IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA - GHANA

CIVIL APPEAL
NO. H1/240/04.
25TH FEBRUARY, 2005.

CORAM - AKOTO-BAMFO [PRESIDING]
ASARE KORANG, JA
OSEI, JA

P.Y. ATTAH & SONS LTD.
B. 37/1 GRAPHIC ROAD
ABOSSEY OKAI, ACCRA **… PLAINTIFF/APPELLANT**

V E R S U S

KINGSMAN ENTERPRISE LTD.
B. 37/1, ABOSSEY OKAI, ACCRA **… DEFENDANT/RESPONDENT**

J U D G M E N T

OSEI, JA - This is an appeal brought by the plaintiff/appellant (hereinafter referred to simply as Plaintiff) against the judgment of the High Court Accra dated 15/04/04.

In his writ of summons, the plaintiff claims against the defendant/respondent (hereinafter referred to simply as defendant), as follows:-

"(i) Declaration that upon its true and proper construction, the agreement dated 18th November 1993 made between the plaintiff as sub-lessor of the one part and the defendant as sub-lessee of the other part whereby the plaintiff granted to the defendant a portion of the land – comprised in the head-lease dated 11th May, 1972, made between the Government of Ghana as Lessor of the one part and the plaintiff as Lessee of the other part constitute a sub-lease and not an assignment by the plaintiff of its leasehold interest in the said portion of the land to the defendant." (Emphasis mine).

"(ii) Rectification of the said agreement by addition to the habendum "less one day" or less such other period as will make the agreement reflect the true character of a sub-lease.

(iii) Declaration that under the said agreement the defendant is entitled

to construct on the portion of land granted to it only one six roomed store building with toilet facilities and that the ground floor building already constructed and occupied by the defendant is the building which was contemplated under the agreement."

(iv) Declaration that under the said agreement, the defendant has no right to put up without the prior consent in writing of the plaintiff of any new building, erection, or addition to the store building already constructed by it on the ground floor and that the first floor building currently being put up by the defendant above the ground floor building is wholly outside the scope of authority given by the agreement to the defendant to build on the land except with the prior consent of the plaintiff.

(v) Recovery of possession of the said first floor building currently being put up by the defendant and an order of perpetual injunction restraining the defendant from continuing with the construction of the said first floor building or otherwise having anything to do with it."

(vi) Exemplary damages for trespass to the space above the ground floor building occupied by the defendant.

(vii) Ejection of the defendant from the plaintiff land for breach of covenant contained in clause 3(1) on its part to be observed.

In response thereto, the defendant filed the following counterclaim:-

(a) Declaration that upon its true and proper construction the agreement dated 18th day of November 1993 and made between the plaintiff and defendant whereby the plaintiff granted to the defendant a portion of the land comprised in the head-lease dated 11th day of May 1972 made between the Government of Ghana as lessor the of the one part and the plaintiff as lessee of the other part constitutes an assignment and not a sublease {Emphasis Mine}.

(b) A declaration that the defendant is entitled to collect rent from the plaintiff for the one store ceded to it."

(c) An order that 1st plaintiff should pay all arrears of rent from the 18th

day of November 1994 to the 17th day of December 1997.

(d) Mense profits.

(e) Perpetual injunction to restrain the plaintiff, his servants, assigns, workmen howsoever, from interfering with the defendants' possession of the portion of land assigned to it."

Issues set down for trial at the summons for direction were as follows:-

(i) Whether the transaction which gave rise to the preparation of the of the agreement dated 18th November 1993 was one for the sub-lease or an assignment by the plaintiff of its interest in a portion of the land comprised in the head-lease with the Government to the defendant. (Emphasis Mine).

(ii) Whether the defendant paid for the interest to be granted to it by the plaintiff the amount of ¢135,413,900 and USD 13,551 as consideration for an assignment or only 452, million as premium or goodwill for acquisition of various rights in the portion of land, the subject of the agreement dated 18th November 1993."

(iii) Whether the agreement contains a mistake or error on the part of the Solicitor who prepared it not consistent with the common intention of the plaintiff and the defendant.

(iv) Whether or not the said agreement must be rectified.

(v) Whether the first floor structure put up by the defendant above the ground floor stores was constructed lawfully."

(vi) Whether the plaintiff is entitled to its claim.

(vii) Whether the defendant is entitled to its counter-claim."

One cannot fail to observe that the central issue mounted before the Court below and at this Court is whether or not the agreement dated 18th November 1993 made between the plaintiff and defendant herein is a sublease between them (plaintiff and defendant) or an assignment to defendant. Let us see what the Learned Trial Judge made of it at the end of the trial (having evaluated the evidence adduced before him). He said "the law on leases and subleases is very clear. If a tenant (a lessee) assigns his lease, he grants his whole estate to the assignee, thus putting the assignee in his shoe as immediate

tenant of the landlord, ie. head-lessor. If a tenant grants a sublease, he does not cease to be tenant since he retains his estate.

In that case, it is said that the tenant has merely carved out of it a lesser estate in respect of which he owns the immediate reversion. It is said that the assignment of a lease transfers an estate but creates no new tenure; the grant of a sub-lease creates a new tenure between a sub-lessor and sub-lessee. The distinction between an assignment and sub-lease is one of substance not one of form. And assignments which result from sub-leases of a tenant's whole interest are brought about by operation of law." The Learned Trial Judge referred to the case of **MILMO V. GARRARES {1946} KB 306** and continued:

"Thus if A with less than three years of his unexpired term purports to grant a sub-lease to B for three years this operates as an assignment of the residue of the term.

Simply put, a sub-lease by deed for a term equal to or greater than the residue of the tenants (or lessee's) own term operates as an assignment of his term and not a sub-lease. It does not matter if the deed is referred to as a "sub-lease," (cited **BEARDMAN v. WILSON [1868] LR 4 CD 57 and HALLEN v. SPACTH [1925] AC 684, 687** and says in respect of Exhibit B. (the controversial exhibit) as follows:-

"In the instant suit, Exhibit B is very clear and unambiguous. The "sub-lease" agreement grants to the sub-lessee:

"To hold unto the sub-lessee for all the residue now unexpired or the said term of 50 years, granted by the lease subject to henceforth to the payment of the rent and the covenants agreements. The unexpired period of 29 years is what Plaintiff Company will be deemed to have assigned to Defendant Company under Exhibit B."

I must admit and appreciate that the learned trial Judge's statement of the law as applicable to the instant case, (and as applied) is remarkable. I only wish to highlight what was said in the case of BEARDMAN V. WILSON [1868] LR 4 CP 57 to emphasize the applicable principle. BOVILL CJ in that case, pronounced:

"I am of opinion that there ought to be no rule." As far back as the year 1818 it was held in **PERMENTER V. WEBBER** that where a lessee underlets for the whole residue of the term, it amounts to an assignment and it was there treated as established

law. In a note to Shepherd Touchstone page 266 8th Edition the law is stated in the same way; and it is in accordance with the usual practice of conveyancers.

In **WOLLASTON V. HELKEVIL** the same question again arose, the under-lease in that case being for a term exceeding that of the original lease; and after taking time to consider, **TINDAL CJ** delivering the judgment of the Court said: "the only question therefore is, whether if a lessee for ninety-nine years demises for a larger term, such demise operates in law as an assignment and we entertain no doubt but that for a very long period, the law has been held that it has such operation and may be so treated in pleading."

And in the same case **BYLES J** said:

> "I am of the same opinion. I have always understood that an under-lease of the whole term though in form a lease, acts as an assignment….." (Emphasis Mine).

In his Notice of Appeal filed on 11/4/03 Counsel filed two main grounds of appeal namely:-

(i) The trial Judge erred in holding that, on the true and proper construction of the document dated 18th November 1993 agreed by the parties, is an assignment and not a sub-lease.

(ii) The trial Judge erred in dismissing the plaintiff's claim and allowing the counterclaim. These appear on page 220 of the record, but Counsel chose to argue the grounds on page 16 of his written submission filed on 29/2/04 and which are as follows:-

"Ground one:-

The trial Judge misdirected himself in law for failing to recognize that the case of **MILMO V. CARRARES** on which he relied to construe the instrument dated 18th November 1993 as an assignment is distinguishable from the facts of this case because **MILMO V. CARRARES** involved an instrument creating an assignment by operation of Law whereas the instrument involved in this case created a consensual assignment based upon agreement of the parties.

Ground Two:-

"The trial Judge erred in law in failing to appreciate that in construing an instrument to determine whether it constitutes a consensoual assignment or a sublease the Court has to find out the intention of the parties expressed in the document itself as gathered from the entire document and not to pick on isolated phrases and construe them."

Counsel then decided to argue the two grounds together thus "These two grounds will be argued together as one ground to the effect that the learned trial Judge failed to appreciate that the problem in **MILMO V. CARRARES** was to find out the legal effect of an instrument without regard to the intentions of both parties expressed in it whereas in this present case the problem is to construe the instrument to discover the consensual intention of both parties expressed in it as to whether they meant an assignment or a sub-lease. Counsel argued vehemently and in appreciable detail as to what was required and expected of the learned trial Judge. Most important, Counsel claimed that "the trial Judge was therefore called upon in his judgment to construe that instrument to determine whether it reflected a common intention on the part of the parties to create a sub-lease or an assignment. With respect, I do not share that view.

The trial Judge, in my view was only called upon, to look at Exhibit B (the document dated 18/11/93) and find from that document what the parties have actually done therein and what the law will conclude on it. So as the trial Judge found that the parties had conveyed the entire unexpired term, it was not for the trial Judge to have looked elsewhere for evidence to discover or determine the common intention of the parties. The principle the trial Judge was applying was that if a lessee sub-lets the whole of his term to another, that conveyance operates as an assignment whatever the state of mind of the parties involved.

I am satisfied that the learned trial Judge was right in coming to the conclusion that the agreement (Exhibit B) is an assignment, and not a sublease. Accordingly, I affirm the judgment and disallow the appeal.

J.A. OSEI
JUSTICE OF APPEAL

I agree. **V. AKOTO-BAMFO[MRS]**
JUSTICE OF APPEAL

I also agree. **A. ASARE KORANG**
JUSTICE OF APPEAL

COUNSEL - MR. BOB SENYALAH LED BY THOMAS HIYHU holding brief For OPOKU ADJAYE for the Defendant/Respondent.

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