[ZEKIA, J., ZANNETIDES, J.]

M. SALIM AZIZ, of Nicosia,

Appellant (Respondent),

v.

M. FEVZI AKARSOU, of Nicosia,

Respondent (Applicant).

(Civil Appeal No. 4240)

1957, Dec. 18
1958 Jan. 18

M. SALIM AZIZ v. M. FEVZI AKARSOU

Protected premises—Rent restriction—Business premises—Grant by the Court of a new tenancy to a tenant of business premises against whom an order of ejectment was made under the provisions of the Rent (Control) Law, 1954, Section 18 (1) (i) or (j)—Application for grant of such tenancy under Section 20.

"Business premises", "Dwelling house"—Meaning—Section 2—Two separate physical entities subject to a single lease—Each one of such entities should be considered separately for the purpose of ascertaining whether it is "business premises" or "dwelling house", notwithstanding that both are held under one letting instrument and constitute the component parts of one building.

The Respondent was the tenant under a single lease of two premises at Nos. 34 and 36 Kyrenia Street, Nicosia. The contractual lease having expired, the tenant continued to hold over thereafter as a statutory tenant under the Rent Restriction Laws. Eventually the Landlord - Appellant obtained an order for possession of the said premises under the Rent (Control) Law, 1954, Section 18 (1) (i) on the ground that he proposed to demolish the premises and erect shops on the site. The premises at No. 36 were being used by the tenant for the purposes of his business as a photographer, wholesaler and retailer of photo goods, perfumery, furs, and other novelty goods, whereas those at No. 34 were being used by him as a dwelling with the exception of one room which was used as his photographic studio. After the order for possession was made, the Respondent - Tenant, relying on Section 20 of the Rent (Control) Law, 1954 (Note : The Section is set out in the judgment of the Court) applied to the District Court for the grant to him of a new tenancy of one of the shops proposed to be built by the Landlord - Appellant. In the meantime the Respondent - Tenant secured a lease of two shops almost next door to the old premises, the new shops being, admittedly, equally well situated and much more attractive than the old ones. His main claim for the grant of a new tenancy of one of the shops to be built by the Appellant rested on the ground that there was no sufficient room

in his new premises to use as his photographic studio which was indispensable for his business. It was on this account that the Court of trial ordered the grant of a new tenancy of one of the prospective shops of the Appellant. The District Court, taking the old premises at Nos. 34 and 36 as a whole, ascribed to both of them business character.

The Supreme Court, reversing the order of the District Court,—

Held: (1) The crux of the case lies in the fact that the premises at Nos. 34 and 36, constitute two separate physical entities notwithstanding that both are included in a single lease and constitute the component parts of one building. It was an erroneous approach on the part of the trial Court to deal with Nos. 34 and 36 as a whole. Although subject to a single letting instrument they should be considered distinctly and separately.

Thomstone v. *Simpson,* (1952) 1 T.L. R. 447 ; (1952) 1 All E.R. 431, *not followed*

Whitley v. *Wilson* (1953) 1 Q.B. 77, per Evershed M.R. at p. 83—84, per Romer L.J. at p. 85; (1952) 2 All E.R. 940, per Evershed, M.R. at p. 943, per Romer, L.J. at p. 944, *followed.*

R. v. *Folkestone Rent Tribunal, Ex parte Webb,* (1954) 1 All E.R. 427, *applied.*

(2) On the evidence the premises at No. 36 were business premises. They were let and used exclusively for business purposes, whereas the premises at No. 34 were let as a dwelling and principally or chiefly used as such. Therefore, applying the test of the object of the letting and that of the dominant user, the premises at No. 34 should be considered for the purposes of the Rent (Control) Law, 1954, as a dwelling house ;

Dictum of Denning L. J. in Wolfe v. *Hogan* (1949) 1 All E.R. 570 at p. 575, *considered.*

(3) Inasmuch as the Tenant - Respondent wanted a new tenancy of a shop to be used as his photographic studio and as the old studio formed part of the premises at No. 34, his claim depended upon whether No. 34 could be classed as business premises. Having decided that it could not, it follows that the Court had no jurisdiction to grant a new tenancy.

Appeal allowed.

Cases referred to :

Yiannis Vanezis v. *Michael Koursoumpas,* Civil Application No. 8/50, 19 C.L.R. 26.

Wolfe v. *Hogan* (1949) 1 All E.R. 570.

Pender v. *Reid* (1948) S.C. 381.

Thomstone v. *Simpson* (1952) 1 All E.R. 431 ;
(1952) 1 T.L.R. 447.

Whitley v. *Wilson* (1953) 1 Q.B. 77 ; (1052) 2 All E.R. 940.

R. v. *Folkestone Tribunal, ex parte Webb,* (1954) 1 All E.R. 427.

Per curiam : Rent Restriction Acts and kindred legislation in England contain provisions quite often touching the same subject-matter, which are dissimilar to the corresponding provisions of our Rent (Control) Law. Under section 3 (3) of the Act of 1939, for instance, it is provided that " the application of the Principal Acts to any dwelling house shall not be excluded by reason only that part of the premises is used as a shop or office or for business." Dominant user under this section, unlike the case of a dwelling house under our law, appears to be irrelevant.

Appeal.

The District Court of Nicosia (Stavrinides, D.J.) by order dated the 5th June 1957 given on an Application in action No. 3438/55 made by the Respondent - Tenant under Section 20 of the Rent (Control) Law, 1954, granted to him a new tenancy of one of the shops proposed to be built by the Appellant on the site of premises at Nos. 32, 34 and 36, Kyrenia Street, at Nicosia. The Appellant - Landlord had already obtained against the Respondent - Tenant, an order for possession of the premises at Nos. 34 and 36, given in the aforementioned action No. 3438/55, for the object of demolition and reconstruction under Section 18 (1) (i).

The Appellant appeals against the order granting the new tenancy.

Ali Dana, for the Appellant.

Osman Orek, for the Respondent.

Cur. Adv. Vult.

The facts sufficiently appear in the judgment of the Court which was delivered on the 18th January, 1958, by :

ZEKIA, J. : The Appellant (landlord) in this case appeals against the order of the District Court granting to the Respondent (tenant) a new tenancy of one of the shops proposed to be built by the appellant on the site of premises at Nos. 32, 34 and 36 Kyrenia Street, Nicosia, an order for the recovery of possession for the object of demolition and reconstruction of the said premises having already been obtained. The grant of the prospective shop is made on an application filed by the respondent in pursuance of section 20 of the Rent (Control) Law, 1954, he being the tenant of premises Nos. 34 and 36 Kyrenia Street. This section reads as follows :

"20. — (1) A tenant of business premises, against whom a judgment was given or an order was made under the provisions of paragraph (i) or (j) of sub-section (1) of section 18 and whose trade or business has been so attached for the last five years to the premises that he will suffer a loss if he removes and carries on his trade or business in other premises, may, unless awarded a compensation under section 19, in case the new premises shall comprise any business premises, within two months of the giving of the judgment or of making the order, by serving a notice to this effect on the landlord, claim the grant to him of a new tenancy of such business premises, if any, as more or less will correspond in dimensions, frontage and location to the premises occupied by him in respect of which the judgment or order was given or made on payment of a reasonable rent and if the landlord refuses to grant such a tenancy or within two months of the service of the notice upon him does not signify his willingness so to do, the tenant may apply to the Court for the grant of such tenancy, and if the Court considers that the grant of a new tenancy is in all circumstances reasonable the Court may order the grant of such tenancy on payment of a reasonable rent and for such period and on such terms as the Court may, in default of agreement between the parties, determine to be proper."

The right to a grant of a new tenancy primarily depends upon whether the premises vacated by the tenant for the purpose of demolition and reconstruction were let and used for business, trade or professional purposes. In the first place therefore it has to be ascertained whether the premises at Nos. 34 and 36 Kyrenia Street, are business premises within the definition of section 2 of the Rent (Control) Law 1954. In section 2 of the said law, "business premises" is defined as "any premises let for any business, trade or professional purpose and used as such." "Dwelling house" is defined "as a building or part of a building let as a separate dwelling and used wholly or chiefly as such.". These premises which bear street Nos. 34 and 36 are constructionally designed to serve as a dwelling house and a shop respectively. This clearly emerges from the evidence and from the additional description of the premises given in the hearing of the appeal. No. 36 consists on the ground level at the front of a shop

with a room at the back attached to it and communicating with it. No. 34, on the other hand, consists on the ground level of an entrance hall opening to the street, a kitchen and a water closet and yard; a room and a hall on the first, one room on the second and two rooms on the top floor. The entrance hall which is only 7 ft. wide, provides a passage (a) to the staircase leading to the upstairs rooms and (b) to the kitchen, closet and yard on the ground floor. The room in the rear of the shop has got a communicating door to the yard. With the exception of this communicating door in the back room of No. 36 there is no connection whatsoever between premises No. 36 and 34. These premises could be used separately and independently of each other. The very fact that each has a separate street number is also an indication of this. Neither of them could be said as forming part of the other. It is plain beyond doubt that premises in No. 34 and 36 were structurally adapted for living accommodation and business premises respectively.

The respondent tenant rented the premises in question from the previous landlord in 1934. The lease has not been produced. We have no evidence as to how the premises demised were described in the contract of lease and whether there was a provision in the lease as to contemplated user. In the proceedings it appears that at the conclusion of the evidence the appellant's advocate applied for leave to recall the tenant with a view to cross-examine him on the contract of lease and seek its production, this application was abandoned however on an intimation by the Bench that it was up to the applicant (tenant) to prove that the premises he occupied were business premises. The tenant himself who signed the contract and therefore very likely was familiar of its contents said nothing about the description of the premises in the contract and of the purpose of letting. In his evidence he confined himself only to the use he made of the premises demised. It is in evidence that the previous tenant used No. 34 exclusively as a dwelling house and No. 36 as a shop. The tenant in his evidence said: "The last tenant of the premises No. 34 and 36 before me was one Shakir. He was occupying the whole of the premises. He was using part of the ground floor as a bicycle shop. This part was No. 36 i.e. the room I was using as a novelty shop

and the adjoining room at the back. The other storeys were used as a dwelling and the rest of the ground floor was used in connection with the dwelling." He continues "My only business at that time was photography. The premises have a kitchen not shown in the plan. We used to have our meals there during the cold months and during the hot months in the yard. The waiting room was also used as a guest room. In 1946 I had enough room for my photographic business and the sale of cameras and photographic requisites. Down to 1945 I had used shop No. 36 solely in connection with my photographic business and the sale of the goods just mentioned. I was not carrying on any other business at the time. Down to that time I was using the adjoining room at the back as a passage and also for receiving customers. In other words as a waiting room."

It is abundantly clear that the tenant hired at any rate originally the premises in question for dual purpose, namely, No. 34 as his dwelling and No. 36 as his business premises and indeed he used them admittedly as such up to the year 1946 when tenant's business started expanding gradually. He became an importer and wholesaler and retailer of photo goods, perfumery, furs and coats and other manufactured novelty goods. As the learned trial Judge found, his business originally and up to the year 1946 was only photographic business and after that year he expanded his trade in sale business. He mentioned elsewhere in his evidence that he used second floor room in No. 34 as his studio from the very start. If therefore we revert to the position in 1946, the facts and circumstances lead only to one conclusion, namely, that premises No. 36 were let and used exclusively for business purposes and No. 34 were let as a dwelling house and principally or chiefly used as such. Denning, L.J in *Wolfe* v. *Hogan* (1) said —

> "In determining whether a house or part of a house is "let as a dwelling" within the meaning of the Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is

(1) (1949) 1 All E R 570, p. 575.

constructed for use as a dwelling-house, it is reasonable to infer that the purpose was to let it as a dwelling, but if, on the other hand, it is constructed for use as a lock-up shop, the reasonable inference is that it was let for business purposes. If the position were neutral, it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let."

What were the changes, if any, in the user of the premises in question since 1946 and with what effect on the issues under consideration? The tenant increased gradually his business in the sale of photographic requisites and novelty goods. The volume of his sale business was doubled during the last two years or so. No. 36 continued exclusively to be used for business as usual but it became more and more stuffed with goods for sale. The entrance hall of No. 34 started to be used for photographic business e.g. glazing and cutting of photographs and a temporary booth was erected for the purpose. One of the rooms upstairs was used as a store room. The tenant however with his family went on living in No. 34 as usual. Although the narrow entrance hall was partly occupied for a business purpose it continued to be an adjunct of the house serving as a passage from the street to the rooms at No. 34. Although the guest room—drawing room might be a more appropriate name in the sense it has been used—was used as a waiting room for the customers of the tenant, it did not cease to be used as a drawing room of the house. Taking No. 34 by itself, really it cannot be argued that the premises lost their character of being chiefly used as a separate dwelling house. The phrase "let as a separate dwelling house" has already been interpreted by this Court (1) and the additional use of premises No. 34 made since 1946 for business purposes could not, in the circumstances, turn the building from a separate dwelling into business premises.

When part of a building e.g. a room or an entrance hall is being used for a dual purpose, that is, for business as well as for residential purposes, it would indeed be difficult to fix which of the two users predominates. It becomes still

(1) Vanezis v. Koursoumpas 19 C.L.R. 26

more difficult to draw inference as to any change in the object of letting, basing oneself on such alternate or partial users—as distinct from a use made for one purpose, to the exclusion of the other—and to hold, in the absence of any direct evidence, that the lessor with full knowledge and consent agreed to such change of object.

We are inclined to the opinion, therefore, that since the year 1946, (in other words, throughout the period of tenancy) there was no change in the object of letting and in the dominant user of No. 34 premises. They have to be considered as dwelling house for the purpose and application of the Rent (Control) Law, 1954.

The conclusion reached is not necessarily inconsistent with the finding of the trial Court. The learned Judge in considering the character of the buildings demised treated both premises 34 and 36 as one entity under the description of "old premises". The fact that two ground floor rooms comprised in 36 were admittedly business premises might very possibly have influenced him in ascribing a business character to both premises taken together. For reasons we propose presently to expound we are of the view that it was an erroneous approach on the part of the Court to deal with 34 and 36 as a whole.

The crux of the case, in our opinion, lies in the fact that the premises referred to as No. 34 and 36 constitute two separate entities notwithstanding that both are included in a single lease. Premises are not infrequently constructed as having ground floor rooms designed as shops and with an entrance next to the shop opening to the street leading to rooms on the ground level behind the shops and to up-stairs rooms, built on top of the shops, which are designed as flat or flats for residential purposes. In such cases it is possible that the tenant of the shop and flats on the back or on the top be the same person. In such circumstances when either the protection of the Rent Restriction Law or the application of section 20 for the grant of a new tenancy is considered the premises tenanted should be examined whether they constitute one entity or two separate entities. If the former, then the Court has to decide as a whole whether the premises fall within one or the other of the category defined in section 2 of the law. On the other hand,

if the premises leased consist of two separate physical entities, when the section of the law applying to a particular category should in its application be limited to that particular entity. Megarry has dealt with this topic in his work "The Rent Act" in page 83 (7th Edition). He summarised the authorities relating to this point in a page or two under the heading 'Application to two Physical Entities':

> "Prima facie, for this head to apply, the shop and residence must form *unum quid*; thus a shop cannot form 'part of the premises' merely by being included in a single tenancy with a residence on the other side of the street. The same applies if the residence is in the same building (e.g., upstairs), even if there is internal communication, provided they are independent entities with separate entrances. Such cases differ from those where there are no separate entrances and the shop is merely one of the rooms of the house adapted as a shop, or where, although there are separate entrances, the shop and living accommodation are inter-connecting parts of a single structure which on a common-sense view is a dwelling-house. The question is whether there is one dwelling house, part of which is used as a shop, or (i) a dwelling house, and (ii) a shop, and this is a question of fact upon which it is difficult to discern any satisfactory criteria in the authorities."

Both premises, as we said earlier, can be used separately and independently of each other. The presence of a communicating door between the premises, acceptedly let and used as business premises, with the building used as a dwelling house does not preclude them from being separate entities. The premises under review correspond and are similar to those dealt with in *Pender* v. *Reid* (1), *Thomstone* v. *Simpson* (2) and *Whitley* v. *Wilson* (3). In *Thomstone* v. *Simpson* the tenant was the manager of a garage and the lessee of a flat over the garage business premises. He received a notice to quit from the garage proprietor. He claimed that the Rent Restrictions Act applied to the premises. It was held by Mr. Justice Hallet that the Rent Restrictions Act did not

(1) (1948) S.C. 381.
(2) (1952) 1 All E.R. 431; (1952) 1, T.L.R. 447.
(3) (1953) 1 Q.B. 77; (1952) 2 All E.R. 940.

apply to the premises and that the proprietor was entitled to an order for possession. The business and the living parts of the premises were separate entities, but the dominant purpose of the letting was for carrying on the garage business, the dwelling-house being merely an adjunct of the business part of the premises. On page 449 (1) the premises are described as follows :

"In this case I find that those two parts of the premises can be regarded as separate entities. One reason why I say that, although not the only one, is that there was a separate entrance giving access to the living part of the premises and not giving access to the business part of the premises. It is true that there was also a physical connection between the business part of the premises and the living part of the premises, whereby one could go from one to the other without passing out into the street and using the entrance, but I feel no doubt that they were two entities. I feel certain that there is no real difficulty hereof a physical character why there should not be one tenant occupying the business part of the premises and another occupying the living part of the premises."

It appears that Hallett, J. after finding that the premises consisted of two separate entities refused to consider each part separately in the application of the relevant Act and considered the dominant purpose of the letting in conjunction with both premises and thus came to the conclusion that the premises as a whole were for the dominant purpose of carrying on of the business and not for the provision of a dwelling-house, and held that the Act did not apply. (We need hardly mention that in England only dwelling-houses were protected; business premises were decontrolled at the time this case was considered).

In *Whitley* v. *Wilson* supra (referred to earlier) in connection with the decision in *Thomstone* v. *Simpson,* (supra), Evershed, M.R. had to say this (1953) 1 Q.B. at p. 83—84 :

"I apprehend to be certain of the reasoning of Hallett J. in the case of *Thomstone* v. *Simpson.* That (like the present) was a case of a single structure, the ground floor of which was used for business purposes and the first and second

(1) The passage is from the report of the case in (1952) 1 T.L.R. 447.

floors for living accommodation. The judge found, as a fact, that the business part and the living part of the premises were "divisible into two separate entities," and that the dominant purpose of the house was the carrying on of a business and not the provision of a dwelling-house. The part of the reasoning from which I venture to dissent is that which involves and proceeds on the consideration of dominant purpose. If the judge had found as a fact that the first and second floor should be regarded as one entity, distinct from the shop premises on the ground floor, which were to be regarded as a wholly distinct entity, then I think he might have proceeded to find that the latter entity was outside the protection of the Act, and he might have made an order confined to it alone."

Romer, L.J. on page 85, ibid. subscribed to the view taken on this point by Evershed, M.R.:

"With regard to the case of *Thomstone* v. *Simpson* I entirely agree with the observations My Lord has just made upon that and I have nothing to add to what he has said about it."

Whitley v. *Wilson* (supra) was applied in a number of subsequent cases, *R.* v. *Folkestone Rent Tribunal* ex Parte Webb (1) being one of them; in the head-note of that case it is said:

"The premises consisted of a shop on the ground floor and dwelling rooms on the two upper floors. The residential part, to which there was a separate entrance consisted of a kitchen, a living room, and a water closet on the first floor and two bedrooms on the second floor. The services to the premises consisted of gas, electricity and water. These services were not provided separately and independently from the shop. The lease contained a covenant by the tenant not to carry on any business on the premises other than that of a tobacconist. The rent tribunal held that they had no jurisdiction to entertain the application as the premises were let to the applicant as business premises.

Lord Goddard, C.J. stated further down on p. 427:

"It is impossible, I should have thought, to suppose that

(1) (1954) 1 All E.R. 427.

the living part of these premises could be described as anything else than a dwelling-house. There is a separate entrance, a kitchen, a sittingroom, bedrooms, sanitary arrangements, and everything of that nature which one would expect to find .....

It is only fair to the tribunal to say that, at the time when they gave that decision, *Whitley* v. *Wilson* had not been heard. I think that, if they had had the advantage of reading that case, they would have probably come to a different decision."

The decision of the Rent Tribunal that they had no jurisdiction to entertain the application on the ground that the premises were let to the applicant as business premises was set aside.

Reference to the authorities just cited was made with the sole object of explaining the necessity to deal separately with properties answering a particular category—albeit they constitute the component parts of one building and they are held under one instrument of letting—when for the application of particular provisions of Rent (Control) Law such a section 20 of the said law calls for a separate consideration.

Rent Restriction Acts and kindred legislation in England contain provisions quite often touching the same subject-matter, which are dissimilar to the corresponding provisions of our Rent (Control) Law. Under section 3 (3) of the Act of 1939, for instance, it is provided that the "application of the Principal Acts to any dwelling house shall not be excluded by reason only that part of the premises is used as a shop or office or for business." Dominant user under this section, unlike the case of a dwelling house under our law, appears to be irrelevant.

Respondent tenant, after the vacation order was made, under section 18 (1) (i) of the Rent Control Law, 1954 against him secured the lease of two shops on the same street almost next door to the old premises, namely, Nos. 40 and 42, Kyrenia Street, which according to his evidence are equally well situated and much more attractive than the old ones. His main claim for the grant of a new tenancy of one of the shops proposed to be built by the appellant

rests on the ground that he has no room in his new premises to use as his studio which is indispensable for his photographic business. It was on this account that the learned Judge ordered the grant of a new tenancy of one of the prospective shops of the landlord. This claim depended undoubtedly on whether No. 34 in which the tenant had his studio could be classed as business premises or not. For the reason we have endeavoured to explain, premises No. 34 falls to the class of a dwelling-house and a new tenancy under section 20 of the Rent (Control) Law could not therefore be granted. Since the appeal could be disposed of on one ground we thought the consideration of the remaining grounds of appeal unnecessary.

Appeal allowed. The order granting the new tenancy is set aside. We make no order as to costs owing to the peculiar features of this case.

Appeal allowed.

No order as to costs.