1988 April 6

(A. LOIZOU, P., LORIS, STYLIANIDES, JJ.)

THELMA TRIFONIDES,

Appellant-Defendant,

v.

ALPAN (TAKI BROS) LIMITED AND ANOTHER,

Respondents-Plaintiffs.

(Civil Appeal No. 6937).

Equity — Maxims of equity — Equity does not act in vain — A decree of specific performance of a contract of lease will not be granted after expiration of the term of the lease, even if the term had not been expired at the time of the filing of the writ of summons.

Contracts — Specific performance of contract of lease — See Equity — Maxims of equity.

Appeal — Evidence — Fresh evidence — Principles applicable.

Appeal — Powers of Court of Appeal — The Civil Procedure Rules, O. 35, r.8.

On 21.4.81 the litigants entered into a contract of lease in respect of a shop in Limassol. At that time the shop was occupied by statutory tenants. The lease was to commence on 1.7.81, provided that if such tenants failed to vacate the shop by that day, the lease would begin on 1.9.81. The period of the lease was for 5 years, ending on 30.6.1986.

The respondents (lessees under the lease) had an option to call for the renewal of the lease for a further period for 5 years upon certain terms and conditions relating to rent. The option should have been exercised at least three months before the expiration of the lease.

The statutory tenants who were in ocupation of the shop at the time of the contract of lease failed to vacate the premises in question. In fact they vacated the premises on 1.3.84.

On 28.4.84 the respondents instituted proceedings against the appellant for specific performance of the contract of lease and for damages in lieu or in addition to specific performance.

The trial Court, having found that the contract of lease had neither been abandoned by the lessees (as alleged by the lessor) nor frustrated, granted a decree of specific performance in favour of the respondents. The trial Court further held that the respondents failed to prove damages.

This is an appeal by the lessor. As the decree for specific performance was stayed the respondents did not take possession of the shop.

This Court, having unanimously held that the trial court did not err in finding that the contract of lease was neither abandoned nor frustrated,

Held further, allowing the appeal, A. Loizou, P. dissenting:

(1) No evidence was adduced as regards the exercise of the option for renewing the lease for a further period of 5 years. If the option was exercised, then, with reasonable diligence and in the light of the principles governing reception of fresh evidence (See *Tryfonides v. Alpan (Taki Bros.) Ltd. and Others* (1987) 1 C.L.R. 479), evidence of this could have been adduced before this Court.

(2) Specific performance is an equitable remedy. Equity does not act in vain and there is ample authority that no decree for specific performance will be made where the agreed term has expired or will expire before a decree can be obtained.

(3) In the light of the authorities, specific performance of a contract of lease will not be ordered by a Court after the expiration of the term, even if it was capable of being specifically executed at the time of the filing of the action, irrespective of whether there is delay in the prosecution of the judicial proceedings.

(4) In the circumstances the only remedy of the respondents for the period up to 30th June, 1986, is in damages. This issue will be dealt with in the Appeal filed by the respondents to this appeal.

Appeal allowed.
No order as to costs.

Cases referred to:

Trifonides v. Alpan (Taki Bros.) Ltd. and Others (1987) 1 C.L.R. 479;

Nesbitt v. Meyer, 36 E.R. 366;

Walters v. Northern Coal Mining Co, 43 E.R. 1015;

Wilkinson v. Torkington, 160 E.R. 586;

De Brassac v. Martyn [1863] 9 L.T. 287.

Appeal.

Appeal by defendant against the judgment of the District Court of Limassol (Hadjitsangaris, P.D.C. and Artemis, S.D.J.) dated the 29th April, 1985 (Action No. 1064/84) whereby defendant was ordered to deliver to the plaintiff immediately a shop at Makarios Avenue, Limassol.

G. Cacoyannis, for the appellant.

K. Michaelides, for the respondent.

Cur. adv. vult.

A. LOIZOU, P.: The judgment of the Court will be delivered by His Honour Stylianides, J.:

STYLIANIDES, J.: This appeal is directed against a Judgment of the District Court of Limassol, whereby specific performance, requiring the defendant-appellant to deliver the subject premises - shop at Makarios Avenue - to the plaintiffs immediately to occupy it, pursuant to the terms of a Contract of Lease, was ordered.

The appellant is the owner of a shop at Makarios Avenue 116, Limassol, which at the material time was under the occupation of a statutory tenant.

On 21st April, 1981, the litigants entered into a Contract of Lease - Exhibit 1.

The period of the lease was for five years, commencing on 1st July, 1981 and ending on 30th June, 1986.

Clause 3(ζ) provided that in case the present tenants of the shop do not vacate it on the date of the commencement of the present

tenancy and the delay in the delivery of possession of the said shop to the lessees does not exceed two months from the date of the commencement of this lease, then the lessees will have no claim from landlord and the commencement of the tenancy will be postponed to 1st September, 1981.

In 3(θ), however, it is clearly stated that the tenancy ends on 30th June, 1986.

In the clause for the duration of the tenancy it is written:-

«... του Ενοικιαστού έχοντος το εκλογικόν δικαίωμα να προβή εις ανανέωσιν της ενοικιάσεως δι' άλλα πέντε (5) έτη εάν το ενοίκιον το οποίον θα καταβάλη διά το ρηθέν κατάστημα θα είναι το ενοίκιον το οποίον θα καταβάλλεται διά παρόμοια καταστήματα επί της ιδίας περιοχής τα οποία θα προσφέρονται προς ενοικίασιν κατά τον Ιούνιον 1986.»

«... the tenant having the option to renew the lease for a further period of five (5) years, provided the rent, which he shall pay for the said shop, shall be equal to the rent, which will be payable for similar shops in the same area, offered to be let during June, 1986».

And paragraph 3(θ) reads:-

«θ) Τρεις μήνας προ της λήξεως της παρούσης ενοικιάσεως ο ενοικιαστής υποχρεούται να ειδοποιήση την ιδιοκτήτρια γραπτώς εάν θα ασκήση το δικαίωμα της ανανεώσεως της ενοικιάσεως με τους ως άνω αναφερομένους όρους περί ενοικίου. ...»

«(i) Three months before expiration of the present lease the tenant must notify the owners in writing, if he will exercise the option to renew the lease in accordance with the said terms in respect of rent.....».

In the course of the hearing of this appeal, counsel for the respondents - lessees stated that reference to the rents of similar shops in the same area was to rents in the free market and not controlled premises.

The statutory tenants did not vacate the premises and on 4th July, 1981, the respondents sent letter - Exhibit 2, which the trial Court, rightly, considered as premature in view of the provisions of paragraph 3(ζ) of the contract.

The appellant filed before the Rent Control Court Application No. 157/81, seeking order of ejectment against the statutory tenants. (See Exhibit 6).

In the meantime, Laws No. 28/82, 41/82 and 69/82, prohibited the issue of, and the enforcement of, any order of eviction; finally the Rent Control Law, 1983 (Law No. 23/83) came into force on 22nd April, 1983.

It was the version of the appellant that as from August 1981 the respondents did not communicate with her, or with her husband - agent, until 30th December, 1983, when they sent to her a letter. They did let another shop on the same avenue, near the subject shop, where they housed their business in Limassol.

P.W.1 - Managing Director of the respondents companies - testified that he had some telephone communications with appellant' s husband, and the trial Court accepted that contacts were made, during the period that followed, between the parties, which were not frequent after the summer of that year 1981. It, further, accepted that there was no reason for more contacts, as they knew that the premises were still occupied by the statutory tenants.

Those tenants started making arrangements to vacate the premises, which they ultimately did on 1st March, 1984.

On 30th December, 1983, letter - Exhibit 3, was sent to the appellant, which reads:-

> «I refer to my letter dated 4/7/1981 and I request to have your answer the shortest possible.»

Consequently to this letter, the appellant and her husband arranged a meeting with the respondents at their offices in Nicosia. There were two conflicting versions of what transpired at that short meeting. The trial Court found that P.W.1 wanted the letting of the premises to start from the date of delivery of possession and not from 1st September, 1981; and that he was rude to the appellant and her husband, something which finally led them to leave and resort to their lawyer. Thereafter, letter -

Exhibit 5 - was sent. The trial Court found, further, that the attitude of P.W.1 was not such as to show that he considered the contract of lease at an end. They interpreted his conduct as a wish to force the other side to sign a new lease to his benefit, which should start from the date of delivery of vacant possession; the trial Judges further said in their Judgment that P.W.1 erred in the interpretation of the lease itself as to the time of commencement of the lease, but his conduct did not actually lead the defendant and her husband to believe that he considered the contract at an end.

On 28th February, 1984, this action was filed, whereby the plaintiffs claimed:-

(A) Declaration that the contract of lease of 21st April, 1981, is valid and enforceable.

(B) Order for specific performance of the said contract.

(C) £3,000 - per month as from 1st September, 1981 for ten years damages for breach of the said contract in lieu of and/or in addition to specific performance.

The defendant-appellant desisted and denied the claim and contended, inter alia, that the contract was not valid for uncertainty, it was abandoned, it was frustrated. The plaintiffs were not entitled to the remedy of specific performance and that they suffered no damages at all.

The trial Court found that the contract was not abandoned, relying on the facts to which reference we have made earlier; that the contract was not a contingent one, on the vacation of the premises by the aforementioned tenants. And that the period started definitely on 1st July, 1981, and ended on 30th June, 1986; that the contract was not frustrated; the time was not of the essence of the contract and the date of breach was 1st September, 1981. Having dealt with the question of damages, it found that no damages were proved, because the claim for damages was not substantiated by the evidence adduced, and, finally, it ordered specific performance as aforesaid.

It is to be noted that as it emerges from the file, a Judge of the District Court of Limassol granted stay of execution of the Order for specific performance and the plaintiffs-respondents have never taken possession of the shop.

The trial Court had before it, and we have before us, a contract of definite duration - five years - ending on 30th June, 1986. This part of the contract is neither uncertain, nor suffers from any defect in law.

With regard to the right of option for the period after 30th June, 1986, we shall revert later on.

We gave due consideration to the argument for abandonment and we have not been persuaded that the contract was abandoned by the respondents. Abandonment is a question of fact to be found, either from the primary facts, or from inferences drawn from such facts.

With regard to frustration, as nothing intervened, having regard to the principles governing frustration of contracts of this nature, as pronounced in the various cases, this contract was not frustrated.

It is plain that the specific performance ordered by the trial Court was for the unexpired period up to 30th June, 1986. This was a contract of lease for a period over a year, which under section 77 of the Contract Law,Cap. 149, to be valid and enforceable, it has to be in writing, signed at the end thereof by the party to be charged in the presence of at least two witnesses at the same time.

There was no allegation in the pleadings, or at any stage of the proceedings of variation of any term of the contract.

There was no evidence before the trial Court that the right of option was exercised. It was certainly premature at that stage. In the Judgment - p. 78 of the record - we read:-

> «One should not lose sight of the fact of the option available to the Plaintiffs, *which, if exercised,* would still give them a very substantial term for occupation of this shop.»

An appeal is governed by section 25 of the Courts of Justice Law, 1960 (Law No. 14/60) and by Order 35 of the Civil Procedure Rules.

An appeal shall be by way of rehearing. Rule 3 of Order 35 is almost identical to Rule 1 of Order 58 of the Rules of Court in operation in England before 1956.

The material part of Rule 8 of Order 35 reads:-

> «... The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which

ought to have been made, and to make such further or other order as the case may require.»

In the Annual Practice of 1949 we read at p. 1335:-

«An appeal to the C.A. is by way of rehearing (r.1) and the court may therefore make such order as a judge of first instance could have made if the case had been heard before him on the date on which the appeal was heard.»

Further, evidence may be admitted by the Court of Appeal. The matter is governed by rule 8 of Order 35, which is almost identical to the old English Rules, Order 58, rule 9.

Evidence which is relevant to the issues before the Court and which could not, with reasonable diligence, be traced and produced, may be heard by the Court of Appeal.

To justify the reception of fresh evidence, three conditions must be fulfilled: First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at a trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case; third, the evidence must be such as is presumably to be believed, i.e., it must be apparently credible - *(Thelma Trifonides, v. Alpan (Taki Bros) Limited and Others,* Decision delivered on 24th November, 1987, not yet reported)*.

No evidence was adduced before us, though the hearing of the appeal started very recently, long after 30th June, 1986, that the option envisaged in the contract was exercised. Therefore, it is unnecessary to deal with the rival arguments advanced on the validity and enforceability of this second part of the contract, the period which followed the expiration of the five years - fixed duration of the contract.

The claim was for specific performance and/or for damages for ten years. If the option was exercised, then, with reasonable diligence, evidence of this could have been adduced before this Court.

Specific performance is an equitable remedy. Equity does not act in vain and there is ample authority that no decree for specific

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* *Reported in (1987) 1 C.L.R. 479.*

performance will be made where the agreed term has expired or will expire before a decree can be obtained.

If a contract, capable of being specifically executed at the time of the issuing of the writ, has by lapse of time between that and the trial become incapable of execution in the ordinary way, so as to confer future benefit, the question arises, what course ought to be pursued.

In *Nesbitt v. Meyer,* E. R. 36, p. 366, where a bill was filed before the term expired, for a specific performance of a contract to accept a lease, but, without fault on either side, the term expired before the hearing, Plumer M.R. said that the Court would not decree the execution of a formal lease after the expiration of the term. (See, also, *Walters v. Northern Coal Mining Co.*, E.R. 43, p. 1015; *Wilkinson v. Torkington,* E.R. 160 p. 586 and *De Brassac v. Martyn* [1863] 9 L.T. 287. See Woodfall Landlord and Tenant, paragraph 1 - 0361 and Fry on Specific Performance, 6th edition pp. 432-434.)

In view of the aforesaid authorities, the Law is settled that specific performance of a contract of lease will not be ordered by a Court after the expiration of the term, even if it was capable of being specifically executed at the time of the filing of the action, irrespective of whether there is delay in the prosecution of the judicial proceedings. It is impossible for a plaintiff to obtain an order for specific performance when the term of the contract has come to an end. This is broadly speaking an application of the maxim «equity does not act in vain».

Therefore, having regard to the circumstances of this case, that on the material before this Court the period of lease expired on 30th June, 1986, and this appeal is determined today, though with some delay, specific performance cannot be granted and the order of specific performance cannot be enforced. The contract cannot be varied or modified by the Court. The dates cannot be changed or moved onwards and the order for specific performance is not permissible under the circumstances.

In the circumstances the only remedy of the respondents for the period up to 30th June, 1986, is in damages. They adduced evidence for which the trial Court pronounced until the date of their judgment, but there is evidence on which we could ourselves pronounce.

In view, however, of Civil Appeal 6955, taken by the respondents in this appeal against the part of the Judgment of the Trial Court, whereby their claim for damages was dismissed, we consider that it is convenient and proper that the issue of damages be determined by the Bench, which will hear that appeal.

For the foregoing, the Order for Specific Performance is set aside.

In the circumstances, there will be no order as to costs, either before the District Court or before this Court.

LORIS J.: I had the opportunity to study and discuss the matter. I agree with what was said by my brother Mr. Justice Stylianides and I have nothing further to add.

A. LOIZOU P.: I need not delve with most aspects of the case as the judgment just delivered by His Honour Stylianides, J., with which His Honour Loris J., agrees, answers most of the grounds of appeal and I find myself in agreement with the approach to the extent only that there has been neither a frustration of the contract of lease, the subject of these proceedings, nor an abandonment by the tenants. I cannot, however, agree with the approach of my Brethren regarding the issue relating to the remedy of specific performance granted by the trial Court.

I hold the view that on appeal I had to examine the correctness of the approach of the trial Court in granting this remedy as at the time it did grant it and not as at to-day. I would therefore dismiss the appeal, as I find no reason to interfere with the judgment of the trial Court on any ground.

COURT: In the result the appeal is allowed by majority as regards the order of specific performance with no order as to costs here and in the Court below.

Appeal allowed by majority.
No order as to costs.