1982 July 27

[MALACHTOS, DEMETRIADES AND SAVVIDES, JJ.]

STAVROS HJIPAVLOU,

Appellant,

v.

JINARO TERRA CO. LTD.,

Respondents.

(*Civil Appeal No.* 6010).

Landlord and tenant—Statutory tenancy—Recovery of possession—Premises let at £10 *per month and sub-let at* £30*—Tenant by sub-letting premises and parting with possession of the premises making a profit which, having regard to the rent paid by him, was unreasonable—Reasonable having regard to the facts of the case to make order for recovery of possession against the tenant —Section* 16(1)(f) *of the Rent Control Law,* 1975 (*Law* 36/75).

Landlord and tenant—Leased property—Buildings and fixtures thereon by tenant who under the terms of the tenancy agreement was under an obligation to restore leased property into its original condition —Tenant sub-letting the premises—Proceedings for recovery of possession directed against tenant and not the sub-tenant who could remain as statutory tenant after the ejectment order against the tenant—Tenant exonerated from above obligation and buildings and fixtures on leased property become the property of the landlord—Sections 2 *and* 22 *of the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224.

Civil Procedure—Practice—Trial of civil cases—Court has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest.

By virtue of a written tenancy agreement dated 7th March, 1956, the tenant leased from the predecessor in title of the landlord a room with yard at Ayios Dhometios for a period of five

years at a monthly rent of £9. Under the terms of the agreement the tenant was not allowed to sub-let the leased property without the written consent of the landlord but he was allowed to use the premises as a cinema and make any necessary additions or alterations at his own expense and had to restore the premises in their previous condition at the expiration of the tenancy period. Soon after the signing of the above agreement the tenant proceeded and constructed on the said piece of land a large room which he used as a cinema up to 1966. The present landlord bought the premises in question in 1960 and the rent was increased to £10 per month as from 1961. This is the rent that the tenant continues to pay till the present day. In 1966 the tenant left Cyprus and went to Spain where he has settled with his family and never returned to Cyprus ever since. Some time before leaving for Spain the tenant, with the tacit consent of the landlord, sub-let the premises to a sub-tenant at a rent of £30 per month.

In an application by the landlord for an order of possession under section 16(1)(f)* of the Rent Control Law, 1975 (Law 36/75) on the ground that the tenant by sub-letting and parting with the possession of the whole of the premises, was making a profit which, having regard to the rent paid by him was unreasonable, the trial Judge found that the tenant was making an unreasonable profit of £20 per month having regard to the rent of £10 per month paid by him and that it was reasonable, having regard to the facts of the case, to make an order for possession against the tenant.

The trial Judge, further, proceeded to consider the question whether the tenant, who has settled in Spain since 1966, was a protected tenant and found that he cannot be considered

* Section 16(1)(f) reads as follows:

"16(1) No judgment or order for the recovery of possession of any dwelling house or busines premises to which this Law applies, or for the ejectment of a tenant therefrom, shall be given or made except in the following cases:

(a) .....

(f) where the tenant, by taking in lodgers or by sub-letting or otherwise parting with the possession of the whole or any part of the dwelling house or 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".

as a protected tenant. This question however was not raised in the pleadings or by any of the parties during the trial.

Upon appeal by the tenant:

Held, (1) that the appellant failed to satisfy this Court that the trial Judge was wrong in the application of section 16(1)(f) of the Law; that on the facts placed before him the trial Judge rightly found that the tenant by sub-letting and parting with the whole of the leased property was making an unreasonable profit of £20.—per month and that it was reasonable to make the ejectment order; that the fact that the tenant incurred expenses in erecting new buildings on the leased plot of land with the consent of the landlord, does not render section 16(1)(f) of the Law inapplicable and the rent received by the tenant from the sub-tenant reasonable; that it is clear from the original contract of lease that the expenses incurred by the tenant were not only unrecoverable but, on the contrary, he had the obligation to restore the leased property into its original condition; that, however, the statement of counsel for the landlord that the present proceedings were not directed against the sub-tenant and that he could remain as statutory tenant after the ejectment order against the tenant, exonerates the tenant from the obligation to restore the leased property into its original condition; so, that, it follows, according to sections 2, and 22 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, that the building and fixtures on the leased property become the property of the landlord; accordingly the appeal must fail.

Held, (2) further, that in civil proceedings a court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest; (see, inter alia, *Iordanou* v. *Aniftos* (1959-1960) 24 C.L.R. 97); and that since the question whether the tenant was protected by the law was not raised in the pleadings or during the trial the trial Judge quite unnecessarily and wrongly proceeded to examine such question.

Cases referred to:

Brown v. *Brash* [1948] 1 All E.R. 922;

Colin Smith Music Ltd. v. *Ridge* [1975] 1 All E.R. 290;

Iordanou v. *Aniftos* (1959–1960) 24 C.L.R. 97;

Loucaides v. *C.D. Hay & Sons Ltd.* (1971) 1 C.L.R. 134.

Appeal.

Appeal by the tenant against the order of the District Court of Nicosia (HjiConstantinou, S.D.J.) dated the 12th October, 1979 (Appl. No. 464/77) whereby he was ordered to evacuate and deliver up vacant possession of the premises at Markos Mbotsaris Str. No. 10 at Ayios Dhometios.

L.N. Clerides, for the appellant.

J. Mavronicolas, for the respondents.

Cur. adv. vult.

MALACHTOS J. read the following judgment of the Court. This is an appeal against the Order given by a Senior District Judge of the District Court of Nicosia dated 12th October, 1979, by which the appellant, hereinafter referred to as the "tenant" was ordered to evacuate and deliver up vacant possession of the premises at Markos Mbotsaris Street No. 10 at Ayios Dhometions, Nicosia, now in the possession of a sub-tenant, under the relevant provisions of the Rent Control Law, 1975 (Law 36/75). The execution of the Order was stayed up to 1st November, 1979, by virtue of section 16(2) of the said Law.

The respondents in this appeal, hereinafter referred to as the "landlord", applied for and obtained an order for possession under section 16(1)(f) of the said Law, on the ground that the tenant by sub-letting and parting with the possession of the whole of the premises, was making a profit which, having regard to the rent paid by him was unreasonable. This section reads as follows:

"16(1) No judgment or order for the recovery of possession of any dwelling house or business premises to which this Law applies, or for the ejectment of a tenant therefrom, shall be given or made except in the following cases:

(a).....

(f) Where the tenant, by taking in lodgers or by sub-letting or otherwise parting with the possession of the whole or any part of the dwelling house or business premises, is

making a profit, whether directly or indirectly, which, having regard to the rent paid by the tenant, is unreasonble and the Court considers it reasonable to give such judgment or make such order".

The relevant facts of the case, as agreed before the trial court, by counsel for the parties, are the following:

By virtue of a written tenancy agreement dated 7th March, 1956, exhibit 1, the tenant leased from the predecessor in title of the landlord a room with yard situated at Markos Mbotsaris Street, No. 10 at Ayios Dhometios, Nicosia, for a period of five years for the agreed sum of £540.- payable by monthly instalments of £9.- each, commencing on the 1st June, 1956 and ending on the 31st May, 1961.

According to term 3 of the agreement, the tenant was not allowed to sub-let any part or the whole of the leased property without the written consent of the landlord. Also, according to term 4 of the same agreement, the tenant was allowed to use the premises as a cinema and make any necessary additions or alterations, which he considered necessary for that purpose at his own expense and he had to restore the premises in their previous condition at the expiration of the tenancy period.

Soon after the signing of the said agreement, the tenant proceeded and constructed on the said piece of land a large room which he used as a cinema up to 1966.

The present landlord bought the premises in question in 1960 and the rent was increased to £10.- per month as from 1961. This is the rent that the tenant continues to pay till the present day.

In 1966 the tenant left Cyprus and went to Spain where he has settled with his family and never returned to Cyprus ever since. Some time before leaving for Spain the tenant, with the tacit consent of the landlord, sub-let the premises to a certain Demetrakis Tsaoushis, who is still in possession thereof, under the provisions of Law 36/75.

The sub-tenant since 1966 is paying to a representative of the tenant as rent the sum of £30.- per month. As from 1st November, 1979, this rent is paid directly to the landlord.

On the above facts and without adducing any other evidence, both counsel for the parties invited the trial Judge to apply the provisions of section 16(1)(f) of the Law and decide in favour of their respective clients.

Furthermore, as regards the sub-tenant, counsel for the landlord submitted that the claim was not directed against him and in case an order for possession was made, to be effective only against the tenant under the provisions of section 22 of the Law. This section is as follows:

"22.(1) Where any judgment or order for the recovery of possession has been obtained against any tenant of dwelling house or business premises, such judgment or order shall not be enforceable against any sub-tenant of such tenant unless the Court is satisfied that such tenant was prohibited by the terms of his tenancy from sub-letting or that such sub-tenant has used the dwelling house or business premises for illegal or immoral purposes. Every judgment or order for possession made against any tenant shall declare whether it shall be enforceable against any sub-tenant or not.

(2) Any sub-tenant against whom such judgment or order is not enforceable shall, if he remains in possession after notice of the judgment or order has been served on him, cease to be a sub-tenant of the tenant and become a statutory tenant of the landlord in respect of the dwelling house or business premises comprised in his sub-tenancy".

The trial Judge in his judgment found that the tenant by subletting and parting with the whole of the leased property was making an unreasonable profit of £20.- per month, having regard to the rent of £10.- per month paid by him. He also considered it reasonable having regard to the facts of the case, to make the Order for Recovery of Possession against the tenant. In doing so the trial Judge rejected the submission of counsel for the tenant to take into account the expenses incurred by him and find that the profit of £20.- made was reasonable. At page 19 of the record the trial Judge said:

"It is my opinion that the expenses incurred by the tenant were related to the first five-years tenancy period and according to the tenancy agreement they were not only

unrecoverable but the tenant would even have to incur further expenses to restore the premises to their original condition. So, in my opinion, the tenant is not justified in trying to earn by way of profit those expenses after the expiration of the first five years of his tenancy. I may even go further and say that I would reach the same conclusion even if the legal position as found by me to be as above, were not the correct one, because the tenant has been making a profit of £20.- per month for the last 13 years, thus making a profit well exceeding the expenses made by him".

However, the trial Judge quite unnecessarily, in our view, proceeded further to consider a question raised in his mind, as he put it, whether this tenant who has settled in Spain since 1966 and has no intention of returning, can be said to be a protected tenant. He found on the authority of *Brown v. Brash* [1948] 1 All E.R. 922, and *Colin Smith Music Ltd.* v. *Ridge* [1975] 1 All E.R. 290, where it is stated that a non occupying tenant prima facie forfeits his status and a licensee left in possession by a protected tenant who he himself leaves, and leaves with the intention of remaining permanently away from the premises no longer has the protection of the Rent Acts, that the tenant in the case in hand cannot be considered as a protected tenant.

Counsel for the appellant in arguing this appeal before us submitted that the trial Judge erroneously came to the conclusion that the appellant was not a protected tenant under the provisions of Law 36/1975 inasmuch as both parties in their pleadings and at the hearing of the case admitted that the tenant was protected by law and argued their case on this assumption. So, the Court had no right to raise or consider ex proprio motu this point. This misdirection of the Court goes to the root of the case and so for this reason only the appeal should be allowed.

He also submitted that section 16(1)(f) applies only to premises sub-let in the same condition as at the time of the original lease and not to premises where new buildings were erected by the tenant with the consent of the landlord as in the present case. The profit, therefore, for a huge store made by the appellant is not unreasonable in view of the expenses incurred by him.

He further submitted that the trial Judge had no right to order the ejectment of the tenant since, as counsel for the landlord stated, the claim was not directed against the sub-tenant who would remain in possesion of the premises as a statutory tenant. The appellant, therefore, could not in any way bring the leased property back to the condition it had been when the contract of lease, exhibit 1, was signed.

Finally, he submitted that the statement of the trial Judge in the judgment of the Court that after careful consideration of all the circumstances of the case he considered it reasonable to make the ejectment order, must have been influenced by his wrong finding that the appellant was not a statutory tenant.

We have considered the arguments of counsel for the appellant and we must say that he has failed to satisfy us that the trial Judge was wrong in the application of section 16(1)(f) of the Law. On the facts placed before him the trial Judge rightly found that the tenant by sub-letting and parting with the whole of the leased property was making an unreasonable profit of £20.- per month and that it was reasonable to make the ejectment order. The fact that the tenant incurred expenses in erecting new buildings on the leased plot of land with the consent of the landlord, does not render section 16(1)(f) of the Law inapplicable and the rent received by the tenant from the sub-tenant reasonable. It is clear from the original contract of lease that the expenses incurred by the tenant were not only unrecoverable but, on the contrary, he had the obligation to restore the leased property into its original condition. However, the statement of counsel for the landlord that the present proceedings were not directed against the sub-tenant and that he could remain as statutory tenant after the ejectment order against the tenant, exonerates the tenant from the obligation to restore the leased property into its original condition. So, it follows, according to sections 2, and 22 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, that the buildings and fixtures on the leased property become the property of the landlord.

The trial Judge proceeded further, as we have already said, quite unnecessarily and wrongly in our view, and found that the tenant was not protected by law. This point was neither

raised by the pleadings nor was it raised during the trial. In the case of *Eleni Panayiotou Iordanou* v. *Polykarpos Neofytou Aniftos* (1959 - 1960) 24 C.L.R.97, it was decided that in civil proceedings a court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest. This case was followed in the case of *Christakis Loucaides* v. *C.D. Hay & Sons Ltd.* (1971) 1 C.L.R.134. However, this misdirection of the trial Judge does not go to the root of the case so that an order for new trial should be necessary since the trial Judge decided also the issue raised by the pleadings as well.

For the reasons stated above this appeal fails and is dismissed with costs.

In view of the fact that the tenant has no actual possession of the premises and has been exonerated from the obligation to restore the premises in their original condition, the ejectment Order as issued by the trial Court shall remain in force against him.

In compliance with section 22(1) of the Law we make a declaration that the ejectment Order shall not be enforceable as against the sub-tenant.

Appeal dismissed with costs.