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THE ROYAL COURT OF THE ISLAND OF JERSEY
(Heritage Division)
4th December, 1990.
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Before: Commissioner F. C. Hamon
Jurat J. Vint
Jurat E. H. Herbert

Between	THE FORT REGENT DEVELOPMENT COMMITTE	Plaintiff
And	THE REGENCY SUITE DISCOTHEQUE AND RESTAURANT LIMITED	Defendant

Advocate S. Pallot for Plaintiff
Advocate R. G. Fielding for Defendant

On the tenth day of October 1980 the parties entered into a twenty-one year contract lease before Court for premises to which we shall refer for ease of reference as "Bonapartes". Those premises are situated within the Fort Regent Complex. The lease imposed obligations upon both the lessor and the lessee.

The plaintiff relies on covenants in eight clauses of the lease as follows:-

> By clause 8 (3) of the lease "At all times to work in closest consultation with the Director and with the general co-operation of the said Director and with the General co-operation of the said Director to develop, extend and improve the business conducted within the demised premises on request and further at no time to permit to be done anything to injure the reputation or good will of the business so conducted."
>
> By clause 8(4) of the lease "At no time to do anything or permit anything to be done which would prejudice the renewal of the liquor licence held by the lessee to serve alcoholic drinks within the demised premises'"
>
> By clause 8(8) of the lease "To comply at all times with the requirements of the Food Hygiene (General Provisions) (Jersey) Order, 1967 and/or any other regulations as may from time to time succeed the said Order and at all times hereafter to indemnify and keep costs, expenses, claims and demands in respect of any such act, matter or thing contravening the said provisions of the said Order or regulations or any of them as aforesaid."

By clause 8(14) of the lease "To keep the interior of the demised premises and all fixtures and fittings therein clean and tidy and in good repair and good decorative condition and to replace such fixtures and fittings should this become necessary, to adorn the demised premises only with objects or articles reasonably acceptable to and agreed by the Director, to furnish the said premises with floor coverings, carpets, curtains, furniture and furnishings clean, tidy and in good condition and to replace any articles as may become necessary from time to time.

By clause 8(18) of the lease "At all times to keep clean both the interior as well as the exterior of all window panes and other glass panels forming part of the demised premises."

By clause 8(25) of the lease "To ensure that no thing, matter or substance likely to cause blockage or harm or cause a nuisance is put into drains serving the demised premises and in particular to observe and comply with the terms of the Discharge of Waste Matter and Effluents (Jersey) Order, 1968 and to indemnify the lessor against all actions and claims made against it by its tenants, licensees or other person or persons arising from the misuse of the Fort Regent Leisure Centre drainage system by the lessee, its servants, employees, customers or invitees."

By clause 8(29) of the lease "Not to carry on or exercise or suffer to be carried on within or upon the demised premises or any part thereof anything whatsoever which may be a nuisance or disturbance or which may cause damage or injury to the lessor or the tenants.

It cites examples of breaches of each of those covenants, it invokes clause 13 of the lease and seeks to terminate the lease. It relies on customary law as well as the specific covenants. The alleged breaches of covenant consisted of failure to conform to proper standards of hygeine. This was the main thrust of the plaintiff's complaints. There was also a quite separate allegation than on several occasions the defendant had breached the Bailiff's Permit limiting Bonaparte's occupancy to a maximum of 180 persons by selling tickets to the discotheque in excess of that number.

The complaints regarding the cleanliness of the premises occurred in 1987, 1988 and 1989. There were complaints about the disrepair of seats in 1988 and 1989 constituting a possible hazard. We heard evidence over three days concerning all these incidents. We also heard argument on the law for one day. Despite the length of the hearing the point that we have to decide is a narrow one. It is this. Are the breaches of covenant (such as they may be) sufficiently grave to warrant the draconian step of cancelling the lease?

It is clear from the authorities cited to us that there is really very little difference in the argument on law between the plaintiff and the defendant. Both Mr. Pallot and Mr. Fielding have given much assistance to this Court in setting out the legal authorities upon which we can rely. On one matter both parties were agreed. If the Court is to cancel a lease (particularly a long term lease such as the one before us) then there must be more than a technical breach. The substance of the breach must prejudice the lessor in a real way.

"La Cour n'est pas tenue de prononcer immédiatement la résiliation; elle peut accorder au défendeur un délai pour s'exécuter, et apprécier si l'inexécution est suffisamment grave pour entraîner la résolution, ou si elle ne justifie que des dommages-intérêts". (Hamon v. Fisher's Grocery Stores (1962) 253 Ex 415 p3 - 4). Mr. Pallot in his meticulous argument asked us to consider the nature of the discretion of the Court and, in this regard, cited a passage from Bailhache (née Hubert) v. Williams (née Lewis) et autre (1968) JJ 1067 at page 1079. The Court said there

that "circumstances can well be such that it is just and equitable to order the cancellation of the lease but it is unjust and inequitable where the effect of making such an order is to impose an excessive penalty".

The alternative would of course be an award in damages but we can foresee great difficulty in attempting to assess a payment of damages if we felt that the facts justified cancellation but also felt that such cancellation would be too harsh. The problem was immediately apparent to Mr. Pallot who conceded that the plaintiff could not be easily compensated in damages. He did not go so far as to say that the Plaintiff had not suffered any damage. We must say immediately that we are at a loss to see what damage the plaintiff has suffered. As Barry Nicholas says in his work the "French Law of Contract" (1982) at page 239:-

> "Where the inexécution is other than total, the jurisprudence has held that the court has a discretion. This discretion relates in the first place to the assessment of the gravity of the breach. Thus the Cour de cassation has constantly repeated that 'it is for the courts ... in the case of partial inexécution to assess, according to the particular circumstances, if the inéxecution is of such importance that résolution should be pronounced immediately or whether is would not be sufficiently made good by a condemnation in damages.' In making this assessment the court will have regard to the question whether the creditor would have contracted had he forseen the inexécution (i e whether the element unperformed could be the "cause" of the creditor's obligation). But it will also consider the economic circumstances in which the claim is made and the conduct of the parties, in order to achieve a proper balance between the advantage to the creditor and the disadvantage to the debtor. Résolution may be justified even where the extent of the breach is small, if the court finds indications of bad faith on the part of the debtor; and the converse, as has been said above, is also true. Moreover, the court's discretion does not relate merely to the question whether it should grant résolution or not. As we have seen, the court may also order partial résolution, with modification of the creditor's obligation, thereby in effect setting the contract aside on terms."

We will examine this point in due course but we have already alerted ourselves to the suspicion (which must always be there in cases such as this) that the plaintiff "is seeking to take advantage of a temporary difficulty in order to escape from a bad bargain." These are not our words. They might well have been. They came from a sentence in Nicholas. The sentence was not cited to us but it occurs immediately before the passage referred to above.

We must also examine what the parties intended when they entered into the lease. We may not need to go further on an exposition of law other than to say, as has been said so often in this Court on these matters, : "la convention fait la loi des parties".

Throughout his detailed and careful address on the law Mr. Pallot, whichever path he took, always came to the ultimate point that we have to decide. It may be the only point of substance that we have to decide. Mr. Fielding was in agreement. He raised the technical point of the 'mise en demeure'. We shall deal with that in its turn. The centre of this argument has been well rehearsed by the ancient commentaries.

Pothier in his Traité du Contrat de Louage (Siffrein Edition) explains the nature of the lessee's obligations(page 354):

> "Les engagements du conducteur, dans le contrat de louage, naissent aussi ou de la nature du contrat, ou de la bonne foi qui doit y régner, ou des clauses particulières qui y ont été apposées".

He tells us (at page 381) that amongst his other obligations the lessee has contracted "d'apporter à la conservation de cette chose le soin convenable". He repeats this many times: "Le conducteur doit jouir er user de la chose qui lui est loueé, comme un bon père de famille useroit de la sienne propre: il doit avoir le même soin pour la conserver, qu'un bon et soigneux père de famille auroit pour la sienne propre." The expression "bon père de famille" is not unknown to this Court. It has been used time and again. The Court of Appeal recalled it to mind in In Re Barker 1987 JJ140 at page 150. The basis of the expression is axiomatic. It is part of the very life-blood of our law. It puts obligations on the lessor's servants (paragraph 193 at pages 384 and 385). It is born from customary law (paragraph 201 at page 389) and from the clauses of the contract (paragraph 205 at page 392).

It was argued that the fact that the defendant has breached the terms of the lease gave the plaintiff the right ipso facto to apply to this Court for cancellation. Pothier expresses the right (paragraph 322 at page 446) in this way :-

> "C'est pareillement une raison de donner congé au locataire avant l'expiration du bail, lorsqu'il ne jouit pas de la maison comme il doit en jouir ; s'il la dégrade et la détériore; s'il en fait un bordel ; si d'une maison bourgeoise il en fait un cabaret, un brelan, une forge, etc."

We return to the one narrow point (paragraph 323 at page 447):-

> "cette clause ne peut pas plus s'appliquer à l'autre cause d'expulsion, qui est le cas auquel le locataire mésuse de la maison qui lui a été louée; car c'est une règle en fait de contrats synallagmatiques, que lorsqu'une des parties contrevient à ses obligations, elle n'est pas recevable à demander que l'autre partie satisfasse aux siennes. Le locataire qui ne remplit pas ses obligations en n'usant pas, comme il le doit, de la maison qui lui a été louée, ne doit pas, en vertu de quelque clause que ce soit, demander que le

The customary law as expanded by Pothier is confirmed by Dalloz Ainé in his Répertoire de Législation de Dcctrine et de Jurisprudence (Paris 1853). There is no distinction to be made between the commentators.

> "Le preneur doit jouir et user de la chose louée comme un bon père de famille userait de la sienne propre. Cette obligation, qui lui est formellement imposée par l'art. 1728, dérive de la nature même des relations que le contrat établit entre lui et le bailleur. En doit faire comme ferait celui-ci, ou du moins comme on doit présumer qu'il ferait; il doit surtout éviter tout ce qui pourrait détériorer la chose, afin de pouvoir, à l'expiration du bail, la rendre dans l'etat où il l'a reçue."

The guiding principle (and the very many examples given to us by both counsel merely confirmed our view of the law) is set out by Dalloz at paragraph 300 : "Du reste, on comprend que la résiliation ne peut être prononcée que dans les cas graves". It was helpful of both counsel to show us examples of where we should not allow cancellation of the lease. For example (paragraph 300 at page 355) :

> "les tribunaux ne sont point obligés de prononcer cette résiliation; qu'ils peuvent, tout en reconnaissant qu'il y a dégradation et usage de la chose contraire à sa destination, rejeter la demande d'après les circonstances, par exemple, en considérant quele mal est récent et facilement réparable (Req. 19 mai 1825)(2)".

and again paragraph 302 at page 356 :

> "Il est évident que ni la résiliation du bail ni les dommages-intérêts ne peuvent être demandés si les faits qui en eux-mêmes pourraient constituer un abus de jouissance avaient été approuvés expressément ou tacitement par le propriétaire."

The authorities are leading us along a path which is so clearly lit, so obvious in common sense, so well trodden by the legal commentators that we saw no pitfalls, no obstacles, no unforeseen diversions.

In fact the passage of Nicholas on French Law is in our view a sound submission on Jersey Law. As the Code Dalloz says in its Codes des loyers et de la Copropriété (1989) at page 639 on the section "Baux commerciaux" : "Les juges du fond apprécient souverainement les motifs graves et légitimes de refus de renouvellement." We have to find "un motif grave et légitime" to justify cancellation of the lease.

Mr. Pallot was right to concentrate on the law. He gave us a very well balanced and clear exposition. But before turning to the facts which lead us to our decision we need to examine what we described earlier as Mr. Fielding's "technical point".

The statement of law upon which the technical point is based - and in our judgment soundly based - is expressed in the Dalloz Répertoire in this way (paragraph 553 at page 427):

> "Une demande en résolution de bail, pour inexécution des conditions, est non recevable, si le bailleur n'a pas été préalablement mis en demeure d'exécuter ses obligations: on ne peut se prévaloir à cette fin d'une mise en demeure verbale."

There were serious breaches of the lease in 1988. A report of the District Environmental Health Officer Mr. Derek John Binet set them out. They were sent to the defendant. They ran into five pages. They led to voluntary closure of the premises. The report states "voluntary closure of premises having been agreed, you are reminded that should any part of the operation be commenced without reference to this department the premises will be formally closed by order of the Public Health Committee with the likelihood of legal proceedings to follow". It was stipulated that all items to do with

cleanlines hould be attended to immediately. All items of a structural nature should be completed within 28 days. There was also a report prepared for the plaintiff by Mr. Michael G. Boyce a divisional Director of a firm known as Hinton & Higgs Environmental & Industrial Safety Limited ("Hinton & Higgs") who were carrying out what is described as a health and safety survey report for the plaintiff. That report (the date of the visit) is dated 6th September, 1988. It finds that some (but by no means all) of the matters detailed by Mr. Binet still needed attention.

On the 7th October, 1988 Mr. Pitman, the plaintiff's Chief Officer, wrote to Mr. Michael Green (who is a director of the defendant) in these terms:-

"GIGP/LF 13/4 7th October, 1988

M. Green, Esq.,
Managing Director,
Gala Holidays,
Mason Parade,
Ley Street,
Ilford,
Essex.
1G1 4BD

Dear Mr. Green,

FORT REGENT - BONAPARTES - LEASE

With reference to my two previous meetings with you, I write to inform you that the Fort Regent Development Committee has now had the written opinion of the Law Officers of the Crown concerning, in particular, the recent occurences involving the Public Health Department and the Fire Services confirming that there has been breaches by your Company of various clauses of the lease and expressing the opinion that the Committee could therefore invoke clause 13 of the lease.

I am directed to advise you that the Committee is minded to proceed on this basis.

Yours sincerely,

GRAEME PITMAN
Chief Officer "

He wrote again on the 18th November, 1988 on these terms:-

"FORT REGENT - BONAPARTES - LEASE

With reference to my letter dated 7th October, 1988, I write to inform you that, at its meeting on 18th November, 1988, the Fort Regent Development Committee gave further consideration to the breaches of your lease earlier this year and decided that, on this occasion and in respect of these breaches only, it would not proceed to take legal action subject to the following conditions - (a) That, as from 1st January, 1989, activity at Bonapartes should cease no later than 11.45 pm so as to ensure that all customers are off Fort Regent premises by midnight; (b) That, whilst it would be prepared to agree to extended hours on Friday's and Saturday's to 1.30 am, it would require your company to bear the cost of the two security staff involved between 12.00 pm and 2.00 am.

I should also make it clear that, if further breaches of the lease occur in the future, the Committee will be free to take such action as it deems appropriate including legal action in accordance with the terms of the lease. "

It was on this letter that Mr. Fielding placed the strongest reliance.

In order to understand these two letter we were given access to the plaintiff's Minutes.

The weight and importance of the Minutes of a States Committee were carefully examined by the Court of Appeal in Housing Committee v. Phantesie Investments Limited (1985-86) JLR 96 at pages 101 and 102.

We therefore considered the Minutes with some interest.

On 18th August, 1988 the Chief Officer prepared a memorandum for his Committee. It reads in part as follows:-

"7. Under the lease, Mr. Green is entitled to keep open his discotheque until 1.30 a.m. and may remain on Fort Regent premises together with his staff until 2.00 a.m. As a consequence, it is necessary to maintain security staff until 2.00 a.m. each morning and the cost of maintaining security staff between 11.00 p.m. and 2.00 a.m. throughout the year is approximately £19,500. Bearing in mind that the current rent received in respect of the premises is approximately £24,500, the net income received as a result of Bonapartes presence at the Fort is only around £5,000 and is certainly of little or no value to the Fort. If Bonapartes did not exist, Fort Regent could close to the public no later than 11.15 p.m. resulting in a saving of approximately 2,000 man hours per annum.

8. Mr. Green has been advised that, until further notice, the Fort's Duty Managers will be instructed that at least two inspections of the premises should take place each week and full reports prepared on the conditions found. However, it might be an opportune time to consider whether or not it would be desirable to attempt to persuade Mr. Green to discontinue his operation at the Fort or at least to reduce it substantially so that his company is left only with the bar and the adjacent room currently used as a restaurant which could become a lounge bar giving up the kitchens and the disco area which the Fort itself could hire out for private parties serviced by the client directly or through caterers.

9. Regrettably, the previous Fort Regent Development Committee granted a twenty one year lease from 24th June, 1980, which means that the current lease will not expire until 24th June, 2001, on the basis that the rent is reviewable only every three years (the next occasion is June, 1989) in accordance with the Jersey Cost of Living Index."

There are two extracts which caused us some concern. The sentence which reads "If Bonapartes did not exist Fort Regent could close to the public no later than 11.15 p.m. resulting in a saving of approximately 2,000 man hours per annum" and, in paragraph 9 "Regrettably, the Fort Regent Development Committee granted a twenty-one year lease".

The Minutes of the Committee are those of 26th August, 1988, 18th November, 1988 and 16th December, 1988. They are so important that we set the extracts out in full.

"26th August, 1988

"The Committee heard that its officers were continually receiving complaints regarding the management and operation of Bonapartes and questioned its future operation in view of the fact that there would be minimal financial loss and a positive saving of 2,000 man hours per year if the premises were closed. However, it noted that the current lease on the premises did not expire until 24th June, 2001 with the rental renewable on a three-yearly basis in line with the cost of living. Whilst it was considered that the management of Bonapartes had contravened the terms of the lease it was decided that the Chief Officer should negotiate with the management for a reduction in the activities and the opening hours andd report back in due course."

"18th November, 1988

"The Committee, with reference to its Act No. 10 of 21st October, 1988, considered the action which might be taken against Bonapartes in relation to their lease.

The Committee noted that the Chief Officer had conveyed to Mr. M. Green, Managing Director of Gala Holidays (proprietors of Bonapartes) the serious view which the Committee had taken of his company's breaches of a number of clauses of its lease.

The Committee heard that Mr. Green had indicated that he was prepared to modify the terms of the lease in order to restrict late night opening to Fridays and Saturdays only.

The Committee, having expressed its satisfaction at the potential outcome of the negotiations, authorised the Chief Officer to continue to press Mr. Green to confirm his intentions in writing."

"16th December, 1988

"The Committee, with reference to its Act No. 13 of 18th November, 1988, received an oral report from the Chief Officer concerning the revised hours of opening which had been agreed with the management of Bonapartes.

The Committee noted that it had been agreed that the premises would be closed each evening at 11.45 p.m. in order to ensure that members of the public were off Fort Regent premises by midnight, except where otherwise specially arranged, and also except for Fridays and Saturdays in respect of which Bonapartes would pay for the overtime involving Fort Regent staff.

The Committee endorsed the action taken by the Chief Officer in suggesting to Mr. Green, the Manager of Bonapartes, that, in the circumstances, it would be minded not to proceed further against the company in respect of the breaches of a number of clauses of the existing lease agreement which had occurred in August 1988."

The defendant acted on its agreement. It changed its hours. Consequently it has suffered financial loss. We view with some disquiet the way the plaintiff negotiated from a point of a threat to prosecute. But it must always be borne in mind that the defendant was the author of its own misfortunes. We can sympathise with the Chief Officer when he told us that he did not believe (after further breaches in 1989) that the defendant would ever improve its method of working in the long term and that the ideal solution would be to cancel the lease. That sympathy does not allow us to ignore the letter and the promise (Mr. Fielding called it a novation of the contract) that the plaintiff would not proceed to take legal action if the defendant did certain things. There is a promissory estopel that in our view is absolute.

We must consider the second paragraph of the letter of the 18th November, 1988. We do not see that it justifies the revival of the 1988 breaches if (as did) breaches should occur in the future. The plaintiff is merely warning the defendant (and quite properly so) that it will not fetter itself from taking further legal action if breaches should occur in the future. Indeed the Minute of the 16th December is even less ambiguous:-

> "The Committee endorsed the action taken by the Chief Officer in suggesting to Mr. Green, the Manager of Bonapartes, that in the circumstances, it would be minded not to proceed further against the company in respect of the breaches of a number of clauses which had occurred in August 1988."

We will not, in our judgment, go as far as Mr. Fielding and say that we must ignore those breaches in their entirety. We say that, despite the fact that the pleadings seem particularly silent

on the "mise en demeure" point, and on the point that t plaintiff is estopped from raising the 1988 breaches to form a basis for this present action. The pleadings deal with waiver and the English equitable doctrine of accord and satisfaction. The arguments arose naturally from the points of law; they were dealt with my Mr. Pallot in his address to us and far from claiming that he was taken unfairly by surprise he grasped both these nettles firmly and fairly. The breaches in 1988 cannot be ignored. They occurred. We heard much evidence concerning them. There were also breaches in 1987. We find only that the breaches in 1988 are not now capable of forming the basis of a complaint.

We come, however, to 1989. On the 22nd September, 1989 Mr. Boyce of Hinton & Higgs visited the property with Mr. Ernest Roscouet who is the Plant and Amenities Manager of the Fort. What they found would no doubt have surprised most people. Mr. Roscouet told us that when they entered the kitchens the floor was greasy and the smell unpleasant; there was a tray of cold chips. The sink was dirty. There was a pan with bits of chicken in it. There was a plastic container with snail shells in it. The water was green and smelt. There were pieces of meat and cheese on the meat slicer. The refrigerator door was open with food defrosting in the fridge. There was water on the floor. The place was in a poor state. He felt that it had been like that for days. Mr. Boyce made an even more damming inspection. His was not an exhaustive list but a short list of visible items. He advised the plaintiff's management to prevent the use of the catering facilities until a deep clean had taken place. He also said that he had never previously witnessed

such poor food hygeine standards. He based this statement on the fact that over three years he had visited twenty to thirty industrial kitchens, ten to twelve school kitchens, and three to four leisure centres with catering facilities. The visit occurred at 10.40 a.m. He also discovered a fire hazard in the seating in the discotheque where foam had been exposed because some of the seats had been slashed. This was a matter that the Chief Fire Officer had reported on by letter (a copy of which was sent to the defendant) on the 15th August, 1988.

On the 28th September, 1989 the Chief Fire Officer had again visited the property. This was, however, a routine check. The fact that the seating was found to be in a serious state of disrepair and "past the stage of repair as requested in (the) department's letter dated 15th August, 1988 appears to be a comment with a recommendation. The report was sent to the Bailiff's Secretary who wrote to say that the recommendations contained in the report were to be carried out by the end of October. The work was eventually done albeit somewhat tardily.

The quite appalling state of the kitchen was described to us by two senior public health inspectors who were both very experienced. Mr. Derek Binet and Mr. Gerald Reid spoke of months of neglect when telling us of the 1988 incident. Mr. Reid went so far, again talking of the 1988 incident, to describe it as the worst that he had ever seen. We say that because Mr. Reid was adamant that what he found in 1989 was far worse than 1988. We learned of "working dirt" (which arises on a day-to-day basis) and "lazy dirt" (which is an accumulation over a period of time). Mr. Reid visited

Bonapartes at about 3.00 p.m. on the 22nd September (some four and a half hours after Mr. Boyce's visit). The defendant tried to explain away the disgusting state of the kitchen (which included a thriving colony of mice in a disused cupboard) by saying that the kitchen porter had walked out after a very busy night without attempting to clean. This may well be so but there was undoubtedly a lack of proper supervision. The present manageress told us candidly that if the 1989 chef (who has now left the Island) had been a decent chef he would not have worked in those conditions. Although a defence witness Mr. Stephen Jones the Hotel General Manager for Gala Holidays Ltd. (with which the defendant is associated) said that he did not agree with the Hinton & Higgs report of the 22nd September, 1989, we have no reason to doubt its accuracy nor to doubt what was told us by any of the plaintiff's witnesses who made reports on the state of the kitchen.

It is clear from the evidence that we heard that the relationship between the plaintiff and the defendant is not good. Mr. William Biddlecombe, the Operations Manager for the plaintiff, said as much when he told us that the running of a late night discotheque is not compatible with the use of Fort Regent as a Leisure Centre. That may help to explain the way that the plaintiff used the damming reports on cleanliness in 1988 to obtain an agreement from the defendant to curtail its opening hours. It is perhaps indicative of the plaintiff's attitude that the letter of the 18th November, 1988 refers only to bearing the cost of the two security staff on Fridays and Saturdays whilst on the 11th January, 1989 the plaintiff is referring to invoicing the defendant for the hours worked "at the premium rates payable to our staff".

The Chief Executive Officer of the plaintiff told us quite candidly that the commercial viability of Fort Regent was in the forefront of his mind. That is understandable. We do feel, however, that the plaintiff acted somewhat heavy handedly when the Duty Managers received a memorandum dated the 24th January, 1990 from Mr. Biddlecombe. It reads as follows:-

"BONAPARTES - BREACHES OF BAILIFFS PERMIT

> Recent head counts indicate that the Management at Bonapartes are not complying with the Bailiffs Permit.
>
> I have confirmed with A.D.O. Bailey the permit allows for a maximum of 180 to enter the discotheque when the restaurant is closed. Any overflow into the other areas still constitutes a breach of the permit.
>
> In future, you are to ensure that these numbers are not exceeded. Once 180 entrants have passed through the Main Reception turnstyle no more tickets are to be sold. If there are still persons waiting to enter Bonapartes after 10.20 pm you are authorised to refuse entry to the Complex except where these persons possess membership cards.
>
> You should inform the Manager or Assistant Manager of Bonapartes of the control being exercised. Report back any breach of the Bailiffs permit or problems with compliance you experience in a separate incident report."

It is true that the Bailiff's Permit limits the occupancy of Bonapartes to 180 persons and allows dancing and cabaret on Monday to Saturday only (Good Friday and Christmas Day excepted) from 2.00 p.m. until 1.00 a.m. The whole of the premises, however, are allowed to hold 310 persons (that is 180 in the discotheque and 130 in the restaurant). The defendant had a system, which seemed to us to be effective, whereby numbers were limited to 180 in Bonapartes and the balance of the patrons contained in the other rooms. There was a soft drinks bar for under 18's and a carefully controlled bar

area for over 18 drinking. These arrangements appeared to have worked well. There had been complaints but no prosecution of any kind concerning overcrowding or rowdyism. The sudden and unilateral decision by the plaintiff to limit entry to the Fort Regent Complex led to quite serious (and we would say understandable) scenes of frustration from the many young people who had paid for tickets. We do not feel that the plaintiff was justified in the action that it took. It was in our view, precipitate and unfair. We find nothing in the allegation of overcrowding made in the Order of Justice.

What then of the serious breaches of hygiene in 1989? The defendant explained the matter in a letter dated the 28th September, 1990 from Mr. Fielding to Mr. Pallot. The relevant passage reads as follows:-

> "Upon reviewing the matter, my client Company concedes that in September 1989, the standard of hygiene apparent in the kitchen was not what it ought to have been. I emphasis that the abysmal state of cleanliness found by Hinton and Higgs (Environmental and Industrial Safety) Limited arose from the neglect by a kitchen porter of his duties the previous evening. The kitchen porter was subsequently dismissed. My client Company also concedes that the seating in the discotheque had unavoidably fallen into a state of disrepair. My client Company also appreciates the concern which members of your client Committee may feel concerning limitation of numbers in the discotheque."

We are not convinced that the "abysmal state of cleaniness" arose entirely from the neglect of duties by the kitchen porter. Certainly that occurrence (and we accept that it happened) exacerbated the situation in a very profound way and led to the condition of the kitchen on the day of inspection but we feel that there had been general neglect for some considerable time. We must recall that the toilets were also in a bad state and the seats in Bonapartes constituted a fire hazard. We were disturbed to hear that a prosecution may follow as a result of the state of the kitchen as found in 1989. There were many offences under the Food

Hyg. ..e (General Provisions) (Jersey) Order, 1967. Mr. Reid who is the Senior Environmental Health Officer listed thirteen infractions under various articles of the Order. That may be so but why the Crown should wait until this case has been decided before bringing a prosecution (if that is the intention) we do not understand.

There is one other matter of law. The passage that we have cited above from Dalloz concerning the "mise en demeure" ends in this way" "on ne peut se prévaloir à cette fin d'une mise en demeure verbale". We can see nothing in the documentation prior to the signing of the Order of Justice on the 9th February, 1990 that could amount to a written "mise en demeure". But the matter goes beyond that finding in any event. We saw photographs taken by Mr. Joseph Bates, a professional photographer, which show the kitchens as being on the 18th October, 1990 what can best be described as "squeaky clean". It must be remembered that the kitchens are established within a building constructed as a Fort. There is no natural light in the kitchen. The walls are of stone. There are two extractor fans to remove the fumes from the kitchen. It must, when busy, be a difficult place in which to work. This does not excuse the track record of the defendant which seems to us to be appalling. Mr. Reid told us that in his long experience of public health matters he had never come across an establishment that had twice closed down in thirteen months because of its insanitary kitchens.

We sympathise with the plaintiff which, finding further breaches in 1989, decided that it had no alternative but to take action. We do feel, however, that in the light of what we were told

and what we read, the plaintiff was not reluctant t nter into foreclosure proceedings and thus rid itself of a troublesome, time consuming and costly tenant.

It is interesting to note that complaints from the general public were few and far between. We still do not fully understand why there was a reluctance to prosecute. The Public Health Department were helpful in allowing the defendant to put its house in order on three separate occasions.

We have considered the terms of the lease most carefully. The defendant is entitled peacefully and quietly to use and enjoy Bonapartes under Clause 11 whilst it performs and observes the covenants. It cannot complain, in the light of its breaches, if the lessor enforces its right of entry to inspect under Clause 21 on a more regular basis than it would perhaps with some of its other tenants. The breaches of lease do not, however, lead us ineluctably to the conclusion that the plaintiff has succeeded in establishing breaches which are so serious that we must cancel the lease.

We find for the defendant on the basis that the breaches were not sufficiently grave.

The plaintiff must, however, have its unpaid rental to date with interest thereon calculated at Barclays Bank Base Rate from the time that payment fell due to the date of when payment is made.

We feel that each side should, in the particular circumstances of this case, bear its own costs.

Authorities

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