

William Henry Sands - - - - - Appellant

v.

Harbour Club Limited - - - - - Respondents

FROM

THE SUPREME COURT OF THE BAHAMA ISLANDS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1955

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*Present at the Hearing:*

LORD MORTON OF HENRYTON

LORD KEITH OF AVONHOLM

LORD SOMERVELL OF HARROW

[*Delivered by* LORD MORTON OF HENRYTON]

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This is an appeal, by leave, from a judgment of the Chief Justice of the Supreme Court of the Bahama Islands (Equity Side) dismissing a claim by the appellant as lessor against the respondent as lessee, for possession of premises situate on Bay Street, in the City of Nassau, and known as the "Spider Web Garden Club".

The facts giving rise to the present appeal are as follows. 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 the 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, situate on the Northern side of Bay Street in the City of Nassau. The term of the lease was for eight years from the 1st May, 1950, and the rent thereby reserved was at the rate of £900 per annum. The lease contained a covenant by the respondent with the appellant in the following terms:—

"2. (F) Not to assign underlet or part with the possession of the premises or any part thereof without first obtaining the written consent of the landlord such consent however not to be unreasonably withheld in the case of a responsible person."

The lease gave 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.

On the 13th January, 1951, by an agreement under seal (hereafter called "the agreement") made between the respondent of the first 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 Spider Web Garden Club.

It is alleged by the appellant, and disputed by the respondent, that the agreement was in effect, upon its true construction, an underletting of the Club premises to Mr. Handler, and that it was made without the consent of the appellant and in breach of the covenant already set out.

It is therefore necessary for their Lordships to consider the agreement as a whole, and it is convenient to set it out at once. It was in the following terms, the respondent being referred to as "the company", Mr. Handler as "the Manager" and Mr. Thompson as "the Guarantor".

“ WHEREAS the Company are the owners of a lease of the hereditaments and premises known as The Spider Web Garden Club the particulars whereof are set out in the Schedule hereto. AND WHEREAS it has been agreed that the Company should appoint the Manager to be the Manager of the said Club upon the terms hereinafter expressed. NOW IT IS HEREBY AGREED as follows:—

1. The Company hereby appoints the Manager to be the sole Manager of the Club known as The Spider Web Garden Club situate on the North side of Bay Street in the City of Nassau in the said Island of New Providence from the First day of January, A.D., 1951 to the Thirtieth day of November, A.D., 1951.

2. The Manager shall pay all expenses in operating the said Club including the purchase of all wines, spirits, beers, minerals and food purchased for the Club. The Manager will not at any time pledge the credit of the Company nor of The Spider Web Garden Club.

3. The Manager shall pay all charges including telephone electricity water sewerage insurance and licence and shall pay the salaries and wages of all employees of the Club.

4. The Manager shall 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 hereinafter mentioned.

5. The Manager shall pay the sum of Nine hundred pounds in respect of rental of the said Club for the period ending the Thirtieth day of November, A.D., 1951 and the sum of Four hundred pounds as a premium towards the cost of the improvements already made to the Club by the Company.

6. Of the above sum of Thirteen hundred pounds the sum of Six hundred and Fifty pounds shall be paid on the signing of this agreement and the balance of Six hundred and Fifty pounds on the Thirtieth day of April, A.D., 1951.

7. 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 cancel this agreement on the breach of any of the conditions contained herein and upon such event the Company will refund to the Manager Seventy-five per cent of the 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.

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

9. 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.

10. The Manager shall have the option to renew the engagement for a further period of one year to the Thirtieth day of November, A.D., 1952 or alternatively to renew the engagement to the Twenty-eighth day of April, A.D., 1958 at the rental of Eighteen hundred pounds per annum for the said period payable in advance on the First day of December, A.D., 1951 and on the First day of December in each and every year thereafter provided such option is exercised on or before the First day of September, A.D., 1951.

11. At the expiration of the second year's engagement the Manager shall have the option to renew the engagement for a further period to the Twenty-eighth day of April, A.D., 1958 provided such option is exercised on or before the First day of September, A.D., 1952 at the said annual rent of Eighteen hundred pounds payable in advance on the First day of December in each and every year.

12. The Company shall discharge all liabilities due by the Club up to and including the Thirty-first day of December, A.D., 1950.

13. If the Company receives a *bona fide* offer for the purchase of the said lease which the Company now holds on the demised premises this engagement shall terminate within thirty days after such notice in writing is given to the Manager of such offer but the Manager shall have the option to purchase the said lease at the price which has been offered to the Company within thirty days after such notice is received.

14. The Guarantor guarantees the Manager's undertakings as to the payment of the rental and other liabilities contained in this agreement and covenants to indemnify the Company against the Manager's failure to discharge all liabilities of the Club from the First day of January, A.D., 1951, up to and including the Thirtieth day of November, A.D., 1951, and also during any renewal of this agreement.

15. The Company hereby covenants with the Manager that they will pay the rent due to the Landlord William Henry Sands as and when the same becomes due and payable.

16. Anyone authorized by the Company shall at all 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 is operated."

Having regard to the view which their Lordships take as to the construction and effect of this agreement, it is not necessary to narrate all of the events which followed upon its execution. It is only necessary to state that the appellant, by his statement of claim, in addition to alleging that the agreement was an underletting, alleged that there was subsequently an underletting or parting with the possession of the premises to the party of the third part, Mr. Thompson.

At the trial the learned Chief Justice framed the following issues by consent:—

- "(1) whether or not the Defendant Company sub-let or parted with possession of the premises in breach of the covenant in the lease;
- (2) if there was a breach was there a waiver by acceptance of rent;
- (3) if the defendant sub-let or parted with possession did the plaintiff give the necessary consent either verbally or otherwise or did he unreasonably withhold that consent;
- (4) if the answer to (1) is in the affirmative and there was no waiver and consent was not unreasonably withheld what are the damages, if any."

Evidence was given on these issues and the learned Chief Justice dismissed the action, making no order as to costs. Having found on the first issue that there had been no underletting or parting with possession of the Club premises, he gave no decision upon the other issues.

Their Lordships now turn to a consideration of the terms of the agreement. Mr. Mendel for the respondent contended that the agreement is not an underletting. He submitted first that it is merely a service agreement, the respondent being the master and Handler the servant appointed to manage the Club for the respondent. Alternatively he submitted that even if the agreement is not a service agreement, it is no more than a licence to use the premises.

Their Lordships feel no doubt that Mr. Mendel's first submission must be rejected. It is clear from the agreement as a whole, and in particular from clauses 2, 3 and 4 thereof, that Mr. Handler was in no way to be

the servant of the respondent but was to carry on the business of the Club on his own account, paying all expenses and taking all the profits if any. Further, from beginning to end the agreement does not mention any act which Mr. Handler is to do in the capacity of servant or agent of the respondent.

It is equally clear, however, that the fact that Mr. Handler is to carry on the business on his own account and is to pay a rental of £900 for the Club, and a sum of £400 as a premium, is consistent either with his being a tenant or with his being a licensee. A convenient statement as to the distinction between a lease and a licence, relied on both by Mr. Widgery for the appellant and by Mr. Mendel for the respondent, and well supported by authority, is to be found in Halsbury's Laws of England (Hailsham Edition) Vol. 20, at page 9:—

“ If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease ; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect ; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease will not prevent the grant from being a licence merely, if from the whole document it appears that the possession of the property is to remain with the grantor.”

It is therefore necessary to consider all the terms of the agreement in order to discover whether it is a licence or a lease. Most of its clauses are consistent with either view, but there are three clauses which throw a strong light upon the matter. By clause 8 Mr. Handler agrees to “ take over the Club in its present condition ” together with certain furniture and equipment. The words “ in its present condition ” make it clear that this clause refers to the Club premises, and not to the business carried on or to be carried on therein ; and the words “ take over ”, as applied to premises, are apt to signify the taking over of possession from the previous occupier. Clause 9 refers to the termination of the “ engagement ”, but as Mr. Handler was not in fact engaged to serve the respondent the word “ engagement ” is inappropriate. The material point is that the premises are to be “ handed back ” to the respondent. This phrase again indicates that until this event happens the respondent will be out of possession.

Finally, if there still remains doubt that during the continuance of the agreement Mr. Handler is to be in possession and the respondent is to be out of possession, it is removed, in their Lordships' view, by clause 16. That clause provides that anyone authorised by the respondent shall have “ permission ” to enter the Club premises “ at all reasonable times ” and for specified purposes. The fact that a limited right of entry is expressly conferred on the respondent shows that some person other than the respondent is to have possession, subject to the limited right thus reserved to the respondent ; and clauses 8 and 9 make it clear that that other person is Mr. Handler.

Mr. Mendel submitted that clause 7 of the agreement tended to show that the respondent had no intention of parting with the legal possession of the premises, and this submission found favour with the learned Chief Justice, but their Lordships cannot accept it. They think that clause 7 is merely directed to regulating the manner in which the business of the Club is to be carried on by Mr. Handler, and throws no light upon the question of possession.

In *Glenwood Lumber Co. v. Phillips* [1904] A.C. 405 at p. 408 Lord Davey in delivering the judgment of the Board said :—

“ It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder the exclusive right of

occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

In their Lordships' view that is exactly the effect of the agreement now under consideration.

If this is the effect in law of the agreement, it matters not that the parties used words such as "Manager" and "engagement" which were calculated to convey the impression that the transaction was of a different nature. As Lord Wright observed in *Clore v. Theatrical Properties Ltd.* [1936] 3 All E.R. 483 at p. 484: "The question in my opinion turns entirely on the true effect of the document". In that case the document in question was held to be a licence, not a lease, although several expressions were used such as "lessor", "lessee", and "demise" which would indicate that the document was a lease.

For these reasons their Lordships are of opinion that the agreement of 13th January, 1951, was an underletting of the property demised by the lease of 18th April, 1950. It thus becomes necessary for a decision to be given by the Supreme Court on the questions of fact raised by issues (2), (3) and (4) already set out.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the case remitted to the Supreme Court of the Bahama Islands in order that issues (2), (3) and (4) may be dealt with by that Court. The respondent must pay the appellant's costs of this appeal.

**In the Privy Council**

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WILLIAM HENRY SANDS

v.

HARBOUR CLUB LIMITED

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DELIVERED BY  
LORD MORTON OF HENRYTON