IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

CIVIL APPEAL NO. 16 of 1989

BEFORE The Hon. Mr. Justice Zacca, President
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Henry, J.A.

BETWEEN ENGLISH SHOPPE LTD. Defendants/ Appellants
RICHARD ARCH
MARGARET ARCH

AND

CAYMAN ARMS (1982) LTD Plaintiff/Respondent

Mr. Norman Hill, Q.C. and Mr. O.U. Panton for Appellants
Mr. Pierre La Montagne Q.C. and Mrs. Caroline Baker for Respondents

August 14th 15th & 16th AND September 20th 1989

HENRY, JA:

On April 28, 1982 the Appellants leased to the Respondent for a period of 5 years from May 1, 1982 (with option to renew for 2 further 5 year periods) the top floor of a building owned by the First Appellant and the ground floor of which was occupied by the First Appellant.

On June 17, 1986 clause 2 of the lease was amended to read as follows:

> "2. The Lessee hereby covenants and agrees that it will use the demised premises for the business of a cocktail lounge and restaurant only and will in pursuance hereof and at its sole expense obtain and at all times keep in its own name (or the name of a nominee on its behalf) as sole owner hereof in full force and effect during the term hereby created all necessary liquor and other licences and approvals required under the laws of the Cayman Islands for the conduct of the business aforesaid. The Lessee further covenants and agrees that it will keep the demised

> premises open for business as aforementioned as permitted by the laws of the Cayman Islands."

Both the lease and the amendment were duly registered under the Registered Land Law 1971 ('the Law") and the option to renew the lease for 5 years from May 1, 1987 was exercised.

On December 1, 1986 the parties signed an agreement providing for reconstruction work to be done on the building, some by the Respondent and some by the Appellants. On January 8, 1987 the Appellants received from the Central Planning Authority permission for some of that work in the following terms:

> "In clarification, I advise that permission for the relocation of the present ingress/egress door is valid permanently (as long as it is acted on within a year); the rear doorway as an emergency exit is only approved for two months: this was done on the advice of the Chief Fire Officer, for which purpose he is a co-opted member of the Central Planning Authority, to allow Cayman Arms to continue operating until such time as an alternative emergency exit to the satisfaction of the chief Fire Officer could be devised."

On July 23, 1987 the Respondent applied for a renewal of its liquor licence and on September 21, 1987 this application was refused.

On September 2, 1987 the Respondent received a public health notice dated August 24, 1987 requiring remedial steps to be taken within 90 days.

On September 20, 1987 the Respondent closed its premises and on September 21, 1987 its letter to the Public Health Department stated that this had been done to allow a complete clean-up and renovation of the premises including the demolition ofthe existing facilities and the building of new washrooms and a kitchen in adjoining premises.

On October 19, 1987 the Appellants' attorneys wrote the Respond-

ent's attorneys a letter in the following terms:

"RE: Cayman Arms (1982) Ltd.

We have been instructed to inform you that our clients regard your failure to comply with the provision of Clause 2 as a substantial breach of the terms of the lease.

We have been further advised to state that unless your clients comply with the terms of the said Clause within two (2) weeks from the date hereof, our clients intend to treat the Lease as having been forfeited."

On November 30, 1988 the Appellants wrote the Respondent as follows:

"RE - LEASE CAYMAN ARMS (1982) LTD.

I refer to our letter of 19 October, 1987.

The Chairman of the Liquor Licensing Board has confirmed that as of 5th October that Cayman Arms (1982) Ltd. is without a a Liquor License.

In view of the fact that Cayman Arms (1982) Ltd. had notice of these violations and have had over one year to comply and further, in view of the public disclosure of the violations, and in view of the adverse effect this can have on English Shoppe Ltd., we have no alternative but to forfeit the lease as of 1st December, 1987.

Your cheque number 003152 in the amount of two thousand and thirteen dollars and fourteen cents (CI$2013.14) is herewith returned."

On December 30, 1988 the Appellants reentered the premises, placing new locks on the doors.

On February 3, 1989 the Respondent filed an originating summons seeking as subsequently amended:

"(1) A declaration that a lease, dated the 28th day of April, 1982, and made between ENGLISH SHOPPE LTD. (therein referred to as "the Lessor") of the one part and the Plaintiff (therein referred to as "the Lessee") of the other part as varied by an instrument, dated the 17th day of June 1986, and made between the same parties to the said lease and in the same order: and as further agreed to be varied by an agreement, dated 1st day of December, 1986, and made between the Plaintiff of the one part, ("the Lease"), is still subsisting, and that the Plaintiff Company is entitled to regain possession of the Premises known as "THE CAYMAN ARMS" comprised in the Lease (as varied as aforesaid) to wit:- the first floor above ground of the building erected on the land registered as George Town Commercial, Block OPY, Parcel 113 situated on South Church Street, George Town ("the Demised Premises") subject to payment of the rent thereby reserved and the covenants therein. The said lease varied or agreed to be varied as aforesaid is hereinafter referred to as ("The Lease");

(2) Damages;

(3) That the Defendants and each and all of them surrender forthwith possession of the demised premises;

(4) That the Defendants and each and all of them, whether by their servants or agents or otherwise howsoever, be restrained from entering upon the demised premises;

(5) Such further or other relief as is just;

(6) Costs;"

Following the hearing of that originating summons the learned trial judge granted the declaration sought, awarded damages "of a sum which will have the effect of relieving the Plaintiff of the obligation to pay rent from the time of the First Defendant's reentry to the time when the Defendants hand over the demised premises, calculated at the rate of $2,214.45 per month from 30th December, 1988 to 30th April, 1989 and $2,435.89 per month from 1st May, 1989 to the date when the Defendants hand over possession of the demised premises to the Plaintiff." He also ordered that the Appellants surrender possession of the premises and pay the Respondent's costs. This is an appeal against that judgment. There is also a Respondent's notice contending that the judgment should be affirmed on other additional grounds.

It is convenient to deal first with the second ground of appeal that

> "the Learned Trial Judge erred in law when he held that the application of section 55 (2) (a) of the Registered Land Law was subject to the provisions of sections 56 and 57 of the said Registered Land Law."

In support of this ground counsel argued that section 55 (2) (a) of the Law created a right of forfeiture separate and distinct from the right created by section 55 (1), that this right arose in circumstances where the lessee left the premises unoccupied and that in those circumstances a notice to the lessee was neither practical, necessary nor required by section 56. Sections 55, 56 and 57 are as follows:

> "55. (1) Subject to the provisions of section 57 and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee -
>
> (a) commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease; or
>
> (b) is adjudicated bankrupt; or
>
> (c) being a company, goes into liquidation.
>
> (2) The right of forfeiture may be -
>
> (a) exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining in possession of the land; or
>
> (b) enforced by action in the court.
>
> (3) The right of forfeiture shall be taken to have been waived if -
>
> (a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and

(b) the lessor is or should by reasonable diligence have become aware of the commission of the breach;

Provided that the acceptance of rent after the lessor has commenced an action in the court under subsection (2) of this section shall not operate as a waiver.

(4) The forfeiture of a lease shall terminate every sublease and every other interest appearing in the register relating to that lease, but -

(a) where the forfeiture is set aside by the court on the grounds that it was procured by the lessor in fraud of the sublessee; or

(b) where the court grants relief against the forfeiture under section 57,

every such sublease and other interest shall be deemed not to have terminated.

56. Notwithstanding anything to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease whether expressed or implied, until the lessor has served on the lessee a notice -

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and

(c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach,

and the lessee has failed to remedy the the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money.

57. (1) A lessee upon whom a notice has been served under section 56, or against whom the lessor is proceeding, by action or re-entry, to enforce his right of forfeiture, may apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit.

(2) The court on application by any person claiming as sublessee or chargee any interest in the property or part of the property comprised in the lease forfeited or sought to be forfeited, may make an order vesting the property or such part in such sublessee or chargee for the whole period of the lease or any lease period, upon such conditions as the court in the circumstances of the case thinks fit:

Provided that nothing in this sub-section shall apply in the case of a forfeiture arising from a breach to which the sublessee is a party or from the breach of an express agreement of condition against subleasing, parting with the possession of or disposing of the property leased.

(3) For the purpose of this section a lease limited to continue as long only as the lessee abstains from committing a breach of agreement or condition shall be

> and take effect as a lease to continue for any longer term for which it could subsist, but terminable by a provision for re-entry on such breach.
>
> (4) This section shall have effect notwithstanding any stipulation or agreement to the contrary and whether the lease is registered or not."

In my view, the right of forfeiture referred to in section 55(2) is the right created by section 55(1) or by the lease itself. The object of section 55(2) is to make it clear that a direct re-entry on the land in exercise of the right of forfeiture may only be made when the land is unoccupied, and that otherwise the right must be enforced by court action. Where, as here, the right of forfeiture is alleged to arise from breach of a term of a lease, that right cannot be exercised by the lessor unless a notice to the lessee in accordance with section 56 has been served. That is the clear effect of section 56 although it is not specifically referred to in section 55. In so far as section 57 is concerned the section itself makes it clear that the lessee upon whom a notice has been served under section 56, or "against whom the lessor is proceeding, by..re-entry, to enforce his right of forfeiture" may apply to the court for relief. Furthermore section 55 (1) is expressed to be subject to section 57. This ground of appeal therefore fails.

In so far as the notice to the Respondent is concerned the Appellants contend that the period specified therein within which to remedy the breaches was adequate whereas the Respondent contends that not only was the period inadequate but the notice itself was not sufficiently specific to make it clear to the

Respondent what breaches were being alleged.

Section 14(1) of the English Conveyancing Act, 1881 in so far as is relevant is similar to section 56 of the Law and provided as follows:-

> "A right of re-entry or forfeiture under any proviso in stipulation in a lease, for a breach of any covenant or condition 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."

In interpreting that section in Fletcher v Nobes (1897) 1 Ch. 271 North J at p. 274 held

> "I think the notice which is to be given under s. 14 ought to be such a notice as will enable the tenant to understand with reasonable certainty, what it is he is required to do...so that the tenant may have an opportunity of remedying... before an action to enforce forfeiture is brought against him."

This statement was approved in Fox v Jolly 1916 A.C. by Lord Buckmaster. In that case in a concurring judgment Lord Parmoor said at p. 22:

> "My Lords, in my opinion a notice is sufficient to comply with s. 14 if it specifies to the lessee the breach complained of, with such particularity, as fairly to tell him what it is he is required to remedy...The risk that the notice does not sufficiently specify some particular breach falls upon the lessor, who cannot enforce his rights of re-entry or forfeiture

> for the breach of any covenant or condition in the lease, unless in respect of such covenant or condition he has specified the particular breach of which he is making complaint."

And while Lord Atkinson said at p. 18:

> "It should be borne in mind that the notice is addressed to a person who knows, or ought to know, the nature and condition of the premises of which he is the tenant, so that a statement might be sufficient to draw his attention to the things of which the landlord complains, which might be insufficient so to do in the case of a stranger who had never seen or who knew nothing of the premises."

Lord Sumner observed at p. 20:

> "It it were true to say of the notice that it really only says "perform the covenants," though it says it over and over again, with many words and little meaning, I agree that the notice would not comply with the Act."

It seems to me that the notice in this case only says "perform the covenant" i.e. "comply with the provisions of clause 2." As counsel for the Respondent observed there are at least 4 matters about which complaint was being made and none of which were specified in the notice, namely,

1. the failure to obtain a renewal of the liquor licence
2. the fire safety problems
3. public health problems
4. the failure to keep the premises open for business.

Furthermore, if a re-opening of the business was being required, 2 weeks was a wholly inadequate period for the complete renovation of the premises contemplated by the Respondent to be effected. For these reasons in my view the notice does not comply with the requirements of section 56 of the Law and the Appellant was not entitled to exercise the right of forfeiture. If the right of forfeiture did not arise it is not necessary to consider whether the Respondent was in occupation of the premises at the time of re-entry.

I turn now to the question of frustration. Clause 2 of the Law required the Respondent to use the premises for the business of a cocktail lounge and restaurant. In the agreement of December 1, 1986 the Appellant agreed to certain work being done including the removal of the kitchen to adjoining premises owned by Cayman Property Corp Ltd. and in fact that appears to have been done. On December 29, 1988, however, the Director of Planning served on Cayman Property Corp. Ltd. an enforcement notice requiring demolition of the kitchen on the ground that it had been established without planning permission. Counsel for the Appellant submitted that this action by the Central Planning Authority effectively frustrated the lease, because, without a kitchen the premises could not be maintained as a restaurant. This would perhaps be so if no alternative arrangement for a kitchen could be made. There was, however, no evidence to this effect. There is no frustration if only one of the possible ways of performing a contract has become impossible. The lease had not been amended to require that the kitchen be maintained outside the demised premises. If the Respondent requested the Appellant to agree to the kitchen being reestablished in those premises it does not seem to me that the

Appellant could refuse to agree, and then maintain that the lease had been frustrated because the Respondent could not operate a restaurant without a kitchen. In that situation the frustration would arise by the fault of the Appellant and could not be maintained as a defence. For these reasons, in my view, frustration does not arise.

Finally, I turn to the question of damages. Counsel for the Appellant argued that the award was wrong in principle, justice and equity. There was, he argued, no loss of mesne profits to be compromised for. There was no evidence that the value of the lease had been diminished and there was no special damage since the premises had already been gutted by the Respondent. The award to which the Respondent was entitled could only, he submitted, be general damages.

The effect of the learned trial judge's award is to direct that payment of rent for the premises be suspended while the Appellant remains wrongly in possession of it. In all the circumstances that would seem to me to be a just award.

I would dismiss the appeal and affirm the judgment of the learned trial judge.

I agree (signed) E. Zacca President I agree (signed) J.S. Kerr JA

Appeal Dismissed. Costs of the appeal to the Respondent to be agreed or taxed.