All England Law Reports/1947/Volume 2/Egerton and Others v Esplanade Hotels London Ltd and Another - [1947] 2 All ER 88

Egerton and Others v Esplanade Hotels London Ltd and Another

KING'S BENCH DIVISION

MORRIS J

7, 8, 9, 12, 13 MAY 1947

Landlord and Tenant – Lease – Forfeiture – Breach of covenant – Notice of breach – Notice not containing requirement that breach should be remedied – Permitting premises to be used as a brothel – Validity – Relief – Law of Property Act, 1925, (c 20), s 146(1) (2).

The lease of certain premises contained a covenant by the tenants not to do, or suffer to be done, on the premises any act which might be an annoyance, damage or disturbance to the landlords or their tenants, and to use them as a private dwelling-house only, and there was a proviso for re-entry in the event of a breach of covenant. Under a licence from the landlords, the tenants were allowed to use the premises as a hotel, and, by the terms of this licence which were to be treated as though embodied in the lease, the premises were to "be kept and managed … so as not to contravene any of the laws of the land … and in a quiet orderly and proper manner." In March, 1945, the tenants allowed rooms in the hotel to be occupied by persons for the purpose of having illicit sexual intercourse. Pursuant to the Law of Property Act, 1925, s 146(1), the landlords served a notice on the tenants complaining that they had committed a breach of covenant by allowing the premises to be used as a brothel, but the notice did not contain any requirement that the breach should be remedied:—

Held – (i) the premises had been used as a brothel (definition in *Winter v Woolfe* ([1931] 1 KB 549) applied), and the tenants had committed a breach of their obligations under the lease and the licence, but the breach was not capable of remedy and there was no necessity for the landlords to have called on the tenants to remedy it, and the notice was, therefore, a valid and sufficient notice under the Law of Property Act, 1925, s 146(1).

Rugby School v Tannahill ([1935] 1 KB 87) *followed*.

(ii) in the circumstances of the case, the tenants were not entitled to relief under s 146(2) of the Act.

Notes

As to Notice of Breach, see *Halsbury*, Hailsham Edn, Vol 20, pp 257–259, paras 290, 291; and for Cases, see *Digest*, Vol 31, pp 483–486, Nos *6322–6342*, and Supplement.

Cases referred to in judgment

Winter v Woolfe [1931] 1 KB 549, 100 LJKB 92, 144 LT 311, 95 JP 20, *Digest* Supp.

R v Holland, Lincolnshire JJ (1882), 46 JP 312, 15 *Digest* 754, *8133*.

Rugby School v Tannahill [1935] 1 KB 87, 104 LJKB 159, 152 LT 198, *Digest* Supp.

Action

Action for possession of premises on the ground of breach of covenant by the tenants, the first defendants. The relevant facts appear in the judgment.

Melford Stevenson KC and *Sir S Worthington-Evans* for the plaintiffs.

M Turner-Samuels KC and *Jessel Turner-Samuels* for the first defendants.

Unqoed-Thomas for the second defendants.

13 May 1947. The following judgment was delivered.

MORRIS J.

The plaintiffs are the trustees for the time being of the Paddington estate and they claim possession of premises known as 37 Warrington Crescent, Paddington. Those premises are in the occupation of the first defendants, Esplanade Hotels London Ltd and form part of a hotel carried on by them at Nos 2, 37 and 39,

Warrington Crescent. By a lease dated 10 November 1863, and made between the then trustees of the estate and a Mr William Thompson, the premises, No 37, were demised to Mr Thompson for a term of 95 3/4 years from Michaelmas, 1863. That term has become vested in the first defendants. The second defendants. Magnet Building Society, are parties to the action because, by a mortgage of 1 March 1937, and a further charge dated 4 August 1937, the first defendants, as beneficial owners, charged the premises to the society. The Magnet Building Society counterclaim for relief if circumstances arise making it necessary for them to do so.

The claim is brought by the plaintiffs because they say that there was a breach by the first defendants of an obligation contained in the lease and, also, a breach of a licence granted in July, 1937, by the plaintiffs to the first defendants, the terms of which were to be treated as though embodied in the lease. So far as the lease is concerned, there is a covenant which binds the first defendants that they:

> '… shall not nor will do or suffer to be done on the premises any act which may be or grow to be an annoyance damage or disturbance of the said Lord Bishop [*i.e.*, the bishop joined in the deed] or his successors or the said trustees or trustee for the time being or their or his tenants and shall and will keep and use the said messuage or tenement as and for a private dwelling-house only.'

There was a proviso for re-entry and it provides that, in default of performance of any of the covenants, then it shall be lawful for the trustees for the time being to enter the demised premises. The licence that was granted permitted the premises to be used as a hotel and included in the terms of the licence was this provision:

> '(7) That the said premises shall be kept and managed only as specified in the schedule hereto and so as not to contravene any of the laws of the land for the time being in force and in a quiet orderly and proper manner.'

The schedule set out that the user was by Leon Shapiro, and Marie Davidova of 2 Warrington Crescent, Paddington, called the licensed users

> ' … whilst being directors of Esplanade Hotels London, Ltd., and whilst personally supervising managing and keeping up the said premises and attending upon the persons therein with a competent resident manager or manageress and a staff of servants in style and manner appropriate to the character of the said premises as and for a high class private residential hotel for persons of good class and social position suitable to the character aforesaid but so that and only so that the provisions and conditions hereinbefore set out are fully observed fulfilled and kept.'

Clause I of the licence was in these terms:

> 'That throughout the term of the said lease and the subsistence of this licence all the lessee's covenants and the conditions contained in the said lease (subject to any subsisting licence previously given by us or our predecessors in title) be applicable to and enforceable in respect of the premises comprised therein and generally operate and have effect as if the user and any other things hereby licensed or permitted had been licensed or permitted by the said lease and the provisions and conditions herein had been embodied therein but so that in all other respects and subject as aforesaid the said lease shall continue in full force.'

The plaintiffs say that the first defendants, in breach of the covenant and of the condition in the licence, used the premises and suffered them to be used as a brothel between 2 March 1945, and 6 March 1945. The plaintiffs say that they have complied with the necessities of the Law of Property Act, 1925, s 146(1), and that, therefore, they are entitled to exercise their right to re-enter, and are, in consequence, entitled to possession of the premises. The first defendants deny that they have broken the covenant or the term of the licence to which I have referred. They say, secondly, that no notice that was sufficient or satisfactory to comply with s 146 of the Act of 1925 was ever served on them. In the alternative, if a breach is proved and if a valid and sufficient notice was given, they ask that relief be granted to them under the provisions of s 146(2).

The first issue is clearly one which depends on the facts. [After reviewing the evidence, His Lordship found that rooms in the hotel had been occupied by persons for the purpose of having illicit sexual intercourse. He said that, following a raid by the police on the hotel on 11 March 1945, one Westermann, who was one of the directors of the first defendants and was at the relevant time largely responsible for the management of the hotel, and one Lienhard, a porter at the hotel, were convicted for that they between 2 and 6 March 1945, at the Esplanade Hotel had unlawfully assisted in the management of a brothel. His Lordship continued:—] The plaintiffs have alleged their breach in the way in which I have indicated and, therefore, they must prove that breach. In *Winter v Woolfe*, in the Divisional Court, Avory J said ([1931] 1 KB 555):

> 'I am content to accept the definition of a brothel given by GROVE and LOPES, JJ. [46 J.P. 312, 313] in the case of *R.* v. *Justices of Parts of Holland, Lincolnshire*.

> GROVE, J., said: "The sole question is whether there was any evidence to support this conviction before the justices for permitting these licensed premises to be a brothel … I don't think that the matter of nuisance is of any importance, for it is too well known that these places are often kept in such a way as to be no nuisance at all, but kept perfectly private. But what needs only to be proved is this, namely that the premises were kept knowingly for the purpose of people having illicit sexual connection there." LOPES, J., said: "Now, the sole question before the justices was whether the applicant permitted his premises to be a brothel. What is the meaning of permitting the premises to be a brothel? I think my brother GROVE has given a very apt definition, namely, that it is permitting people of opposite sexes to come there and have illicit sexual intercourse. That is a very complete and satisfactory definition of the whole matter."'

Avory J added *(ibid)*:

> 'There was in this case evidence upon which the only reasonable inference was that these men and women were resorting to these premises habitually for the purpose of having illicit sexual intercourse, and of this, on the evidence, it is not really disputed that the respondent must have known.'

I accept the evidence that the three police officers gave in this case. In my judgment, it leads overwhelmingly to the conclusion that the covenant in the lease and the conditions in the licence were broken by the first defendants, since, between 2 and 6 March 1945, the premises were used as a brothel in the sense in which that expression has been referred to, and is referred to, in the courts, and were, therefore, used in such a way as to violate the obligations binding on the first defendants as assignees of the lease and licensees under the licence.

That being my clear conclusion on the first issue, *viz*, that there was a breach of covenant, the next matter which arises is the question whether the plaintiffs served a notice under the provisions of the Law of Property Act, 1925, s 146, so as to comply with statutory necessities. There has been much discussion at the Bar in regard to the wording of s 146(1) and, therefore, I think it necessary to read the words of the sub-section:

> 'A right of re-entry or forfeiture under any proviso or 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 *(a)* specifying the particular breach complained of; and *(b)* if the breach is capable of remedy, requiring the lessee to remedy the breach; and *(c)* in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.'

The notice that was served on behalf of the plaintiffs was dated 3 August 1945. The breach complained of is the breach pleaded in the statement of claim, the breach which I have already said I find to be established. The notice does not contain any requirement that the breach should be remedied. It is, therefore, submitted on the part of the first defendants that the notice is not a good notice and that a right of forfeiture cannot be exercised, for it is said by counsel for the first defendants that the breach was one capable of being remedied. It is said by counsel for the plaintiffs that this breach was not one capable of being remedied. I think it is clear that the phrase “remedy the breach” cannot mean, and was not intended to mean, that the breach was to be wiped out, for that clearly would be an impossibility. That which has taken place cannot be obliterated as an event or as a fact. Counsel for the second defendants submitted that a useful way in which to approach the phrase “remedy the breach” would be to consider whether the consequences of the breach were capable of remedy.

I think that the section is precise in its language and that it is necessary to look at the facts of each case where there has been a breach of covenant and to say whether the breach was, or was not, capable of remedy. I do not think that it would be desirable to lay down or suggest that there are certain categories, or groups, or types, of breaches of covenants which are incapable of remedy, and I propose to approach the facts in this case and to consider them and them alone. I think I am entitled to get as much guidance as possible from *Rugby School v Tannahill*, a decision of the Court of Appeal which is, of course, binding on me. In that case a lessee committed a breach of her

tenancy not to use the premises for illegal or immoral purposes. The notice that was served on her did not require her to remedy the breach or to make compensation in money, and it was held by the Court of Appeal (approving the decision of MacKinnon J but not entirely indorsing everything that he said) that ceasing to commit the breach was no remedy, that the breach was not capable of remedy, and that, consequently, an omission to require it to be remedied did not invalidate the notice. Greer LJ said ([1935] 1 KB 90, 91):

> 'The first point is, whether this particular breach is capable of remedy. In my judgment MACKINNON, J., was right in coming to the conclusion that it was not. I think perhaps he went further than was really necessary for the decision of this case in holding that a breach of any negative covenant—the doing of that which is forbidden—can never be capable of remedy. It is unnecessary to decide the point on this appeal; but in some cases where the immediate ceasing of that which is complained of, together with an undertaking against any further breach, it might be said that the breach was capable of remedy. This particular breach, however—conducting the premises, or permitting them to be conducted, as a house of ill-fame—is one which in my judgment was not remedied by merely stopping this user. I cannot conceive how a breach of this kind can be remedied. The result of committing the breach would be known all over the neighbourhood and seriously affect the value of the premises. Even a money payment together with the cessation of the improper use of the house could not be a remedy.'

Maugham LJ said *(ibid*, 93, 94):

> 'The second thing to be gathered from the section is that the breach must be capable of remedy within a reasonable time. The lessor is not to be kept out of his right of action for an unreasonable time. If, for example, the breach is of such a character that many months or perhaps years must elapse before the breach can be remedied to the satisfaction of the lessor, such a case would not be as regards remedy within the section at all. The importance of that in this case is that merely ceasing to use the premises for an illegal or immoral purpose is not in any true sense to remedy the breach. The phrase in the covenant is of course negative; it is not to permit the premises to be used for an illegal or immoral purpose. In a sense the lessee ceases to permit the premises to be used for such a purpose if during a week she complies with the covenant; but that is not sufficient to establish that in the particular case the breach is capable of remedy. The use of the premises for a long period for an immoral purpose seriously tends to damage their value and to give them a bad name, as indeed is shown by the common designation of such premises—namely, a house of ill-fame; and merely ceasing for a reasonable time, perhaps a few weeks or a month, to use the premises for an immoral purpose would be no remedy for the breach of covenant which had been committed over a long period.'

The matter which I have to consider is whether, on the facts of this case, the breach was capable of remedy. The breach was in March. The notice was served in August, but that, presumably, was because, after the proceedings in court as a result of the police raid on 11 March 1945, there were appeals, and, doubtless, the result of those appeals, which were heard in July, was awaited before the notice was served. In any event, no complaint is made by anyone that the notice was not served earlier. Was this breach a breach capable of remedy, which means a breach capable of remedy within a reasonable time of the date in August on which the notice was served? There were the convictions of two individuals, and the dismissal of their appeals. Inevitably there would be some publicity, though I cannot assess the amount of it in regard to those proceedings, but, in my judgment, the breach was of such a nature that it must cast a stigma on the premises and impose a taint which can only be removed if those who have brought it about are no longer associated with the premises. There are, of course, always the beneficent effects of time in effacing the memory of unhappy and unpleasant things, but this was not, in my opinion, a breach which was capable of remedy within a reasonable time. I think I am entitled, when considering this matter, to have regard to the whole amenity of the neighbourhood and what must be the repercussions of events of this kind and their effect on property in the neighbourhood. Under the contract, which existed between the plaintiffs and the first defendants, the first defendants covenanted not to use the premises in the way in which they have used them. Merely desisting from the wrongful user or not continuing to commit further breaches is not, in my judgment,

on the facts of this case, a way of remedying the breach. In my view, the conclusion on this second issue that arises is that these breaches were not capable of remedy and that there was no necessity for the plaintiffs to have called on the first defendants to have remedied the breaches of which the plaintiffs complain. It follows, therefore, that the notice that was given was a valid and sufficient notice.

The result of these findings, unless the powers of the court can successfully be invoked, is that the plaintiffs are entitled to re-enter these premises, but the first defendants ask the courts for relied under s 146(2) of the Act of 1925, which reads:

> 'Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.'

Without reference to any of the authorities on this matter, a mere reading of those words shows that the discretion in the court is very wide, and, indeed, is unfettered, subject to this, that it must be exercised judicially and having regard to all the circumstances. [His Lordship reviewed the evidence on this part of the case, and continued:] I have no doubt that in March 1945, many proprietors of hotels had particular difficulties. Clearly a man who runs a hotel cannot be responsible if, without his knowlede, unmarried couples resort to his hotel to have illicit intercourse. I think it is right to make every possible allowance for those who were running hotels during the difficult days of the war. When all these matters are taken into account I think the inquiry is raised: Did or did not those who were running this hotel know what was happening? Did they or did they not tolerate what was happening? Did they or did they not profit deliberately and without regret as the result of what was happening? I think it is reasonable also to bear in mind, that although the breaches complained of are stated to refer only to five days. When considering the general circumstances it would be unreasonable to say that one must have regard to those five days only. It further seems to me that the sort of events that were occurring on 11 March and between 2 and 6 March could not have taken place on the scale on which they were taking place without many of the people responsible for running the hotel, who were managing it and deriving their income from it, having a pretty shrewd idea what was happening and of the source of a good many of their receipts. I have no doubt that this hotel was conducted for a great many years quite properly, but, nevertheless, for the reasons that I have stated, it seems to me that it would not be right for me to grant relied in this case on any terms which permitted the first defendants to continue, beyond some reasonable time, to be in occupation.

Judgment for the plaintiffs against the first defendants. The question of relief to the second defendants to be dealt with later.

Solicitors: *Trower, Still & Keeling* (for the landlords); *Kerly, Sons & Karuth* (for the tenants); *Wright, Son & Pepper* (for the mortgagees).

F A Amies Esq Barrister.