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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 28 of 1954.

ON APPEAL FROM THE SUPREME COURT OF
THE BAHAMA ISLANDS EQUITY SIDE

BETWEEN
WILLIAM HENRY SANDS (Plaintiff) APPELLANT
AND
HARBOUR CLUB LIMITED (Defendants) RESPONDENTS.

CASE FOR THE APPELLANT

1.—This is an Appeal by leave from a Judgment given on the 30th January, 1954, by the Chief Justice of the Supreme Court of the Bahama Islands Equity Side dismissing a claim by the Appellant to possession of premises situate on Bay Street, in the City of Nassau, and known as the "Spider Web Garden Club," which premises had been let by the Appellant to the Respondent under a lease dated the 18th April, 1950. The Appellant claimed that the said lease had been forfeited by reason of breaches by the Respondent of a covenant therein contained.

RECORD
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p. 51, Ex. A

2.—The facts giving rise to the present Appeal so far as material to be herein stated are as follows.

3.—By a Lease under seal made on the 18th April, 1950, between the Appellant of the first part, the Respondent of the second part and one William George Elcock of the third part the Appellant demised to the Respondent All Those premises known as the Spider Web Garden Club together with the entrance thereto from Bay Street and the open sections of the Harbour of Nassau, all situate on the Northern side of Bay Street in the City of Nassau. The term of the said Lease was for eight years from the 1st May, 1950, and the rent thereby reserved was at the rate of £900 per annum.

p. 51, Ex. A

20 4.—The said Lease contained a covenant by the Respondent with the Appellant in the following terms:—

p. 52, l. 17

" 2. (F) Not to assign underlet or part with the possession
of the premises or any part thereof without first obtaining the

RECORD

“ written consent of the landlord such consent however not to be
 “ unreasonably withheld in the case of a responsible person.”

p. 53, l. 8

The said Lease further reserved a right of re-entry to the Appellant in the event of breach by the Respondent of any of the covenants on the Respondent's part therein contained.

p. 35, l. 15

5.—On the 13th January, 1951, by an Agreement in writing (hereinafter called the said Agreement) made between the Respondent of the one (*sic*) part, Maurice Handler of the second part and Roscoe Whittleton Thompson of the third part, the Respondent purported to appoint the said Maurice Handler to be the sole manager of the club referred to in the said Lease 10 and therein called the Spider Web Garden Club.

p. 52, l. 17

The Appellant will contend that the said agreement was in truth and in fact a sub-letting of the said Club premises to the said Handler and/or the said Thompson and, being made without the consent of the Appellant, amounted to a breach of the covenant numbered 2 (F) in the said Lease and set out in paragraph 4 hereof.

p. 35, l. 27

6.—The said Agreement expressly provided (*inter alia*) :—

p. 35, l. 32

(A) That the said Handler should be appointed to be the sole Manager of the said Club.

p. 35, l. 36

(B) That the said Handler should pay all expenses in operating 20 the said Club including the purchase of all wines, spirits, beers, minerals and food purchased for the Club and should pay all charges including telephone electricity water sewerage insurance and licence and should pay the salaries and wages of all employees of the Club.

p. 36, l. 1

(C) That the said Handler should receive and retain all moneys received by the Club whether as subscriptions or otherwise for his own use and benefit after payment of the above-mentioned expenses and the rent and premium in the said Agreement provided for.

p. 36, l. 5

(D) That the said Handler should pay the sum of £900 in respect of rental of the said Club for the period 1st January, 1951, to 30th November, 1951, and the sum of £400 as a premium towards the cost of the improvements already made to the Club by the Respondents.

p. 36, l. 13

(E) By Clause 7 thereof :—

“ The Manager shall open the Club at such times
 “ during the engagement as he thinks fit and hereby
 “ covenants with the Company to operate the Club on high
 “ class lines and the Company shall have the right to 40
 “ cancel this agreement on the breach of any of the
 “ conditions contained herein and upon such event the
 “ Company will refund to the Manager 75 per cent. of the

10 “ unexpired rental paid by him provided that if any act
 “ or thing done by him or his agent or servants results in
 “ the revocation or cancellation of any licence under which
 “ the Club is operated the Company will be under no
 “ obligation to refund any of the rental paid provided
 “ further that in the event that the Company and the
 “ Manager are unable to agree as to whether or not the
 “ Club is operated on high class lines the matter shall be
 “ referred to two arbitrators one to be appointed by each
 “ party to the differences and if they are unable to agree
 “ then both parties shall agree on a third arbitrator to be
 “ appointed.”

In the said clause the expression “ the Manager ” referred to the said Handler and the expression “ the Company ” referred to the Respondent.

(F) By Clause 8 thereof :—

p. 36, l. 28

“ The Manager agrees to take over the Club in its present
 “ condition together with the furniture and equipment
 “ set out in the attached inventory.”

pp. 38-42

20 (G) By Clause 9 thereof :—

p. 36, l. 30

“ At the termination of the engagement the Club is to
 “ be handed back to the Company in at least as good
 “ a condition as when taken over (fair wear and tear and
 “ damage by fire storm or tempest excepted) together with
 “ the equipment set out in the attached inventory.”

(H) That the said Handler should have the option to renew p. 36, l. 34
 the engagement for a further period of one year or alternatively
 until 28th April, 1958, at an increased rental.

30 (I) That if the Respondent received a *bona fide* offer for the p. 37, l. 7
 purchase of the said lease the said engagement of the said Handler
 should terminate within 30 days after notice in writing of the said
 offer was given by the Respondent to the said Handler.

(J) That the Respondent should pay to the Appellant the p. 37, l. 19
 rent reserved by the said Lease.

(K) That anyone authorised by the Respondent should at all p. 37, l. 22
 reasonable times have permission to enter and view the state of
 repair of the Club premises and to observe the manner in which
 the Club was operated.

7.—Following upon the execution of the said agreement the business
 40 of the said Club was undertaken by the said Handler with assistance from
 the said Thompson and/or one Lightbourn until in or about the month of
 October, 1951, when the said Handler left the said premises and thereafter p. 43, l. 22
 took no interest in the running of the said Club.

RECORD

After the departure of the said Handler the business of the said Club was undertaken by the said Thompson until the month of April, 1953. It was understood between the said Thompson and the Respondent that the terms of the said Agreement were to apply to the said Thompson whilst he undertook the business of the said Club as those terms had formerly applied to the said Handler.

p. 43, ll. 26-30

8.—Although the Respondent maintained that on the making of the said Agreement it retained a key of the front door of the said Club, and of the offices therein, the said locks were changed on numerous occasions by the said Handler and/or the said Thompson and no key or keys to fit such new locks were given to the Respondent. 10

p. 42, l. 33

p. 12, ll. 43-47
p. 23, l. 1

9.—The proceedings giving rise to the present appeal were begun by Writ issued by the Appellant against the Respondent on the 27th February, 1953.

p. 1

By his Statement of Claim, delivered on the date of issue of the Writ, the Appellant alleged that there had been two breaches by the Respondent of the covenant numbered 2 (F) in the said Lease and set out in paragraph 4 hereof, namely :—

p. 2

(A) On or about the 13th January, 1951, by sub-letting or parting with possession of the said premises or parts thereof to the said Handler without the written consent of the Appellant first obtained. 20

(B) In or about the month of November, 1951, by sub-letting or parting with possession of the said premises or of part or parts thereof to the said Thompson without the written consent of the Appellant first obtained.

The Appellant accordingly claimed possession of the said premises, damages for breach of the said covenant and mesne profits.

p. 3

10.—By its Defence, delivered on the 2nd May, 1953, the Respondent denied the alleged breaches of the said covenant and maintained that notwithstanding the making of the said Agreement (which the Respondent admitted) and the conduct of the said Handler and the said Thompson pursuant thereto the Respondent was, and had always been, in possession and control of the said Club premises. 30

11.—In the alternative the Respondent contended :—

(A) That if the alleged forfeiture had occurred the same had been waived by the Appellant.

p. 4, l. 32

(B) That the Appellant had consented to the alleged sub-letting or parting with possession.

p. 4, l. 35

(C) That the Appellant's consent to the said sub-letting had been sought by the Respondent and unreasonably withheld by the Appellant. 40

12.—By his Reply delivered on the 15th June, 1953, the Appellant joined issue with the Respondent on the Respondent's Defence. p. 5

13.—The action was heard by the learned Chief Justice of the Supreme Court of the Bahama Islands on the 30th and 31st December, 1953, and the 11th January, 1954.

The said Thompson, called as a witness by the Appellant, said that he thought that the said Agreement constituted a sub-lease in favour of the said Handler and when asked who was in control of the said Club replied :— p. 12, ll. 6, 21

10 “ I thought I was—that's why we had it rented—I figured
“ I was in control.” p. 13, l. 3

One Elcock, a director of the Respondent, called on behalf of the Respondent maintained that the said Agreement accurately reflected the true arrangement between the Respondent and the said Handler. The said Elcock agreed that when the said Handler left the said Club a new arrangement was made between the Respondent and the said Thompson whereby the latter was substituted for the said Handler on the same basis as that provided for the said Handler by the said Agreement. p. 17, l. 30
p. 18, l. 20
p. 20, l. 38

20 The said Elcock further testified that the only conduct of the Respondent during the subsistence of the said Agreement which amounted to an exercise of control over the Club premises was the fact that the licence authorising the sale of intoxicating liquor remained in the name of Mrs. Elcock on behalf of the Respondent. p. 22, l. 29
p. 19, l. 34

14.—On the 15th January, 1954, the learned Chief Justice dismissed the Appellant's claim with no order as to costs. pp. 31–32

15.—On the 30th January, 1954, the learned Chief Justice delivered Judgment giving the reasons for his said decision. Having found in favour of the Respondent that there had been no sub-letting or parting with possession of the said Club premises the learned Chief Justice gave no decision on the Respondent's alternative contentions that any breach of the said covenants had been waived by the Appellant or that the Appellant had consented, or ought to have consented, to any such underletting or parting with possession. p. 32
30

16.—The Appellant contends that upon a true construction of the said Agreement its effect was to grant a sub-lease to the said Handler and that when a further arrangement was made by the Respondent with the said Thompson upon the terms of the said Agreement, a further sub-lease of the said premises was thereby granted by the Respondent to the said Thompson. The Appellant says that the grant of each such sub-lease was a breach by the Respondent of the covenant referred to in paragraph 4 hereof. 40

17.—The Appellant further contends that having regard to the terms of the said Agreement and to the fact that the said Handler and the said

RECORD

Thompson changed the locks upon the said premises without protest by the Respondent and in such a way as effectively to exclude the Respondent therefrom, the Respondent parted with the legal possession and control of the said premises first to the said Handler and later to the said Thompson and thereby committed the alleged breaches of the said covenant.

18.—The Appellant therefore humbly submits that this Appeal should be allowed and that the decision of the Supreme Court of the Bahama Islands Equity Side should be reversed and that the case should be remitted to the said Court for decision of the issues raised in paragraphs 5 and 6 of the Respondent's said Defence for the following amongst other

p. 4, l. 21

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REASONS.

- (1) BECAUSE on a true construction of the said Agreement the same amounted to a sub-letting to the said Handler.
- (2) BECAUSE in or about the month of November, 1951, the Respondent sub-let the said premises to the said Thompson upon the terms of the said Agreement.
- (3) BECAUSE the Respondent parted with possession of the said premises to the said Handler on or about the 13th January, 1951.
- (4) BECAUSE the Respondent parted with possession of the 20 said premises to the said Thompson in or about the month of November, 1951.

J. P. WIDGERY.

In the Privy Council.

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WILLIAM HENRY SANDS
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AND
HARBOUR CLUB LIMITED
(Defendants) RESPONDENTS.

CASE FOR THE APPELLANT

LOVELL, WHITE & KING,
5 Thavies Inn,
London, E.C.1,
Solicitors for the Appellant.