TREASORE

THE HIGH COURT

No.2118p 1986

BETWEEN:

TREASURE ISLAND LIMITED

PLAINTIFF

AND

ZEBEDEE ENTERPRISES LIMITED (IN RECEIVERSHIP)
AND DEREK EARL

DEFENDANTS

Note of a Judgment given on the 29th of May 1987.

I am completely satisfied on the evidence that the contract between Zebedee Limited and Mr. Gallagher which was reduced partially to writing on the 3rd of February 1984 was that Zebedee would contribute two thirds and Mr. Gallagher one third of the cost of setting up the disco and dance-hall premises at the Inter County Hotel, Lifford. Mr. Gallagher was given a licence to operate public entertainment there until the 1st of January 1988, which then settled down in fact to Saturday night discos and dances on special holidays. Zebedee and Mr. Gallagher were to divide the net profits fifty/fifty. Mr. Gallagher was responsible for the payment of all expenses, i.e., everything connected with the running of the discos (advertising staff etc.). The hotel, that is Zebedee Limited, ran the bar of the disco and provided the bar staff. So there

was no exclusive licence and certainly no lease. Mr. Gallagher was responsible for the maintenance of the lighting and sound equipment. This equipment cost approximately one third of the original investment and it was agreed he was entitled to that and entitled to remove it when the contract terminated. I do not interpret the evidence about the contract as conferring joint ownership of the disco lighting and sound equipment on the business partners during the duration of the contract. I interpret the contract as confirming ownership of the equipment on Mr. Gallagher at all times, but he would only be entitled to remove it when the contract terminated. He in fact bought the equipment himself and never parted with ownership but he was bound to leave it installed for the duration of the contract. When Treasure Island was incorporated, then with the consent of Zebedee, Teasure Island was substituted for Mr. Gallagher.

When Mr. Robinson took over control of Zebedee, there were discussions initiated to alter the original contract but his efforts came to nothing and the contract remained as it was.

There was no provision in the original contract for the expenditure of extra money on spring cleaning and renovating the dance-hall after the Christmas season. Mr. Gallagher said if money was not spent on it it would go down. The nature of the business is such, that money must be spent to keep it alive; if not it goes downhill. In October 1985 it was agreed to spend the extra money.

After the Christmas season, the Receiver arrived. He was appointed on the 22nd of January 1986 and there were only two discos held after that, one on the Saturday after when the business took a nose dive, according to Mr. Gallagher. By letter of the 5th of February, the Plaintiff's solicitor asked

the Receiver to spend the money required for Zebedee's share of the cost of renewal. The Receiver refused by letter dated the 7th of February 1986. The last disco was held on the 12th of February. Twelve people turned up in contrast to twenty staff employed. Those twelve got their money refunded and Mr. Gallagher withdrew from running the disco business and did not go back because the Receiver would not pay for any refurbishment.

In my opinion,there were two contracts, the licence agreement and the further contract in October 1985 to spend money on necessary renovations. Zebedee were in breach of this latter contract by failing to renovate, due to its inability to provide the money. Mr. Gallagher's evidence was that unless the money was spent, the business venture of running discos could not succeed. Therefore,the breach of the October contract led to the frustration of the earlier contract. In my opinion, Mr. Gallagher was acting reasonably in failing to continue to operate after the fiasco of the 12th of February. There would be no profits unless the money was spent.

But the breach of the October contract was solely the responsibility of Zebedee. The Receiver specifically refused to expend any further money (as he was entitled to do) and he incurred no liability as a result of his refusal to implement the October contract. A cause of action lies against Zebedee in respect of its breach of the October contract. Since this led to the frustration of the licence agreement, Zebedee Limited are also liable in damages in respect of the frustration of the earlier contract.

In my opinion the licence agreement came to an end sometime

after the 12th of February. It was in abeyance for a while, while Mr. Gallagher sought to preserve his position under the licence, but whenever Treasure Island made an unequivocal demand for the return of the equipment, the licence was at an end. Treasure Island could not and would not operate without the renovations and it could not force the Receiver to spend the money.

The licence was a personal arrangement between Zebedee and Treasure Island and did not run with the land for the four year period. Any arrangement with a new purchaser (other than by way of share transfer) would have to be the subject of a new agreement. In my view this contract effectively finished once Mr. Gallagher claimed the return of his property. From then on the contract was at an end and Treasure Island was entitled to the return of the disco equipment. Treasure Island could not pursue two contradictory claims at the same time. The Plaintiff could not claim to be entitled to operate under a subsisting licence and at the same time claim the return of the disco equipment which he only became entitled to remove when the licence came to an end.

As far as the licence is concerned, the Receiver incurred no liability to the Plaintiff. A claim for breach of contract lies solely in respect of Zebedee. Neither is there any negligence on the part of the Receiver. He was under no duty or obligation to spend money on renovations and when this was not done the Plaintiff was not willing to continue.

So the Plaintiff is not entitled to any declaration that it had either a lease or a licence up to the sale to Manor Hunt

Limited on the 19th of April 1987 or that it was entitled to half the net profits from public entertainment up to the 1st of January 1988. It is entitled to damages from Zebedee for breach of contract, but not against the Receiver and the damages are from the time the contract was frustrated.

In relation to the figure for breach of contract by Zebedee, I think the correct approach is to estimate the loss of profits. The accounts produced by the Plaintiff are not helpful since the first set of accounts do not reflect the operating profit because of the clawback credits arising prior to the incorporation of the company. If Zebedee had been able to find the money to spring-clean and renovate, the Plaintiff would have had to contribute too and I can only hazard a guess at how much money would have had to be provided by the Plaintiff and this would have affected the net profits. The projected trading account is based on the two sets of accounts and since I do not consider the first set of accounts as relevant since they go outside the simple receipts and expenditure during the relevant period, therefore the projected trading account is not relevant. I am satisfied that the Plaintiff would have made a profit if there was a cash injection for renovations since Mr. Gallagher is a good businessman. I do not suppose the Plaintiff would do worse than in the eight month period, May 1985 to January 1986. So assuming the profits from the other months went to finance renovations, I think a figure of £10,000 is reasonable.

I now come to the claim for damages for detinue and an order for delivery of fixtures and fittings in the schedule.

This claim to relief, set out in item 7 and the schedule, was added on the first day of the trial. It had been omitted on the original Statement of Claim but is based on paragraph 13 of the original statement. The schedule owes its origin to a list drawn up by Mr. Gallagher early in the receivership of the property to be insured by the Receiver's insurers. Mr. Gallagher and Mr. Murnahan said they were clear it was understood the property was belonging to Treasure Island. The Receiver, Mr. Barry and Mr. Black did not share the same understanding. All they understood was that Treasure Island was claiming to be entitled to a share in it. It seems to me that the conflict in evidence is explained by the fact that the opposing sides had a different understanding. I am satisfied of one thing. Whatever the misunderstanding as to the ownership of the entire or a proportion of the equipment, there was no unequivocal demand for possession of the disco and lighting equipment and a refusal to hand it over prior to the issue of the summons. What the Plaintiff and its legal advisers were concerned about at that time was pursuing its claim to be entitled to an interest under the licence and trying to purchase the property. The last thing the Plaintiff wanted at that stage was the removal of the lighting equipment. It wanted to buy the premises as they were. There was not even a claim for damages for detinue in the original summons. There was merely the statement in paragraph 13 that the Defendants wrongfully withheld property. The effect of not having made a demand for possession followed by a refusal is clear under the authorities.

In Clayton .v. Le Roy (1911 KB 1031 at 1048) Fletcher Moulton L. said that the question as to the exact moment a cause of action arises may seem technical but it is a point of substance. He said it is very important that some clear act is required to constitute an action in detinue as the statute of limitations starts to run from then.

This principle was approved by the former Supreme Court in King .v. Walsh (1932 IR 178). Kennedy CJ says at page 185:

> "I regard it as absolutely settled law, accepted as such for some centuries, that to sustain a claim for damages for the mere detention of a personal chattel which has come lawfully into the possession of the defendant by delivery or bailment, there must have been a demand for it by the plaintiff from the defendant, and a refusal by the defendant to deliver or to redeliver it."

At page 187 he says:

> "These obsolete technicalities need no longer be observed in pleading, but they are of vital importance, as showing what facts must be proved to sustain the action."

I do not consider that I can disturb long settled law and award damages for detinue when the ingredients of the tort did not exist at the issue of the summons. However, I have no doubt that I can under general equitable jurisdiction order the return of the equipment to the Plaintiff who is the owner of it and I so do.

In order to dispose of the question if damages for detinue were

recoverable, (which I do not believe they are),I would measure them at £2,000 treating it on the basis that the Plaintiff was deprived of their use for approximately a year. If payable,they would have to be alternative to part of the damages for breach of contract payable by the company. It would be contradictory to recover damages from one Defendant on the basis the Plaintiff was deprived of the equipment and from the other Defendant for loss of profits from the use of the equipment.

Approved. Hella Cantell

25-7-87.