1977 September 20

[TRIANTAFYLLIDES, P., A. LOIZOU, MALACHTOS, JJ.]

SOCRATES ANASTASSIADES AND ANOTHER,

Appellants—Defendants

ERASMUS ESTATES LTD.,

Respondents—Plaintiffs

(*Civil Appeal No.* 5664)

Landlord and Tenant—Covenant for use as residence only by tenant—And covenant against subletting or assignment or licence—Parents of tenant residing in demised premises—And tenant residing elsewhere but occasionally sleeping there herself—Her son staying quite often with his grandparents—Tenant still in possession of the flat—No assignment contrary to above second covenant—But residence by parents constitutes breach of the first covenant—Ordered to cease interfering with demised premises.

By virtue of a contract dated September 23, 1972 a certain Melpo Stavrou, who is the daughter of the appellants but not a party to these proceedings became the tenant of a flat the property of the respondents, at Nicosia.

Clauses 1 and 2 of the tenancy agreement provided that:

"1. The premises will be used only as residence by the tenant only.

2. No subletting or assignment or licence for the use or occupation of the whole or part of the premises is allowed without the written consent of the owner."

In April 1976 the said Melpo Stavrou rented another flat in Nicosia and she let her parents take up residence in the flat which she had rented from the respondents. She has left in such flat some of her furniture. Her nine years old son was quite often staying there with his grandparents and, occasionally she slept there herself but, as a rule she was residing at her other flat.

The trial Judge held that the appellants were not entitled to occupy the flat of the respondents and that they were, therefore, trespassers. He based this view on a finding that Melpo had assigned the flat to her parents without the written consent of the respondents, and he referred to the aforesaid provisions of the tenancy agreement.

The appellants appealed against the order requiring them to deliver vacant possession of the flat in question to the respondents.

Held, (1) in the light of the facts established at the trial and of the relevant principles of law (see Woodfall on Landlord and Tenant, 27th ed., Vol. 1, p. 523, para. 1221 and *Lam Kee Ying Sdn. Bhd.* v. *Lam Shes Tong Trading as Lian Joo Co. and Another* [1975] A.C. 247 at pp. 255–256) we have reached the conclusion that it was not rightly held by the trial Judge that Melpo Stavrou has assigned the flat concerned to her parents; we are of the opinion that though she allowed her parents to reside in the flat she did not part with, but still retains, possession of the flat; therefore, there has not occurred an assignment contrary to clause 2 of the relevant tenancy agreement. (pp. 54–55 of the judgment *post*).

(2) In view of the wording of clause 1 of the tenancy agreement, as well as of the fact that this is not a case where the tenant, Melpo Stavrou, is using the flat in question as her main residence and her parents are staying only temporarily there as guests, it is not lawful for them to keep on residing in such flat; it is obvious that they cannot enjoy a use of the flat which is excluded by the aforementioned clause 1; in other words they cannot be found to have a better right as regards the use of the flat than Melpo Stravrou has, namely to use it only as a residence for herself only. They have, therefore, to cease interfering with it. The appellants are ordered to cease interfering unlawfully with the flat of the respondents by using it as their residence and the present appeal is determined accordingly.

Appeal partly allowed.

Cases referred to:

Lam Kee Ying Sdn. Bhd. v. *Lam Shes Tong Trading as Lian Joo Co. and Another* [1975] A.C. 247 at pp. 255–256.

Appeal.

Appeal by defendants against the judgment of the District

Court of Nicosia (Papadopoulos, S.D.J.), dated the 26th January, 1977 (Action No. 2394/76) whereby they were ordered to deliver to plaintiff vacant possession of flat No. 4, at 10 Theocritou Street, Nicosia.

L. Papaphilippou, for the appellants.

A. Paikkos, for the respondents.

Cur. adv. vult.

The judgment of the Court was delivered by:

TRIANTAFYLLIDES P.: The appellants have appealed against an order, made by the District Court of Nicosia, on January 26, 1977, which requires them to deliver to the respondents vacant possession of flat No. 4, at 10 Theocritou street, Nicosia.

The trial Court when making the said order stayed its operation for three months and, later on, a stay of its execution was granted till the outcome of the present appeal.

The trial Court ordered, also, the appellants to pay to the respondents the sum of C£ 10,750 mils in respect of the consumption of water from April 1976 to January 1977; but this part of its judgment is not challenged.

The two appellants are married to each other and are parents of a certain Melpo Stavrou, of Nicosia, who, by viture of a contract dated September 23, 1972, became the tenant of the aforesaid flat, which is the property of the respondents; she has not, however, been made a party to the present proceedings.

She is about thirty years old, she is separated from her husband and she has a son about nine years old. As found by the trial Court, in April 1976 she rented another flat in Nicosia and she let her parents take up residence in the flat which she had rented from the respondents. She has left in such flat some of her furniture. Her son is quite often staying there with his grandparents and, occasionally, she sleeps there herself; but, as a rule, she is residing at her other flat.

On the basis of the above factual situation the learned trial Judge held that the appellants were not entitled to occupy the flat of the respondents and that they were, therefore, trespasserst

The trial Judge based his view on a finding that Melpo Stavrou had assigned the flat of the respondents to her parents withou.

the written consent of the respondents, and he referred, in this respect, to the following two conditions in the tenancy agreement.-

"1) Τὸ κτῆμα θα χρησιμοποιῆται μόνον ὡς κατοικια ὑπὸ τοῦ ἐνοικιαστοῦ μόνον

2) Οὐδεμία ὑπενοικίασις ἢ ἐκχώρησις ἢ ἄδεια πρὸς χρησιμοποίησιν ἢ κατοχὴν τοῦ ὅλου ἢ μέρους τοῦ κτήματος ἐπιτρέπεται ἄνευ τῆς πρὸς τοῦτο γραπτῆς συγκαταθέσεως τοῦ ἰδιοκτήτου"

("1 The premises will be used only as a residence by the tenant only

2 No subletting or assignment or licence for the use or occupation of the whole or part of the premises is allowed without the written consent of the owner.")

In Woodfall on Landlord and Tenant, 27th ed., vol. 1, p. 523, para. 1221, it is stated that -

> So long as the lessee remains in possession, he may permit another person to use the demised premises without committing a breach of a covenant 'not to assign, underlet or part with the possession of the demised premises' Occupation by licensees is no breach of a covenant not to assign, demise or otherwise part with any estate or interest in the demised premises, even though the licence is given by a document styling the grantor 'landlord' and the grantees 'tenants'."

In *Lam Kee Ying Sdn. Bhd* v *Lam Shes Tong Trading as Lian Joo Co and another*, [1975] A.C. 247, Sir Harry Gibbs, in delivering the judgment of the Privy Council in England, said (at pp. 255-256).-

> "The questions that fall for consideration by their Lordships on this appeal are whether the first respondent committed any breach of the covenant contained in clause 1 (g) of the lease, and if so whether the Federal Court was right in granting relief against a forfeiture

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* 1 (g) Not to assign underlet or part with the possession of the demised premises or any part thereof without the prior written consent of the lessors such consent not to be unreasonably withheld

Before their Lordships' Board, counsel for the appellant very properly did not seek to maintain that there had been any assignment of the lease or any underletting. The sole breach alleged was a parting with the possession of the demised premises. It could not be disputed that the first respondent had permitted the second respondent to occupy the premises. Counsel for the respondents, again very properly, did not place any reliance on the fact that the second respondent was a company controlled by the lessee in submitting that there had been no parting with possession. Their submissions were based on a number of cases in which it was held that a lessee who retains the legal possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises: *Peebles* v. *Crosthwaite* [1896] 13 T.L.R. 37, 38; [1897] 13 T.L.R. 198, 199; *Jackson* v. *Simons* [1923] 1 Ch. 373, 380; *Chaplin* v. *Smith* [1926] 1 K.B. 198, 206, 209-210; and *Pincott* v. *Moorstons Ltd.* [1936] 156 L.T. 139, 140. Accordingly it has been said that a lessee who grants a licence to another to use the demised premises does not commit a breach of the covenant:

'unless his agreement with his licensee wholly ousts him from the legal possession ..... nothing short of a complete exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession': *Stening* v. *Abrahams* [1931] 1 Ch. 470, 473-474.

Their Lordships regard these decisions as settling the law and as proceeding upon correct principles. A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. It may be that the covenant, on this construction, will be of little value to a lessor in many cases and will admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result: *Crusoe d. Blencowe* v. *Bugby* [1771] 2 Wm. Bl. 766, 767 and *Chaplin* v. *Smith* [1926] 1 K.B. 198, 210."

In the light of the facts established at the trial, and of the above relevant principles of law, we have reached the con-

clusion that it was not rightly held by the trial Judge that Melpo Stavrou has assigned the flat concerned to her parents; we are of the opinion that though she allowed her parents to reside in the flat she did not part with, but still retains, possession of the flat; therefore, there has not occurred an assignment ("ἐκχώρησις") contrary to clause 2 of the relevant tenancy agreement.

On the other hand, we have no doubt that, in view of the wording of clause 1 of the said agreement, as well as of the fact that this is not a case where the tenant, Melpo Stavrou, is using the flat in question as her main residence and her parents are staying only temporarily there as guests, it is not lawful for them to keep on residing in such flat; it is obvious that they cannot enjoy a use of the flat which is excluded by the aforementioned clause 1; in other words they cannot be found to have a better right as regards the use of the flat than Melpo Stavrou has, namely to use it only as a residence for herself only. They have, therefore, to cease interfering with it.

Once we have held, as above, that, in view of a breach of clause 1 of the tenancy agreement, the appellants are not, in any case, entitled to reside in the flat in question, and as Melpo Stavrou is not a party to the present proceedings, we have not deemed it fit or necessary to proceed to examine whether or not she has granted a licence to the appellants to use the said flat, in which case again they could not have been the lawful occupants of it, since the respondents have not given their consent, in this respect, as required under clause 2 of the tenancy agreement.

In the result the appellants are ordered to cease interfering unlawfully with the flat of the respondents by using it as their residence, and the present appeal is determined accordingly.

We have decided, in the light of all relevant considerations, to allow one month within which the appellants are expected to comply with the order we have just made, and to make no order as to the costs of this appeal.

Appeal partly allowed.
No order as to costs.