Privy Council Appeal No. 70 *of* 1922.

Fuller's Theatres and Vaudeville, Limited - - - - *Appellants*

v.

Thomas Ernest Rofe - - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH FEBRUARY, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD ATKINSON.
LORD WRENBURY.

[*Delivered by* LORD ATKINSON.]

This is an appeal from the judgment of the Full Court of the Supreme Court of New South Wales, dated the 13th April, 1922, affirming a judgment dated 21st December, 1921, of Mr. Justice Street, Chief Judge in Equity, in favour of the present respondent. The proceeding out of which this appeal arises was an action of ejectment brought by Thomas Ernest Rofe, the respondent, against the appellant company, to recover possession of certain valuable premises situate in Sydney, New South Wales, on the ground that the leases under which the appellant company held them from the former had been forfeited by breach by the lessees of their covenant against subletting any portion of the premises demised in it. The property involved consisted of two "sites," as they were styled, adjoining one another in the city of Sydney. On one of these sites the Grand Opera House had been built. It was styled the "Theatre site." On the other, buildings known as the Grand Opera House Chambers had been erected. This site with the buildings thereon was styled the "adjoining premises." These two sites, with the buildings respectively upon them, were by a lease dated the 23rd December, 1910, demised by the Municipal

Council of Sydney, hereafter styled the Council, to the present respondent, Thomas Ernest Rofe, for a term of 50 years from the 4th October, 1910, at the yearly rent of £1,200. This lease contained many most onerous covenants, to some of which it is necessary to refer, coupled with a proviso for re-entry on breach by the lessee of any of them. In addition to a covenant to pay the rent reserved, to repair, paint and cleanse the premises, it contained two covenants on which much in this case turns. First, a covenant (a breach of which it was specifically provided could not be remedied) that the lessee would not assign or sublet the whole or any part of the demised premises without the consent of the Council, in writing, first obtained; and secondly, a covenant as to the uses to which the premises must not be put by the lessee. It ran as follows :—

> "He, the lessee, will not use or permit the buildings and demised premises to be used for any purpose other than one of the purposes hereinbefore mentioned. And will not carry on or suffer or permit to be carried on in or upon the demised premises any noxious trade or business whatsoever nor permit or suffer the demised premises or the buildings thereon to be used for any offensive, dangerous or noisy pursuit or operation, or any purpose which shall be in any way a nuisance, danger, damage or annoyance to the owners or tenants of adjoining property or the neighbourhood or to be occupied or frequented by any person of openly immoral conduct. And all sanitary conveniences in connection with the buildings shall be subject to the requirements and approval of the City Health Officer for the time being."

Having regard to these onerous covenants and conditions it was obviously of vital interest and importance to Mr. Rofe that, in case the demised premises or any part of them should be sublet the sublessee should be firmly bound to perform all the covenants by the lessee contained in this head lease, since the breach of any one of them might, at the will of the Council, work a forfeiture of the head lease. And this would be all the more necessary since it is well established that no privity of contract or estate would exist between the lessor, the Council, and such a sublessee.

The respondent being thus entitled as lessee to both the so-called sites with the buildings thereon, by deed dated the 4th April, 1911, sub-demised the "theatre site" with its buildings to one Joseph Lewis Marks, and a duly incorporated company named George Marlow Limited for a term of twenty-five years from the 4th of April aforesaid, at a yearly rent of £3,640 for the first twenty years, to be increased to £4,160 per annum during the last five years of the term.

Into this lease the oppressive covenants and conditions by the lessee contained in the head lease to Rofe (including those against subletting) were introduced, and his interest thus protected.

The present respondent, in addition, by deed dated the 15th December, 1915, made to Marks and one Benjamin John Fuller, described as the theatrical manager of the aforesaid company, George Marlow Limited, a reversionary lease of the

"theatre site" and the buildings thereon for a term of ten years to commence from the expiration of the before-mentioned lease, dated the 4th April, 1911. This reversionary lease contained a covenant by the lessor identical with that upon which as regards the lease of the "adjoining premises" the main controversy in this appeal turns. It runs :—

> "The said Thomas Ernest Rofe hereby covenants for himself, his heirs, his executors and administrators that so long as the City Council raises no objection to an assignment or subletting or sublettings of the said demised premises or any part thereof the said Thomas Ernest Rofe will not object to any such assignment or subletting."

Whether it was because the lease containing this provision was a reversionary lease, or for some other reason which he deemed adequate, Sir Leslie Scott frankly admitted that as to the dealings with the "theatre site" he could not assail the decision appealed against. That matter may consequently be put aside, and the dealings of these parties with the other of the two sites alone considered. The present respondent, by deed bearing date the 11th November, 1918, demised direct to the appellants the so-called "adjoining premises" for a term of thirty-five years to run from the 4th April, 1911, at a rent, payable in advance, of £426, until the 31st December, 1918, when it should be increased to £1,185 2*s*., payable in advance by equal weekly payments of £22 16*s*. This lease contained, first, a covenant by the lessees that they would not (with an immaterial exception) assign or sublet the whole or any part of the demised premises without the consent in writing of the lessor (the respondent) and the Council first had and obtained ; and secondly a most proper covenant essential for the protection of the lessor's interests, to the effect that the lessees :—

> "Will not use or permit the buildings and demised premises to be for any purpose other than one of the purposes mentioned in the said Lease of the 23rd day of December, 1910. And will not carry on or suffer any noxious trade or business whatsoever nor permit or suffer the demised premises or the buildings thereon to be used for any offensive dangerous, noisy pursuit or operation or any purposes which shall be in any way a nuisance danger or damage or annoyance to the owners or tenants of the adjoining property or the neighbourhood, or be occupied or frequented by any person of openly immoral conduct."

But at the end of the lease is found the covenant of the lessor (the respondent) upon which the appellants strongly rely. It runs thus :—

> "The said Thomas Ernest Rofe hereby covenants for himself, his executors, administrators and assigns, that so long as the City Council of Sydney raises no objection to an assignment or assignments or subletting or sublettings of the said demised premises or any part thereof the said Lessor will not object to any such assignment or subletting."

The appellants insist that so long as the Council raise no objection to a sublease of the whole or any part of the demised premises, no matter what provisions it contains or does not contain, no matter what opportunity it may afford to the sub-lessee

by a violation of one of the covenants to prejudice the respondent's interest, he (the respondent) is bound to consent to the subletting.

It is well established by the following authorities, amongst others, namely, *Treloar* v. *Bigge*, L.R. 9 Ex. 151, *Sear* v. *House Property Investment Society* 16 Ch. D. 387, *Barrow* v. *Isaacs & Son* (1891) 1 Q.B. 417, *Eastern Telegraph Company* v. *Dent* (1899) 1 Q.B. 835, that if one finds in a lease a covenant by the lessee not to assign or sublet the demised premises without the consent, in writing, of the lessor first had and obtained, and also a covenant by the lessor that he will not unreasonably withhold his consent to a subletting or such like, the two covenants must be construed together, with the result that the covenant of the lessee will be held to be qualified by that of the lessor.

If that principle be applied to the present case it may well be that the lessee's positive covenant not to sublet without consent is qualified by the lessor's covenant not to object to or to withhold his consent to a subletting simply because it is a subletting. This is the vice the lessor undertakes to pardon, but it by no means follows that the lessor is disentitled to withhold his consent to the granting of a sublease not because it simply amounts to a subletting, but because of the nature of the provisions it contains. The lessor is, in their Lordships' view, entitled to be told what is in substance the true nature of the transaction to which he is asked to assent. If the provisions of the sublease are reasonable and proper then the lessor could not refuse to give his consent simply because it was a sublease. That fault must be pardoned, but it is an entirely different proposition that the lessor must not only overlook this fault but every other, and approve no matter how much the sublease offends in other respects.

For instance the respondent might have his own lease forfeited if he permitted or suffered any of the noxious trades mentioned in it to be carried on in the premises. It is a vital question whether in such a case the lessor would not be held to have permitted and suffered this to be done when he consented to a sublease which left the sublessee absolutely free to do any of the prohibited things.

The construction of this covenant by the respondent contended for by the appellants, that once the Council consent to the grant of a sublease he, the lessor, is obliged also to consent to the making of it, though he should know nothing of its contents, is in their Lordships' view having regard to the subject matter to which the consents applied an unreasonable and unsound construction to put upon it. They decline to adopt it. The appellants desired to make a sublease of the ground and first floor of the buildings of the adjoining premises to three persons named respectively Arthur George Lewis Biden, Frederick Stewart Roberts and Norman Frederick Biden. The solicitors of the appellants, Messrs. Sly and Russell, on the 19th May, 1921, wrote to the respondent, Thomas Ernest Rofe, asking for his consent to this subletting.

They informed him that the term of the sublease was to be ten years, and the rent £50 per week, the landlord paying the rates and taxes. They gave him no further information as to the contents of the lease, nothing as to its date, the time from which the term was to run or the use to which the demised premises were to be put. They stated that their clients had obtained the consent of the Council, but gave no indication whether this consent was absolute or conditional or was a mere bald consent or a qualified consent, and then informed the respondent that when the lease was executed (*i.e.* when the matter was fixed and concluded and could not be altered) their clients, *i.e.* the appellants, would give further particulars of the lease. If the fair construction of this letter be that the Council gave an unconditioned and unqualified consent to the sublease, it is inaccurate and misleading. The consent runs thus :—

"'H (10).'—Consent of the Municipal Council of Sydney to Sub-Lease to Biden & Roberts.

"The Municipal Council of Sydney the Lessor of all that piece of land situate in the City of Sydney Parish of St. Lawrence and County of Cumberland being the land comprised in Indenture of Lease bearing date the 23rd day of December 1910 made between the Municipal Council of Sydney of the one part and Thomas Ernest Rote of the other part being the land on which the building adjoining the building now known as the Grand Opera House is erected doth hereby consent to Fullers' Theatres and Vaudeville Limited the Sublessees of the said land granting a sublease to Arthur George Lewis Biden, Frederick Stewart Roberts and Norman Frederick Biden all of Sydney Motor Cycle Specialists of the ground floor and first floor of the said building for a term of ten years from the 28th day of May One thousand nine hundred and twenty-one. Subject nevertheless to the payment of the rent and the performance and observance of the covenants and conditions in the said Memorandum of Lease reserved and contained and on the Lessee's part to be paid performed and observed and reserving to the Council its rights and remedies in respect of any default already made by the Lessee in the due fulfilment of the said covenants and conditions or any of them. Provided always that such consent as is hereby given shall not extend to any further subletting or dealing with the premises or any part thereof either by the said Fullers Theatres and Vaudeville Limited or the said Arthur George Lewis Biden Frederick Stewart Roberts and Norman Frederick Biden their and each of their respective executors or administrators.

"Dated this 19th day of May 1921.

"Signed by THOMAS HUGGINS NESBITT,
Town Clerk of the City of Sydney,
for and on behalf of the Municipal
Council of Sydney.

"T. W. K. WALDRON,
"*City Solicitor.*

"T. H. NESBITT,
"*Town Clerk.*"

Sir Leslie Scott contended that the words "Memorandum of Lease" refer to the lease under which the respondent held, and not to the draft sublease. If so, it is a strange misdescription of a deed duly executed long before.

On the 24th May, 1921, the respondent's solicitor wrote to Messrs. Sly and Russell, asking for a copy of the lease about to be made by Fuller to Biden and Roberts, before advising his client to

consent to it. On the 8th July, 1921, the respondent himself wrote to the secretary of the appellant company, stating that he insisted on the form of lease the appellants proposed to execute being submitted for his approval before the same was signed or the terms finally arranged by the company, and asking that the draft might be submitted to him. On the 12th July, Messrs. Sly and Russell wrote in reply to this reasonable and businesslike request, stating their view, that so long as the approval of the Council was obtained to the sublease from their clients, his (Rofe's) consent was unnecessary, and adding: "It seems to us that going through the form of submitting a draft lease to you which you have no right, either to approve or disapprove of, would be a useless expense."

If it is upon the contention so put forward by these gentlemen that the appellants have been obliged to take their stand upon the hearing of this appeal, it seems impossible in their Lordships' view to justify it on any just, fair, legal, businesslike or creditable principle. The respondent has not been guilty of any breach of his covenant. He has not refused to give his consent to this sublease. He has not raised any objection to the subletting as such. He has only asked before he gives his consent, what on every principle of law and justice he was entitled to, namely, that information should be afforded to him such as would enable him to ascertain what was the precise nature of the thing he was asked to consent to. That information was rather uncivilly withheld from him.

Ultimately when the lease was executed and was no longer held as an escrow but delivered the sublessees put into possession and things had become fixed, and Messrs. Sly and Russell evidently thought it could not have been in any way altered or undone, they wrote the following letter to the respondent:—

"27*th July*, 1921.

"T. E. Rofe, Esq.,
"60, Castlereagh Street,
"Sydney.

"Dear Sir,—

"Fuller's Theatres & Vaudeville Ltd., to Biden and Roberts.

"Herewith copy lease that has been executed herein, and also copy of the enclosed Council's consent.

"(Signed) SLY AND RUSSELL."

The appellants, therefore, in their Lordships' view, have broken their covenant. They have made this sublease without the consent of the respondent. He is entitled to avail himself of that breach and under the condition of re-entry to terminate the lease and recover the possession of the demised premises. On this point their Lordships are clearly of opinion that the appeal fails.

The second point relied upon by the appellants is that the breach of the covenant against subletting, which the respondent seeks to take advantage of, was waived by the receipt of rent, which it is alleged accrued due as the respondent well knew after

the breach of covenant had occurred which is the foundation of his action of ejectment. In *Matthews* v. *Smallwood* (1910), 1 Ch. 777, Mr. Justice Parker (as he then was) laid down in terms which have often since been approved of, the law upon this question of waiver with his accustomed clearness and accuracy. "Waiver" he said (p. 786) "of a right to re-enter can only occur, where the lessor with knowledge of the facts upon what his right to re-enter arose, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes or appears to recognize the continued existence of the lease unless at the time when the act is done he has knowledge of the facts under which or from which his right of entry arose."

Upon one of the other points in the case the head note states the pith of this judgment thus: "The question whether there has been a waiver in such a case is one of law, and the onus is on the lessee to adduce some evidence of the lessor's knowledge and proof of an act showing recognition of the tenancy does not throw the onus of proving want of knowledge on the lessor."

By the receipt of the letter of Messrs. Sly and Russell, dated the 27th July, 1921, the lessor is first definitely informed that the lease has been executed, and then for the first time receives a copy of it and of the consent of the Council. The respondent swears he only received these documents on the morning of the 28th July, 1921; up to that time he was deliberately kept in the dark as to the particulars of the transaction upon which his right of entry depended.

A rather futile cross-examination of the respondent is referred to, which really strengthens his case, because it shows how ignorant he was as to the exact position which Biden and Roberts occupied or the particular rights they had acquired.

The last receipt for rent is dated the 27th July, the day before the respondent received the draft lease and was informed of its execution. In addition every one of the weekly receipts for rent from the 22nd June, 1921, to the 27th July, 1921, inclusive, are endorsed with the words: "Without prejudice to the rights of the lessor under the lease." This endorsement could only have been designed to keep alive the lessor's rights and prevent them from being prejudiced by the secret proceedings.

Their Lordships are of opinion that the appeal fails on this point as well as on the other, and they will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

FULLER'S THEATRES AND VAUDEVILLE, LIMITED,

v.

THOMAS ERNEST ROFE.

DELIVERED BY LORD ATKINSON.

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