1972
July 14
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NIKI A. LAPITHIS
v.
ATHENA STAVROU

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

NIKI A. LAPITHIS,
Appellant-Plaintiff,

v.

ATHENA STAVROU,
Respondent-Defendant.

(*Civil Appeal No.* 5064).

Rent Restriction—" Business premises "—Recovery of possession—Dwelling house—Lease—Tenant living in the premises—Covenant to use them as residence with the right to sublet rooms to others—Purpose for which premises were covenanted to be used is the essential factor and not the nature of the premises or the actual use made of them—But in the present case the landlord well knew throughout that the tenant lady (defendant-respondent) was using the premises as a boarding house or for conducting the business of " pansion " by letting lodgings—In the circumstances, the premises held to be " business premises " within the definition of the words in section 2 of the Rent Control (Business Premises) Law, 1961 (*Law No.* 17 *of* 1961 *as amended by Law No.* 39 *of* 1969)*—Consequently, the tenant (defendant-respondent) was rightly held by the trial Court to be entitled to resist successfully the order of possession, claimed by the plaintiff (appellant) landlord, by relying on the aforesaid Law—There being no dispute that the premises in question are within the " controlled area " provided by the aforesaid statute.*

Rent Control—See supra.

" Business premises "—Section 2 of the Rent Control (Business Premises) Law, 1961 (*Law No.* 17 *of* 1961 *as amended by Law No.* 39 *of* 1969)*—Meaning of the words.*

Landlord and Tenant—" Business premises "—See supra.

Words and Phrases—" Business premises " in section 2 of Law No. 17 *of* 1961 (*as amended*)*—See* supra.

The contractual tenancy of the premises in this case having expired, the landlord (plaintiff-appellant) instituted an action in the District Court of Nicosia claiming possession. The tenant lady (defendant-respondent) by her defence resisted the claim on the ground that the premises in question are " business premises " within section 2 of the relevant Law (the Rent Control (Business Premises) Law, 1961 as amended,

supra) and that, therefore, she is protected by the said Law. The sole issue in this case was whether or not the premises were " business premises " within the said statute. Paragraph 5 of the contract of lease provides :

" The tenant will use the apartment as residence and will have the right of sub-letting rooms to other persons ".

The previous as the present landlord well knew throughout that the premises were being used as a boarding house the tenant letting lodgings from the year 1960 to the present time. The trial Court found for the tenant (defendant-respondent) and from that judgment the landlord-plaintiff took the present appeal.

Dismissing the appeal and affirming the judgment appealed from, the Court :—

Held, (1). The tenancy agreement provides for or contemplates the use of the premises for some particular purpose. We are of the opinion that that purpose is the essential factor and not the nature of the premises or the actual use made of them.

(2) However, directing ourselves with those judicial pronouncements, and in the light of the surrounding circumstances in this case, particularly since the previous landlord and the appellant were aware that the premises in question were let and used for business purposes, we have reached the view that it was in the contemplation of the parties, according to the terms of the letting that the premises would be used as " business premises " ; and that the tenant (defendant-respondent) has succeeded to bring her case within the protection of the Rent Control (Business Premises) Law, 1961 (*supra*). We therefore affirm the judgment of the trial Court.

Appeal dismissed with costs.

Cases referred to :

Levermore v. *Jobey* [1956] 2 All E.R. 362, at p. 365 ;

Wolfe v. *Hogan* [1949] 1 All E.R. 570, at p. 574 ;

Ponder v. *Hillman* [1969] 3 All E.R. 694 ;

Erichsen v. *Last* [1881] 8 Q.B.D. 414, at p. 420 ;

Smith v. *Anderson* [1880] 15 *Chancery Division* 247, at *p.* 258 ;

Thorn v. *Madden* [1925] Ch. D. 847, at pp. 851–52 ;

Tendler v. *Sproule* [1947] 1 All E.R. 193, at p. 194 ;

Helman v. *Horsham and Worthing Assessment Committee* [1949] 1 All E.R. 776, at p. 781 ;

Tompkins v. *Rogers* [1921] 2 K.B. 94, at pp. 96–97.

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Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Demetriades, Ag. P.D.C. and Papadopoulos, D.J.) dated the 24th February, 1972, (Action No. 4977/71) whereby plaintiff's action for delivery of possession of certain premises at No.40 Evagoras Avenue Nicosia was dismissed.

A. Emilianides, for the appellant.

S. Erotocritou (*Mrs.*), for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by :—

HADJIANASTASSIOU, J. : This is an appeal from the judgment of the Full District Court of Nicosia dated February 24, 1972, dismissing the action of the plaintiff for possession relating to premises, viz., an apartment on the 2nd floor at 40, Evagoras Avenue, within a block of flats known as Pantheon Building.

The plaintiff is the owner of the premises since January, 1971, when she purchased the apartment from a certain Georghios Charalambous, subject to the existing occupation of the tenant, Athena Stavrou. The defendant is the tenant of the premises in question, which consist of three bedrooms, two dining rooms, one sitting room, a corridor, kitchen, bathroom, and a balcony.

The substantial, and, indeed, the only point in the appeal is whether the tenant can successfully resist an order for possession claimed by the plaintiff of the premises (admittedly within the " controlled area ") by relying on the Rent Control (Business Premises) Law, 1961 (as amended by Law 39/69). Section 2, so far as material, provides as follows :—

" In this Law, unless the context otherwise requires—

' business premises ' subject to the provisions of the Constitution, means any premises let for any business, trade or professional purposes and used as such and situate within a controlled area, but does not include any such premises—

(i) completed and let for the first time after the date of the coming into operation of this Law ;

(ii) in respect of which there is a valid and binding agreement between the tenant and the landlord thereof, so long as such agreement is in force ;"

The plaintiff, a doctor, is married with five children, and although she resides in an apartment of the 4th floor in the same block of flats, she is also the owner of two more apartments in the same building. On January 28, 1971, the plaintiff wrote to the defendant informing her that she purchased the apartment and was giving her notice terminating the tenancy as from July 14, 1971, the reason being that, she needed the apartment to use it for residence for herself and her family.

On May 4, 1971, the plaintiff, apparently having not received a reply from the tenant, wrote to her again asking her to deliver vacant possession of the apartment as from the expiration of the date of the contractual tenancy viz., July 14, 1971.

It is beyond doubt that when the plaintiff purchased the premises in question, she knew that there was an agreement of tenancy or a contract of lease between the former owner and the defendant, and that at any rate the defendant lived in those premises as well as conducting her business of letting the premises to other persons.

It is clear from the contract of lease dated June 20, 1970, that the period of tenancy is for one year beginning from July 15, 1970, and expiring on July 14, 1971, and after that the tenancy would continue for one more year under the same conditions, unless, either one of the contracting parties expressed desire to notify the other party by a registered letter of its intention not to continue with the said tenancy, two months prior to the expiration of the period provided in the contract of lease. We think paragraph 5 is the most material one, and is in these terms :—

> " The tenant will use the apartment as residence and will have the right of sub-letting rooms to other persons ".

The defendant on the termination of the contractual tenancy, refused to vacate the said premises, alleging both in her statement of defence and before the trial Court, that she was using the said premises as a boarding house or for conducting the business of " pansion ", by accepting lodgers from the year 1960 till the present time, with the full knowledge and consent not only of the former owner, but also with the permission of the present landlord. Although the plaintiff denied that she had knowledge that

the premises were used for business purposes, the trial Court, in their judgment said :—

> " On the evidence as it stands before us, we are prepared to accept that the defendant takes in the flat lodgers and that she earns her living out of what she gets from them. We also find that the defendant herself resides in the flat.
>
> In view of the above, we feel that we cannot but hold that the flat, the subject of this action, is used by the defendant to earn her living and that it is premises used for business purposes as well as a dwelling house ".

It appears to us that on the facts, there was ample material on which the trial Court could find that the whole premises were occupied by the tenant for the purpose of her business of letting lodgings, and that from her own evidence for the purpose of that business, she had a continual right of access to the lodgers ' rooms.

In determining whether premises constitute " business premises " for the purposes of our law, we think, the first thing that must be looked at is the formal lease or tenancy agreement, by which the letting was created ; and on this issue we find ourselves in agreement with the argument of counsel on behalf of the appellant.

In *Levermore* v. *Jobey* [1956] 2 All E.R. 362, at pp. 364 and 365, Jenkins, L.J. said :—

> " This question has been many times before this Court, and it has been laid down that the first thing that must be looked at in considering it in any particular case is the formal lease or tenancy agreement, if any, by which the letting was created. If from the provisions of that lease or tenancy agreement it appears that the premises were let on terms excluding their use for residential purposes, then the matter is concluded against the tenant notwithstanding the use to which the premises may in fact have been put unless on the facts it can be shown that by the common consent of the tenant and the landlord the provision excluding use for residential purposes was relaxed, so as to create a new modified letting of the premises which, as modified, constitutes a letting of them for residential purposes ".

Later on he had this to say :—

> " For the purpose of construing the lease and in particular tenant's covenant (11) it is permissible for

the Court, and indeed obligatory on the Court, to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting ".

In *Wolfe* v. *Hogan* [1949] 1 All E.R. 570 at p.574, Evershed, L.J. said :—

" I hope I shall not be thought guilty of any disrespect to BANKES, L.J., if I observe that the statement quoted from his judgment would seem to be incomplete in so far as there is no mention of the bearing of the question whether the user by the tenant is one which is or is not known to or accepted by the landlord. I think that the matter is more accurately stated by Mr. Megarry in his book on the RENT ACTS, 4th edn., and adopt as part of my judgment the brief summary of the position which I find on p. 19 of the book :

' Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if the premises are let for business purposes, the tenant cannot claim that they have been converted into a dwelling-house merely because somebody lives on the premises ' ".

Then he refers to the two passages from the judgments of Scrutton, L.J., and Bankes, L.J., and says (*ibid.*, 20) :

" ' If, however, the tenancy agreement contemplates no specified use, then the actual use at the time when possession is sought by the landlord must be considered ' ".

Later on he said :—

" What does arise here is plainly a contemplation, according to the terms of the letting, of user as a shop ".

This dictum of Evershed L.J., at p. 574, was applied in *Ponder* v. *Hillman* [1969] 3 All E.R., 694.

The question which is posed is whether the premises in question were let for any business, trade, etc., and used as such. Unfortunately, business or trade is not defined in this legislation, but we can derive assistance from other judicial pronouncements regarding the definition of those words. In our view, a person carries on a business or trade when he habitually does and contracts to do a thing capable of producing profit.

In *Erichsen* v. *Last* [1881] 8 Q.B.D., 414 at p. 420, Cotton, L.J., had this to say on this issue.

> " .... I wish to say that, however true that may be as regards the meaning of the words ' carry on, or exercise business ' in some Acts of Parliament, it is not the true interpretation of those words in this Act of Parliament, where the object is not to see where a company is to be sued, but what duty on profits it is to pay in this country. Then as to the question on what profit the company are to pay? The question is, what profit they make by the business carried on here, which is contracting to send messages to various parts of the world ".

Moreover, adopting the language of Jessel, M.R. in *Smith* v. *Anderson* [1880] 15 Chancery Division, 247, at p. 258, a business has been defined as " anything which occupies the time and attention and labour of a man for the purpose of profit ".

In *Thorn* v. *Madden* [1925] Ch. D. 847 at pp.851 and 852, Tomlin, J., dealing with the question whether the premises were used as business premises, had this to say :—

> " I think that, where, as here, a lady is of set purpose occupying a house which she is aware is beyond her means and, for the purpose of supplementing her means and enabling her to live in the house, is securing, to use a neutral term, visitors to come and live there for short or long periods upon payment for board and residence, it is impossible to say that the house is being used as a private residence only. It seems to me to be used by her in precisely the same way as it would be used by one who kept a lodging house or a boarding house (whatever the strict distinction between them may be), although there may be some differences in the actual methods employed. This is not like a case between two friends, when the one desiring to pay a visit the other says : ' I cannot afford to keep you, but I shall be delighted to see you if you will pay '. Here what is being done is to keep the house permanently available for the accommodation of any approved person who cares to come and stay there and pay for doing so. I think that such a case as this falls into a different category, and amounts to carrying on a business. It does not seem to me to be a necessary quality of a business that it should be advertised in an obtrusive manner or at all. For carrying on a business all that is necessary, I apprehend, is to take the steps required to

secure the necessary customers, and I think it is plain from the letter I have read that the defendant takes steps by the means which she thinks most adequate, to secure customers, when she wants them ".

In *Tendler* v. *Sproule* [1947] 1 All E.R. 193 at p. 194, Morton, L.J., after quoting a passage of Tomlin, J. In *Thorn* v. *Madden* (*supra*), had this to say :—

" I do not think that the decision of Tomlin, J. was based on the fact that the tenant wrote letters to persons to endeavour to induce them to become paying guests. I think that the real gist of the decision is that the taking in of paying guests is a business, and that a house which, or part of which, is used to take in paying guests, is not a house which is being kept as a private dwelling house only ".

Later on he said :—

" It seems to me that this was a breach of covenant not to use the said premises, except as a private dwelling house. For these reasons, I am of the opinion that in the present case there has been a breach of an application of the tenancy ".

Regarding the question of letting lodgings, cf. *Helman* v. *Horsham and Worthing Assessment Committee* [1949] 1 All E.R. 776 at p. 781, Evershed, L.J. had this to say :—

" But it can I think be justified and explained when we remember that the landlord . . . . . is occupying the whole premises for the purpose of his business of letting lodgings, that for the purpose of that business he has a continual right of access to the lodger' s rooms, and that he, in fact, retains the control of ingress and egress to and from the lodging house, notwithstanding that the power of ingress and egress at all hours is essential to the lodger ".

See also s. 10(f) of our law which deals with the recovery of possession of business premises :—

" Where the tenant, by taking in lodgers or by subletting or otherwise parting with the possession of the whole or any part of the business premises, is making a profit, whether directly or indirectly, which, having regard to the rent paid by the tenant, is unreasonable and the Court considers it reasonable to give such judgment or make such order ".

In *Tompkins* v. *Rogers* [1921] 2 K.B. 94 at pp. 96 and 97, Lord Coleridge J. said :—

" What we have to decide is whether there was any evidence upon which the justices could come to the

conclusion that these premises were not business premises within the meaning of the Act. It is found as a fact that the appellant has carried on in the house the occupation—if I may use that neutral term—of a lodging house keeper, and was carrying it on at the time the order was made. She had several people in the house who paid for board and lodging ; there were several gentlemen, all of them paying guests, and a lady who no doubt for some reason connected with the carrying on of the boarding house paid nothing but deprived the appellant of the sole use of her own room. It was held in *Rolls* v. *Miller*, 27 Ch. D. 71, that a house used as a ' Home for Working Girls '—a charitable institution—came within the restrictions of a covenant by the lessees that they should not use the house for any trade or business. So, too, in *Hobson* v. *Tulloch* [1898] 1 Ch. 424, where there was a similar covenant, and the defendant used the house as a boarding house for scholars attending a school, it was held that the defendant was carrying on a species of business. I have no hesitation in coming to the conclusion that this house was being used for business purposes, the appellant getting her living mainly by so using it ; and that the justices had no evidence before them entitling them to find otherwise ".

For the reasons we have endeavoured to explain, and in view of the terms of the lease or tenancy agreement, which provide for or contemplate the use of the premises for some particular purpose, we are of the opinion, that that purpose is the essential factor and not the nature of the premises or actual use made of them. However, directing ourselves with those judicial pronouncements, and in the light of the surrounding circumstances of this case, particularly since the previous landlord and the appellant were aware that the premises in question were let and used for business purposes, we have reached the view that it was in the contemplation of the parties, according to the terms of the letting, of user of the premises for business purposes. We would, therefore, affirm the judgment of the trial Court, because we are satisfied that the premises were let by the landlord 's predecessor in title to the present tenant to carry on the business of letting lodgings. In our view, therefore, since the tenant has succeeded to bring her case within the protection of the law, we would dismiss the appeal with costs in favour of the respondent.

Appeal dismissed with costs.