CC:213/11 2011 C. NO.23

IN THE HIGH COURT OF SIERRA LEONE

(LAND AND PROPERTY DIVISION)

BETWEEN:

CAPE MANAGEMENT ENTERTAINMENT CORPORATION LIMITED - PLAINTIFF

AND

S.H. INTERNATIONAL BUSINESS AND TRADING COMPANY LIMITED - DEFENDANT

Counsel:

MR. O. JALLOH Esq. for the Plaintiff

MR. T.A. JAH Esq. for the Defendant

JUDGMENT DELIVERED THIS 2nd DAY OF October 2012 BY HONOURABLE MRS. JUSTICE V. M. SOLOMON J. A.

JUDGMENT

The action herein by writ of summons is against the Plaintiff for the following reliefs to wit:-

1. Possession of the premises known as Lagoonda Entertainment complex situated at Cape Road, Aberdeen, Freetown.
2. Arrears of rent
3. Mesne Profits
4. Damages for breach of covenants.
5. Interest on the said amount.
6. Any further or other relief.
7. Costs.

The Defendant filed an appearance and a Motion Paper dated 9th September 2011 to which this court delivered a ruling on 29th

February 2012. At that time the Plaintiff had filed a summons dated 18th August 2011 in which the Plaintiff is seeking the following orders:

1. That Judgment be entered for the Plaintiff for the following orders endorsed in the writ of summons:
   i. Possession of premises known as Lagoonda Entertainment Complex situated at Cape Road, Aberdeen Freetown.
   ii. Arrears of rent.
2. Any other order(s) that this Honourable court may deem fit and just.
3. That the costs of this application be borne by the Defendant.

Several affidavits were filed in favour of and against the application. During submissions a deponent Mohamed Jojo, was cross examined on his affidavits.

Mr. O. Jalloh Esq. counsel for the Plaintiff abandoned the first order and made submissions only in relation to the second order which is the recovery of possession of the premises situate lying and being at Cape Road, Aberdeen Freetown (hereinafter called "the Demised Premises"), carrying on business as Lagoonda Entertainment Complex. Counsel relied on all the three affidavits in support. He referred to Exhibit "C" clause 2:9 which relates to subletting of the demised premises. He relied on Exhibit "F" which is a lease subletting the demised premises to Club Tourism and Entertainment Limited (hereinafter called "The Sub-Lessee"). Consequently the Lease between the parties is

forfeited as the Defendant has not complied with provisions in exhibit "C". Mr. Jalloh further submitted that relief cannot be obtained against subletting and the lease is forfeited. He referred to Section 14 of the Conveyancing Act 1881-82. This does not cover subletting. He also referred to Halsbury's Laws of England, 3rd Edition page 678 at paragraph 1406 and case of Scala House & District property V Forbes & ors (1973) 3 ALL ER. Page 308 the dictum of Russell L.J. at page 314. He submitted that the Law of property Act 1925 does not apply in Sierra Leone. He referred to Barrow V Isaacs & Sons (1891) 1 Q.B. 417, Eastern Telegraphs Co. Ltd V Dent & ors (1899) 1 Q.B. page 835.

Counsel referred to receipt marked "AML 1B" for sum of US$80,000/00. He referred the court to the case of Misc. App. 198/10 Attorney General V Yazbeck & Sons Agencies and Another unreported 21st September 2010. He relied on aforesaid case and submitted that is on all fours with instant case and urged the court to grant possession to the Plaintiff. He submitted that the Defendant was duly informed of subletting the demised premises and referred to "AML 9". Counsel submitted that the Plaintiff only had notice of subletting very recently as at up to 15th May 2011 the Defendant denied that they had subletted the demised premises. He referred to exhibit "B" as the lease between the Defendant and the Sub-Lessee.

On the issue of waiver Mr. Jalloh submitted that the Plaintiff must have knowledge and proceeded to do an act which unequivocably waives the right to forfeiture. He submitted without exhibit "B" the Defendant would have denied subletting the demised premises and the management contract referred to is not before this court. In reply to submissions of Mr. Jah, he submitted that his court is a court of law and equity and it will not allow a statute to be used as a cloak for fraud. He submitted that the lease was for four years but it is not void abinitio because it is not registered as provided in Cap 256 of the Laws of Sierra Leone 1960. He referred to proposed defence at paragraph 3 thereof and submitted that it does not raise triable issues but instead the Defendant confirmed it is in breach of exhibit "C". He finally submitted that the Defendant has not denied that the sub-Lessee is in occupation of the demised premises. The said sub-lessee are occupying and using the disco exclusively at the demised premises at an annual rent of US $40,000/00.

Before commencing his reply Mr. Jah on behalf of the Defendant cross-examined Mohamed Jojo (hereinafter called "deponent"), on his affidavits of 14th March, 18th August 2011. The deponent confirmed his depositions and stated under oath that the Defendant is in arrears of rent. Mr. Jojo stated that a Mr. Sam was summoned to a meeting to discuss the issue of subletting and he denied in the presence of Mr. Filo Jones Esq. Solicitor for the Defendant that indeed the demised premises was sub-leased,

but Management contract was not discussed. The deponent affirmed that the issue of repairs effected to the demised premises and invoices thereof were not discussed.

Mr. Jah relied on the affidavit in opposition sworn on 12th September 2011 and exhibits thereto, particularly paragraphs 2 to 14 thereof. Mr. Jah submitted that the Plaintiff had waived its rights to forfeiture as rent was accepted with knowledge of breaches on the part of the Defendant. He submitted that by letters dated 9th February and 17th May 2011 the Plaintiff had knowledge of the breaches but accepted rents. Counsel referred to case of Matthew V Smallwood (1909)1 Ch. D page 777. He submitted that the Defendant intended to sublet but did not sublet as it did not have the consent of the Plaintiff and entered into a management contract with the sub-lessee. He relied on case of S/C App 6/2005 Alhaji Sesay v Emad Bahsoon. Mr. Jah submitted it is sufficient if intention of notice to sublet is delivered and no need for a reply on the consent sought, as seen in clause 2.9. He relied on case of CC: 174/2007 Gloria T. Williams V Gladys Strasser King. He submitted that US $52,500 is paid as rent and US $ 80,000 paid for use of furniture. He also relied on Megarry and Wade 2nd Editin page 642 under rubric "Waiver of breach", Halsbury's Laws of England, Volume 23, 3rd Edition paragraph 1399,97. He finally submitted that there are triable issues raised and so the matter should go to trial.

The present application is by Judges Summons in which the Plaintiff submissions were restricted to the first order, to wit, possession of the Demised premises as a result of breach of the covenant to sublet.

Mr. Jalloh has submitted that the Defence marked "AML8" has not raised issues to be tried by this Court as particularly paragraph 3 of "AML8" is a confirmation by the Defendant of its breach of exhibit "C".

I shall first of all deal with the present application; that is judgment by summary process. The basis of the parties relationship is one of Landlord and Tenant. The terms and conditions of their tenancy are stipulated in exhibit "C" the lease agreement.

The first issue for my consideration is the validity of this Lease. This agreement was duly executed by the representatives of the parties. It was duly registered in the office of the Registrar General for Sierra Leone. Mr. Jah has submitted that the sublease "F" is void abinitio in that is a lease for a four year period and it was not registered pursuant to cap 256 of the Laws of Sierra Leone 1960 as amended by the registration of instrument Act 1964. The submissions by Mr. Jah that this lease is void are therefore untenable. This agreement is valid until set aside by this court and can be enforced by either party in a court of law that is, voidable. Having established that this lease is valid, I shall now consider whether it can be terminated and/or forfeited before the expiry of its term in 2014.

The Plaintiff herein is seeking summary judgment pursuant to Order 16 of the Rules for immediate recovery possession of the demised premises and for the lease to be forfeited for breach of covenant to sub-let. To be entitled to such judgment the Plaintiff is to prove his claim clearly and the Defendant's defence is not bona fide and raises no issues to be tried. In case of Anglo-Italian Bank V Wells (1878) 38 L.T. page 197 at page 201 per Jessel M.R he stated that judgment can be obtained when the Judge is satisfied that not only is there no defence but no arguable point to be argued on behalf of the Defendant. By paragraph 14/4/5 of the Annual Practice 1999, a Defendant's affidavit should deal specifically with the Plaintiff's claim and affidavit and state concisely and clearly what the defence is, and the facts relied on the support it. A Defendant ought to show sufficient facts and particulars that there is a triable issue. I refer to case of S/C App 4/2004 AMINATA CONTEH V APC and previous rulings/judgments of this Court including the following to wit: CC. 172/08 MOHAMED A JALLOH V MRS ADELLA EHIMHAUN AND ADMIRE BIO unreported ruling delivered on the 22nd October 2012; CC 158/10 ZAIOUX SESAY V MATRIX SERVICES AND MR. JAMES SESAY unreported judgment delivered on the 26th September 2011; CC:331/10 ABERDEEN BEACH RENDEZVOUS V ALEX HEROE CHRISTIAN DAVIES AND ACCESS BANK unreported judgment delivered on the 2nd February 2012.

It is trite law that the mere assertion in an Affidavit of a situation does not, ipso facto, provide leave to defend since the Defendant must satisfy the Court that he has a fair or reasonable probability of showing a real or bona fide defence that is, and his evidence is reasonably capable of belief. In the case of National Westminster Bank PLC V Daniel (1994) 1 AER Page 156 the Court of Appeal laid a definitive ruling that if the evidence of the Defendant is incredible in any material respect, it cannot be said that there is a fair or reasonable probability that the Defendant has a real or bona fide defence and judgment will be given for the Plaintiff. It enumerated 2 tests:

- Is what the Defendant says credible?
- Is there a fair or reasonable probability of the defendant having real or bona fide defence?

It stated that the 1st question must be answered in the affirmative before moving to the 2nd question. The Defendant entered an appearance on 21st July 2011 and filed a Motion Paper dated 9th September 2011 to which a ruling was delivered. The Defendant has exhibited a defence dated 17th April 2012 "AML 8". The basis of its defence filed is that it is not in breach of the lease marked "C"; they paid rents; insured the demised premises; and consent to sublet was unreasonably withheld by the Plaintiff herein. The Defendant cross-examined Mohamed Jojo on his affidavits and he confirmed that he only had knowledge of

subletting the demised premises in May 2011. The Plaintiff was informed of it and when Defendant was confronted, he denied but in May 2011 it had a copy of the Sublease marked "F". This document was duly executed by the Defendants and the representative of the sub-lessees. That is not disputed by the Defendant. Instead it has submitted that its arrangement with sub-lessee is no longer a sub-lease but a management contract. The Defendant has filed defence to this action. This court is a court not only of law but of equity.

The Plaintiff is seeking summary judgment for recovery of possession on basis of forfeiture of the lease marked "C". The Defendant's defence "AML8" has not addressed the issue of forfeiture save that there is a management contract with the sub-lessee as the Plaintiff unreasonably withheld its consent to sublet. The Defendants submission is twofold, that the Plaintiff had waived its right to relief of forfeiture as rent have been paid and secondly that the lease marked "F' is no longer the basis of its relationship with the sub-lessee but they now operate a management contract.

Having held that the lease marked "C' is valid, I now consider clause 2.9 which is the basis of this application.

Its reads thus:

> "2.9. Not at any time during the said tenancy without the *consent in writing of the landlords to assign under let, sub lease, sublet or otherwise part with the possession of the*

premises or any part thereof such consent not be unreasonably withheld". (Emphasis added).

This clause is very clear and unequivocal. There is no evidence before this court that the Plaintiff gave consent in writing to the Defendant to sublease or dispose part of demised premises to Sub-Lessee. The sublease marked "F" does not recite any such written consent. Instead, it has in clause 2(h) a similar provision to clause 2.9 referred to supra. It is a sublease of the Lagoonda Entertainment Complex, the demised premises herein. It is a tenancy for four years commencing 1st August 2010 at an annual rent of US $ 40,000/00 per annum. The first year's rent was paid on 1st June 2010. This lease is between the Defendant and the Sub-Lessee. The Plaintiff is not a party nor is any reference made to it. I agree with the submissions of Mr. Jalloh that a statute should not use as a cloak for fraud. It was in the interest of the parties to have caused this sublease to be registered. Mr. Jah cannot now submit that it is void abinitio because of lack of registration. It is in the interest of his clients to have the said sublease registered. It is basis of the party's relationship. If the issue of forfeiture on basis of subletting was not raised, this document would still been enforced as between the parties. Either party is at liberty to have this document registered out of time as was does in case of exhibit "C". Forfeiture is the right of a landlord to determine a tenancy and re-take the premises and prematurely put an end to the lease. Forfeiture clauses are usual clauses in every lease.

A tenant obligations are worded as "upon condition that" or "provided always that" certain things are done or not done. In such a case when a term created by a lease becomes liable to forfeiture if the condition is broken, even if there is no forfeiture clause, even if the lease is made merely in writing and not by deed. A forfeiture clause is on the following lines; "provided always that if (the tenant commits a breach of covenant or becomes bankrupt) it shall be lawful for the Lessor to re-enter upon the premises and immediately thereupon the term shall absolutely determine". Under this sort of proviso the lessor reserves to himself a right of re-entry and the lease continues unless and until he exercises it. Even if a proviso for re-entry is stated on a lease the lease shall be determined or become void immediately upon its breach but the lease remains valid until Lessor re-enters or indicates his unequivocal intention to determine the lease. The lease is not void but merely voidable by the Lessor. See cases of: Quesnel Forks Gold Mining Co. Ltd V Ward (1920) A.C. 222 the right to reenter can be enforced by commencing an action for possession. In exhibit "C" I refer to clause 4 and 4: 1 which reads thus:

> "4. PROVIDED ALWAYS and it is hereby agreed as follows:-
>
> 4.1. If ..... or if any of the *covenants on the Tenant's part shall have not been performed or observed*... and in any cases it shall be lawful for the landlords *at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and*

thereupon the demise shall absolutely determine but without prejudice to the right of action of the landlords in respect of the rent or any antecedent breach of the tenant's covenants herein contained."

(Emphasis added).

This provision is clearly the forfeiture clause which gives the landlord a right of reentry if the tenant has not performed or observed any of the covenants in the lease. The question then it, has this Defendant not observed a covenant in this lease? Has it complied with clause 2.9? The owner is in the negative. The defence that it entered a management contract cannot be sustained as there is no evidence to substantiate that. A management contract ought to be reduced in writing with terms and conditions therein stipulated just as the sublease marked "F" was reduced in writing.

The next issue for my consideration is whether the breach of covenant to sublet can be remedied. Is it one which can be compensated by damages upon the requisite notice as in Section 14 of the Conveyancing Act 1881? The answer is no. I am forfeited in my view by Section 14 (6) (i) of this Act which reads thus:

"(6) *This section does not extend* –

(i) *To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased;*

or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest;"

(Emphasis added).

The evidence is that the Defendant leased a portion of the demised premises to a sublease without the written consent of the Plaintiff. Leases are bilateral contracts in which the tenant is not given an estate in the land but he covenants to pay rents, execute repairs and observe all covenants as stipulated therein. It is trite law that once a legal lease has been validly granted a deed is required to effect a legal assignment of it no matter how short the term. I refer to Section 3 of the Real Property Act 1845. A proper lease gives the lessee a legal estate, and an assignment of it passes to the assignee not only the lessees rights, but also the obligations as to the observance of all ordinary covenants. The lease marked "C" is for a period of 4 years and 10 months commencing 15th July 2009 ending on 13th May 2014 and Sublease marked "F" is for a period of 4 years commencing 1st August 2012 thereby ending on 31st July 2014, a date later than the lease. In essence exhibit "C", the sub lease is an assignment of the entire period of the tenancy to the sub lessee. It is trite law that an assignment of lease transfers the estate but creates no new tenure. The grant of a sublease creates a new tenure between Defendant and the Sub-lessee. I refer to the Law of Real Property by R.E. Megarry and H.W.R. Wade 3rd Edition pages 636 to 67.

The question then is whether a breach of the covenant to sub-let and/or assign is incapable of remedy. I find the authority of Scala House & District property V Forbes & ors (1973) 3 ALL ER. Page 308 instructive. The Court of Appeal held that a breach of covenant not to assign, sublet or part with possession was a once and for all breach and was incapable of remedy. In as much as that case was based on the Law of Property Act 1925, it is very instructive. A breach of the covenant to pay rents can be remedied as provided in Sections 210 to 212 of the Common Law Procedure Act 1852 by the payment of rents, interest and costs. But there is no such provision in relation to subletting or assignment of a lease. Instead by Section 14 (6) (i) referred to supra it cannot be remedied by damages or compensation. The Defendant had not denied that the Sub-lessee is in occupation of the demised premises but that it is in occupation by virtue of a management contract. Indeed the Defendant has parted with a portion of the demised premises that is presently in occupation thereof. Mr. Jah has contended that even if it is assumed that the Defendant is in breach of covenant to sublet the Plaintiff had waived its rights to forfeiture of the lease as rents were paid. A waiver of a breach of a covenant e.g. to sublet or assign may be expressed or implied. It will be implied if two conditions are met to wit:-

a. The landlord is aware of the acts or omissions of the tenant which make the lease liable to forfeiture

And

b. The landlord does some unequivocal act recognizing the continued existence of the lease.

(Emphasis added).

I refer to the Law of Real Property by R.E. Megarry and H.W.R. Wade 3rd Edition at page 663. I refer to Matthews v Smallwood (1910) 1 Ch. 777. Both conditions must be present to constitute a waiver. (Emphasis added). Knowledge of the breach accompanied by a merely passive attitude in the landlord will not amount to a waiver – see case of Perry v Davis (1858) 3. C.B. 769. A waiver could be implied if the landlord knowing of the breach sure for the rent or agree to grant a new lease to the tenant to commence from the normal determination of the existing lease. In instant case, the Plaintiff has abandoned its claim for non-payment of rents and it has not granted the defendant a new tenancy. The case of Agip (Sierra leone) Limited, Paramount Chief of Kakua Chiefdom and Chiefdom Council v Edmask (by his Attorney Allie (1970-71) A.L.R. S.L. 332 puts the onus of proof of the burden on the tenant that the landlord knew of the cause of forfeiture and has waived that right. This burden has not been discharged by the Defendant. The landlord must show some positive act of waiver. The landlord does not waive his right to forfeiture by merely standing by and seeing it occurred. See Halsbury's Law of England 3rd Edition page 671, paragraph 1396. If this Plaintiff has merely stood by and does nothing when a breach of covenant is committed that cannot a fortiori constitute a waiver,

Did the Plaintiff recognize the sub-lessee? The answer is No. If it did it would not have commenced this action. There is evidence of a lease agreement between Defendant and Sub-lessee marked "C" duly executed and which tenancy has not been surrendered and/or terminated. This is clearly in breach of the lease marked "C". If it is assumed that the tenancy is now a management contract then the latter ought to be in writing as the former. What are the terms/conditions of this management contract? . This document is vital to assist the Defendant's case. Further in the defence filed, there is no counter-claim for the relief of forfeiture. In fact there is no counter-claim at all. If indeed rents have been paid to cover period after the issue of the writ of summons, then that ought to be counterclaimed. The relief of forfeiture as provided in Clause 4.1 can be enforced and it does not prejudice the right of the Plaintiff in respect of any owing and due. Notice of all the several breaches were addressed to the Defendant by letter dated 17th May 2011 marked "D" to which there is a reply marked "E" dated 30th May 2011 and by clause 3 thereof Filo Jones solicitors stated inter alia that no consent has been given on part of the Plaintiff and that the relationship of the Defendant and Sub-lessee in relation to the right club is governed by a management contract. This letter again refers to the management contract which is not before this court.

From the forgoing and after consideration of the evidence the application of the Plaintiff is hereby granted and it is hereby ordered as follows to wit:-

1. The lease between Cape Management Entertainment Corporation Limited and S H International business and trading Company limited dated 13th July 2009 registered as No. 991/2011 at page 46 in volume 106 is hereby forfeited.

2. The Plaintiff is to recover immediate possession of the premises known as Lagoonda entertainment complex situate at Aberdeen Freetown in Western Area of the Republic of Sierra Leone.

3. The Defendant is to bear the costs of this action such costs to be taxed if not agreed upon.

.....V.M.Solomon.....

HON. JUSTICE V. M. SOLOMON J. A