it is not possible to allow this appeal to be argued  
on the basis of the notice of appeal as it is at present; that no  
matter how one may look at such notice, it cannot be said that  
it complies even to the minimum required extent with the pro-  
visions of rule 4 of order 35; accordingly the objection must be  
upheld.

*Objection upheld.*

\* Rule 4 is quoted at p. 236 post.

Cases referred to:

*Clifton Securities Ltd. v. Huntley & Others* [1948] 2 All E.R. 283:

*Mouzouri v. Makris and Others* (1976) 1 C.L.R. 329 at p. 330.

**Preliminary objection.**

Objection by counsel for respondent 1 to the expressed intention of counsel for the appellant to take together grounds 1, 2 and 3 of the notice of appeal and base arguments on these grounds for the reason that there had been no compliance with Order 35, rule 4 of the Civil Procedure Rules. 5

*G. Papatheodorou*, for the appellant: 10

*C. Velaris*, for respondent 1.

*M. Iacovou*, for respondent 2.

A. LOIZOU, J. gave the following ruling of the Court. At the commencement of the hearing of this appeal and after counsel for the appellant expressed his intention to take together grounds 1, 2 and 3 of the notice of appeal, learned counsel for respondent 1—counsel for respondent 2 being also in agreement with him—objected to arguments being based on these grounds for the reason that there had been no compliance with rule 4 of Order 35 of the Civil Procedure Rules which reads as follows:— 15 20

“4. The appellant may, by his notice, appeal from the whole or any part of any judgment or order, and the notice shall state whether the whole or part only of the judgment or order is complained of, and in the latter case shall specify such part. The notice shall also state all the grounds of appeal and set forth fully the reasons relied upon for the grounds stated. Any notice of appeal may be amended at any time as the Court of Appeal may think fit”. 25

It has been contended on behalf of the respondents that the said three grounds refer to a complaint in respect of the fixing of the monthly payable rent regarding the said property, whereas the trial Court never fixed a rent but after arriving at the conclusion that there had been no lease and that the appellants were trespassers on the subject property, it proceeded to assess the damages which in the circumstances had styled as mesne profits. It examined the measure of damages which it defined as being “the market rental value of the property occupied or used for the period of wrongful occupation or user”, and in support 30 35

thereof he referred to *McGregor on Damages*, 13th Ed., para. 1076, and to the case of *Clifton Securities Ltd. v. Huntley & Others* [1948] 2 All E.R. 283, quoting a passage from Denning J., from p. 284, of the said judgment where it was said –

5        “There is no doubt that in point of law the defendants were trespassers for that time, and that they can have no answer to this claim for mesne profits up to July 15 1947. At what rate are the mesne profits to be assessed? When the rent represents the fair value of the premises, 10 mesne profits are assessed at the amount of the rent, but, if the real value is higher than the rent, then the mesne profits must be assessed at the higher value. In this case the real value of the premises at the material time was £300 a year and the mesne profits are to be taken at that rate’

15        Then after dealing with the evidence adduced the trial Court concluded by saying the following –

20        “We shall assess the value of the use and occupation on the evidence adduced. Having considered the material before us, we assess at £50.– per month for each plaintiff as from 1.4.1979. As the wrong is continuous, they are entitled to this amount as from 1.4.1979 until the outset is brought to an end or until there is a fluctuation when either side may take the necessary steps for increase or reduction. The plaintiffs are not entitled to any other remedy’.

25        There does not arise therefore from the judgment appealed from, to the relevant parts of which reference has just been made, an assessment of rent, but merely use of the market rental value of the premises as a measure for the assessment of the appropriate amount of damages for the trespass and wrongful 30 occupation of the property in question by the appellant.

35        On the other hand, learned counsel for the appellant has argued that he could proceed with his appeal on the grounds as set out in his notice as the term “rent” used in the grounds means as defined in the English Rent Act as set out in *Megarry’s Rent Act*, 10th Ed., Vol. 1, at pp. 322 and 323: “The entire sum payable to the landlord in money (or in goods or services quantified in money) as rent for the dwelling-house in question and any articles or services provided with it’.

We are sure that though this definition refers to a dwelling

house there must be a corresponding provision regarding business premises with a similar definition but we are not concerned with this aspect of the case and we need not deal with it any further for the reasons we are about to give.

We are afraid that the definition of the "rent", whether in respect of dwelling houses or in respect of business premises and even if we were to take it that the same definition exists in our corresponding Rent Control Laws for what that it is worth to-day, cannot take the case of the appellant any further inasmuch as we are not concerned with rents and the occupation of premises either by virtue of a contractual or statutory tenancy. We are here concerned with a clear case of trespass as found by the trial Court and for which part of the judgment no appeal has been made. Therefore, in our view it applies with equal force what has been said in the case of *Elli Mouzouri v. Andreas Makris and Others* (1976) 1 C.L.R. 329, at p. 330:

"We have carefully weighed all that counsel for the appellant has submitted, but we are still not persuaded that it is possible to allow this appeal to be argued on the basis of the Notice of Appeal as it is at present. No matter how one may look at such Notice, it cannot be said that it complies, even to the minimum required extent, with the provisions of rule 4, of Order 35".

We need not, therefore, add anything to this summing up of the law answering fully the point raised with this objection of the respondents in respect of grounds 1, 2 and 3 which we uphold, and consequently it is not possible to allow this appeal to be argued on the basis of the notice of appeal as it is at present. A perusal of the remaining four grounds of appeal shows that they have also been framed on the basis that the issues emanate from the assessment of rent arising out of a tenancy and not from the assessment of damages payable in respect of trespass and wrongful occupation of property and we draw the attention of counsel for the appellant so that in any steps that he is likely to take he will bear in mind also the position as regards these remaining grounds of his notice of appeal.

We uphold, therefore, the objection of counsel for the respondents in respect of grounds 1, 2 and 3.

*Objection upheld.* 40