

Emma the widow of Erik W. Gollcher - - - Appellant

v.

Walter Baldacchino and others - - - Respondents

FROM

THE COURT OF APPEAL OF MALTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 7TH MARCH 1973

Present at the Hearing :

LORD DIPLOCK

VISCOUNT DILHORNE

LORD CROSS OF CHELSEA

[*Delivered by* LORD DIPLOCK]

This is an appeal from a judgment of the Court of Appeal of Malta who, by a majority, reversed a decision of the Rent Regulation Board whereby permission was granted to the appellant to refuse to renew a lease (hereinafter referred to as "the Head-lease") of premises in Valletta which had been granted by her predecessor in title, her husband, to the predecessors in title of the respondents on 7th March 1951 and which expired on 6th March 1967, and to resume possession of those premises.

The premises comprised in the lease were "urban immovable property" within the meaning of Chapter 109 of the Laws of Malta—the Rerletting of Urban Property (Regulation). Section 4 of that Law makes it unlawful for the lessor of urban property to refuse the renewal of the lease at the expiration of the period of the tenancy without the permission of the Rent Regulation Board. Section 9 requires a lessor, who desires to resume possession of the premises at the termination of the lease, to apply to the Board for permission to do so. Section 10 provides that the Board shall grant such permission "If" (*inter alia*) "the tenant has in the course of the previous lease . . . sub-let the premises or made over the lease without the express consent of the lessor."

The respondents, whom it is convenient to refer to as "the Tenants", had in the year preceding the termination of the Head-lease made it over to a third party, hereinafter referred to as "the Assignee". This was done by two contracts of sale made in March and April 1966 whereby *inter alia* the Tenants assigned to the Assignee their rights under the Head-lease. No specific consent to this assignment had been given to the Tenants by the appellant. She relied upon the assignment as entitling her to refuse to renew the Head-lease and to recover possession of the premises at its termination.

The Tenants' contention is that consent of appellant as lessor to the lease being made over (*i.e.* assigned) to the third party had been given in advance by Clause 7 of the Head-lease itself which was in the following terms:

"The tenants are empowered to sub-let 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."

The short question in this appeal is whether, upon the true interpretation of the lease, this clause operates as a consent by the lessor to an assignment of the Head-lease by the Tenants as well as a consent to the Tenants' sub-letting the whole or any part of the premises.

Their Lordships would observe that the juridical concepts to be applied in deciding this question are not those derived from the common law of England, but are those which underlie the Civil Code of Malta. This does not originate from the common law of England but owes its inspiration to the Italian and French Civil Codes. So too the rules of construction applicable to the interpretation of the Head-lease and of the relevant Maltese legislation are not the same as those followed by English courts but are those which are applied by the courts of Malta. These also are similar to those used in the Italian and French legal systems. In their Lordships' view no assistance is to be derived from decisions of English or Irish courts on analogous questions relating to the rights and obligation of parties to head leases and sub-leases of real property which arise at common law.

It is common ground that in Maltese law the sub-letting by the tenant of immovable property comprised in a lease involves a different juridical concept from that involved in an assignment by the tenant of his rights under a lease. The former is dealt with in Title IX of the Civil Code—"Of Contracts of Letting and Hiring". The latter is dealt with in Title VI of the Civil Code—"Of Sale".

The right of a tenant vis-à-vis his own lessor to sub-let the premises or to assign his rights under the lease to a third party are regulated by Article 1703. This corresponds in substance to similar articles in the Italian and French Civil Codes and the views of authoritative commentators on the corresponding provisions of these codes are treated as applicable doctrine by the courts of Malta. Article 1703 is in the following terms:—

"(1) The lessee has the right to sub-let or assign the lease, unless he has been restrained from so doing in the contract.

(2) Such restraint may be total or partial."

A lessor who wishes to prevent or curtail his tenant's *prima facie* right to sub-let the premises or to assign his rights under the lease to a third party is thus under the necessity of including in the lease an express prohibitory or restrictive clause. There is a considerable body of doctrine relating to the interpretation of such clauses which has been accepted as authoritative in the Maltese courts and is supported by jurisprudence, in particular a judgment of the Court of Appeal on 19th May 1952 in *Re Rita sive René Brown noe. v. Charles Gerada pro et noe. et.*

Although the doctrinal authorities cited by the Rent Regulation Board and by the Court of Appeal are not unanimous, the preponderance of doctrine was accepted by the majority of the Court of Appeal as supporting the view that a clause which expressly prohibited or restricted sub-letting by the tenant was to be construed as intended to apply also to assignment of the tenant's rights under the lease, and *vice versa*. Their Lordships would not desire to question this; but, as the Court of Appeal recognised, it is not determinative of the present case which is not concerned with the meaning of "sub-let" or "assign" in the context of a clause prohibiting or restricting the tenant's right to sub-let or assign during the currency of the lease. It is concerned with a clause which is relied upon as giving express consent by the lessor in advance to the assignment by the tenant of his rights under the lease to any third party whom he chooses, so as to deprive the lessor of the right to

recover possession of the premises at the termination of the lease, which in the absence of consent would be available to him under section 10 of Chapter 109 of the Laws of Malta.

In their Lordships' view the reasoning which leads the doctrinal authorities cited by the majority of the Court of Appeal to the conclusion that in a prohibitory or restrictive clause in a lease a reference to sub-letting is in general to be interpreted as including assignment and *vice versa*, does not lead to the conclusion that a similar inclusive interpretation was intended by the parties to the Head-lease to be given to the expression "sub-let" in Clause 7 of the Head-lease. Indeed it tends to the contrary conclusion.

That reasoning is based upon the proposition that although on the one hand as between the tenant and his sub-lessee or assignee both the legal relationship and its economic consequences differ according to whether that relationship is the result of a sub-lease or of an assignment, on the other hand as between the tenant and his own lessor, although the legal relationships are not identical, the practical and economic consequences to the landlord of a sub-letting by the tenant are not significantly different from the consequences of an assignment. If therefore he is unwilling to permit sub-letting he must be taken as a reasonable man to be unwilling also to permit assignment, even though the Head-lease is silent as to this.

The practical and economic effect of granting a lease of immoveable property from the point of view of the lessor is that for the period of the lease he converts his right to the use and enjoyment of the property into a right to receive a monetary income in the form of rent paid to him by the tenant. He has a practical and economic interest in the continuing solvency of the tenant and thus in his identity. But during the currency of the lease this interest is not adversely affected by sub-letting or assignment of the tenancy, since in either event the tenant himself continues to be liable to the landlord for the payment of rent and the observance of all other obligations imposed upon him by the lease. If this were the landlord's only economic interest, it would be a matter of indifference to him whether the tenant sub-let or assigned the tenancy or retained it in his own occupation. But the lessor may also have a practical and economic interest in the way in which the property is cared for during the period of the tenancy, so that the value of the use and enjoyment of the property when it reverts to him upon the termination of the lease may be maintained or enhanced. To protect this interest he may be content to rely upon the obligations imposed on the tenant by the terms of the lease. But he may desire to supplement this protection by ensuring that throughout the period of the lease the property continues to be in the actual occupation of the person to whom he has chosen to grant the lease because of his confidence in that person's taking good care of the property. That the lessor has so relied upon the confidence reposed by him in the actual person to whom the lease is granted is made manifest by a clause in the lease prohibiting or restricting the right of the tenant to transfer the right of occupation of the property during the period of the lease to any third party or to any third party over whose selection the lessor himself has had no control. But transfer of the right of occupation may be the consequence either of a sub-letting or of an assignment by the tenant. The reasoning of the commentators whose conclusions are accepted as doctrine by the Court of Appeal of Malta is that a lessor who has expressly prohibited either sub-letting or assignment has manifested an intention to rely upon his confidence in the care which the tenant himself will take of the property as actual occupier of it; and that since this reliance would be equally ineffective if the property were sub-let instead of being assigned and *vice*

versa, he must be taken in prohibiting one to have intended to prohibit the other even though the prohibitory clause of the lease omits to mention it.

Under Chapter 109 of the Laws of Malta however the practical and economic consequences of a consent by the landlord to the tenant's sub-letting or assigning the tenancy do not occur during the period of the lease but upon its termination, and the consequences of an assignment differ from those of a sub-letting.

It is conceded, in their Lordships' view rightly, that in the case of an assignment of lease before its termination the right under Chapter 109 to be granted a renewed lease by the lessor vests in the assignee and not in the original tenant; whereas in the case of a sub-letting it is in their Lordships' view clear that the right to the renewal of the lease continues to be vested in the original tenant.

If by terms of a lease of urban immovable property the lessor gives in advance his consent to the grant by the tenant of sub-leases to sub-lessees over whose selection the lessor himself will have no control, he does not thereby bind himself to accept as tenant under any renewed lease which he may be compelled to grant under the provisions of Chapter 109, anyone other than the original tenant whom he selected because of his practical and economic interest in that tenant's continuing solvency. But, in contrast, if by the terms of the lease the lessor gives in advance a similar consent to the assignment of the tenancy by the tenant, he thereby binds himself to accept as tenant under a renewed lease not the original tenant but any person to whom the original tenant may choose to assign the tenancy, irrespective of that person's solvency.

The practical and economic interest of the lessor in withholding consent in advance to the assignment by the tenant of the tenancy is thus quite different from any practical or economic interest he may have in withholding consent in advance to the grant by the tenant of sub-leases to sub-lessees.

There is thus, in their Lordships' view, no ground for any implication that the express power conferred upon the Tenants by Clause 7 of the Head-lease to sub-let the premises was intended to include also consent in advance by the lessor to the assignment of the tenancy by the Tenants to any assignee whom they might choose. To accept such an implication would involve reasoning to the contrary of that by which the commentators, whose opinions were accepted by the Court of Appeal, reach their conclusion as to the interpretation of clauses in leases which are prohibitory or restrictive of the tenant's right under Article 1703 of the Civil Code to sub-let or assign the tenancy.

Their Lordships are thus unable to accept as valid the reasons for which the majority of the Court of Appeal reversed the decision of the Rent Regulation Board. They agree with the dissenting opinion of Cremona J. in favour of upholding the decision of the Board.

This makes it unnecessary to do more than mention briefly some of the subsidiary arguments advanced by either the appellant or the respondents.

The respondents relied upon the proviso to Clause 7 of the Head-lease as supporting the implication that the expression "sub-let" was intended to include "assign" because the proviso was unnecessary if all that were contemplated were sub-letting. Their Lordships content themselves with observing that it would be equally unnecessary if assignment were also contemplated. The proviso does no more than state what in its absence would still be obligations of the Tenants under Maltese law.

The appellant, for her part, in addition to her main submission which their Lordships have accepted as correct sought to rely upon the reference to "express" consent in section 10 of Chapter 109 of the Laws of Malta as showing the intention of the legislator that what was required in order to disentitle the lessor to refuse to renew a lease of premises which the tenant had sub-let or assigned was a consent given specifically to a sub-lease to a sub-tenant or an assignment to an assignee who was identified at the time when the consent was given. Their Lordships are inclined to think that this was what was primarily contemplated by the legislator; but they do not think that it would be right to rule out as a compliance with a requirement for "express" consent, consent given in advance by express words in the lease itself to sub-letting or assignment by the tenant to any person whom he might in future choose as sub-lessee or assignee. The use of the adjective "express" may have been intended to do no more than to make it clear that the fact that the lessor had not by a prohibitory clause in the lease itself restrained the right which the tenant would otherwise have under Article 1703 of the Civil Code to sub-let or assign the premises, was not to be treated for the purpose of section 10 of Chapter 109 of the Laws of Malta as a consent by the lessor to sub-leases or assignments.

The appellant, however, does not need to rely upon this alternative submission. She is entitled to succeed in this appeal upon the grounds already stated, *i.e.* because there are no express words in the Head-lease authorising the Tenants to make any assignment of the tenancy.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the decision of the Rent Regulation Board restored. The respondents must pay the appellant's costs of the hearing before their Lordships' Board.

In the Privy Council

EMMA the widow of
ERIK W. GOLLCHER

v.

WALTER BALDACCHINO AND
OTHERS

DELIVERED BY
LORD DIPLOCK