COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Appeals Division

2018/APP/sts/11

IN THE MATTER of the Arbitration Act 2009

R. E. PROPERTIES LIMITED **Plaintiff**

AND

HARRY LOUIS **Respondent**

BEFORE: **The Honorable Mr. Justice Keith H. Thompson**

Appearances: **Mr. Donovan Gibson of Counsel for the Applicant**

Mrs. Giahna Soles-Hunt of Counsel for the Respondent

Hearing Dates: **27th February, 2019**

22nd March, 2019

FACTUAL MATRIX:

[1] This is an appeal from the Arbitrator's ruling delivered on 20th March, 2018 by Notice of Motion filed 12th April, 2018.

[2] The grounds of appeal are set out in the Notice of Motion as being;

(i) The Arbitrator erred in law when she determined that the acts of Ms. Pratt at Lot 14 on the 3rd September, 2015 were not the acts of a person claiming under the Plaintiff as Ms. Pratt was not a successor in title to the Plaintiff nor did she actually have the authority from the Plaintiff to do those acts.

(ii) The Arbitrator erred in law when she failed/refused to find that the Respondent breached clause 3 (1) of the Lease Agreement which is the Covenant for peaceful and quiet enjoyment.

[3] In general support of the above the Appellant says;

(a) The Arbitrator decided that even though Ms. Pratt was not paid, the fact that she executed a conveyance she divested herself of any interest in Lot 14.

(b) The Arbitrator failed to take into consideration that the Conveyance was not effective as no consideration was passed and the Conveyance was not registered.

[4] In furtherance of (b) above the Appellant puts forward the point that merely signing a conveyance did not result in Ms. Pratt divesting her interest as she would not have been able to secure an order for vacant possession if her claim was for a debt due.

(c) **It was conceded that the Respondent did not authorize Ms. Pratt to take possession but the law permitted it as a direct consequence of Mr. Louis' default.**

THE RESPONDENT'S CASE:

[5] The Respondent's position is that the award dated 20th March, 2018 made by Retired Justice Claire Hepburn, the Arbitrator, be set aside and/or remitted for reconsideration for the Arbitrator together with the Court's opinion on a question of law, subject of this appeal. The Respondent is also seeking costs of and incidental to this appeal be paid by the Respondent. (I take this as a mistake).

[6] The Respondent submits that the Court ought to refuse the Applicant's appeal and the that the ruling ought to stand on the following grounds;

(a) This court does not have the jurisdiction to hear an appeal on questions of fact or questions of mixed fact and law.

(b) There is no basis upon which to interfere with the ruling.

(c) The Respondent did not breach the covenant for quiet enjoyment based upon the evidence before the court.

THE ORDERS:

[7] An Order was filed 21 September, 2011 ordering the Respondent to pay over to the Petitioner her interest in Lot No. 14, Ocean Club Estates, "The ....) Paradise Island.

[8] Due to non-compliance of the order, a subsequent order was made and filed 25 February, 2015 wherein, the Respondent was ordered to pay within forty (40) days the balance of the sum of money award to the Petitioner in action 2007/FAM/div/575.

[9] The Respondent willingly and knowingly entered into a lease agreement with an option to purchase with the Applicant in the instant matter but never disclosed to the Applicant that the Lot was subject to several court orders. The critical order being the Order dated 18 February, 2015 and filed 25th February, 2015

[10] This particular order ordered;

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FAMILY DIVISION

BETWEEN

2007

FAM/DIV/575

TAMMY PRATT- LOUIS

Petitioner

AND

HARRY H.A. LOUIS

Respondent

ORDER

Before His Lordship the Honourable Mr. Justice Gomez

Dated the 18th day of February A.D., 2015

UPON HEARING K. Miles Parker of Counsel for the Petitioner there being no appearance by the Respondent;

AND UPON READING the Affidavit of the Petitioner, Tammy Pratt-Louis, filed herein on the 29th day of June, A.D. 2014;

IT IS ORDERED:

1) That the Respondent do within forty (40) days of the date hereof, pay over to the Petitioner the sum representing the balance due to the Petitioner from the Respondent pursuant to the Order of the Court filed herein on the 21st day of September A.D. 2011, whereby the Respondent was ordered to pay to the Petitioner the sum of $1,025,307.00 in default of which and without further accounting the Petitioner shall be and is hereby authorized to do and perform all of the following acts with respect to Lot No. 14 Ocean Estates, Paradise Island, Bahamas;

2) To sell the said Lot 14 Ocean Estates by public or private auction or contract with power to sign such Deeds and documents as may be required to effectuate such contracts and the Petitioner's signature alone shall be competent to bind both the Petitioner and the Respondent and to effectively pass all estates both legal and equity in and to the said lot to a purchaser, and to apply the proceeds of such sale as follows:

a) To all legal encumbrances on the said lot which rank in priority to the Respondents indebtedness to the Petitioner pursuant to and in accordance with the said Order of this Court filed herein on the 21st day of September A.D. 2011.

b) To the satisfaction of the balance of the Respondent's said indebtedness to the Petitioner pursuant to the said Order of this Court filed herein on the 21st day of September, A.D. 2011 plus interest at the statutory rate as well as:

i) The costs of and occasioned by this application the same to be taxed if not agreed.

ii) The costs of and occasioned by the sale hereby ordered inclusive of the cost of advertisement and auctioneer's fees or commission.

iii) All rates taxes utilities outgoings and other Vendor's cost (if any) due and payable with respect to the sale of the said lots which shall be due and payable at the date of completion of the said sale.

iv) The balance (if any) after satisfaction of items 1(b)(i) through 1(b)(iii) hereof to be paid to the Respondent, Harry H. A. Louis.

3) Should there be no agreement between the parties as to the sum due from the Respondent to the Petitioner at the date of execution of the contract for sale of the said lot hereby called for, the Petitioner shall be at liberty to apply to the Court for a determination of the said amount.

4) The Respondent do forthwith deliver up unto the Petitioner vacant possession of the said Lot 14, Ocean Estates.

DATED this 18th day of February, A.D. 2015

REGISTRAR

[11] The Applicant was never made aware of the said order, which would have vested the Petitioner in the divorce matter with an equitable interest. Pursuant to the lease, the Applicant paid to the Respondent the sum of $400,000.00.

[12] A writ of possession was obtained and filed on 3 September, 2015. Pursuant to the Writ of Possession, the Petitioner took possession of the lot until she was paid the balance owed to her.

[13] There was an extended period of time between the Order of 25 February and the Writ of Possession.

[14] As a result of the possession by the Petitioner in the divorce proceedings the Applicant ceased making payments inclusive of rent and other expenses during the possession period and only resumed payments after the Petitioner was paid and the Respondent regained possession.

[15] The relevant question here is whether in law the Respondent has breached the Applicant's quiet enjoyment of the leased premises.

[16] In the authoritative book **"THE LAW OF REAL PROPERTY" By R.E. MEGARRY Q.C. and H.W.R.**, Third Edition, the authors state at page

681, under Chapter 11 Leases and Tenancies and under the sub-topic "Rights and Duties of the Parties under a Lease or Tenancy."

(b) ***Effect.*** **The covenant gives the tenant the right to be put into possession of the whole of the premises demised, and to recover damages from the landlord if the landlord, or any other person to whom the covenant extends, physically interferes with the tenant's enjoyment of the land. The covenant is not one for "quiet" enjoyment in the acoustic sense, the lessor undertakes not that the tenant will be free from the nuisance of noise, for which the tenant has the ordinary remedy in tort, but that he will be free from disturbance by the exercise of adverse rights over the property or over other neighbouring land occupied by the lessor or some person for whom he is responsible. For example, the covenant will be broken if a lessor who has reserved the right to work the minerals under the land demised causes a subsidence of the land by his mining activities, and similarly if the landlord tries to drive out the tenant by persistent threats, or inflicts physical discomfort on him by cutting off his gas and electricity.**

(c) ***Reduction of enjoyment***: **Usually there is no breach of the covenant unless the tenant suffers some physical interference with his enjoyment of the property. Thus where a landlord erected an external staircase which passed the tenant's bedroom windows and so destroyed his privacy, the tenant's action for damages failed. Nor can punitive damages be given if the landlord's conduct, though a breach of contract, does not amount to a tort; in such cases the effective remedy is an injunction.**

Independently of this covenant, it is a criminal offence for any person to interfere with the peace or comfort of a residential occupier or his household or to withdraw services reasonably required for residential occupation if the intention is to drive him out of the premises or to prevent him from exercising his rights. It is similarly an offence for any person unlawfully to deprive the residential occupier of his occupation of any of the premises unless he proves that, with reasonable cause, he believed that the residential occupier had ceased to reside in the premises.

(d) ***Acts of others***: **The scope of the landlord's covenant for quiet enjoyment may be contrasted with that of the**

covenant for quiet enjoyment ordinarily given by the vendor of a fee simple. The landlord's covenant extends to his own acts, whether rightful or wrongful, but to only the rightful acts of persons claiming under him. For the wrongful acts of persons claiming under the landlord the tenant has his remedies against them, but for their rightful acts under any title derived from the landlord the landlord is made answerable by his covenant, for it is through him that they are enabled to disturb the tenant. For example, the tenant of a farm suffered damage from the flooding of drains on two neighbouring farms; all the farms were held by tenants of one landlord, but the flooding from one farm was caused by defective drains properly used and from the other by sound drains excessively used. The landlord was held liable for the former but not for the latter, since only in the former case was the interference caused by his tenant's lawful act. A landlord, it may be added, does not use the words "as beneficial owner' when granting a lease; and even if he did, these words would not import the covenants for title applicable to a conveyance."

[17] In the case of **MALZY V EICHHOLZ [1916] 2 K.B. 308, LORD COZENS-HARDY M.R.** stated at paragraphs 313 – 317;

"The first point raised is that there was an express covenant for quiet enjoyment in the usual form in the lease to Mr. Malzy, the plaintiff, and that that has been broken by Mr. Eichholz, who has done acts which fairly amount to or which the jury were entitled to say were done with his knowledge and consent. Then it is said, even if it is not within the express covenant, there was an implied covenant for quiet enjoyment. I pass that by at once by saying that when in a deed you find an express covenant dealing with a particular matter as to the demised premises there is no room for an implied covenant covering the same ground or any part of it. That is very old law. An expression of doubt upon that would be a fatal thing to the whole law of covenants both express and implied.

The very object of inserting a covenant for quiet enjoyment in a conveyance of freehold or leasehold property is to get rid of the implied covenant which is found in the word "grant" or "demise", whichever it may be. Then it is said that if the express covenant does not go far enough you can fall back upon the implied covenant from the word "grant" or the word "demise. That proposition would be absolutely contrary to the uniform practice of all owners who deal with real property, and would, moreover, be contrary to the law which has been perfectly established for more than half of a century. I need not cite authority for the proposition. Then it is said there was a derogation from the grant. Now what

is the derogation? It seems to me to be nothing more or less than a statement of the same proposition, that there is a breach of the covenant for quiet enjoyment. Our attention has been called to the case of Grosvenor Hotel Co. v. Hamilton. (1) That was a perfectly different and a perfectly clear case. If I may respectfully say so. There was a covenant for quiet enjoyment. The lessor, not on the demised premises but on adjacent premises, caused a nuisance by working engines. That was not, of course, within the covenant for quiet enjoyment, because the covenant for quiet enjoyment extended to different matters. The fact that what he was doing on adjoining land derogated from his express grant was a matter which most legitimately and properly came into play, but was in no way intended, no could it be deemed, to affect the general law as to a covenant for quiet enjoyment. Then there is another point which was taken, and that was the neglect of Mr. Elchholz to prevent the nuisance. The learned judge in the course of the case held that there was no breach of the covenant for quiet enjoyment; he ruled also that there was no evidence that Mr. Elchholz had participated in any nuisance; but, notwithstanding those rulings, after hearing the evidence he put to the jury the questions which I have read. The only point which seems to me to create any difficulty in this case is what must a landlord not do if he wants to escape liability in respect of a nuisance really commenced by somebody else. I do not thing that as a proposition of law the matter

is what must a landlord not do if he wants to escape liability in respect of a nuisance really commenced by somebody else. I do not think that as a proposition of law the matter can be more accurately stated than in the case relied upon by counsel for the respondent, *Jaeger v. Mansions Consolidated*. (1) Mention is there made of an unreported case of *Harris v Bentley*, in which Lord Collins, then the Master of the Rolls, said this, "If the evidence showed acquiescence by the landlord carried to such a point as to found an inference that the landlord actively participated in the use of the flats for immoral purposes, possibly there might be a breach of the contract." The question in that case was under what circumstances the landlord might possibly be made liable for the use by one of his tenants of the flats for immoral purposes and Lord Collins there laid down that there must be such circumstances as to found an inference that the landlord actively participated In the use of the flats for immoral purposes. The same doctrine is laid down in the judgment of the same case. I apprehend there is no authority and no principle for holding a landlord liable under a covenant for quiet enjoyment – that is to say, that he had done anything which renders him liable to damages under the covenant in respect of quiet enjoyment – merely because he knows of what is being done and does not take any steps to prevent what is being done. There must be something much more than that. There must be something which can fairly amount to his doing the act complained of

complained of. Then it is said, just look at a number of things Mr. Eichholz did. In the first place he had no business to take out the window at all and lay the shop open to the street. Even if that were so, I do not think as between Mr. Eichholz and his superior landlord that would in any way avail the present plaintiff, Mr. Malzy. Then it was said, this auction room was such a risky business, almost notoriously one involving great noise, that he ought not to have allowed it, and ought not to have allowed it for the purpose of an auction room. It is quite a novel doctrine to me that permission by a lessee to use demised premises for a purpose which may or may not involve or create a nuisance is a wrong act on the part of the landlord, and that the landlord can be rendered liable merely because a person does carry on that business in such a manner as to create a nuisance, but this letting did not necessarily involve a nuisance. That is quite plain from the plaintiff's own evidence. He says there was no ground for complaint until the Dents came into possession. Then it is said, Oh, but you knew of it and you have been receiving the rent from Castiglione, which he could not have paid unless he got it from the Dents, and therefore you knew the business was being carried on, and that would amount to consent or assent – it is put both ways – to what was done, and rendered you, Eichholz, an active participator in the nuisance which was being carried on. That proposition, to my mind, has only be stated to show how fallacious it is. It

rendered you, Eichholz, an active participator in the nuisance which was being carried on. That proposition, to my mind, has only be stated to show how fallacious it is. It cannot be that a landlord who according to the settled authorities is not bound to commence any legal proceedings to abate a nuisance is in this position, that unless he does commence those proceedings he cannot recover any rent, or if he does receive the rent he is to be taken to have sanctioned everything that the wrong-doer has done. Then, putting it another way, it is said, in your lease to Castiglione you had power, whenever anything was done or was threatened to be done which might have imperiled the existence of your own lease, to enter upon the premises and abate what was objectionable and do what was necessary to secure your title. That again seems to me an extraordinary proposition, but if it be true it is a proposition which renders Mr. Elchholz a sort of trustee of that covenant for the benefit of Mr. Malzy. In my opinion that cannot be sustained. Then what is to be said to the answer to the third question; "Was the business so conducted with the knowledge and assent of the defendant Elchholz?" A. "Yes." I think there is no evidence whatever that it was done with the assent of Mr. Elchholz. The correspondence which we have shows from first to last he was complaining of it and was telling Castiglione that he ought to put a stop to it. In my view assent and knowledge are not sufficient unless you qualify it in a manner in which the learned judge has not

whether this was done by the authority or with the knowledge or assent of Mr. Elchholz they must consider what he could have done. That is not the way to test it. He was no more bound to enter into the premises under his power, or to enter without any such power and put the shutters up in the front of the shop, than he was bound to commence an action. That, to my mind, is the only point of difficulty in the case. The learned judge said, and obviously thought, it was a case of great difficulty, and he almost invited an appeal. Notwithstanding the very able and elaborate arguments which we have heard, I think the appeal must be allowed and judgment entered for the defendant Elchholz with costs.

[18] PICKFORD L.J. in the same case said at paragraphs 318 – 322;

"Now the question which arises is, is the defendant responsible for that? The plaintiff has got a verdict against Castiglione, and Castiglione does not appeal, and therefore, for what it is worth, the plaintiff retains that verdict. The defendant Mr. Elchholz does appeal, and what he says is that he is not legally responsible, whether he ought as a matter of common sense and morality to have taken steps to put an end to this nuisance or not. That is the question we have to decide. Now the first question which lies at the

threshold of the case is this; was this done by the defendant's authority? I do not think it is enough to say that it was done with his knowledge or consent, and I think in the very able argument of Mr. Haydon the word "consent" or Assent" was used sometimes in rather an ambiguous sense. I think what has to be proved is stated in the passage which has been read by the Master of the Rolls quoting the judgment of the then Master of the Rolls, Lord Collins, and also in this passage, in which the learned judge says in Jaeger v. Mansions Consolidated A (1) "The allegation is that some of the adjoining flats have, as I have said, been occupied for immoral purposes. Of course that would not in itself be enough to ground proceeding against the landlord, and it has been very properly admitted by the plaintiff's counsel in this case that unless they can adduce evidence from which a jury might fairly infer that the acts of the persons using these flats for immoral purposes can be construed to be the acts of the defendants in the sense that they authorized them – not merely that they did not stop them, but that they were in effect a party to them – they cannot pray against them, as giving a cause of action, the fact that these premises are conducted and used for immoral purposes." Now that, of course, is a statement of the law by which we are bound, and if I may say so without disrespect, in my opinion it is an absolutely correct statement of the law, and therefore, unless the consent or knowledge amounts to making the defendant in effect a

party to the acts, it is not sufficient to make him liable. The sheet-anchor of the plaintiff is, if I may say so, the finding of the jury to this effect. "Was such business so conducted with the knowledge and assent of the defendant Elchholz? – A. "yes." Now the first thing we have to look at is what was that conduct of the business with which the jury were dealing. As to that it seems to me there is no doubt. It was the conduct of the business by the fraudulent people, the Dents. The evidence not only of the plaintiff himself, but of all his witnesses, is that until the Dents took possession there was no nuisance and no disturbance at all. It was suggested that the authority given to Castiglione to conduct auctions upon the premises, coupled with the taking away of the whole of the front of the shop so as to make the auctions take place in an open space, was of itself sufficient authority for what took place. In my opinion that is not so. Authority to conduct a business is not an authority so to conduct it as to create a nuisance unless the business cannot be conducted without a nuisance. That was decided only the other day in the House of Lords in Pwllback Colliery Co. v. Woodman (1), and it is perfectly clear that you may conduct an auction, even in an open shop, without a nuisance. We need not travel outside the four corners of this case to find that out, because we have evidence from all the witnesses that it was so carried on until the Dents took possession and began to carry on these mock auctions. That was the conduct of the business to which the jury were

the witnesses that it was so carried on until the Dents took possession and began to carry on these mock auctions. That was the conduct of the business to which the jury were referring when they found that it was done with the knowledge and assent of the defendant Eichholz. The learned judge ruled, and in my opinion properly ruled, at the end of the plaintiff's case that there was no evidence that he participated in the nuisance. He says; "There is no evidence that he, the defendant, participated in the nuisance. The evidence is that he disapproved of it. I do not think it made him a participator simply because he has not put in force an implied covenant, if ever there is such a thing." That, in my opinion, was right. I do not think there was any evidence that he assented to it in such a way as to authorize or become a participator in the act in the sense in which the words ought to be used according to the judgment of Lord Collins in the case of which I have referred. But the learned judge did leave this question to the jury and they answered it against the defendant, and it is upon the answer to this question that so much stress has been laid; "Was such business so conducted with the knowledge and assent of the defendant Eichholz The jury found it was, but when I look at the summing-up I do not think the learned judge had any intention of departing from his ruling that there was no evidence that the defendant was a participator in it, because I find that the whole thing which he put to the jury as being evidence to show that it was done with his knowledge and

is quite true if you had done so the Dents would have knocked it down again; but you could have gone in under your power." The learned judge left that to the jury as evidence of knowledge and assent, and the jury found knowledge and assent upon that. If that finding is to be taken as meaning knowledge and assent such as to make the acts authorized by the defendant and the defendant a participator in them, in my opinion there was no evidence to support it. If it means, and I believe it only does mean, that it was done by his knowledge and assent – certainly with his knowledge and by his assent, because he did not take any steps to stop it – then that is not sufficient to satisfy the requirements of the passage in that judgment of Lord Collins which I have read. It was said, first, that authorizing auctions at all was sufficient to make the defendant responsible for this nuisance. I have pointed out that in my opinion that is not so. Then it is said he knew it, and although he remonstrated he did not mean it, but meant them to go on all the time, and although Castiglione said he was going to stop it the defendant knew quite well that he was not, and that the defendant knew quite well that he could not get his money from Castiglione unless these mock auctions did go on. All I can say is those are only suggestions. I cannot find that there is any evidence of them. It is q2uite true that the defendant did receive his rent. He received his rent from Castiglione, and he received his rent from Castiglione at the same time that Castiglione was

them. It is quite true that the defendant did receive his rent. He received his rent from Castiglione, and he received his rent from Castiglione at the same time that Castiglione was assuring him that this nuisance was going to be put a stop to. I cannot see that that is evidence that he was authorizing the nuisance to be carried on. I think that some of this argument proceeds upon this, that Mr. Eichholz's conduct was very suspicious, and the jury may have doubted his bona fides, and therefore they were justified in finding against him. Now that is an argument which is sometimes used, but I think it is necessary to point out that the fact that there is reason to disbelieve what a witness says does not make evidence against him. Here he said nothing in the witness-box. He only said it upon paper. If there is evidence against a man, the fact that he is not called, or you do not believe him if he is called, may be a reason for accepting that evidence even though slight, but it does not make evidence, and in this case, in my opinion, there was no evidence. I do not think the receipt of the rent under those circumstances was evidence, and I do not think that the omission to take steps to stop what was going on, not by his assent, but by the act of somebody admitted by his assent, was sufficient to show that he was a participator in the sense which I have explained If that is so then it seems to me there was no breach of the covenant for quiet enjoyment. He did nothing, and nothing was done by anybody claiming to do the act by his authority, contrary to the covenant for

another way. It is said there arises from the relationship of these parties an implied obligation on the part of the defendant to do whatever he could do short of bringing an action to prevent any disturbance of the business carried on by the plaintiff. That argument is based upon this, that there is in the lease to the plaintiff, as I have already said, a covenant by the plaintiff that he will carry on this business as a restaurant. From that there arises, it is said, an implied obligation on the lessor not only not to interfere with the carrying on of the business as a restaurant by the plaintiff himself, but not willfully to permit or surer anything which would prejudice the tenant in the fulfilment of his obligations. I fail to grasp the exact meaning of "willfully permit or suffer." If it means a deliberate act to authorize what is done, then I think there is such an obligation in all probability; but if the word "willfully" is discarded, as I think it must be, and it merely means "permit or suffer," then I cannot see that any such obligation is involved. It does not seem to me that it imposes an obligation upon the defendant to use all the powers that he may have under any agreements with other persons for the benefit of the plaintiff. That is what it would amount to in this case. The right of compelling him to bring an action is repudiated – that is not contended; but it is said that as he had a right to enter upon Castiglione's premises in order to repair anything which might be a breach of the argument with his head landlord, and as the opening of the whole of the front

enter upon Castiglione's premises in order to repair anything which might be a breach of the agreement with his head landlord, and as the opening of the whole of the front of the shop was such a breach, it was obligatory upon him to do so, and the plaintiff could compel him to bring an action against him if he did not, or to enter upon these premises and put up the front of the shop again. I do not think that any such obligation can be implied from the mere covenant which he exacted from the plaintiff to carry on the business as a restaurant."

[19] Also in the same case Neville J said at paragraphs 323 – 324;

"Neville J. I am of the same opinion. It appears to me that the plaintiff could only succeed on one of two grounds, either on the ground that the defendant committed a breach of the express covenant for quiet enjoyment contained in the lease, or that what he has done amounted to a derogation from his grant. I think in either case authorization or participation in the act done by the defendant was essential to render him liable. It appears to me that knowledge and assent by no means necessarily amounts to authorization. If the finding of the jury was intended to indicate authorization – I mean the finding with regard to knowledge and assent of the defendant Eichholz –

clearly no authorization by the defendant Eichholz in his lease to Castiglione of the nuisance that was committed, nor do I think that there was any evidence of authorization proved. Now the next point made is this; it is said that inasmuch as there was a covenant on the part of the lessee to carry on the business of a restaurant keeper, that involved by implication some reciprocal covenant on the part of the lessor. I need not consider what the terms of the covenant were supposed to be, because in my opinion no such covenant can be implied. I think that such a suggestion is entirely novel, and I think it would be extremely unfortunate if the Courts were to recognize any such implication against the covenantor. One word about the receipt of the rent. It has been suggested that in some way the receipt of rent amounted to an act on the part of the defendant Eichholz which rendered him liable to the plaintiff in respect of the nuisance that existed. I think obviously the receipt of rent could only be material in case it was the duty of the defendant Eichholz to bring an action against his lessee, Castiglione, to eject him, because the only effect of the receipt of rent in this regard would be that it would be a waiver, or might be a waiver, of past infringements of the covenant, and therefore, Eichholz might have lost an existing right to sue Castiglione in ejectment, but the moment you come to the conclusion I have come to, that there was no obligation whatever on the part of the defendant to sue, it is quite clear that the abandonment of

moment you come to the conclusion I have come to, that there was no obligation whatever on the part of the defendant to sue, it is quite clear that the abandonment of the right to sue could not be material to the matter which we have to consider."

[20] There is also the case of MATANI V NATIONAL PROVINCIALBANK LTD. [1936] 2 All E.R. 633 the facts of which were:

"In 1925 the whole of certain premises were demised to the defendant bank with a restriction against alteration without the consent of the lessor. In 1933 the bank demised the second and third floors of the premises to the plaintiff with the usual covenant for quiet enjoyment and to perform and observe the covenants in the head lease. In 1934 the defendants, the Elevenist Syndicate, wished to take the first floor of the building and for this purpose extensive alterations were necessary. The bank obtained the consent of the head lessor to the alterations subject to the consent being obtained of all the sub-lessees, and the bank subsequently gave a similar consent subject to the same terms and conditions. The plaintiffs consent was never obtained. The Elevenist Syndicate, however, proceeded to instruct contractors to carry out the alterations, and, no proper precautions being taken, the plaintiff's consent was

plaintiff suffered damage by reason of the dust and noise caused by such building operations. The plaintiff brought an action for damages for breach of the covenant for quiet enjoyment, nuisance and trespass.

Held – (i) as the consent to the alterations being carried out was subject to the plaintiff's consent being obtained, and this was never obtained, the position was that there was no proper consent to the alterations being effected.

(ii) the bank's consent being subject to the consent of the plaintiff, which was not obtained by the Elevenist Syndicates, there was no breach of the covenant for quiet enjoyment and no derogation from the grant.

(iii) although the Elevenist Syndicate had employed independent contractors, they were liable in damages for nuisance since the work to be done in its very nature involved a risk of damage being done to the plaintiff.

(iv) as the bank had covenanted with the plaintiff that it would observe all the covenants of the head lease and were in default upon this covenant, the appeal must be allowed without cost."

[21] It is clear from the authorities cited that a lessor cannot be held liable for a breach of the covenant for quiet enjoyment, by someone who is not a person claiming under the lessor. I further hold that a lessor will also not be liable for a breach of quiet enjoyment where the lessor has not given consent for any activities to be carried out by anyone carrying out such activities, which can be regarded as breaches of the covenant of quiet enjoyment.

[22] In the case of **STANLEY V. HAYES (1842) 3 Q.B.** 105:-

> **"Premises were demised for a term, at a certain rent, with a covenant by the lessor, that the lessee, paying the rent and keeping the covenants, might quietly occupy, possess and enjoy the demised premises without the let, suit, trouble, denial, disturbance, eviction, or interruption of the lessor, his heirs or assigns, or any other person lawfully claiming 'by, from, or under him': Held an entry and distress upon the premises for arrears of land tax, due at the time of the demise, was not a breach of this covenant, not being an entry 'by, from, or under' the lessor, <u>but made adversely to him</u>."**

[23] In **WOODFALL'S LAW OF LANDLORD & TENANT VOL. 1 1984** at page 534 the author states;

"Even distress for previous arrears of land tax due from the lessor was no breach of the usual qualified covenant, because the collector of the tax did not claim by, from or under, but against the lessor."

[24] This authoritative statement is very clear and clarifies the events which took place when Mrs. Pratt-Louis attended the premises of No. 14 Ocean Place with her attorneys and a locksmith. She was in no way whatsoever claiming by, from or under, but against in this case the landlord pursuant to a court order. It was against Mr. Louis.

[25] Finally, in the case of **KELLY V. ROGERS [1892] 1 Q.B. 910, [1891-94] All ER Rep. 974, LORD ESHER** said;

"I think that, even without any authority to that effect, no other meaning can possibly be given to the words of this covenant, according to the ordinary meaning of the English Language, than a meaning which does not make the defendant liable. The words "interruption by him" do not mean an interruption which has been caused because he has, by his conduct, given somebody else a right to turn the tenant out, and that is what has happened in the present case. The defendant, by his breach of covenant, gave the superior landlord the legal power to enter, and the superior landlord did enter. The actual interruption, therefore, was

made by the superior landlord and not by the defendant. That being so, let us see if the words used in this covenant can include an interruption by the superior landlord.

These very words, or words as nearly like them as possible, were interpreted, in *Stanley v Hayes* (1) many years ago, and it was held in that case that the words did not include an interruption, such as this, by the superior landlord. Even if we thought that case wrongly decided, as I do not, yet all leases since the year 1844 when it was decided have been drawn on the faith of that decision, and it ought not to be upset. It seems to me perfectly clear that the interruption in the present case does not come within any of the words of this covenant. The superior landlord is not a person claiming by, through, or under the lessor of the plaintiff. The proper interpretation of this covenant was legally settled long ago, and the plaintiff ought to have been nonsuited at the trial. This appeal must be allowed, and judgment entered for the defendant."

[26] I conclude with a quote from **THE LAW OF REAL PROPERTY BY RE: MEGARRY Q.C. and H.W.R. WADE** Third Edition at page 682 where the authors state;

[26] I conclude with a quote from **THE LAW OF REAL PROPERTY BY RE: MEGARRY Q.C. and H.W.R. WADE** Third Edition at page 682 where the authors state;

> **"The scope of the landlord's covenant for quiet enjoyment may be compared with that of the covenant for quiet enjoyment ordinarily given by the vendor of a fee simple. The landlord's covenant extends TO HIS OWN ACTS, WHETHER RIGHTFUL OR WRONGFUL, but to only THE RIGHTFUL ACTS OF PERSONS CLAIMING UNDER HIM. For the wrongful acts of persons claiming under the landlord THE TENANT HAS HIS REMEDIES AGAINST THEM, but for their rightful acts under any title derived from the landlord the landlord is made answerable by his covenant, for it is through him that they are able to disturb the tenant."**

[27] Therefore, having considered the submissions of both parties and having taken into consideration the relevant law and authorities, I hereby order that:-

1. "The Award dated 20 March, 2018 which was made by Retired Justice Claire Hepburn, the Arbitrator, be confirmed by this appeal as there is no basis to interfere with the said award.

3. Costs to the Respondent to be taxed if not agreed.

I so order.

Dated this 19th day of December A.D., 2019.

Keith H. Thompson

Justice