

IN THE PRIVY COUNCIL

No.19 of 1971

ON APPEAL

FROM THE COURT OF APPEAL OF MALTA

BETWEEN:

EMMA the widow of ERIK W. GOLLCHER

Appellant

- and -

WALTER BALDACCHINO, JOSEPH BALDACCHINO,  
 JOHN BALDACCHINO, VICTOR BALDACCHINO,  
 10 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  
 20 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 (since deceased),  
 and by a decree of 29th September 1966  
 WALTER BALDACCHINO, PAUL WOODS,  
 VALERIE VALENTE and VALERIE RAFFAELE  
 30 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  
 40 and for any interest he may have) who are  
 absent from these Islands and ROMEO SAID,  
 who is absent from these Islands, ADELINA  
 SAID and RAFFAELE SAID (the two last-named  
 being substituted together with ROMEO SAID,  
 for JOSEPH SAID deceased)

Respondents

CASE FOR THE RESPONDENTS

UNIVERSITY OF LONDON  
 INSTITUTE OF ADVANCED  
 LEGAL STUDIES  
 28 MAY 1974  
 25 RUSSELL SQUARE  
 LONDON W.C.1

RECORD

|   |  |    |
|---|--|----|
| pp.27-49  | 1. This is an appeal from the judgment of the Court of Appeal of Malta (Mamò, P. and Flores, J., Cremona, V.-P. dissenting) dated the 8th March, 1968, which allowed the Respondents' appeal from a judgment of the  |    |
| pp.7-13   | Rent Regulation Board dated the 17th November, 1966, which allowed the Appellant's application to recover possession of premises at No.138, St. Lucia Street, Valletta on the termination of the current period of a lease on the 6th March, 1967.   |    |
| pp.8-9<br>pp.34-35  | 2. The facts of the case are not in dispute and are set out in the judgments of the Rent Regulation Board and of the Court of Appeal. It was common ground that the Appellant is, and was at all material times, the owner of tenement No.138, St. Lucia Street, Valletta. The said tenement was initially let to the Respondents by a deed dated the 6th July, 1943. By another deed, dated the 7th March, 1951, the terms of the first deed were modified and the period of the lease was extended to the 6th March, 1967. Clause 7 of the later deed provides as follows :- | 10 |
| Exhibits<br>pp.20-24<br>Exhibits<br>pp.3-5<br>Exhibits<br>pp.4,11,<br>32-35 | "7. The tenants are empowered to sublet the said 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."   | 20 |
| p.34  | It was not contested by the Appellant that, in the ordinary course of things, the Respondents at the expiry of the lease, i.e. on the 7th March, 1967, would have been entitled to a renewal of that lease pursuant to Chapter 109 of the Laws of Malta (Reletting of Urban Property (Regulation)), the relevant parts whereof provide as follows :-   | 30 |
|   | "4. It shall not be lawful for the lessor, 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 ..."<br>(the Rent Regulation Board).   |    |
|   | "9. (1) Where the lessor desires to resume possession of the premises at the termination of the lease he shall apply   | 40 |

to the Board for permission to do so."

= = = = = = =

"10. 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 ..."

10 3. By two deeds dated respectively the 31st March, 1966 and the 6th April, 1966, the Respondents sold to Regency Estates, Limited the temporary utile dominium, for the remaining period of the emphyteutical grant, of tenement No.254, Kingsway, Valletta, and in both deeds it was provided that :- Exhibits pp.5-13, 14-19

20 "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 No.138 St. Lucia Street as per two deeds one in the records of Notary George Borg Olivier of the 6th July, 1943 and the other in the records of Notary Victor Bisazza of the 7th March, 1951 ... " Exhibits p.8, 11. 16-24 p.15, 11. 27-36

30 By a letter dated the 9th July, 1966, Regency Estates, Limited gave notice to the Appellant that "this Company has acquired the right of sub-lease of the premises situated at No.138, St. Lucia Street, Valletta, which right was granted to Messrs. Said, Grech and Baldacchino in terms of Clause 7 of a deed signed on 7th March, 1951, and published by Not. V. Bisazza." Exhibits p.24

40 By a judicial letter in reply dated the 21st July, 1966, the Appellant stated that she contested that the lessees had the right to assign the lease as they had by the two deeds dated the 31st March and the 6th April, 1966, and she proposed to institute proceedings under Section 10 (a) of Chapter 109 of the Laws of Malta to recover possession of the tenement in question at the termination of the lease, namely, on the 6th March, 1967. Exhibits p.25

RECORD

- pp.3-5 4. By her Application to the Rent Regulation Board, dated the 5th August, 1966, the Appellant stated that the Respondents had assigned the lease under the deed of the 7th March, 1951 by the two said deeds dated the 31st March and the 6th April, 1966, although they did not have the right to do so either under the deed of the 7th March, 1951 or under the earlier deed of the 6th July, 1943. Accordingly, the Appellant prayed that she should be authorised to recover possession of the tenement in question on the 6th March, 1967. 10
- p.6 By their Reply, dated the 4th October, 1966, the Respondents maintained that the power to sublet under Clause 7 of the later deed of the 7th March, 1951 included the power to assign, first, because there is no substantial difference between a sub-lease and an assignment vis-à-vis the owner, and secondly, because the said Clause 7, which allowed sub-letting provided that the lessees remained responsible to the owner for the performance of the obligations, was more appropriate to the hypothesis of an assignment. 20
- pp.7-13 5. In its judgment, dated the 17th November, 1966, the Rent Regulation Board summarised the relevant facts and dealt first with the Respondents' submission that an assignment and a sub-lease were substantially the same vis-à-vis the owner. The Board agreed with a number of writers who said that, although sub-letting and assignment were in practice used promiscuously, they were not one and the same thing: in sub-letting the lessee himself became a lessor, whereas in the case of an assignment the lessee made a sale of his rights. The Board did not consider that sub-letting and assignment were substantially identical vis-à-vis the owner. The Board said the prevailing doctrine was that the lessee in the case of an assignment did not remain responsible to the owner for the performance of the obligations arising from the lease, but the assignee was liable to the lessor, just as the lessee had been before the assignment, and the assignee took the place of the lessee. 30
- pp.9-10  
p.10, 11.  
16-37
- p.10.1.39  
p.11.1.1
- pp.10-11 6. The Board considered that "doctrine and jurisprudence" had been concerned with the question whether a prohibition against sub-letting amounted also to a prohibition against assignment and vice versa, and had not been concerned with the effect of a 40

- permission granted to the lessee in derogation of the special law contained in Chapter 109. The Board felt that one had to be cautious in the application to the position under Chapter 109 of principles enunciated in the consideration of a prohibition. The Board said that all the writers were in agreement that a prohibition against sub-letting involved also a prohibition against assignment, principally on the ground that whoever did not want the lesser thing (a sub-lease) did not want the greater (an assignment). In the Board's view an assignment was much more radical than a sub-lease, because in the case of an assignment there was the substitution of the lessee and the severance of relations between the lessor and the original lessee. The Board felt that the argument that whoever did not want the lesser thing could not want the greater could not be transported to the case where sub-letting was permitted by the lease, because it could not logically be said that whoever permitted the lesser thing wanted also to permit the greater. The Board said that the principle "inclusio unius est exclusio alterius" applied, and it would not be logical to hold that if in granting the power to sublet the Appellant had wished to grant the power of assignment as well she would not have mentioned it expressly
- 10
- 20
- 30
- 40
7. The Board did not consider the argument based on the proviso to Clause 7 of the deed of the 7th March, 1951 to be decisive. It felt that the proviso emphasized that the Appellant intended to make it clear that she did not want to enter into lease relations with anyone other than the Respondents.
8. The Board concluded by saying that the transaction between the Respondents and Regency Estates, Limited was a true and proper assignment. The Board authorised the Appellant to recover possession of the tenement in question on the termination of the current period of the lease on the 6th March, 1967, and ordered each party to bear its own costs.
9. The Respondents appealed to the Court of Appeal of Malta. The appeal was heard by Mamo, P., Cremona, V.-P. and Flores, J., and judgment was given on the 8th March, 1968, allowing the Respondents' appeal (Cremona, V.-P. dissenting).
- p.12, 11.  
3-6
- p.12, 11.  
7-16
- p.12, 11.  
17-33
- p.12. 1.34 -  
p.13. 1.12
- p.13, 11.  
18-25
- p.13, 11.  
27-31
- pp.27-49

RECORD

- p.34, 1.1- 10. In the judgment of the majority of the Court of  
p.35, 1.31 Appeal, the relevant facts and the judgment of the Rent  
p.29, 1.23- Regulation Board were summarized. Mamo, P. and  
p.33, 1.31 Flores, J. observed that the Respondents had not  
p.35, 1.32- questioned that, in the relations between the lessee  
p.36, 1.15 and the sub-lessee and between the lessee and the assignee  
p.36, 1.16- of the lease, sub-letting and assignment of the lease  
p.37, 1.10 were two different contracts and in such relations they  
created different rights and obligations. They had  
submitted that as regards both the relations of the lessee 10  
with the owner, as well as the relations, or absence  
of relations, of the sub-lessee or assignee with the  
owner, there was no substantial difference between the  
case of sub-letting and that of assignment: in both  
cases the lessee substituted another in the enjoyment  
of the thing and it was of no importance to the owner  
whether such substitution was made by means of an  
assignment of the lease or a sub-letting. In either case  
his rights remained the same. Saving some particular 20  
circumstances which did not exist in this case or  
some specific stipulations to the contrary, both the  
prohibition and the power to sublet included the  
assignment of a lease, and vice versa.
- p.36, 1.32- 11. The Respondents had further submitted that  
p.37, 1.10 Chapter 109 made no distinction between the two forms  
of transfer of enjoyment of the thing let by the tenant  
to a third person; and, even for the purposes of  
Chapter 109, it should be held that, when the owner  
had expressly given the lessee the power to sub-let, he 30  
had also given him the power to assign the lease.  
They had also submitted that it would have been  
equally easy for them to effect a sub-lease to Regency  
Estates, Limited, if it had occurred to them that  
this would make any difference or that the Appellant  
would try to take advantage of a legal subtlety which  
did not affect her relations with them and did not cause  
her any prejudice.
- p.37, 11. 12. The learned Judges found that the substantial  
11-14 complaint of the Respondents should be accepted.  
p.37, 11. Sub-letting and assignment of a lease were not in 40  
15-19 themselves as contracts one and the same thing.  
p.37, 11. However, the Board had been wrong in thinking that  
39-41 there was any substantial difference between the two  
p.38, 11. contracts "with regard to the owner". The Board's  
2-6 citation of writers did not give a balanced or wholly

- correct impression of the doctrine of such writers themselves or of legal doctrine in general; and the Board's conclusion, that the prevailing doctrine was that the assignor did not remain responsible to the owner for the performance of the obligations arising from the lease, was not well founded. There was no disagreement in doctrine or in jurisprudence in relation to the proposition that "the lessee who assigns the lease remains nevertheless liable to the lessor for the performance of all the obligations arising from the lease, unless of course the lessor acknowledges the assignee in his place as lessee or frees the original lessee from his obligations". The principle that a person may assign his rights but not his obligations was affirmed in the clearest terms by the very writers cited by the Board. Furthermore, it was idle in the present case to quote doctrine as to whether the original lessee remained liable to the owner for all the obligations arising from the lease in the case of an assignment, because Clause 7 of the deed of the 7th March, 1951 made express provision that the Respondents should remain liable.
- 10
- 20
- 30
- 40
13. The learned Judges then considered in detail sections 1702-1711 of the Maltese Civil Code. They held that the word 'sub-lease' in several places in these sections meant, not only a sub-lease proper, but also an assignment of a lease; and these sections equated a sub-lease with an assignment not only with respect to the power of the lessee to effect the same, but also with respect to the relations of the sub-lessee or assignee with the owner. The learned Judges agreed with the Board that when, for the purposes of section 1703 of the Civil Code, sub-letting was prohibited by the contract, it should be deemed that assignment of the lease had also been prohibited. They rejected, on the other hand, the Board's reasoning based on the false premises that the assignment of a lease was a more radical step than sub-letting or that an assignment included "the substitution of the lessee and the severance of relations between the lessor and the original lessee".
14. The learned Judges held that the considerations applicable to the prohibitory Clause under the Civil Code (section 1703) applied also to the authorisation Clause for the purposes of Chapter 109. For all civil
- p.38, 11.  
36-38
- pp.38-39,  
1.4
- p.39, 11.  
30-33
- p.40, 11.  
12-21
- p.40, 1.34-  
p.41, 1.34
- p.41, 11.  
38-42
- p.42, 11.  
8-12  
pp.41-42, 1.8
- p.45, 11.  
6-8  
p.45, 11.  
9-12

RECORD

- p.45, 11. 13-25 purposes, sub-letting and assignment were vis-a-vis the owner substantially the same thing. In Chapter 109 the two methods of transfer were placed on an equal footing; when the owner had granted the lessee power to transfer the enjoyment to a third person, it should make no difference for the purpose of deciding whether the owner might apply to recover possession whether such power was given in one form rather than in another.
- p.45, 1126- p.46, 1.2 This was not a case where the maxim "inclusio unius est exclusio alterius" should be applied. The maxim ought not to be applied when its application having regard to the subject-matter led to inconsistency or injustice. In the general system of Maltese law the word "sub-letting", with respect to the relations with the owner, include also "assignment", and there was nothing to show in the deed in question that it was the intention of the parties that the word "sub-let" should be read restrictively to mean a true and proper sub-letting only. Indeed, the proviso to Clause 7 of the lease in question would have been quite unnecessary if sub-letting in its restrictive sense had been intended. Only in the case of an assignment could there have been any doubt as to the continuance of the lessee's obligations under the lease. 10
- p.46, 11. 3-10
- p.46, 11. 10-35
- p.47, 11. 4-12 15. In the learned Judges' view, there was no reason (apart from the doctrinal reason, which they rejected) why the Appellant should authorise sub-letting but disallow assignment. The important matter for the Appellant was that the Respondents should continue to remain responsible for their obligations under the lease; in this case, the Respondents did remain so responsible in spite of the assignment. 20
- p.48, 1.38- p.49, 1.2 16. The learned Judges concluded by saying that it had been held several times by the Court of Appeal that where a doubt arose as to a matter of correct interpretation, such doubt should be resolved in favour of the lessee who might lose possession of his tenement were the doubt to be resolved against him. 30
- p.49, 11. 3-6 17. The Court of Appeal therefore allowed the Respondents' appeal and disallowed the Appellant's demand, ordering that each party should bear its own costs. 40
18. The Respondents respectfully submit that this

10 appeal ought to be dismissed and the judgment of the Court of Appeal was correct. The terms of Clause 7 of the deed of the 7th March, 1951 permitted the Respondents to assign the said lease. On a proper construction of the said Clause 7, the power to sub-let given to the Respondents included the power to assign. It is respectfully submitted that the Appellant was not entitled to refuse the renewal of the said lease or to resume possession of the premises at the termination of the same. On a proper construction of section 10 of Chapter 109 of the Laws of Malta, the Rent Regulation Board should not have granted the Appellant permission to resume possession of the said premises.

19. The Respondents respectfully submit that the judgment of the Court of Appeal was right and ought to be affirmed and this appeal ought to be dismissed with costs for the following (among other)

REASONS

- 20 1. BECAUSE on a proper construction of Clause 7 of the deed dated the 7th March, 1951, the Respondents were permitted to assign the same.
2. BECAUSE on a proper construction of section 10 of Chapter 109 of the Laws of Malta the Rent Regulation Board ought not to have granted the Appellant's application to resume possession of the said premises at the termination of the said lease.
- 30 3. BECAUSE of the other reasons given in the judgment of the Court of Appeal.

J.G. Le QUESNE

STUART M. McKINNON





No.19 of 1971

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL  
OF MALTA

BETWEEN:

EMMA the widow of ERIK W.  
GOLLCHER Appellant

- and -

WALTER BALDACCHINO  
and OTHERS Respondents

---

CASE FOR THE RESPONDENTS

---

THOMAS COOPER & STIBBARD,  
27, Leadenhall Street,  
LONDON, EC3A 1AB.

Solicitors for the Respondents.