IN THE PRIVY COUNCIL No. 19 of 1971

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL, MALTA

BETWEEN

EMMA, the widow of ERIK, W. GOLLCHER (Applicant) Appellant

- and -

WALTER BALDACCHINO, JOSEPH BALDACCHINO, JOHN BALDACCHINO, VICTOR BALDACCHINO, CARMELA BALDACCHINO (a spinster), PAUL WOODS, MARY ROSE the wife of VINCENT MARTIN (assisted by him) and the said VINCENT MARTIN (as head of the community of acquests and for any interest he may have), PAUL GRECH, ARTHUR GRECH, EDWARD SIVE EDGAR GRECH, VITTORINA GRECH (a spinster), INES the wife of VICTOR BORG (assisted by him) and the said VICTOR BORG (as head of the community of acquests and for any interest he may have, JOSEPH SCIORTINO, CARMELA the wife of ALFRED CACHIA (assisted by him) and the said ALFRED CACHIA (as head of the community of acquests and for any interest he may have), RAPHAEL SAID, JOSEPH SAID, and by a decree of 29th September 1966 WALTER BALDACCHINO PAUL WOODS, VALERIE VALENTE AND VALERIE RAFFAELE SAID were appointed curators to represent respectively SALVINA the wife of SALVATORE ATTARD and the said SALVATORE ATTARD (as head of the community of acquests and for any interest he may have) who are absent from these islands, CARMELA WOODS known as SISTER LUISA TERESA in the religious community of the Sisters of Charity who is absent from these Islands, ANTONIA Sive ANNETTA the wife of JOHN NATOLI and the said JOHN NATOLI (as head of the community of acquests and for any interest he may have) who are absent from these Islands and ROMEO SAID, who is absent from these Islands

Respondents

p.27

1. This is an appeal from a judgment of Her Majesty's Court of Appeal, Malta (Mamo P., Cremona V-P., and Flores J.) dated 8th March, 1968 allowing the appeal of the above-named Respondents (hereinafter called "the
p. 7 Respondents") from the judgment of the Rent Regulation Board of Malta given on 17th November 1966. On that date the Board held that the
p. 13 above-named Appellant (hereinafter called "the Appellant") was entitled to recover possession of the tenement known as 138, St. Lucia Street, Valletta. Malta, upon the expiration dated (being 6th March 1967) of a lease then in being between the Appellant of the one part as lessor and the Respondents of the other as lessees.

2. The material facts and the background law applicable are set out in the majority judgment of the Court of Appeal but are again set out in the paragraphs next following.

3. The Appellant is the owner of No.138 St. Lucia Street, Valletta. This tenement was
Exhibits p. 20 initially let to the Respondents by a deed in the Records of Notary Dr. Giorgio Borg Olivier of 6th July, 1943. The lease was subsequently
Exhibits p. 3 extended with some modifications by another deed in the records of Notary Victor Bisazza of 7th March, 1951, and this for a period of eight years certain and eight years optional which finally expired on 6th March 1967. Normally, that is to say apart from the question on which this Appeal turns, the Respondents at the end of the period of the lease which had been agreed as aforesaid, would have been entitled to a renewal of the lease by virtue of the provisions of Chapter 109 of the Laws of Malta Section 4 of the said Law provides, so far as is relevant :-

"It shall not be lawful for the lessor of any premises at the expiration of the period of tenancy (whether such period be conventional,

legal, customary or consequential on the provisions of this Ordinance) to refuse the renewal of the lease....without the permission of the Board...." (i.e. the Rent Regulation Board).

By her application to the Board the Appellant in fact prayed that she be granted leave not to renew the lease after the said date of 6th March 1967. Although this is not expressly stated in the application, the Appellant's demand was made on the basis of Sections 9 (1) and 10(a) of the said Chapter 109. Section 9 (1) states :- p. 5

"Where the lessor desires to resume possession of the premises at the termination of the lease he shall apply to the Board for permission to do so."

And Section 10(a) in its relevant part states :-

"The Board shall grant the permission referred to in the last preceding section in the following cases :-

(a) If the tenant has in the course of the previous lease .... sublet the premises or made over the lease without the express consent of the lessor...."

4. The Appellant's claim arose in this way. By the aforesaid deed of 7th March 1951 the Respondents were empowered : Exhibits p.3

"To sublet the premises or part thereof provided that they will be responsible for the performance of all the obligations undertaken by them in virtue of this deed".

5. Nowhere in that or any other relevant deed or at all were the Respondents granted the power of assignment by or on behalf of the Appellant.

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Exhibits pp.5-19

6. In virtue of two deeds, one in the records of Notary Paul Pellegrini Petit of 31st March 1966 and the other in the records of Notary Dr. Paul Pullicino of 6th April 1966 the Respondents sold to a certain company known by the name of "Regency Estates Limited" the temporary utile dominium of tenement No.254, Kingsway, Valletta, Malta and in both deeds it was laid down that :

Exhibits p.88 p.15

"This sale also includes the cession in favour of Regency Estates Ltd. of the right of lease of the adjoining property presently held by the Vendors and by them sublet to third persons namely the premises at number one hundred and thirty eight Saint Lucia Street Valletta as per two deeds one in the records of Notary George Borg Olivier of the Sixth July One thousand nineteen hundred and forty three and the other in the records of Notary Victor Bissazza of the seventh March nineteen hundred and fifty one and includes the sub-lease indicated in Document J. annexed."

7. No consent to the said assignment express or otherwise was given by or on behalf of the Appellant nor was consent sought.

Exhibits p.24

8. By a letter of 9th July 1966 Regency Estates Ltd. gave notice of the assignment to the Appellant informing her that "this Company has acquired the right of sub-lease of the premises....etc." and the Appellant replied by

Exhibits p. 25

the judicial letter of 21st July 1966 whereby she refused to acknowledge what had taken place, which amounted to an assignment not a sub-lease, and instituted proceedings.

pp.3-5

9. The Appellant in her original Application to the Board summarised the above facts and prayed in accordance with Chapter 109 of the Laws of Malta for the Board's permission not to renew the lease when it expired.

p. 6

10. The Respondents in their Reply to the Appellant's Application contended that the express

power to sublet in the deed of 1951 included the power to assign and relied upon three arguments :

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(i) that there is no substantial difference to the lessor between a sublease and an assignment;

(ii) that in any event the two expressions sublease and assignment are used interchangeably or "promiscuously", and

(iii) that "the wording of the clause which allows the subletting provided the lessees remain responsible to the owner for the performance of the obligations is more appropriate to the typothesis of an assignment".

11. The Board in their judgment expressed the following views :

(i) that subletting and assignment are not one and the same thing; p.10 l.16

(ii) that there is a substantial difference between subletting and assignment vis-a-vis the lessor, because the prevailing view is that by assignment the assignor releases himself from his obligations to the lessor. p.10 l.38

(iii) that assignment is a more radical transaction than subletting, involving quite different consequences; p.12 l.30

(iv) that the maxim inclusio unius est exclusio alterius applies and that if the Appellant had intended to grant the power to assign as well as the power of subletting she would have said so expressly ; p.12 l.21

(v) that the transaction effected by the Respondents was an assignment made without the express consent of the Appellant who is consequently afforded a remedy pursuant to Chapter 109. p.13 l.13

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p.13 l.27 12. The Board accordingly granted the Appellant's Application.

p.17 13. The Respondents filed an Application of Appeal in the Court of Appeal, Malta, within 2 days of the Board's decision, setting out their case on the footing that there is no difference to a lessor between assignment of the lease by the lessee and the creation of a sublease by him and that in that event it would be inequitable for the lessor in this case to be allowed to recover possession on a technical point of law when the lessees had recently expended "many thousands of pounds" on improvements to the premises concerned.

p. 27 14. On 8th March 1966 the Court of Appeal gave judgment by a majority (Cremona V-P dissenting) allowing the appeal. The majority of the Court in their single judgment expressed the following views :

p.37 l.35 (i) Although subletting and assignment are different contracts in themselves, they have equal effect vis-a-vis the head lessor.

p.38 l.32 (ii) A lessee who assigns a lease remains liable to the Lessor unless freed by the lessor from his obligations.

p. 39 (iii) a lessor has the same rights against the assignee of the lease as he has against the assignor

p.40 l.34 (iv) The Maltese Civil Code in several contexts uses the word "sublease" to include assignment.

p.41 l.38 (v) Where in the Civil Code subletting is prohibited, the prohibition is deemed to include assignment, which is a greater thing than subletting.

p. 42 (vi) Equally if assignment is prohibited, subletting is deemed to be prohibited also, for

by prohibiting assignment the owner would wish to prevent the substitution of one party for another, which is the effect of subletting as well as assignment.

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(vii) Whenever either subletting or assignment is expressly prohibited the other is as a general rule deemed to be prohibited also. p.43 l.29

(viii) What applies to prohibition clauses of the type described also applies to authorisation clauses. p.45 l.3

(ix) The maxim inclusio unius est exclusio alterius does not apply. It is in any event a bad maxim in that draftsmen are often inadvertently (and not deliberately) incomplete and injustice can therefore be worked by the draftsman's failure to foresee unforeseeable circumstances. p.45 l.26

(x) No reason is given by the lessor why she is willing to permit subletting but not assignment save that the original lessee, the assignor, should remain liable to her, which he is. p.47 l.4

(xi) In cases of doubt as to construction, the doubt should run in favour of the lessee, who might otherwise be evicted. p.48 l.38

15. On the above grounds the court allowed the appeal. However, a note of the dissenting views of Cremona V-P was filed by the learned Vice-President on 2nd July 1971. It is regretted that the Note was filed by the learned Vice-President too late to be included in the formal printed Record and accordingly the Note is reproduced here in full : p.49

"The Note of the undersigned Judge whereby he declares as follows :

In general and with respect he cannot agree with the conclusion arrived at by His

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Honourable colleagues of the Court of Appeal and he agrees instead with the conclusion arrived at by the Rent Regulation Board in the decision appealed from.

In particular and briefly he adds the following remarks.

The clause in question in the original contract of lease has to be considered not only within the framework of the general law but also and particularly within the framework of the special rent law which applies to the case and within such framework it has to be considered as it is. The said law (Chapter 109), which was already in force when the original lease agreement was entered into and which set up a system of control in matters of lease, provides that it shall not be lawful for the lessor of any premises at the expiration of the period of tenancy to refuse the renewal of the lease of the premises without the permission of the Rent Regulation Board (Section 4) and when he desires to resume possession of the premises at the termination of the original period of lease or of the lease renewed in force of the law from time to time, he shall apply (as was done in this case) to the Board for permission to do so (section 9) and the Board shall grant such permission only in certain hypotheses limited by law including that when the lessee - and the following are the textual words of the law - "has sublet the premises or made over the lease without the express consent of the lessor" (section 10).

Under this system where, notwithstanding the effective termination of the agreed lease, the lessor may not - and this for an indefinite time - resume possession of his premises except in certain limited hypotheses expressly specified by the law, the right was reserved to the lessor to resume such possession if the lessee sublets the premises or makes over the lease without his

express consent. The lessor in the present case preventively and expressly renounced in the original lease agreement his right to resume such possession if the lessees sublet the premises (which the lessees in fact had already done some time ago without the lessor being able to take any steps).

There is no doubt that subletting is, as a judicial figure, different from assignment of lease and is also in fact separately envisaged by the special rent law as a ground whereon the lessor may base a claim for the resumption of possession of the premises (and this is the demand in the present case, made under the said law) and, in the absence of clear evidence in this regard, there is nothing to authorise the presumption that the preventive express and specific renunciation by the lessor of his right to resume possession of the premises in the case of a subletting had extended itself also to the case of an assignment of the lease.

Although the special rent law gives the lessor the right to resume possession of the premises in the event of a subletting or of an assignment of the lease, in the public deed in question, a solemn act received by a Notary Public, the lessor's renunciation to such right was in the formulation of the said deed expressly limited to subletting without any mention of assignment of the lease, and no evidence has been produced to show as a fact that, notwithstanding such formulation, the parties were intending that the lessor's renunciation in fact had to extend also to that which was not only not expressed but which also in the particular context (since the special law mentions both subletting and assignment) one would, if anything, have reasonably expected that it would be expressed if it had been intended. Nor, as has been stated, can such renunciation be lawfully presumed. It has many times and with

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good reason been stated by these Courts that renunciations of rights must not be presumed and are to be interpreted strictly.

In the present case the lessees, after having sublet the premises (vide clause 2 of the deed at page 8 of the record*) as they were certainly entitled to do, also assigned the lease, which in the opinion of the undersigned judge they had no right to do under the lease agreement, and once they have done so, the lessor's right to which he has not renounced, and which the law reserves to him by reason of such assignment, is still in force and operative so that his demand should, in the opinion of the undersigned Judge, be allowed as it was allowed by the Board.

(Signed) J.J. Cremona,
Vice-President

This 2nd day of July, 1971
Filed by the Hon. Mr. Justice J.J. Cremona,
Acting Chief Justice and President of the Court.

* Now page 8 of applicant's Exhibits in the printed record.

16. This Appeal therefore raises a single QUESTION in the Appellant's humble submission namely :

Did the express authorisation in the deed of 1951 empowering the Respondents to sublet the demised premises deprive the Appellant of her right, pursuant to Sections 9(1) and 10(a) of Chapter 109, to resume possession of the premises in the event of an assignment?

17. In support of this Appeal the Appellant will rely upon the arguments set out in the note of the dissenting views filed by Cremona V-P which is transcribed in paragraph 15 above.

The Appellant will further contend that the majority judgment of the Court of Appeal was wrong in that, inter alia, prohibition and authorisation clauses are quite different and should be treated differently: whereas there may be circumstances where a lessor in prohibiting one act should be deemed to have prohibited another thereby in addition, it does not follow that there are circumstances in which he should be deemed, in authorising one act, to have authorised another which he has not in fact authorised. In particular, it is not admitted but it may be contended that, where in a lease a lessor prohibits subletting, he is deemed also to have prohibited assignment. It does not follow and it is not the law that, where a lessor renounces his right of recourse in the event of the lessee subletting, he is deemed also to have renounced his right of recourse in the event of the lessee comitting some other, different act namely an assignment.

18. The Appellants humbly submit that the judgment of the Rent Regulation Board and the dissenting view of Cremona V-P in the Court of Appeal were right and that the judgment of the Rent Regulation Board should be restored and that the judgment of the Court of Appeal was wrong and should be reversed and that the Appellants should receive such further and other relief in the premises as may seem just for the following among other

R E A S O N S

(1) The Respondents in 1966 assigned their lease in respect of 138 St. Lucia Street, Valletta to Regency Estates Limited.

(2) The Appellant by Sections 9(1) and 10(a) of Chapter 109 is entitled to possession therefor upon expiration of the term. The Court has no discretion in the granting of the said remedy.

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(3) Assignment and subletting are not the same thing.

(4) The Appellant by conceding the right to sublet is not deemed to have conceded also the right to assign. In the absence of evidence there is no such presumption.

JOHN COPE

No. 19 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM HER MAJESTY'S COURT OF APPEAL, MALTA

B E T W E E N

EMMA, the widow of ERIK W. GOLICHER (Applicant) Appellant

- and -

WALTER BALDACCHINO et al Respondents

CASE FOR THE APPELLANT

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