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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.485/84

1641

IN THE MATTER of Section 118 of the Property Law Act, 1952

A N D

IN THE MATTER of a certain Deed of Lease dated the 6th day of May, 1983

BETWEEN BOLTON ENTERPRISES LIMITED

Plaintiff

A N D RUSSLEY PROPERTIES LIMITED

Defendant

Hearing: 2 & 5 November 1984

Counsel: H.D.P. Van Schreven for Plaintiff
H.M.S. Dawson for Defendant

Judgment: 3 DEC 1984

JUDGMENT OF COOK J.

The plaintiff, Bolton Enterprises Limited, makes application pursuant to Section 118 of the Property Law Act for an order granting relief against forfeiture of a lease.

The original parties to the lease in question were the defendant, Russley Properties Limited, as lessor and a company named F. Petersen (N.Z.) Limited as lessee, the latter's tenancy being created by a deed of lease dated 6th June 1983 whereby the defendant demised to Petersen's premises situated at 152 Lichfield Street, Christchurch. According to

the lease these were described as "... all that the premises owned by the landlord being: the ground floor, attached mezzanine Office Space and the Basement of the Landlord's building ...". The term was two years from the 1st May 1983 at an annual rent of $14,000 payable by equal monthly payments in advance. At some point prior to the plaintiff taking over the premises, Petersen's had assigned to the defendant the former's rights under some contract in satisfaction of all rent which would become owing during the balance of the term so that, from a practical point of view, the rent was paid to 30th April 1985. There remained a liability for rates and insurance, however.

The deed provided that the tenant should not, without previous written consent of the landlord, use the premises other than for the use of "office space, wholesale and retail outlet and general wharehouse (sic)". From the evidence there seems to be some dispute as to what portion of the building did in fact come within the lease, but I do not propose to consider that problem as it does not appear to affect the question in issue and the relief, if any, to which the plaintiff may be entitled.

There is also a covenant against assignment in the absence of compliance with certain stipulated requirements; these include the need for the deed of assignment to include a covenant by the assignee in favour of the landlord whereby the proposed assignee covenants to observe and perform all the covenants, conditions and provisions on the tenant's part contained in the lease. Where the assignee is a private company, there is to be a deed of covenant by the shareholders. There is also a requirement in all cases that there should first be submitted to the landlord the name, address and occupation of the proposed assignee together with such information and evidence as the landlord may reasonably require; the consent in writing of the landlord is to be obtained but may not be unreasonably withheld.

There are a number of matters relating to the background and the previous association of Petersen's, Bolton, who was an original shareholder in the plaintiff company, Curtis, who took over Bolton's shares in that company and was also a shareholder in Garden City Holding Limited, and the defendant company (in particular, Mr Roberts, a director of that company) upon which the evidence is by no means clear; but it seems that Petersen's, which used the premises to operate a clearance sale business buying goods from manufacturers and selling them to the public, was not prospering and the idea was raised in 1983 that Petersen's might sell the business to Curtis and Bolton. There were discussions between Roberts, Bolton and Curtis and some suggestion that the defendant (or possibly one or another of certain finance companies of whom Roberts was a director) would assist with the provision of finance; other suggestions appear to have been to the effect that Curtis and Bolton, in their personal capacities, or by a company to be formed, might purchase. Nothing seems to have come of these discussions, but it does seem that Roberts was aware, at least in a general way, as to what was being considered and the possibility that Bolton and Curtis, in one way or another, might become the purchasers of the business.

What is undoubted is that on 21st October 1983 a contract for the sale of the business, including the lease of the premises, was signed. Petersen's and others were the vendors and Bolton and Garden City as agent for a company to be formed, were named as purchasers. The agreement was conditional upon obtaining the consent of the lessor. Without any such consent having been obtained, there appears to have been some form of settlement between the parties pursuant to which Curtis and Bolton went into possession prior to the formation of a company. What Bolton's true part was in all this is difficult to say but he was not happy with the venture and only continued to the point where a company bearing his name, Bolton Enterprises Limited, was formed.

Matters proceeded as follows:

(1) On 28th November 1983 there was a meeting expressed in the minutes to be of "Bolton Enterprises Limited"; Curtis and Bolton were appointed directors, a common seal was adopted, shares were allotted -

Garden City Holdings	7,000
Bolton	7,000

One suspects that the necessary company papers had been signed that day, in fact the company was not incorporated until 2nd December 1983.

(2) A resolution was passed purporting to confirm and adopt the agreement with Petersen's.

(3) On 29th November 1983, Bolton's resignation was accepted and his shares transferred to Curtis.

(4) The following day the Garden City shares were transferred to Mrs Curtis.

While it seems that a formal assignment of the lease had been prepared, this was never executed, the situation having become somewhat involved by reason of the fact that Petersen's had gone into liquidation. Whatever the problems may have been, that document was not signed, there was no covenant in favour of the lessor by the shareholders of the purchasing company or by that company itself, and no grant of consent by the lessor. It appears clear that the lessor was quite aware of what was happening and made no protest, certainly no formal protest, to the new occupant. In his evidence, Mr Roberts said that he expected in due course to be presented with an assignment of lease for approval; that he would have agreed, provided all the necessary conditions were complied with. One finds it a little difficult to accept, however, that he would have continued for so long without some protest at the situation, had he really been waiting for the

terms of the lease in this respect to be complied with. Some time early in 1984, there were discussions between Curtis and Roberts regarding the operation by the former (or his company, Garden City) of a night club on the ground floor of the premises. While it appears to be accepted that there were such discussions, there is a conflict as to what was agreed. Curtis claimed he obtained Robert's approval and Roberts said he had not and that he had said he would discuss it with the other director of Russley Properties.

As to knowledge that the change was proceeding, Curtis maintained that Roberts was well aware of what was going on because he visited the premises "on an average of at least twice a week" and observed the progress of the conversion; while Roberts agreed that he had noticed some purely minor alterations, he said that he did nothing about it and raised no objection as they improved the building and could have been acceptable for either side. The evidence is not satisfactory and I am not greatly impressed with either witness, but of the two would tend to favour, in this respect, the evidence of Roberts. I would not be prepared to find that there was approval given and, in any event, it is conceded for the plaintiff that the use of the premises as a night club was a breach of clause 105 which specified the permitted use within the premises.

The night club opened for business in April 1984 being run, it appears, by Garden City Holdings Limited. As I have indicated, this was a clear breach of the terms of the lease. On 30th April 1984, Roberts, on behalf of Russley Properties, wrote a letter which should be quoted in full:-

"The Manager
Bolton Enterprises Limited
111 Slater Street
CHRISTCHURCH

Dear Sir

LEASE OF 152 LICHFIELD STREET
ASSIGNED FROM F PETERSEN (NZ) LIMITED

We write to draw your attention to the fact that operating a night club at 152 Lichfield Street is not a Permitted Use (See Clause 1.05).

Further, operating a night club is also a breach of condition 1 of our insurance contract and we have been advised by our insurer that our policy will not be renewed in the event that the premises continue in their present use. Apart from which our insurers could decline to meet any claim during the remainder of the current term.

As we must have insurance for our security and to satisfy our mortgagees we are obliged to advise that there will be no consent to a Permitted Use that causes us insurance problems. Any other reasonable use would be consented to.

Accordingly, we must hereby give 3 months notice for the Night Club (or any other activity outside Clause 1.05) to vacate the premises. We consider that this period should allow sufficient time for you to relocate.

Yours faithfully
RUSSLEY PROPERTIES LIMITED"

As to the continued operation of the night club, I shall return to that later. On 5th September 1984, because of what he stated to be his concern at the continued use of the premises as a night club, Mr Roberts, on behalf of the defendant, re-entered the premises and changed the locks thus successfully denying entrance to the plaintiff.

In addition to the defendant's assertion that Bolton Enterprises was in breach of the lease by operating the night club without consent, in his affidavit Mr Roberts put forward further claims as matters constituting breaches; that Bolton Enterprises made unauthorised additions and alterations to the premises in order to convert them; that the company had erected signs and advertisements on the premises without consent and that rates and insurance due under the lease

amounting to some $3,000 as at 5th September 1984, had not been paid. The plaintiff does not accept that it committed further breaches but, in any event, they were not specified in any notice sent by Russley Properties and, therefore, could not be used as grounds for forfeiture.

For the defendant, a number of points were raised in opposition to the plaintiff's right to seek relief.

It was first submitted that the contract to purchase the business, which included taking over the premises by way of an assignment of the lease, was signed on behalf of a company to be formed and consequently had to be duly ratified by the company following incorporation. It was pointed out that there was no deed of ratification; no ratification of any sort after incorporation, the only thing which purported to be ratification being the resolution (already referred to) of 28th November 1983. Without embarking upon a full consideration of what or what may not amount to due ratification, it seems to me that this is not a point open to the defendant to take, certainly at this time. From a practical point of view, the company did act on the agreement, no questions arose as between the parties to it and, so far as one can gather from the evidence, the agreement was settled according to its tenor, except that the vendor did not fulfil its obligation to provide a consignment of the lease duly consented to by the landlord.

I do not consider that the plaintiff's claim can be barred on these grounds.

The next question to determine is whether the plaintiff is in the position of being able to apply for relief under Section 118. In Section 117 "lessee" is defined to include "assigns of a lessee". In Strong v State Advances Corporation of New Zealand [1950] N.Z.L.R. 492, Hutchison J considered a situation where a tenant had purported to assign his rights, notwithstanding an absolute prohibition against

assignment in the lease. He said at 495:-

> " The substantial controversy is whether the plaintiff is a 'lessee' for the purposes of the section. For the plaintiff, it is said that he is a person to whom the original tenant assigned his rights, and that, notwithstanding the absolute prohibition against assignment contained in the tenancy agreement, he is an 'assign' within the definition of 'lessee' given in s. 93:
>
> .....
>
> The definition of 'lessee' contained in s. 93 is a definition 'For the purposes of the three next succeeding sections.' It is sought to read the word 'assigns' as including a person to whom a tenant has purported to assign his tenancy, he having under his agreement no right to assign, and where such person, when he applied to the lessor for recognition as an assignee, was declined such recognition. Such a reading, in my view, would be entirely inconsistent with s. 94, and could not be 'for the purposes' of that section. The definition in s. 93 explains and enlarges the meaning of the word 'lessee' in s. 94, but, in my opinion, it may not be used to alter the whole tenor of the section. The 'assign' referred to in the definition, in my view, is a person between whom and the lessor there is privity of estate. The position here, I think, is that, as the rights of the original tenant under his agreement were not assignable, the plaintiff cannot be an 'assign', <u>save by agreement, express or implied</u>, of the defendant Corporation."

The underlining is mine.

In the present case there is certainly no formal assignment nor written consent to an assignment. It follows, therefore, that the right of the plaintiff to seek relief against forfeiture must depend on whether, despite the absence of formal documentation, there was conduct of the defendant from which could reasonably be implied consent to the plaintiff taking over the lease and assuming the rights and obligations of the original tenant, or whether it may be said to have waived the need for prior consent. As to the latter, the doctrine of waiver or equitable election is discussed in

Spencer Bower and Turner "Estoppel by Representation" 3rd Ed. at 313:-

> "The doctrine of election as applicable in the law of estoppel may conveniently be summarized as follows: Where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting."

Spencer Bower cites as an example of election on the part of a landlord, which will estop him from afterwards claiming to avoid a lease on the ground of breach of covenant against underletting or assigning, "acts and conduct, or oral representations on the part of the lessor indicating a recognition of the interest of the sublessee or assignee, or his (the lessor's) intention to grant a new lease direct to such sublessee or assignee ..." (p. 328).

In the present case it seems clear that the defendant had prior knowledge of the fact that there might well be a sale and a handing over of the premises by Petersen's to Curtis and Bolton or a company; it was aware that these two had entered into possession but made no demur. When that situation continued for some time without any formal assignment, including the stipulated covenants, being submitted for consent, Mr Roberts was approached regarding the operation of a night club; while it may well be that he did not consent to such use, he did not raise the right of the plaintiff to be in the premises.

The decisive factor must, however, be the letter of the 30th April 1984. The heading contains a direct reference to the lease having been assigned. It draws attention to the fact that the operation of a night club is not a permitted use

under the lease and then gives 3 months notice for the night club or any other unauthorised activity to vacate. If it was not too late prior to the despatch of that letter to assert that there was no assignment which the landlord was bound to recognise, it must surely have been then.

It seems to me that, from the outset, there was an acceptance of the fact that the plaintiff had taken an assignment of the lease from the original tenant.

Whether the plaintiff could be said to have altered his position to his detriment is perhaps less easy; so far as the tenancy was concerned, no rent or other outgoings had had to be paid and the outlay in respect of the night club was for an unauthorised purpose. In addition, it appears to have settled its purchase of the business without requiring the vendor to fulfil the condition in relation to obtaining the written consent of the defendant. On the other hand, it was permitted to continue for a quite substantial time in the reasonable belief that the defendant accepted it as an assignee, not taking such action as might have been open to it to take to perfect its rights.

A case which may be regarded as, in part, analagous with the present one, is Dunedin City Corporation v Searl [1916] N.Z.L.R. 145 in which it was held that an action by the plaintiff's landlord to recover arrears of rent which had become due after the landlord became aware that the lease had been assigned without its consent, operated as a waiver of the breach of covenant against assignment. A similar point was made in Matthews v Smallwood [1910] 1 Ch. 777 by Parker J at 786:-

> "It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a

> lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything. Logically, therefore, a person who relies upon waiver ought to shew, first, an act unequivocally recognizing the subsistence of the lease, and, secondly, knowledge of the circumstances from which the right of re-entry arises at the time when that act is performed."

This passage was approved by the House of Lords in Kammins Ballrooms Co. Ltd v Zenith Investments (Torquay) Ltd [1971] A.C. 850.

In my opinion, whether consent is to be implied or whether it waived the need for consent, the defendant company cannot now be heard to say that the assignment to the plaintiff was not effective; the plaintiff must be regarded as an assignee and entitled to seek the protection of Section 118.

Section 118(1) of the Property Law Act provides:-

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor."

In the present case notice was given and I do not understand it to be suggested that the three months allowed to remedy the

breach (if such a breach is capable of remedy within the meaning of the section) was other than reasonable; indeed, it seems to have been generous. Then, by virtue of Section 118(2), where a lessor has re-entered without action, the lessee may apply to the Court for relief. The section then provides:-

> "... and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the circumstances of the case, may grant or refuse relief, as it thinks fit; ..."

As to the general principles which apply in considering the question of relief, it was stated in Hyman and Another v Rose [1912] A.C. 623 at 631 in the speech of Earl Loreburn L.C.:-

> " I desire in the first instance to point out that the discretion given by the section is very wide. The Court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise the free discretion given by the statute would be fettered by limitations which have nowhere been enacted."

Then in Earl Bathurst v Fine [1974] 2 All ER 1160, at 1162, in the judgment of Lord Denning MR:-

> "In the ordinary way relief is almost always granted to a person who makes good the breach of covenant and is able and willing to fulfil his obligations in the future. That has been the position since Hyman v Rose [1912] AC 623."

In the present case it is not in dispute that there was a breach. That was acknowledged by the plaintiff from the outset. The first question must be whether the plaintiff remedied that breach within a reasonable time, in this case the three months stipulated by the defendant, and, as I see it, proof of that rests with the plaintiff.

In his first affidavit, Curtis states that on the 7th June 1984 he closed the night club and that it had not operated since that date. As against that, Roberts stated in his affidavit that he saw an advertisement for the night club in the Christchurch Star on Tuesday, 30th August which to him confirmed that the night club was still operating; he also saw large pink coloured night club advertising signs remaining attached to the building. When he re-entered the premises on 5th September and changed the locks, he found on the premises a notice to staff dated 10th August 1984. This notice is signed by one Steve Kingi above the word "management" and it refers to leaving the changing room as staff might find it and to the fact that any "clothing etc." left on the floor would be thrown in the rubbish. It is certainly not conclusive that the premises were being used as a night club, but it is not inconsistent with such use at that time. In his second affidavit Curtis maintained that the advertisement was not authorised by the plaintiff or by Garden City Holdings. He did accept that there was a sign, not a new one but an old sign which had been altered. He pointed out that the notice was not addressed to the night club staff (which is correct, it is to "All staff") and said he had no knowledge of it; that Steve Kingi was not an authorised manager or agent of the plaintiff company. He said further that Bolton Enterprises was still operating a massage parlour business upstairs. When cross-examined, he accpted that the name of the night club was "Renees Nite Club" and three further advertisements were put to him for this night club which appeared in Christchurch papers on 9th, 10th and 11th July, within the three month period stipulated by the defendant but well after the date upon which he had said the operation ceased. While he understood there

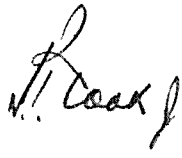
had been advertisements, he maintained he had not authorised them. He acknowledged that he knew Steve Kingi, knew him through Garden City Holding Company which operated Renees Nite Club. Apparently he was known as a hanger-on. He said he was at the premises infrequently, that is, the down-stairs premises where the night club had been operated, as I understand it, but was at the parlour upstairs quite frequently. He maintained that someone was advertising in the paper without his permission and that the cost of the advertisements had now been taken off his company's account. Mr Roberts was cross-examined but not in relation to the continued operation of the night club or of any of his reasons for thinking the operation had continued.

The evidence is confusing and, as indicated earlier, I am not satisfied that complete credibility may be attached to the evidence of Curtis. The night club was run by Garden City Holdings, which apparently was owned by the Curtis's, if I understand the evidence correctly, and Kingi was connected with, if not actually employed by, that company, which does indicate that anything signed by him would relate to its business rather than that of the plaintiff. It is surprising that Curtis could not bring some evidence to corroborate his bald statement that the operation ceased on the 7th June.

Overall, the plaintiff has not discharged the onus upon it of satisfying me that it ceased being in breach of the terms of the lease within the time stipulated or, indeed, prior to being denied access to the premises. We have the situation, therefore, that there was a breach of the terms of the lease which gave to the lessor, subject to compliance with Section 118(1), the right to forfeit. Notice of the breach was given and a reasonable time allowed to the lessee to remedy it (or to cease being in breach) but, as indicated, I am not satisfied upon the evidence which was placed before me that the plaintiff did either. Consequently, the lessor was entitled to enter and retake possession.

Whether, in these circumstances, the plaintiff is entitled to relief is a matter for the discretion of the court. The breach was a serious one and appears to have been carried on for a considerable time. It may be that only the action of the defendant in denying the plaintiff access to the premises brought it to an end. While the defendant may have lost the right to require full compliance with the terms of the lease, so far as consent to the assignment and the giving of covenants by the new lessee and its shareholders are concerned, there appears to have been little effort on the part of the plaintiff, or its shareholders, to undertake the obligations which the lease requires. In addition, there may have been other breaches as mentioned by Roberts in his affidavit. I note, further, that the lease has only a few months more to run.

In the circumstances I am not prepared to exercise the discretion in favour of the plaintiff by directing relief in a form which would permit the plaintiff to reoccupy the premises. Mr Dawson suggested that, if there should be relief granted, it might take the form of a payment by the defendant based on a refund of the rent for the balance of the term after making due allowance for rates, insurances and other outgoings. Whether it is in the power of the court to make such an order is not entirely clear and was not argued before me. In the particular circumstances of this case, with the rent paid in advance to the end of the term, it would be reasonable for some such payment to be made. Possibly the question can be resolved between the parties, otherwise I shall be prepared to hear further submissions. Costs are reserved.



Solicitors:
Clark, Boyce & Co., Christchurch, for Plaintiff
Joint, Andrews, Cottrell & Dawson, Christchurch, for Defendant.