

A

1. JAGJIWAN VANMALI
2. RATILAL MORAR

v.

B

1. MOHAMMED RAMZAN
2. MOHAMMED ISHAQUE
3. MOHAMMED JALIL

and

JAINUL AB DEAN

C

[SUPREME COURT, 1979 (Williams, J.) 2nd March]

Civil Jurisdiction

B. C. Patel for the Plaintiff.
S. Prasad for 2nd Defendant.

- D *Tenancy—purported sub-tenancy for term expiring the head lease—assignment thereby—assignment under lease which has not been forfeited.*

Proceedings were taken under the Land Transfer Act for ejectment.

- E No appearance was filed by the 1st defendant who was the original lessee. The 2nd defendant who was the sub-lessee or assignee did defend the action.

The basis of the plaintiff claim for possession was forfeiture of the head lease on the ground of the non-payment of rent. It was not until the 2nd defendant's affidavit was filed that it appeared that the 1st defendant, had assigned his lease i.e. by purporting to grant a sub-lease to the 2nd defendant expiring several months after the conclusion of the head lease.

F

The Crown Lease held by the plaintiff was not stated to be a protected lease under Crown Land Ordinance, Cap. 12 s.13. Therefore any absence of the Director's consent to a subletting or an assignment did not render the transaction illegal. The question of such consent did not, in the opinion of the learned Judge at first instance play any part in these proceedings. It further emerged that although the assignment was for more than the balance of the term the plaintiff was not aware of it, had not consented to it and was not approached therefor. The learned Judge considered that the plaintiff could claim forfeiture of the head lease on examining the head lease before agreeing to take the sublease. But until the plaintiff forfeited the 1st defendant's head lease for assigning without consent, the 2nd defendant may well be in the position of an assignee. In endeavouring of forfeit the head lease the plaintiff could be met by the argument that he had accepted 3½ month's rent from the 2nd defendant and thereby lost the right to object to the validity of the assignment.

H

Held: The effect of the Property Law Act s.105(4) was that on the application of the sub-tenant in action brought by him for relief against forfeiture or during the lessor's action for possession, the court may grant that relief. The sub-tenant may therefore seek relief in his defence from the result of the sub-lessor's failure to pay rent. The lease and sublease filed in the action together with the 2nd defendant's affidavit clearly showed that the 1st defendant could not be held liable for rent in the first instance, it being the 2nd defendant's responsibility primarily. Therefore the plaintiff could not forfeit the 1st defendant's lease for non-payment of rent because that defendant may not have been the holder of the lease. The plaintiff had only just become aware of the breach. It was open to him to waive the breach and look to the 2nd defendant for the rent. If the plaintiff refused to recognise the assignment, he would have to claim against the 1st defendant for forfeiture for failure to pay rent and also for breach of the covenant not to assign without consent. The 2nd defendant had shown cause why at least he should not be removed from possession. He was an assignee of a lease which perhaps could have been forfeited.

Cases referred to:

Besley v. Besley (1872) 9 Ch. D. 103

Clayton v. Leach (1889) 41 Ch. D. 103

WILLIAMS, J.

Judgment

The plaintiffs are joint owners of a Crown Lease on which they have built 3 shops. They have agreed that each one of them shall have sole right to manage one shop.

On 8.7.75, the first plaintiff leased his shop for 5 years, as if he were sole owner of the Crown Lease, to the first defendant at \$300 per month. The Director of Lands approved the lease.

On 1.10.76, the first plaintiff consented to the first defendant subletting. His written consent makes no reference to the duration of the sub-lease. Thereupon the first defendant purported to sub-let to the second defendant for four years from 13.9.76. Since the sub-lease purports to expire several months after the head lease there was an assignment by the first defendant of his lease. He continued to pay to the rent of \$300 per month to the 1st defendant and plaintiff and 2nd defendant were not aware that the 1st defendant had purported to sub-lease for a longer term than he held. The first defendant stopped paying rent.

By a letter dated 11/7/78 the first plaintiff demanded payment of \$600 arrears of rent from the first defendant. The 2nd defendant was unaware of the arrears. On 23/8/78 the 1st plaintiff wrote terminating the 1st defendant's lease for non-payment of rent and requiring vacant possession on 30.9.78 and demanding of arrears which had accumulated to \$1,050. A copy of this letter notice was sent to the 2nd defendant who despatched \$1,050 via his solicitor Mr S. Prasad and which the plaintiff accepted. A tender by the 2nd defendant of a further \$300.00 on 2.10.78 was rejected.

The first plaintiff has instituted these proceedings under S.169 L.T.A. as against both defendants requiring them to show cause why possession should not be delivered up. His summons is supported by an affidavit setting out the facts which I have outlined.

A No appearance or affidavit has been filed by the 1st defendant who has not attempted to defend.

The second defendant's affidavit admits the allegations. It shows that the consent of the Director of Lands to the sub-letting had been withheld because the 1st plaintiff had been acting as sole lessee and that he joined by his co-owners in applying for the Director's consent.

B The basis of the plaintiff's claim for possession is forfeiture of the head lease on the ground of non-payment of rent. It was not until the second defendant's affidavit was filed that it appeared that the first defendant had assigned his lease.

C The Crown Lease held by the plaintiffs is not stated to be a protected lease under S.13 of the Crown Lands Ordinance Cap. 113. Therefore any absence of the Director's consent to a sub-letting or assignment does not render the transaction illegal and the question of such consent does not, in my view, play any part in these proceedings.

D Had the first defendant paid the arrears of rent and costs to the plaintiff before the hearing I would then, under S.172 of the L.T.A., have been obliged to dismiss the summons and the second defendant would have continued in possession. Such a step on the 1st defendant's part would perhaps have concealed that he had assigned his lease. It would be most unfortunate if the second defendant as assignee should not have that right to relief under S.172 on the ground that the assignment was made without the plaintiff's consent and therefore he should not be allowed to stand in the first defendant's shoes.

E Had the second defendant received a sub-lease one day shorter than the remainder of the first defendant's term the second defendant could have claimed the rights of a sub-tenant under S.105(4) of the Property Law Act. Under that subsection he could move the Court to vest the whole of the lease or a lesser term in him as sub-lessee upon such conditions as payment of rent, etc. as the court ordered. It would be most unfortunate if he were to be denied that relief on the ground that he is an assignee and not a sub-lessee. This is especially so when the plaintiff had given his consent to a sub-letting which for all he knew was to be for the whole of the remainder of the lease less one day. A sub-lease of such a duration would have placed the second defendant in much the same position as an assignment.

F Mr Prasad for the 2nd defendant argues that he is an assignee and therefore notice of termination should have been served upon him and not on the first defendant. The plaintiff's submission in reply is that he was never made aware that the second defendant was an assignee. It is well settled that a purported sub-demise for the whole period of the sub-lessor's term amounts to an assignment. However, the plaintiff has not consented to the assignment and he was not approached for his consent and he could claim forfeiture of the head lease on that ground.

G It would seem that the second defendant could be caught by his own default in not examining the head lease before agreeing to take the sub-lease. In *Besley v. Besley* (1872) 9CH. D. 103 and in *Clayton v. Leach* (1889) 41 CH. D. 103 it was held that the defendant was bound as an assignee when he accepted a sub-lease which unknown to him purported to be a demise for more than the sub-lessor's term. But until such time as the plaintiff forfeits the 1st defendant's head lease for assigning without consent the 2nd defendant may well be in the position of an assignee. In endeavouring

H

to forfeit the headlease the plaintiff could be met by the argument that he had accepted 3½ month's rent from the 2nd defendant and thereby lost the right to object to the validity of the assignment.

A

Turning to the plaintiff's claim to possession on the basis of his affidavit the status he allocates to the second defendant is that of sub-tenant and has argued that the second defendant is not entitled to the relief allowable to sub-tenants under S.105 (4) Property Law Act 1971 simply on the ground that he has not applied for such relief. The subsection reads as follows:—

B

“(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, or for non-payment of rent, the court, may on application by any person claiming as sub-lease any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as sublessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each may think fit, but in no case shall any such sublessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.”

C

D

It says that the Court may, on the application of the sub-tenant in an action brought by the latter for that purpose or during the lessor's action for possession, grant relief. There was no need for the second defendant to apply for relief in any separate action because he was made a party and in his affidavit he pleads that he is a sub-tenant and makes it clear that he wishes to remain in occupation. In my view that would be sufficient to justify the Court to grant relief from the result of the sub-lessor's failure to pay the rent.

E

Unfortunately for the 2nd defendant I do not see how I can proceed on the basis of the plaintiff's affidavit alone. The lease and sub-lease filed herein along with the 2nd defendant's affidavit clearly show that the 1st defendant assigned the lease. That being so the first defendant cannot be held liable for the rent in the first instance. It is the assignee's, the 2nd defendant's, responsibility primarily. Therefore the plaintiff cannot forfeit the first defendant's lease for non-payment of rent because he may not be the holder of the lease. The plaintiff has only just become aware of the breach and it is open to him to waive the breach and look to the second defendant for the rent.

F

If the plaintiff refuses to recognise the assignment then he will have to claim against the first defendant for forfeiture not simply on the ground of his failure to pay the rent but also for breach of the covenant not to assign without consent. The plaintiff would then have to look to the first defendant and not to the second defendant for rent. There could then arise some question as to the plaintiff's retention of the \$1,050 paid to him by the second defendant.

G

The view I take is that as at present the second defendant has shown cause. He is an assignee under the lease which may be forfeited but which as yet has not been forfeited. Thus no order for possession can be made against first defendant.

H

With regard to costs I would observe that this litigation has been caused by the first defendant's continuous deception of both parties. Although I have referred to a first defendant I am aware that three persons are sued as "first defendants." I Order that each one of them shall be responsible for the whole of the costs of these proceedings in respect of the plaintiff's and the second defendant which I fix at \$50.00 each respectively.

B *Plaintiffs claim dismissed.*