1974 *Present:* **Wijesundera, J., and Sharvananda, J.**

T. D. WIJERATNE, Appellant, *and* T. J. DSCHOU, Respondent

S. C. 8/70—C. R. Colombo, 96621/RE

Rent Restriction Act (Cap. 274), as amended by Act No. 12 of 1966—Sections 2 (4), 9 (2), 12 A (1), 13 (1)—Premises whose standard rent for a month does not exceed one hundred rupees—Non-occupying tenant of such premises—He is not liable to be ejected on the ground of the non-occupation—Liability if "wilful damage" has been caused—Proof of wilful damage—Duty of care owed by a tenant in respect of the leased premises—Rent Act of 1972, s. 28.

The defendant, who was a tenant of certain rent-controlled premises whose standard rent for a month did not exceed Rs. 100, was running a restaurant business in the premises from 1942. The premises were kept closed from early 1965 till 1969 and were not physically occupied by the tenant or by anybody for over two years prior to the date of the institution of the present action in October 1967. The plaintiff (landlord) claimed the ejectment of the defendant on two grounds, viz. (*a*) that the defendant had not been in physical occupation of the premises for over two years; (*b*) that the defendant had caused wilful damage to the premises within the meaning of section 12 A (1) (*d*) of the Rent Restriction Act by keeping the premises unoccupied and closed.

Held, (i) that non-occupation of the premises let is not one of the grounds for ejectment set out in section 12 A (1) of the Rent Restriction Act, as amended by Act No. 12 of 1966. The plaintiff, therefore, was not entitled to rely on that ground, even assuming that he had obtained the sanction of the Rent Control Board; in the case of premises whose standard rent for a month does not exceed Rs. 100, the amending Act No. 12 of 1966 has abrogated the provision for getting the sanction of the Rent Control Board in the circumstances mentioned in section 13 (1) of the principal Act.

(ii) that there was sufficient evidence in the present case to establish that, by keeping the premises unoccupied and closed for a period of over two years, the defendant had caused wilful damage to the premises within the meaning of section 12 A (1) (*d*) of the Rent Restriction Act and was, therefore, liable to be ejected on that ground. It is only in the perspective of landlord and tenant relationship that the question whether wilful damage has been caused should be determined. Under the Roman-Dutch law it is the duty of the tenant to use the leased premises with the same degree of diligence that a good and prudent householder would use in the preservation of his own property.

APPEAL from a judgment of the Court of Requests, Colombo.

C. Thiagalingam, with *A. K. Premadasa* and *B. B. D. Fernando,* for the plaintiff-appellant.

C. Ranganathan, with *L. V. Gunaratne* and *S. Ruthiramoorthy,* for the defendant-respondent.

Cur. adv. vult.

February 28, 1974. SHARVANANDA, J.—

This is an action filed by the plaintiff for the ejectment of his tenant, the defendant, from premises bearing assessment No. 81, Bambalapitiya Road, Bambalapitiya. Though the plaintiff claimed in the Lower Court that the premises in suit were "excepted premises" within the meaning of the provisions of the Rent Restriction Act the learned Commissioner quite rightly held against the plaintiff on this issue and in appeal counsel for plaintiff conceded that the Commissioner was quite right in so holding and did not urge any argument to the contrary. In our view, the provisions of the Rent Restriction Act of 1948 apply to the premises in suit and unless the plaintiff satisfies the Court of the existence of any of the grounds for ejectment set out in the Act the defendant is entitled to the protection from ejectment offered by that Act. The plaintiff has claimed the ejectment of the defendant on two grounds, viz. (*a*) that "the defendant had not been in physical occupation of the premises for over two years and that the premises were kept closed at the time of institution of the action; (*b*) that the defendant had caused wilful damage to the premises within the meaning of Section 12 (A) (1) (*d*) of the Rent Restriction Act as amended by Act No. 12 of 1966, by keeping the premises unoccupied and closed.

From the evidence on record it is clear that the defendant who was from 1942 running a restaurant business called the "Shanhai Restaurant" in the premises in suit kept the premises closed from early 1965 till 1969 and the premises were not physically occupied by the tenant or as a matter of fact, by anybody for over two years prior to the date of the institution of this action by the plaintiff in October 1967. The record does not disclose any ostensible reason for such non-occupation. The defendant has not placed any evidence to justify the closure. Since the defendant kept the premises closed for over two years for no appreciable reason, we have to presume that he did not require the premises for his personal occupation or for the purposes of his trade or business. To say the least, the attitude and conduct of the defendant is contumacious. Be that as it may, the question arises—can the plaintiff have such a defendant ejected except on one of those grounds specifically postulated by the Rent Restriction Act for the ejectment of the tenant? Mr. Thiagalingam appearing for the plaintiff argued that as the object of the Rent Restriction Act is to protect the tenant in his occupation of the premises and to offer him security of tenure, and as the defendant was not in occupation at the relevant time he cannot claim the protection of the Act. He referred us to what has been said to be the object of the English Rent Acts i.e. "Their real fundamental object is protecting a tenant from being turned

out of his home". *Carl v. Angelo*[1] (1948) 2 A. E. R. 189 at 192 per Lord Greene M. R. and that "their clear policy ..... is to keep a roof over the tenant's or someone's head not over an unoccupied shell, and to economise rather than sterilise housing accommodation". *Brown v. Brash*[2] (1948) 1 A. E. R. 922 per Asquith L.J., "One object of the Acts was to provide as many houses as possible at a moderate rate. A man who does not live in a house and never intends to do so is, if I may use the expression, withdrawing from circulation that house which was intended for occupation by other people. To treat a man in the position of the appellant as a person entitled to be protected is completely to misunderstand and misapply the policy of the Acts". *Skinner v. Geary*[3] (1931) 2 K. B. 546 at 564 per Scrutton L.J. Counsel invited us to hold that the above observations apply equally well to our Rent Restriction Act and stated that under our law too, the non-occupying tenant should receive short shrift. He referred us to *Sabapathy v. Kularatne*[4] 52 N. L. R. 425, *Suriya v. Board of Trustees of Maradana Mosque*[5] 55 N. L. R. 309 and *Amarasekera v. Gunapala*[6] 73 N. L. R. 469 where the concept of "non-occupying tenant" has received favourable reception locally. As against this trend, Mr. Ranganathan referred us to the case of *Mohamed v. Kadhibhoy*[7] 60 N. L. R. 186 where a bench of two judges held that the English concept of a "non-occupying tenant" is not applicable to our Restriction Act. With reference to the case relied by Mr. Ranganathan counsel for the plaintiff-appellant commented that it was not a well analysed judgment and that as counsel for the Respondent did not seek to support the authority of *Sabapathy v. Kularatne*[8] 52 N. L. R. 425 there was not much argument on the position of non-occupying tenant.

Though we see lot of force in Mr. Thiagalingam's argument about the position of the non-occupying tenant vis-a-vis the Rent Restriction Act, we note that there is nothing in the actual language of our Rent Restriction Act to divest by reason of non-residence or non-occupation a tenant in legal possession of premises of the protection offered by the Rent Restriction Act of 1948. If we are to adopt the principle of the non-occupying tenant we will be taking upon ourselves the function of the legislature and not be deciding on the meaning of the Rent Restriction Act. Such adoption may be beneficial but not warranted by the express provisions of the Rent Restriction Act. That one can apparently gather that such an object or intention as depriving a non-occupying tenant of the benefits of the Rent

[1] *(1948) 2 A.E.R. 189 at 192.*
[2] *(1948) 1 A.E.R. 922.*
[3] *(1931) 2 K.B. 546 at 564.*
[4] *52 N.L.R. 425.*
[5] *55 N.L.R. 309.*
[6] *73 N.L.R. 469.*
[7] *60 N.L.R. 186.*
[8] *52 N.L.R. 425.*

Restriction Act was probably there in the mind of the legislature is not enough to justify us in putting a construction on the provisions of the Rent Restriction Acts which would necessitate reading into those provisions words which are not there.

Section 2 (4) of the Rent Restriction Act states that "so long as this Act is in operation in any area, the provisions of this Act shall apply *to all premises* in that area not being excepted premises; and the expression 'premises to which this Act applies' shall be construed accordingly". Thus the Act applies to all premises whether occupied or unoccupied.

Section 13 (1) of the Act reads as follows :—

> Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any Court, unless the board, on the application of the landlord has in writing authorised the institution of such action or proceedings.
>
> Provided, however, that the authorization of the board shall not be necessary, and no application for such authorization may be entertained by the board in the instances referred to therein.

Section 9 (2) provides as follows :—

> Where any premises or any part thereof is sublet in contravention of the provisions of sub-section (1) the landlord shall, notwithstanding the provisions of Section 13, be entitled in an action instituted ..... to a decree for the ejectment ..... of the tenant .....

Under the original Rent Restriction Act of 1948 the provisions of Sections 9 and 13 exhaust the instances when a decree of ejectment can be entered against a tenant of premises to which the Act applies. A tenant cannot be ejected merely on the ground of his non-occupancy except where the Rent Control Board has in writing authorized the institution of the action. Any Board would reasonably be expected to grant this authorization when application is made to it on the ground that the tenant is not occupying the premises. Thus the legislature has provided for the situation of a "non-occupying tenant". It is to be noted that similar provision is not to be found in the corresponding English Acts and that omission might have induced the English Courts to evolve the rule regarding the non-occupying tenant. Anyway, we have to construe the language of our Act.

The Rent Restriction (Amendment) Act, No. 12 of 1966 has abrogated the above course of getting the sanction of the

Rent Control Board in the case of premises whose standard rent for a month does not exceed one hundred rupees. For Section 12A (1) provides—

> "Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies and the standard rent of which for a month does not exceed one hundred rupees shall be instituted or entertained by any court unless where—
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> (*a*) the rent of such premises has been in arrear for three months or more after it has become due, or
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> (*b*) such premises have been sub-let without the written authority of the landlord of such premises, or
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> (*c*) such premises have been used by the tenant thereof or by any person residing or lodging with him or being his subtenant for an immoral or illegal purpose, or
>
> (*d*) wanton destruction or wilful damage to such premises has been caused by the tenant thereof or any other person at his instigation, or any other person residing in such premises."

The standard rent of the premises in suit for a month does not exceed one hundred rupees and hence, there is no question of the plaintiff in this case validly instituting under the amendment of 1966 an action for ejectment of his tenant on the mere ground that he is not in physical occupation of the premises and that the premises have been kept closed. The defendant could thus have snapped his fingers at the plaintiff by his unsocial act of keeping the premises closed, and sterilising housing accommodation as long as he was not guilty of any of the acts or omissions set out in Section 12A (1) of the Act. We are glad to note that the legislature has now become alive to this *casus omissus* and has provided by section 28 of the Rent Act of 1972 for such a contingency.

A defendant who continuously keeps the premises closed for over two years and thus defies the landlord must steer clear of the law. The plaintiff complains that by keeping the premises unoccupied and closed the defendant has caused wilful damage to the premises within the meaning of Section 12 A (1) (*d*) of the Rent Restriction Amendment Act of 1966. The plaintiff had a commission issued by Court to one J. C. Nilgiriya, a chartered architect and in pursuance of that commission the architect inspected the premises in suit and submitted his report marked P 1 dated 21st January 1968. He stated that at the time of inspection on 19th January 1968 the premises were not occupied and

that no business was being carried on in the premises and that the defendant had told him that the premises had been closed and unoccupied for a period of over two years. In his report, he has listed various items of damage to the premises. In his considered view most of the damages had been caused through the neglect of the defendant having not kept the said premises in a fit and sound condition but having kept the premises closed and unoccupied for a period of over two years. In his opinion to make good the items of damage it would cost about Rs. 3,650. Even assuming that the defendant was not responsible for some of the items of damage listed by the architect the defendant cannot disclaim liability for item (4) viz. tiles, approximately, four rows missing at the junction of wall and roof in the rear verandah and item (7) several large damp patches on the walls of the building—

(*a*) sitting room front wall corner

(*b*) dining room rear wall corner

(*c*) the entire length of the northern wall of the building

(*d*) corner of the office room

(*e*) wall between bed room and sitting-dining room.

According to the report of the architect " the damp patches have been due to leaks which had appeared in the roof within the period the premises were not occupied, and prompt attention had not been given and that the leaks had further developed and caused dampness to penetrate into the brickwork and plaster surface ". The architect was of the view that if the defendant had occupied the premises, he would have seen to it that the missing tiles were replaced either by him or by the landlord and that the damp patches referred to in his report could have been avoided. Though on an analysis some of the items of damage may appear to be insignificant and would have, in any event occurred through ordinary wear and tear, yet when taking a total picture of the whole one cannot avoid the conclusion that substantial damage had been caused to the premises as a result of the neglect resulting from the premises being kept closed for over two years. Had the defendant kept the premises open and occupied he would have definitely noticed the displaced tiles and the rain seeping through the leaks and dampening the walls and damaging the building, and would have brought the matter to the notice of the plaintiff. During the entire two year period and more the defendant does not appear to have peeped into the building even once to see in what state the inside of the building was. He appears to have engaged a watcher and some beggars to sleep in the outer verandah, but had not done anything more.

The defendant had deliberately and recklessly chosen to keep his eyes closed to the ravages caused to the building by the elements. The plaintiff was never made aware of the impending damage nor was ever given an opportunity of taking steps against occurrence of the damage. On this view of the matter the question arises, was the damage wilfully caused by the defendant by his non-action. Counsel for the defendant argued that the defendant loses the protection of the Rent Restriction Act only for wilful damage caused by him and not for constructive damage and injury that may be attributable to his negligence.

To answer the above question, we have to find out what is the duty of care owed by a tenant in respect of the leased premises. It is only in the perspective of landlord and tenant relationship that we should judge the conduct of this defendant to determine whether he had wilfully caused the damage referred to in the architect's report.

Under the Roman Dutch Law it is the duty of a tenant to use the leased premises with the same degree of diligence that a good and prudent householder or paterfamilias or farmer would use for his own property and to take an equal amount of care in the preservation of the property. A tenant is accordingly liable to the landlord for ordinary gross negligence as well as for fraud—Voet 19.2.29. Voet states that the lessee will be fast bound to the lessor if he has neglected the care of homesteads, barns and water leadings and thus has allowed these things and others like them to be spoilt. As the "hirer" is responsible for that degree of diligence which all prudent men, that is which the generality of mankind, use in keeping their own goods of the same kind he is liable for such injuries as are caused by an omission of that diligence. Wille—Landlord and Tenant 1910 ed., page 423. The conduct of the defendant in this case does not measure upto the standard of a prudent householder in the care and use of his property. He has clearly neglected the care of the leased premises and has allowed the premises to be spoilt. It should be noted further that the defendant by his agreement of tenancy undertook to keep the premises in good and clean condition.

The defendant kept the leased premises locked deliberately and intentionally. Since this restaurant business was conducted in the premises until the premises were closed by the defendant in 1965 and since there is no evidence that at that time the premises were in need of repairs or that the plaintiff had failed and neglected to attend to any repairs, we have to conclude that the premises were in good repair at the time the defendant, for

some reason of his own, chose to keep it closed. By keeping the premises closed for a long time the defendant knew or must have appreciated that damage of the kind referred to by Mr. Nilagiriya would ordinarily result to the premises and yet intentionally and without any lawful excuse kept the premises locked up for an unreasonably long time and persisted in keeping the premises closed regardless of consequences. The defendant must be presumed to have intended the natural and probable consequences of his action in keeping the premises unoccupied and closed for over two years. In the circumstances, the defendant, in any event acted with reckless carelessness or *culpa lata* and thus in our view rendered himself guilty of causing wilful damage to the leased premises. " Wilful is not a term of art and is often used as meaning no more than a high degree of carelessness and recklessness. It is not necessarily limited in its use to intentional or deliberate wrong doing "—per Lord Wright in *Casswell v. Powell Distillery Association Collieries*[1] (1939) 3 A.E.R. 722 at 739. The plaintiff has thus made out a case against the defendant for ejectment on the ground of causing wilful damage within the meaning of Section 12 (A) (*d*).

The learned Commissioner has erred in rejecting the report of the architect on the ground that he had not seen the state of the premises prior to the time that the defendant kept it closed and that therefore his conclusion that the damage was due to the premises being kept closed could not be accepted. The learned Commissioner has failed to appreciate the fact that after 1955 the defendant had never complained of the state of the premises and that the restaurant was run in the premises until the day the premises were closed in 1965. The defendant had exclusive possession or control of the leased building and was the best person to speak to the state of the premises in 1965 prior to the closure. The defendant did not give any evidence that the premises were in a neglected condition in 1965 or has contradicted the report of the architect.

We allow the appeal and set aside the judgment of the lower Court and enter judgment for the plaintiff as prayed for with costs in both Courts. The defendant will be entitled to credit for all sums of money that he has paid the plaintiff to date by way of monthly rent or damage.

WIJESUNDERA, J.—I agree.

Appeal allowed.

[1] *(1939) 3 A.E.R. 722 at 739.*