

(1987)

1987 May 4

[PIKIS, J]

IN THE MATTER OF ARTICLE 155(4) OF THE CONSTITUTION AND
SECTION 3 OF THE COURTS OF JUSTICE (MISCELLANEOUS
PROVISIONS) LAW OF 1964

AND

IN THE MATTER OF AN APPLICATION BY COSTAS XENOPHONTOS
OF NICOSIA, FOR LEAVE TO APPLY FOR AN ORDER OF
CERTIORARI

AND

IN THE MATTER OF THE JUDGMENT/OR/LEAVE DATED 22.4.86
OF THE RENT CONTROL COURT OF NICOSIA OF HIS HONOUR
JUDGE MR. A. AGROTIS IN APPLICATION No. ED208/84

KH. PAPASIAN LTD.,

Applicant,

v.

COSTAS XENOPHONTOS,

Respondent.

(Application No. 66/87).

*Judgments and Orders — Eviction order — Service of an endorsed copy thereof —
An act preliminary to the issue of a writ of possession and, therefore, prima
facie, its nature is Judicial — It follows that it is reviewable by certiorari.*

*Judgments and Orders — Eviction order — Service of endorsed copy on 18.3.87 —
Terms of endorsement requiring tenant to vacate premises by 31.1.87 —* 5
*Allegation of risk from contempt proceedings — Prima facie tenant entitled to
relief — Leave to apply for an order of certiorari to quash the order granted —
— The Civil Procedure Rules, Order 42A, r. 1 — Contemplates terms of
endorsement to refer to an act required to be done presently or at a future date.*

Prerogative orders — Certiorari — Leave to apply for — Principles applicable — 10
Existence of alternative remedy — No bar to relief, but relief may be refused

as a matter of discretion — Discretion should best be exercised when both parties are heard

5 The Rent Control Court granted the application of the landlord and ordered the tenant that is the applicant in this case to vacate the landlord's shop. The order was suspended until the 31 1 87. An endorsed copy of the said order was served on the applicant on the 19 3 87.

10 As a result the applicant filed this application for leave to apply for an order of certiorari quashing the aforesaid order on the ground that it is defective on its face in that in accordance with the terms of the indorsement the applicant is required to vacate the premises by 31 1 87 i.e. 45 or more days prior to the service. Applicant's counsel argued that if the order remains in force the applicant whatever he might do runs the risk of contempt proceedings against him.

15 The endorsed order is also impugned on the ground that after the cessation of the statutory tenancy in respect of the shop there emerged a new tenancy by reason of the acceptance of rent.

Held granting leave to apply for an order of certiorari

20 (1) In *Christofi and Others v. Iacovidou* (1985) 1 C.L.R. 692 it was held that proceedings for the issue of a writ of possession are of a judicial character and as such amenable to review by certiorari. By necessary implication judicial acts preliminary to the issue of such a writ likewise qualify as judicial. Service of an endorsed copy of judgment or order is a prerequisite for the issue of a writ of possession and for the invocation of the coercive powers of the Court in face of disobedience (The Civil Procedure Rules Order 42A r 1 and Order 43A r 1). It follows that *prima facie* the validity of the order and its endorsement are amenable to review by way of certiorari.

30 (2) Order 42A r 1 contemplates the terms of endorsement of the order to refer to an act required to be done presently or at a future date. In *Ibenan Trust Ltd v. Founder Trust and Investment Co. Ltd* [1922] K.B. 87 Luxmore J held that an order served after the time limited for the doing of the act specified therein is unenforceable.

(3) In this case applicant complains that unless the matter is put right he might find himself exposed to a charge of contempt for failure to do things prior to service upon him of the order. He is *prima facie* entitled to relief.

35 (4) The existence of an alternative remedy namely an application to the Rent Control Court to set aside its order is not a bar to entertaining a motion of certiorari, but it is relevant to the exercise of the Court's discretion. Such discretion, however, should best be exercised when both sides are heard.

(5) The alleged emergence of a new tenancy has nothing to do with the

validity of the impugned order

Leave granted

Cases referred to

The Bungalows v Mason [1954] 1 All E R 1402,

Re Chnstofi (1985) 1 C L R 692. 5

Chnstofi and Others v Iacovidou (1986) 1 C L R 236,

Heathenngton Secunty Co [1924] A C 988.

Iberian Trusts Ltd v Founders Trust and Investment Co Ltd [1922] K B 87.

Gordon v Gordon [1946] 1 All E R 247

Beeston Shipping Ltd v Babanaft [1985] 1 All E R 923 10

Williams v Faucett [1985] 1 All E R 787,

Re Kakos (1985) 1 C L R 250

Application.

Application for leave to apply for an order of certiorari to bring up and quash an order of the Rent Control Court of Nicosia ordering applicant to vacate a shop at Ledra Street, Nicosia. 15

Ph. Clendes, for the applicant.

Cur. adv. vult.

PIKIS J. read the following judgment. This is an application of 20
 Costas Xenophontos for leave to apply for certiorari with a view to
 bringing up for the purpose of quashing an Order of the Nicosia Rent
 Control Court, ordering him to vacate a shop at Ledra Street,
 Nicosia, attached to the application as exhibit A. An endorsed copy
 of the order was served on him on 19th March, 1987. He complains
 it is defective on its face because, in accordance with the terms of the 25
 endorsement applicant is required to vacate the premises by 31st
 January, 1987, i.e., 45 or more days prior to the service. If the order
 remains in force and irrespective of whatever he might do thereafter,
 he will be liable for breach of its provisions, a serious matter in view of 30
 the grave consequences that may befall him in contempt
 proceedings

- The Order to deliver possession was issued on the application of the owner of the property for the enforcement of a judgment of the Nicosia Rent Control Court whereby the applicant had been ordered to vacate the premises by 31st March 1987. More precisely an Order for delivery of possession was made suspended in the exercise of the discretionary powers of the trial Court up to 31st January 1987. Seemingly the owner took no steps to have an endorsed copy of the Order served upon the applicant prior to 31st March 1987 in anticipation of the outcome of the appeal of Costas Xenophontos. The Order was served on the applicant soon after the dismissal of the appeal on 19th March, 1987 in order to pave the way in case of disobedience for the issue and enforcement of a writ of possession. The appeal was dismissed on 16 3 87.
- The endorsed order is sought to be quashed on another ground too, namely, the emergence of a new tenancy agreement after the cessation of the statutory tenancy by the acceptance of rent. * This ground has nothing to do with the validity of the impugned order as I pointed out to counsel in the course of the argument of the case. His remedy, if any on this count lay elsewhere. Counsel for the applicant agreed with this appreciation of the matter and made no further submission in support of that aspect of the application. In my Judgment that is not a ground upon which the validity of the Order can be challenged by way of certiorari.
- In re *Manolis Christofi*** I doubted whether proceedings for the issue of a writ of possession are of a judicial character and on that account refused among other reasons a motion for certiorari. The view was espoused*** that proceedings associated with the view of a writ of possession are of a ministerial and not of a judicial character and as such inamenable to judicial review by way of certiorari. The decision was reversed on appeal - *Christofi and Others v Iacovidou*****. It was held that proceedings for the issue of a writ of possession are of a judicial character and as such amenable to review by way of certiorari. By necessary implication, judicial acts preliminary to the issue of a writ of possession likewise qualify as judicial and are at least prima facie amenable to review by way of certiorari under Article 155 4 of the Constitution.

* *The Bungalows Ltd v Mason* [1954] 1 All E R 1402 (C A)

** (1985) 1 C L R 692

*** *Heatherrington Security Co* [1924] A C 988

**** (1986) 1 C L R 236

Service of an endorsed copy of Judgment or Order is in accordance with Order 42A r 1 a prerequisite for the issue of a writ of possession in the event of refusal to comply with the terms of the Order. This is made clear from the provisions of Ord 43A r 1(1), particularly the requirement that the writ should be preceded by an affidavit in Form 39C requiring verification of the fact that an endorsed Order was served upon the party to whom the Order is addressed and not obeyed. Moreover, Ord 42A r 1 makes service of an endorsed copy of a Judgment or Order a prerequisite for the invocation of the coercive powers of the Court in face of disobedience. Hence, I rule that the validity of the Order and endorsement thereto, a prerequisite for the valid issue of a writ of possession and service thereof, are prima facie amenable to review by way of certioran.

Order 42A r 1 contemplates the terms of endorsement of the Order to refer to an act required to be done presently or at a future date. In *Iberian Trust Ltd, v Founders Trust and Investment Co Ltd*, *Luxmore, J held that an order served after the time limited for the doing of the act specified therein is unenforceable. The reasoning behind this judgment is that the very object of an endorsement is to require the person to whom it is addressed to do the act specified within the time limited therein, and remind him of the consequences that will befall him in the event of disobedience. It is not in the power of the addressee to do or rectify a state of affairs pre-existing service of the order. In Halsbury's Laws of England,** the appreciation of the law on the subject of retrospectivity of an endorsement depicted in *Iberna* is adopted as a valid legal statement applicable in every situation where the object of the endorsement is to require the addressee to do something.

Counsel also drew attention to Order 34 r 5 whereby it is directed that in every judgment or order requiring any person to do an act, the time at which the act should be done should be stated. To my understanding this rule refers to the Judgment of the Court that did, in point of fact, specify the time at which possession should be delivered, namely on or before 31st January, 1987. In aid of the submission that the endorsement of the Order is invalid,

* [1922] K B 87

** 4th ed Vol 9 para 63

and that the invalidity renders the Order in its entirety defective
counsel drew attention to the case of *Gordon v Gordon* *
deciding that no committal for contempt should be recorded unless
the rules relevant to disobedience of an order have been complied
5 with. Indeed, where the liberty of the subject is at risk – as in the
case of disobedience of an order of the Court – there must be both
certainty as to the details of disobedience** and strict adherence
to procedure requirements relevant to disobedience of an Order
of the Court – *Beeston Shipping Ltd v Babanaft* *** In the light of
10 the above, applicant would prima facie be in a position to put
forward an effective defence to a charge of contempt founded on
disobedience of the Order here under review. That is not of
course, the issue immediately posing for consideration, though it
serves to stress the need for strict compliance with procedural
15 requirements respecting the content and service of the Order.
Therefore, it appears to me that prima facie the standard to be
obtained at this stage****, applicant made out a case for leave and
for that reason leave may be granted to apply for the remedy.

I do not overlook that applicant had been ordered to vacate the
20 premises long ago and failed to do so – nor do I wish to reward him
for that conduct. But that does not relieve me of the duty to review
in the light of the above, the validity of the Order served on the
respondent, particularly the endorsement. Applicant complains
that unless the matter is put right he might find himself exposed to
25 a charge of contempt for failure to do things prior to service upon
him of the Order and he wants to prevent that by bringing up the
Order with a view to quashing. He is prima facie entitled to relief.

Another aspect of the case that troubled me is the amenity that
applicant had to apply before the Court that issued the Order to set it
30 aside and failure to do so. On the other hand, the existence of an
alternative remedy is not of itself a barrier to entertaining a motion
for certiorari. Certainly the availability of an alternative remedy is
relevant to the exercise of the discretion of the Court in making an
order of certiorari. However, I incline to the view that the discretion
35 of the Court in this connection should best be exercised when both
sides are heard and the facts in their entirety appear before the
Court.

*[1946] 1 All E R 247

***Williams v Fawcett* [1985] 1 All E R 787

*** [1985] 1 All E R 923 (Court of Appeal)

**** *In re Kakos*, (1985) 1 C.L.R. 250

In the light of the above, leave is hereby granted to apply for certiorari. The application must be filed within 4 days and served as expeditiously as possible. Respondents will be at liberty to file written opposition to the application within 7 days. The application will come before the Court for further directions on 23rd May, 1987. 5
In the meantime, I direct that the enforcement of the Order here under review and steps in execution associated therewith be suspended pending the determination of the application to be filed or further order.

Application granted 10