1988 November 29

(STYLIANIDES, KOURRIS, BOYADJIS, JJ.)

1. LETO MARKOULLI NICOLAIDES,
2. STALA MARKOULLI,

Appellants-Applicants,

v.

1. PHILIPPOS CHRYSOCHOU,
2. GEORGHIOS EVANGELOU,

Respondents.

(Civil Appeal No. 7659).

Rent control — The Rent Control Law, 1983 (Law 23/83), section 13 — The compensation thereunder — Prerequisites for the award — Burden of proof — Lies on tenant — The Rent Control Court should act on the evidence adduced before it — The «intelligent guess» referred to in one of the leading cases must be made by an expert witness.

Rent Control — The Rent Control Law, 1983 (Law 23/83), section 16 — Imposition of conditions — A matter of discretion — The principles governing interference on appeal with the exercise of the discretion of the trial Court.

Rent control — The Rent Control Law, 1983 (Law 23/83), Sections 14 and 16 — Order for a new tenancy under section 14 cannot be made in the context of an application for recovery of possession.

Rent control — The Rent Control Law, 1983 (Law 23/83), section 16 — Ejectment order — Condition that landlords will not mortgage or alienate their property — Property in question comprised both the shops, in respect of which an ejectment order was made, as well as other premises — A drastic restriction of the right of ownership, which could not be made without first hearing the parties — As regards this issue there has been no fair trial.

Rent Control — The Rent Control Law, 1983 (Law 23/83), section 16 — Ejectment order — Conditions that affidavit be filed on a future date relating to landlords' financial condition as on such date — In the circumstances, the discretion was wrongly exercised.

Rent control — The Rent Control Law, 1983 (Law 23/83), section 11(1)(h)(ii) — Premises reasonably required for demolition and reconstruction — Notion of «reasonably required» linked only to whether or not it is reasonable for the landlord to obtain possession — It is unrelated to any other factor.

Constitutional Law — Fair trial — Constitution, Art. 30.3.

The appellants are owners in equal undivided shares of a block of buildings on Anexartisias Street, Limassol. The block consists of a small basement, ground floor shops, first-storey and a small apartment on the second floor. They are in the occupation of five different tenants.

The appellants filed five applications for recovery of possession on the ground that the premises were reasonably required for demolition and reconstruction.

On 16.6.88 the Rent Control Court issued an ejectment order, but suspended its execution until 1.5.89.

Moreover, the Court ordered the appellants to pay to the present respondents £10,000.- compensation for goodwill under section 13.

Finally the Court imposed the following conditions:

(a) Made a recommendation (sic) for the grant to the respondents of a new tenancy of a shop analogous to the one they have in their occupation.

(b) Ordered that the appellants do deposit until 31st December, 1988, in Court and serve on the respondents or their advocate a copy of a renewed building permit which will be valid until the expiration of the period of suspension.

(c) Ordered the appellants until 31st December, 1988, to file in Court and serve on the respondents or their advocate an affidavit sworn by one of the appellants in which to state their financial capacity in cash and in loans for an amount over £150,000.-

(d) Prohibited the appellants to transfer, or in any way alienate, mortgage, or in any way charge the said property until 31st December, 1988, with the exception of any mortgage of the immovable for security of a loan to cover the cost of reconstruction.

The appellants, as a result, filed this appeal. The respondents cross-appealed, challenging the ejectment order and the compensation of £10,000, as manifestly low. The cross-appeal against the ejectment order was withdrawn.

Held, *allowing the appeal and dismissing the cross-appeal*:

(1)Section 13 is not a new provision in the Rent Control Legislation of this country. It is found in the Rent (Control) Law, 1954 (Law 13 of 1954) Cap. 86 of the 1959 Edition of the Laws of Cyprus. It was verbatim reproduced in section 11 of Law 17/61 and section 17 of Law 36/75. This provision was taken from section 4(1) of the English «Landlord and Tenant Act, 1927». This provision has received authoritative Judicial interpretation both in England and in Cyprus.

(2) It is a cardinal principle of interpretation that the legislator is presumed to know the Law and its authoritative interpretation by the Courts. There is no reason to depart from the interpretation given by the Courts to the provision of section 13. The statutory adherent goodwill (αέρας) has nothing in common with what is called (αέρας) or goodwill which is nowadays paid by incoming tenants to outgoing tenants.

The issue of «compensation» under section 13 should be raised in the pleadings by the tenant. The burden of proof lies on the tenant. In this case the tenants failed to discharge it.

Though there is evidence that the tenants will suffer loss by recovery of possession by the landlord, there is no evidence at all as to the adherent goodwill, no evidence as to the measure of damages. no evidence as to the actual increase in the rental value arising from the exercise by the carrying on of the respondents of their trade or business in the said shops. There is no evidence as to what the landlord will gain by any addition to the rental value due to the carrying on of the business by the tenants.

(4) It was suggested by counsel for the respondents that the statutory «goodwill» is a matter a intelligent guess. In the light of Law 23/83 and Art. 30 of the Constitution the Rent Control Court has to determine cases in accordance with the evidence adduced before it.

The «intelligent guess» (*Whiteman Smith Motor Company Ltd v. Chaplin* [1934] 2 K.B. 35) must be made by an expert witness considered by the Court to be honest and competent and accepted as accurate.

(5) The imposition of conditions under section 16 of Law 23/83 is a matter of discretion. The principles governing interference by this Court with the exercise of a trial Court' s discretion were stated recently in *Stylianou v. Stylianou* (1988) 1 C.L.R. 520.

(6) The grant of a new tenancy is governed by section 14. There is no power to make an order for a new tenancy in an application for recovery of possession.

(7) The condition as to the deposit of a renewed permit was agreed to be varied by the parties.

(8) The appellants adduced evidence as to their financial condition in order to show that they genuinely required possession for the purpose of demolition and reconstruction, though this might not be necessary, in view of judicial pronouncements that the notion of «reasonable requirement» is linked only to whether or not it is reasonable for the landlord to obtain possession for the purpose of the reconstruction and it is unrelated to any other factor.

If a judgment for recovery of possession or ejectment is obtained by false pretences or the concealment of material facts, the remedy of the tenant is damages under section 15 of Law 23/83.

In any event, the trial Court failed to give any weight, in imposing the third condition, to the facts as found by it.

(9) The fourth condition was a drastic restriction of a right of ownership, which could not be imposed without giving to a party the opportunity to present his argument.

Furthermore,though an order restraining a landlord from dealing with his property might be necessary in order to give effect to the provisions of section 14, it is not necessary in a case of ejectment.

On this issue the parties did not have «a fair trial» under Article 30.3 of the Constitution.

Appeal allowed. Cross-appeal dismissed. Costs against respondents.

Cases referred to:

Sulay v. Kazandjian, 24 C.L.R. 37;

Whiteman Smith Motor Company Ltd. v. Chaplin and Another [1934] 2 K.B. 35;

Charrington and Co. v. Simpson [1935] A.C. 325;

Clift v. Taylor [1948] 2 All E.R. 450;

Mullins v. Wessex Motors Ltd. [1947] 2 All E.R. 727;

Rialto Cinemas Ltd. v. Wolfe [1955] 1 W.L.R. 693;

Telemachou v. Papares (1988) 1 C.L.R. 12;

Ireland v. Taylor [1948] 2 All E.R. 450;

Stylianou v. Stylianou (1988) 1 C.L.R. 520;

Altrans Express Ltd. v. CVA Holdings Ltd. [1984] 1 All E.R. 685;

Yerasimou v. Rousoudhiou (1974) 1 C.L.R. 107;

Kontou v. Solomou (1978) 1 C.L.R. 425;

Demetriou and Others v. Ioannides (1982) 1 C.L.R. 16;

Poyiatzis v. Pilavakis and Others (1988) 1 C.L.R. 411.

Appeal and cross-appeal.

Appeal and cross-appeal against the judgment of the Rent Control Court of Limassol dated the 16th June, 1988 (Appl. No. E. 28/86) whereby an order for the recovery of possession of five shops in Limassol against the respondents was given and the applicants were ordered to pay to them the sum of £10,000.- for goodwill.

P. Pavlou with S. Papakyriacou, for the appellants.

A. Konnaris, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment of the Court. The appellants are owners in equal undivided shares by virtue of registrations 35745 and 35746 of plots 30, 31/2, 31/3 and 31/4 of sheet plan LIV/58.5.II of Limassol town. This immovable consists of a small basement, ground floor shops, first-storey and a small apartment on the second floor. The frontage of the shops is on Anexartisias Street and the corner of Pavlos Melas side-street. They are in the occupation of five different tenants.

The appellants, as the aforesaid property is ripe for development and the economic life of the existing building according to their expert, a chartered surveyor and developer Antonis Loizou, P.W.6, has come to an end and the yield thereof is minimal not exceeding 4.3%, they decided to demolish and reconstruct it. Drawings were prepared by P.W.2 Georghios Stamatiou, an architect, and P.W.3 Achilleos a civil engineer. The drawings are for the erection of one multi-storey shop, consisting of basement, first floor, mezani and two floors over it. The statutory notice in writing not less than four months to vacate the premises was given to the tenants.

As none of the tenants complied, five applications for recovery of possession on the ground that the premises were reasonably

required for demolition and reconstruction were filed After a long and protracted trial the Court on 16th June, 1988, issued an ejectment order ordering the tenants - respondents in each application to vacate the premises and deliver vacant possession to the appellants The Court, also, in exercising its power stayed execution and/or suspended the date of possession up to 1st May, 1989

The Court, further, in the case of the present respondents ordered the appellants to pay £10,000 - compensation to the respondents for goodwill under section 13 and imposed the following conditions -

(a) Made a recommendation (sic) for the grant to the respondents of a new tenancy of a shop analogous to the one they have in their occupation and if it is not feasible to grant to them a tenancy of a smaller shop to be used for sale and receipt of films

(b) Ordered that the appellants do deposit until 31st December, 1988, in Court and serve on the respondents or their advocate a copy of a renewed building permit which will be valid until the expiration of the period of suspension

(c) Ordered the appellants until 31st December, 1988, to file in Court and serve on the respondents or their advocate an affidavit sworn by one of the appellants in which to state their financial capacity in cash and in loans for an amount over £150,000 -,

and finally,

(d) Prohibited the appellants to transfer, in any way alienate, mortgage, or in any way charge the said property until 31st December, 1988, with the exception of any mortgage of the immovable for security of a loan to cover the cost of reconstruction

The appellants being aggrieved filed this appeal which is directed against the aforesaid order for compensation and conditions imposed by the Court

The respondents by cross-appeal challenged the order for recovery of possession and further, in the alternative, the quatum of the compensation of £10,000 - which they contended is manifestly low.

At the commencent of the hearing the cross-appeal against the ejectment order was withdrawn

A. COMPENSATION UNDER SECTION 13

Counsel for the appellants submitted that the respondents - tenants failed to prove that any goodwill has become attached to the premises by reason of the carrying on by the tenants of a business in the subject premises as envisaged in section 13 and, further, that they failed to adduce any evidence to establish the measure of compensation or to prove any compensation. And, further, that this part of the judgment is not warranted and/or is contrary to the evidence adduced.

Counsel for the respondents, on the other hand, invited the Court, notwithstanding the Judgment in *Mehmet Ali Sulay v. Ananiya Kazandjian, 24 C.L.R. 37,* to interpret section 13 of the Rent (Control) Law, 1983 (Law No. 23/83) so as to bring it in harmony with the presently prevailing trading conditions in the market (συναλλαγματικά ήθη της αγοράς) and award as compensation what a person is required to pay in order to secure a shop and he, also, submitted that the amount of £10,000.- is manifestly low. No evidence is required to be adduced as the award is simply an intelligent guess by the Court.

Section 13 of Law 23/83 reads:-

«13. Οσάκις λόγω της υπό του ενοικιαστού ασκήσεως εις το κατάστημα επιτηδεύματος ή εργασίας συνυπάρχη εμπορική εύνοια (αέρας) ήτις αυξάνει την ενοικιαστικήν αξίαν τούτου και λόγω απωλείας της κατοχής του καταστήματος ο ιδιοκτήτης καρπούται το όφελος της τοιαύτης αυξήσεως, ενώ ο ενοικιαστής υφίσταται ζημίαν, το Δικαστήριον, κατά την έκδοσιν αποφάσεως ή διατάγματος δυνάμει οιασδήποτε των παραγράφων (ζ) και (η) του εδαφίου (1) του άρθρου 11, δι' ανάκτησιν κατοχής ή έξωσιν, δύναται να διατάξη τον ιδιοκτήτην να πληρώση εις τον ενοικιαστήν τοιούτο ποσόν οιον το Δικαστήριον ήθελε θεωρήσει επαρκές δια να αποζημιωθή ο ενοικιαστής διά την απώλειαν της κατοχής του καταστήματος, λαμβανομένου δεόντως υπ' όψιν του υπό του ιδιοκτήτου καρπουμένου οφέλους και ουδεμία νομική ισχύς δίδεται εις την τοιαύτην απόφασιν ή το τοιούτο διάταγμα μέχρις ότου πληρωθή το τοιούτο ποσόν.»

And in English it reads -

«13 Where by reason of the carrying on by the tenant in the premises of a trade or business a goodwill (αέρας) is attached thereto increasing the rental value thereof and by reason of the loss of the possession of the premises the landlord shall get the benefit of such increase whilst the tenant shall suffer a loss, the Court, in giving a judgment or making an order under any of paragraphs (g) and (h) of sub-section (1) of section 11 for recovery of possession or ejectment, may require the landlord to pay to the tenant such sum as would appear to the Court to be sufficient to compensate the tenant for the loss of the occupation of the premises, due regard being had to the benefit derived by the landlord, and effect shall not be given to such judgment or order until such sum is paid »

This is not a new provision in the Rent Control Legislation in this country. This identical provision is found in section 19 of the Rent (Control) Law of 1954 (Law No 13/54), Cap 86 of the 1959 Edition of the Laws of Cyprus It was verbatim reproduced in section 11 of Law 17/61 and section 17 of Law 36/75 This provision was taken from section 4(1) of the English «Landlord and Tenant Act, 1927»

The issue of compensation for goodwill was judicially considered in England in *Whiteman Smith Motor Company Limited v Chaplin and Another* [1934] 2 K B 35, *Charrington & Co v Simpson* [1935] A C 325 H L , *Clift v. Taylor* [1948] 2 All E R 113, *Ireland v Taylor* [1948] 2 All E R 450, *Mullins v Wessex Motors Ltd* [1947] 2 All E R. 727, C A and *Rialto Cinemas Ltd v Wolfe* [1955] 1 W L R 693 It has to be noted that this provision was abolished in England in 1954 by the Landlord and Tenant Act 1954

The Supreme Court of Cyprus had occasion to deal with section 19 of the Rent (Control) Law 1954 in *Mehmet Ali Sulay v Ananiya Kazandjian* (supra) We must say from the outset that compensation for goodwill should be raised in the pleadings by the tenant. The expression «goodwill» or «compensation for goodwill» (αέρας)» is not defined in the Law but it was considered in *Charrington & Co v. Simpson* (supra) to be inappropriate to describe a payment which is a payment in respect of an improved rental value attached to the premises

In *Whiteman Smith Motor Company Limited v. Chaplin and Another* (supra) it was said by Scrutton L J , at p 42·-

«But the statute has provided as the principal test the difference at the end of the term between the rent with the goodwill and without it. I understand this to mean: find the rental value which at the date of the expiration of the lease a new tenant would pay if there had been no previous business carried on there; compare this with the rent which a new tenant would pay for premises which have been the home of a previous and similar business for so many years. This increase of rent, if any, is the figure with which one has to start. If the landlord can get a higher rent by letting for an entirely different purpose he has not gained anything by the trade of the previous tenant. If the increase of rent at the end of the tenancy is due to more favourable circumstances with which the tenant has nothing to do, such as increase of population, change of character of neighbourhood, increased use of motoring, that increase of rent is not directly due to the trading of the tenant.»

Maugham L.J. had this to say at p. 48-49:-

«The only kind of goodwill which can be an addition to the value of the premises in the hands of the landlord is that kind which has become attached to the premises, irrespective of their position, and which would naturally be reflected in a higher rent payable by a person carrying on a similar business ... If the term 'adherent goodwill', is used, it is essential to define it. I shall use the phrase 'net adherent goodwill' as meaning the goodwill, if any, which will remain attached to the premises, not including the 'site goodwill', that is, irrespective of customers who would come to a new tenant, starting a new business, simply because of their convenient situation. In a sentence it is important not to confuse site goodwill, which is inherent, with net adherent goodwill.»

And at p. 52:-

«..., I think it is clear that under s. 4 of that Act changes in the neighbourhood or in the nature of the trade, not being the direct result of the carrying on of the trade, must be disregarded in determining the increment in value of the premises at the end of the term.»

And at p. 54:

«And as I have already pointed out, the addition to what I call the normal rent due as a direct result of the carrying on of

the trade is not the net adherent profit but the increased rent which it is thought a tenant will pay who is to get the benefit of the true adherent goodwill. It seems to me essential to ascertain this addition, if any, to the value of the holding determined to be the direct result of the trade except in one case where a short cut is possible - namely, if the tribunal is satisfied that the goodwill rent and the normal rent are substantially the same, there is no need to go any further.»

In the House of Lords in *Charrington & Co. v. Simpson* (supra) Lord Tomlin said at pp. 335-336:-

«It is unfortunate that the section has not been framed with a clearer exposition of its general purpose and with more precision in the use of terms. The section, however, seems to contemplate that in certain cases something in the form of increased value will, after the termination of the tenancy and as the result of the tenant' s business activities during his tenancy, adhere to the premises in the landlord' s hands, but that the measure of any compensation to the tenant in respect of it is not what he loses but what the landlord gains.

An analysis of the section suggests that two steps have to be taken by the tenant. The first step is to prove that, by reason of the carrying on by the tenant or his predecessors in title at the premises of a business for a period of not less than five years, goodwill' has become attached to the premises by reason whereof the premises could be let at higher rent than they would have realized had no such 'goodwill' been attached. In order to establish this, two questions have to be answered - namely, (1.) has goodwill become attached to the premises so as to increase its rental value? and if so, (2.) is that attachment due to the carrying on of the business by the tenant or his predecessors in title?

The second step is, under proviso (a) to establish the measure of the compensation. The measure is not the value of the goodwill which the tenant loses by giving up the business, but what the landlord gains by such addition, if any, to the value of the holding as is the direct result of the carrying on of the business by the tenant or his predecessors in title.

.....

... The position of an outgoing tenant selling his business and his lease to an incoming tenant buying them differs materially from the position of a tenant whose lease is terminating.»

In *Mehmet Ali Sulay v. Ananiya Kazandjian* (supra), Zekia, J., as he then was, formulated the main requirements for an order of compensation as follows at p. 38:-

«(a) that goodwill became attached to the business premises in question by reason of the carrying thereon by the tenant of some trade or business;

(b) that the rental value has been increased owing to such business having been carried on by the tenant;

(c) that the landlord shall get the benefit of such increase; and

(d) the tenant shall suffer a loss by giving up possession of such business premises.»

The issues raised by the appellants are whether there was any evidence on which the trial Court could find that there was adherent goodwill, and if there was any evidence to support the award of £10,000.-.

Before proceeding any further, we say that it is a cardinal principle of interpretation that the legislator is presumed to know the Law and its authoritative interpretation by the Courts A statutory provision which was interpreted as early as 1959 was reproduced in successive rent control legislation. We have not been persuaded by counsel for the respondents that we should depart from the interpretation given by the English Courts and our Supreme Court to this provision for statutory compensation for goodwill. The statutory adherent goodwill (αέρας) has nothing in common with what is called «αέρας» or goodwill which is nowadays paid by incoming tenants to outgoing tenants. The latter is an amount both for the goodwill of the business and/or for securing a shop in usually very commercial locations, where shops are either scare or their availability is difficult.

The trial Court had this to say on the matter at p. 221:-

«Δεχόμαστε τη μαρτυρία του Καθ' ου η Αίτησις ότι το 1954 που ενοικίασαν μέρος του επιδίκου καταστήματος η περιοχή δεν είχε την εμπορικότητα που έχει σήμερα. Η αύξηση της εμπορικότητας οφείλεται σε διάφορους παράγοντες μεταξύ των οποίων η σημαντική αύξηση του πληθυσμού της Λεμεσού μετά την εισβολή και η αύξηση του τουρισμού. Στην αύξηση της εμπορικότητας συνέβαλε σε κάποιο βαθμό και η

δραστηριότητα των Καθ' ων η Αίτησις και των υπολοίπων καταστηματαρχών της περιοχής. Η σημερινή μεγάλη εμπορικότητα της περιοχής δημιούργησε την απαίτηση για πληρωμή 'αέρα' για νέες ενοικιάσεις καταστημάτων, ανεξάρτητα από την εργασία που διεξήγαγε σ' αυτό ο προηγούμενος ενοικιαστής. Κατά την μαρτυρία του Καθ' ου η Αίτησις 2 του ζήτησαν 'αέρα' £35,000 και £45,000 για δύο καταστήματα της περιοχής. Αυτός είναι ο 'αέρας' της περιοχής και δεν συνδέεται με τη διεξαγόμενη στο κάθε κατάστημα επιχείρηση.

Από την άλλη πλευρά για την 'εμπορική εύνοια' της επιχείρησης των Καθ' ων η Αίτησις μας δόθηκε μαρτυρία, την οποία δεχόμαστε, ότι αξίζει £100,000 τουλάχιστον. 'Εμπορική εύνοια' είναι η προτίμηση των πελατών και κατ' επέκταση η αξία της επιχείρησης σε λειτουργία, με πελάτες και κύκλο εργασιών, με γνωστό εμπορικό όνομα, χωρίς τα κεφάλαια, εμπορεύματα και άλλα ενεργητικά στοιχεία.»

And at pp. 223-224:-

«Αναφορικά με την ενοικιαστική αξία του καταστήματος έδωσε μαρτυρία ο Καθ' ου η Αίτησις 2 και ανέφερε ότι σε περίπτωση μετακίνησής τους αυξάνεται η ενοικιαστική αξία του καταστήματος, προς όφελος των ιδιοκτητών, γιατί το κατάστημα έγινε γνωστό στον κόσμο από τη δουλειά των ενοικιαστών. Την αύξηση της ενοικιαστικής αξίας την συνέδεσε με τη δυνατότητα να στεγαστεί στο νέο κτίριο φωτογράφος ή πολυκατάστημα που να ασχολείται και με φωτογραφικά είδη και με το γεγονός ότι το κτίριο έγινε γνωστό από την επιχείρηση των ενοικιαστών σαν 'Αυτόματη Γωνιά'. Μας έκανε εντύπωση το γεγονός ότι γνωστός δικηγόρος γράφει στην κάρτα του ''Ανωθεν Αυτόματης Γωνιάς' (Τεκμήριο 17) ενώ θα μπορούσε να αρκεστεί στο γνωστό όνομα της οδού Ανεξαρτησίας ή θα μπορούσε να αναφερθεί στο Διοικητήριο που βρίσκεται απέναντι. Δεχόμαστε ότι η επιχείρηση των ενοικιαστών είναι από τις πιο καλά γνωστές στην πόλη μας. Νομίζουμε ότι η μαρτυρία καλύπτει και τις προϋποθέσεις (β) και (γ) για αποζημίωση εμπορικής εύνοιας, όπως τίθενται στην απόφαση του κ. Ζεκιά.»

And at pp. 226-227:-

«Θα ήτανε χρήσιμο για το Δικαστήριο αν εδίδετο σαφής μαρτυρία και ή δυνατόν εμπειρογνώμονος για το ύψος του ενοικίου χωρίς εμπορική εύνοια και για το ύψος του ενοικίου με την εμπορική εύνοια, οπότε θα φαινόταν η διαφορά. Η μαρτυρία για την αύξηση της ενοικιαστικής αξίας δεν μπορεί έκ της φύσεώς της να είναι πραγματοπαγής παρά υποθετική.

Η μόνη μαρτυρία, που δόθηκε στο Δικαστήριο, την οποία δεχόμαστε σαν αληθή, είναι ότι ζητάται για ενοικίαση διπλανών καταστημάτων 'αέρας' 35,000 και 45,000 ενώ ο 'αέρας' της επιχειρήσεως των ενοικιαστών ξεπερνά τις 100,000. Έχουμε ήδη αναλύσει ότι στον 'αέρα' των διπλανών καταστημάτων περιλαμβάνεται η εμπορικότητα της περιοχής και ότι ο αέρας της επιχείρησης των ενοικιαστών περιλαμβάνει την αξία της εμπορικής εύνοιας από την πλευρά του ενοικιαστή και του υποτιθέμενου αγοραστή της επιχειρησης και όχι την αύξηση της ενοικιαστικής αξίας του καταστήματος, που θα οφεληθεί ο ιδιοκτήτης. Ο ένας 'αέρας' δεν είναι ομοειδής με τον άλλο και παρά το γεγονός ότι η ενοικιαστική αξία δεν αποτελείται μόνο από το μηνιαίο ενοίκιο αλλά και από τον πληρωνόμενο εφάπαξ 'αέρα' η διαφορά των δύο ποσών δεν μας δίνει την αύξηση της ενοικιαστικής αξίας του καταστήματος, η οποία είναι οπωσδήποτε μικρότερη αυτής της διαφοράς (που ξεπερνά τις 50,000) επειδή επιπρόσθετα πρέπει να εκτιμηθεί η ενοικιαστική αξία για οποιονδήποτε νέο ενοικιαστη και όχι μόνο για ομοειδή επιχείρηση με αυτή του σημερινού ενοικιαστή.

Το Δικαστήριο αφού στάθμισε τη μαρτυρία, το Νόμο και τη νομολογία πιστεύει ότι η περίπτωση που εξετάζουμε είναι τέτοια που πρέπει να δοθεί αποζημίωση σύμφωνα με το άρθρο 13 του Νόμου. Αν δεν δίναμε αποζημίωση για εμπορική ευνοια σε μια τέτοια υπόθεση τότε θα θέταμε σε πραγματική αχρηστία το άρθρο 13, πράγμα που δεν θα συμφωνούσε με την επιθυμία του νομοθέτη. Νομίζουμε ότι η αποζημίωση που πρέπει να δοθεί βάσει του άρθρου αυτού είναι μικρότερη των £50,000 αλλά πρέπει

να είναι ένα στρογγυλό ποσό που να συμβαδίζει κατά κάποιο τρόπο με τα διάφορα ποσά που ακούστηκαν στις μαρτυρίες της δίκης. Σαν τέτοιο κρίνουμε το ποσό των £10,000.»

«We accept the evidence of the respondents that in 1954, when they rented part of the sub judice premises the area did not have the commercial value it has to day. The increase in such value is due to various factors, including the substantial increase of the population of Limassol after the invasion and the increase of tourism. In the increase of such value the activities of the respondents and other shopkeepers of the area contributed to a certain degree. The present great commercial value of the area created the demand for a premium in respect of new leases of shops, independently of the work carried out therein by the previous occupants. In accordance with the evidence of respondent 2 he was asked to pay premiums of £35,000 and £45,000 for two shops in the area. Such premiums are not connected with the business carried out in the relevant shop.

On the other hand there was evidence, which we accept, that the commercial value of the business of the respondents is worth at least £100,000. 'Commercial value' is the preference of clients and in consequence the value of the business as a going concern, with its clientele and turn over, its known trade name, without the capital, its stock and other assets».

And at pp. 223 - 224:

«In respect of the rental value of the shop respondent 2 gave evidence and said that in case of their removal the rental value will be increased for the landlord's benefit, because the shop was made known to the people due to the work of the tenants. He connected the increase of the rental value with the fact that, in the new building, a photographer or a departmental store, dealing and with photographic substances, may be installed. He, also, connected it with the fact that the building was, by reason of the tenants' activities, known as the «Automatic corner». The fact that a known advocate writes in his card the phrase 'above the automatic corner' impressed us, because he could have been satisfied with the known name of Anexartisias Street or he could have

referred to the Office of the District Officer, just opposite his office. We accept that the business of the tenants is among the well known businesses of our town. We are of the opinion that the evidence satisfies prerequisites (b) and (c) for compensation for commercial value, as expounded in the judgment of Zekia, J.».

And at pp. 226 - 227:

«It would have been useful for the Court, if there had been adduced positive evidence, if possible by an expert, regarding the rent without commercial value and rent with such value. In such a case the difference would have been made apparent. The evidence in respect of the rental value cannot, due to its nature, be other than hypothetical.

The only evidence adduced, which we accept as true, is that for renting of neighbouring shop premiums of £35,000 and £45,000 are demanded whereas the commercial value of the business of the tenants exceeds £100,000. We have already analysed that the commercial value of neighbouring shops includes the commercial value of the area and that the commercial value of the business of the tenants, includes the value of the commercial value from the point of view of the tenant and the supposed purchaser of the business and not the increase of the rental value, which shall benefit the landlord. The one value is not the same with the other and, despite the fact that the rental value does not consist only of the monthly rent, but, also, of the lump sum paid as premium, the difference between the two sums does not give us the increase of the rental value of the shop, which is, in any event, less than such a difference (which exceeds £50,000), because, in addition, one has to estimate the rental value for any new tenant, and not only in respect of a tenant with the same business as that of the present tenant.

Having considered the evidence, the Law and the case-law the Court is of the opinion that this case is such as to justify compensation under section 13 of the Law. If we had not awarded compensation in a case such as this, we would have thrown into the dustbin section 13, which is contrary to the will of the legislator. We are of the opinion that the compensation

thereunder should be less than £50,000, but it should be such a round figure, as to be compatible with the various sums referred to in the evidence. We award £10,000, as representing such a sum».

The only evidence before the Court was that of D.W.1 Georghios Evangelou. Anexartisias Street was during the colonial rule King George VI Street. It was a dwelling area. There was only a bar in that whole street and no shops at all. In 1954 he let one shop and started the business of a photographer. His business gradually expanded and respondent 2 joined as a partner. They let another shop. Both these shops are of an area of 100 sq. m on the ground floor; later they let an area of 90 sq. m. over the said shops. They expanded further in Pavlos Mela Street in adjoining premises of close relatives of the present appellants. They do everything concerning the business of photography; they import and sell items of that line of business. Through the years Limassol town, the small town of 16,000 people, had become a big city. Trade and industry have increased to a considerable degree and Anexartisias Street has become the first commercial street in town. All premises in Anexartisias Street, especially after the influx of refugees and the development that ensued, are business premises. There is a heavy demand of shops. There are no available ones, but if any, tens of thousand of pounds as «αέρας» is demanded from an incoming tenant.

D.W. 1 Evangelou said the following in examination in chief:

«Q. Have you taken any steps to find other suitable space to house your business

A. ... Opposite are the shops of Mouzouri Brothers, they belong to Chattalas. I asked Mouzouri Brothers if they could dispose a shop as they can trade their items elsewhere and they asked £45,000 'αέρα'. They further said that a certain Stelios Varnava further down paid £40.000...

Q. Have you applied anywhere else?

A. I asked others but no one disposes his shop without 'αέρα'. There is an empty one for which they ask £35,000 'αέρα'

Q. Did they ask £35,000 'αέρα'?

A. Yes, and rent not less than £700 .....

Q. Mr. Evangelou you said that Mouzouris asked £45,000,

you mentioned another who paid £35,000. If someone came to purchase yours how much 'αέρα' would you ask?

A. If we take into consideration our reputation (όνομα) and the years of the business, over £100,000.»

In answering questions put by the Court he said:-

«Q. If another person was to purchase your shop and do the same business how much he has to pay, how much is it worth?

A. £100,000 if we take into consideration what Mouzouris asked, I demand £100,000.

Q. If somebody comes and wants to sell shoes there?

A. If he can pay for the 'αέρα' he will get it.

Q. If we issue an ejectment order and you leave, and you go, and another shop is built of the extent of your shop and it is not basement, first-storey, etc. and one wanted to open a business not of a photographer, would he get more because you were photographer in that shop for so many years?

A. I think yes because it would be 'διαφημιστικό'. (advertizing)

Q. Would he sell the shoes at a higher price?

A. Θα γίνει μια διευκρίνησή σε ένα γνωστό χώρο. Εκεί που ήταν η 'Αυτόματη Γωνιά' υπάρχει το τάδε κατάστημα.»

«There will be a clarification in a known space. At the place where the 'Automatic corner' was there is a certain shop».

This was the whole evidence before the Court on the issue of the adherent goodwill and the measure of compensation.

The £100,000.- mentioned by the respondent - tenant in his evidence is unconnected with the statutory goodwill. This applies with equal force to the £35,000.- and £45,000.- demanded for the vacant shop and by Mouzouris respectively.

The evidence adduced by the tenants, on whom the burden of proof lies, falls short of satisfying the requirements for the award of compensation under section 13. There is evidence that the tenants will suffer loss by recovery of possession by the landlord. There is no evidence at all as to the adherent goodwill, no evidence as to

the measure of damages, no evidence as to the actual increase in the rental value arising from the exercise by the carrying on of the respondents of their trade or business in the said shops. There is no evidence as to what the landlord will gain by any addition to the rental value due to the carrying on of the business by the tenants.

It was submitted by learned counsel for the respondents that the statutory goodwill is only an intelligent guess.

The Rent Control Court is a Court of Law established under Law 23/83. Having regard to the material provisions of the Rent (Control) Law, 1983 in conjunction with the provisions of Article 30 of the Constitution, we are of the view that the Rent Control Court, in the exercise of its jurisdiction has to hear and determine a case on the evidence before it. It can only give judgment affecting the civil rights - the rights of property of a litigant - on the evidence before it. It may, only, take judicial notice of various matters, which are so notorious, or clearly established that evidence of their existence is unnecessary - (*Panayiotis Telemachou v. Chrysa Th. Papares,* C.A. 7212, Judgment delivered on 26th October, 1987*, not yet reported).

The intelligent guess, however, to which referrence was made in *Whiteman Smith Motor Company Limited v. Chaplin and Another* (supra), must be made by an expert witness considered by the Court to be honest and competent and accepted as accurate - (*Ireland v. Taylor* [1948] 2 All E.R. 450, at p. 453).

The appeal, therefore, with regard to the statutory compensation will be allowed and the cross-appeal dismissed.

B. CONDITIONS:

The conditions to which reference was made earlier on in this Judgment were challenged on the following grounds:-

(a) The Court had no power to impose such conditions.

(b) The Court wrongly exercised its discretionary power, if it has any.

(c) The conditions imposed are unreasonable and unnecessary.

Section 16 of Law 23/83 reads as follows:-

«In any application made under this Part the Court may in

* *Reported in (1988) 1 C.L.R. 12.*

its discretion order that in addition to or in substitution for any other order which the Court may make either party shall comply with any conditions, including the payment by one party to the other of any amount agreed upon by them, which the Court may think fit to impose for giving effect to the purposes of this Law.»

It refers to Part IV of the Law comprising: Section 11 - recovery of possession - which provides for the cases an ejectment order may be made and matters relevant thereto; section 12 - compensation to a tenant on the issue of an ejectment order, under paragraph 1 (στ), (ζ) and (η) of section 11; section 13 - compensation for goodwill; section 14 - grant of new lease to the tenant in certain cases and section 15 - compensation for damage or loss sustained by a tenant, where the landlord has obtained a judgment or order for possession or ejectment by misrepresentation or the concealment of material facts.

We do not agree with counsel for the appellants that, under section 16, the Court has no power to impose any conditions on making an order for recovery of possession. This power is discretionary. It must be exercised according to the Law and for the purpose laid by the legislator.

The principles governing the interference by this Court with the exercise by a trial Court of its relevant discretionary power were stated recently in *Eleni Chr. Stylianou, v. Christakis N. Stylianou,* C.A. 7635 (Judgment delivered on 9th September, 1988, not yet reported*), in which the following passage from the English case *Altrans Express Ltd. v. CVA Holdings Ltd.*, [1984] 1 All E.R. 685, at p. 690, was adopted:-

«We must be very careful not to interfere with the judge's exercise of the discretion which has been entrusted to him. We can only do so if he has erred in law or in principle, or if he has taken into account some matter which he should not have taken into account or has left out of account some matter which he should have taken into account, or, and this is an extension of the law which is now I think well recognised, if the Court of Appeal is of opinion that his decision is plainly wrong and therefore must have been reached by a faulty assessment of the weights of the different factors which he has had to take into account:»

* *Reported in (1988) 1 C.L.R. 520.*

With these principles in mind, we proceed to consider each one of the conditions imposed by the Court.

(a) *Recommendation for the grant of new tenancy*

There is statutory provision in section 14 for grant of new lease to the tenant in certain cases.

The trial Court had no power to make an order for the grant of new tenancy in this application, the issue of which was whether to order recovery of possession by the landlord. If the recommendation is an operative part of the Judgment, this was beyond the jurisdiction of the trial Court. If this is an advice and it is not clear what the Court intended, it is an example to be avoided.

(b) *Deposit of renewed building permit*

Counsel for the appellants, though he attacked this condition as well, he stated that the relevant building permit is valid until February 1989. In December 1988 it would not be possible to have a permit valid until the expiration of the period of suspension of the Judgment, i.e. 1st May, 1989. Therefore, if the date is shifted to March, the appellants would comply with such a condition. Counsel for the respondents stated that he had no reason to object to such modification. Therefore, without saying anything more, we shall vary this condition to read as follows:-

> «The appellants to file with the Registrar of the Court, on/or before 15th March, 1989, a copy of a renewed building permit, which will be valid and operative on 1st May, 1989.»

(c) *Affidavit with regard to financial capacity*

By this condition the appellants are required to file and serve on the respondents or their advocate an affidavit in which to state by 31st December, 1988, that they have financial capacity in cash and in loans over £150,000.-

In the course of the trial evidence was adduced by the appellants of their financial condition and their capacity to erect the proposed new building. This evidence came from the appellants and bank employees.

In their judgment the Court said (pp. 219-220):-

> «The financial condition of the applicants appears very good. They have no debts. They have money reserves and considerable immovable property. They have started selling

building sites from a number they can dispose and the price of one of each is about £50,000.-. A loan of £70,000.- was approved by the Bank of Cyprus. The cost of reconstruction of the new building is very small in relation to the total value of the properties of the applicants and we are of the view that they have no difficulty to cover it.»

Notwithstanding this finding, which was not disputed, the Court imposed the above condition. The evidence of their financial ability was adduced in order to satisfy the Court that they genuinely required possession for the purpose of demolition and reconstruction, though this might not be necessary, in view of the pronouncement of this Court in a number of cases that the notion of «reasonable requirement» is linked only to whether or not it is reasonable for the landlord to obtain possession for the purpose of the reconstruction and it is unrelated to any other factor - (*Andreas Yerasimou v. Andreas Rousoudhiou* (1974) 1 C.L.R. 107; *Anastassia S. Kontou v. Antonis Solomou* (1978) 1 C.L.R. 425; *Chrystalla Demetriou and Others v. Savvas Ioannides* (1982) 1 C.L.R. 16 and *Athanasios Poyiatzis, v. Constantinos Pilavakis and Others*, C.As. 7230 and 7231, Judgment delivered on 30th June, 1988, not yet reported*).

If a judgment for recovery of possession or ejectment is obtained by false pretences or concealment of material facts, the remedy of the tenant is damages under section 15 of Law 23/83. If the recovery of possession is secured because of a misrepresentation by the owner as to the need he has of the premises, innocent though it may be, the claim for damages by the tenant is established.

The trial Court failed to give any weight in imposing this condition to the facts as found by it, which it had to take into account. There was no shred of evidence pointing that the financial position of the appellants would, in any way, deteriorate in six months time. This condition is an exercise of discretion, which has to be interfered with on the basis of the principles herein above referred to.

(d) *Prohibition of transfer, charge, etc.*

The relevant title-deed covers, not only the subject shops, but part of other premises - immovable of the appellants.

* *Reported in (1988) 1 C.L.R. 411.*

Counsel for the respondents stated before us that he did not ask for such a condition; the advocates were not given by the trial Court the opportunity to argue on it.

Such drastic restriction of a right of ownership cannot be imposed without giving to a party the opportunity to present his argument. There was nothing before the trial Court on which any Court would impose this condition, which, in fact, is not practically feasible without affecting property of the appellants other than the subject shops.

Furthermore, though an order restraining a landlord from dealing with his property might be necessary in order to give effect to the provisions of section 14, it is not necessary in a case of ejectment.

This condition was a result of wrong exercise of discretion, wrong in principle and faulty. Furthermore, on this issue the parties did not have «a fair trial» under Article 30.3 of the Constitution.

In view of the foregoing, the appeal succeeds as above. The cross-appeal is dismissed.

With regard to costs, bearing in mind the issues raised and the result, we see no reason why in this case they should not follow the event. Respondents to pay the costs of the appellants.

Appeal succeeds as above. Cross-appeal dismissed. Costs by respondents.