COMMONWEALTH OF THE BAHAMAS 1984

IN THE SUPREME COURT No. 493

Common Law Side

B E T W E E N

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H. PAUL HENDERSON

AND Plaintiff

J. ROBERT DOIG

AND 1st Defendant

ROBERT A. KRAMER

AND 2nd Defendant

GEORGE R. MYERS

AND 3rd Defendant

INTEREX LANDSCAPING & PROPERTY MANAGEMENT SERVICES LIMITED

4th Defendant

Mr. Elliott B. Lockhart for Plaintiff
Mr. K. Duncombe & Mr. F. Bethel for Defendant

J U D G M E N T

Georges, C.J.:

The plaintiff is a management consultant. He lives in London but spends part of the year at Sulgrave Manor, an apartment complex on Cable Beach. He first bought Apartment 501 in December 1979. He has since acquired the other apartment on the same floor so that he owns the entire floor. He says that his investment there could be assessed at a couple of million dollars.

The first defendant J. Robert Doig ("Doig") lives in Apartment 102 of Sulgrave Manor (Sulgrave). The apartment is owned by the second defendant, Robert A. Kramer ("Kramer") and Doig is his tenant. Kramer himself owns apartment 101 at Sulgrave in which he lives. George R. Myers ("Myers") in February 1983 purchased the residue of the term in respect of apartment 304. He does not live there but members of his immediate family do. The fourth defendant, Interex Landscaping & Property Management Services Limited ("Interex") is a limited liability company incorporated under the laws of the Commonwealth of The Bahamas. Myers was at one time President and

Director of Interex but he ceased to hold office apparently some time in 1983. Doig has at all relevant times been Vice President and Director of Interex, though he held no shares in it. Interex was wholly owned by Myers, his shares being held by nominees. There is no evidence of the date of incorporation of Interex but it would have been in 1978 or 1979.

Indisputably Sulgrave was conceived and developed as a first class co-operative residential apartment complex. Many of the owners are winter residents who live elsewhere and come to Sulgrave during the winter months.

The complex was developed by The Sulgrave Development Company Limited. That company undertook to convey the property to Sulgrave Management Limited for a nominal consideration at the expiration of 3 years from the completion of the building or whenever all the apartments had been leased whichever first occurred. The original leases were made between the Development Company and the Management Company of the one part and the tenant of the other part.

Each lease is subject to certain restrictions set out in the Second Schedule. The restriction in paragraph 1 of that Schedule reads:-

> "Not to use the demised premises nor permit the same to be used for any purpose whatsoever other than as a private dwelling-house in the occupation of one family, their guests and servants nor to use or permit the same to be used for any illegal or immoral purpose and not to do or permit any act or thing in or about the demised premises or in or about Sulgrave Manor which may be or become a nuisance or annoyance to the tenants or occupiers of any part of Sulgrave Manor."

It is the plaintiff's case that Interex carries on the business of retail landscaping and property management from apartment 102 which is occupied by Doig, its Vice President and Treasurer.

The principles of law governing such an issue can be very simply stated. It is a question of fact in each case and of degree whether the conduct complained of infringes the covenant. I understood it to be contended on the part of the plaintiff that because Sulgrave was intended to be and perhaps indeed is a first class residential corporative complex more exacting standards should be applied in determining whether or not there was a breach. I do not accept this. A restriction has been imposed, a breach is alleged and the circumstances are to be examined to determine whether the

facts complained of constitute a breach.

The plaintiff bought his first apartment towards the end of 1978. He had a large roof terrace which he wished to convert into an informal garden. He does not remember exactly how it happened but contact was established between Doig and himself and arrangements were concluded for Doig to do the work. His wife and Mrs. Doig became friendly and they occasionally visited each others apartments for drinks.

In 1980 Doig told the plaintiff that he was starting a little company with a local person, whom he did not name, to operate the business of property management and landscaping. They intended to cater to persons like the plaintiff who were part-time residents and had to have their properties looked after in their absence. The plaintiff agreed to engage their services. The arrangement was concluded in the plaintiff's living room. The plaintiff did not then know from what place Doig conducted his business. He could always get in touch with Doig at his flat. Doig looked after the plaintiff's premises for a year after which the plaintiff terminated the arrangement. He engaged instead the services of a Mr. Dale, the resident manager of Sulgrave.

The plaintiff's evidence was that in Spring 1981 he noticed that a truck with workmen on it came to Doig regularly. He stated at first that these visits were as often as 3 times a day but later amended this. They may not have been as often as 3 times a day but they were frequent.

Matters drifted through the 1982. On February 17,1983 he wrote a letter to the Directors of the Board of Sulgrave Management Limited objecting to the appointment of Doig to the Board. His principal objection would appear to have been that occupiers who were tenants of owners but not owners themselves should not be made board members. He did state also that Doig had been conducting a business from his apartment at Sulgrave.

When the plaintiff returned in December 1983 he found what he described as "daily pandemonium with the coming and going of trucks, people with goods and furniture for people." Apart from and unconnected with Doig, it would appear that another occupant was carrying on the business of interior decorators from another apartment. This

has been the subject matter of another action. The plaintiff intended to complain at the annual general meeting of the Management Company in February 1984 but that meeting was not held on the date mentioned in the Articles of Association but on a subsequent date when he was away from the Island. He later received the minutes of that meeting which had lasted 13 minutes and had not discussed his concerns.

Shortly after, John Dale, the resident manager, handed him copies of an invoice. This was headed "Interex Landscaping and Property Management Services Limited." Immediately above this at the left and right edges of the invoice was the address P. O. Box N-4903 and 77915. Below were the words "Nassau" and "Bahamas". P. O. Box N-4903 is the postal address of Sulgrave. The mail for residents of Sulgrave is placed in that box and arrangements are made by the management to have the mail collected from the box for distribution and to have outgoing mail taken to the post office for posting. Telephone 77915 is the telephone at Doig's apartment at Sulgrave.

The plaintiff then searched the records at the office of the Registrar General and learnt details as to the contributors to Interex and the names, addresses and occupations of its directors or managers. Myers had prior to March 28, 1984 been President and Director of Interex but by April 1984 he had demitted office and had been replaced. Doig had always been Vice President, Treasurer and Director. His evidence was that he was at all times fully responsible for running the company. His pay was a share of profits and made up more than half of it.

Shortly after, the plaintiff left Nassau as he usually did in the Spring. He returned to Nassau in December 1984. His evidence was that he found the businesses going on as usual. He engaged private detectives to make detailed observations. The action had been filed on May 7, 1984.

The plaintiff was not well served by his private detectives. Their level of performance was far from professional. One would have expected that they would have kept a detailed daily diary of their movements and observations which would have been available for refreshing their memories. The leading member of the two person team, Thomas Robinson, was only able to produce two crumpled sheets from a small yellow note pad. He said he had prepared reports

for the plaintiff from which he could refresh his memory. He said these reports were prepared daily but compiled at the end of the week for typing and submission. The evidence of his aide, Terrence Bullard, was that each would make notes daily and at the end of the week they would collaborate and make the report.

Wherever there is conflict between their evidence and that of Doig I accept the evidence of Doig and reject their version. Clearly their evidence as to the ownership of the premises at Lyford Cay where Doig's foreman, Burrows, worked was derived from conversations with employees at these premises. Robinson did not hesitate to say that it had been derived from nameplates outside these premises. Photographs established that there were no such nameplates. I accept also Doig's evidence that he would pass in to the Post Office regularly to pick up mail and that his route to Paradise Island from Sulgrave was usually via the Post Office while on his trip from Paradise Island to Lyford Cay he quite often used what he called the back route. Although both detectives stated that Doig had more visitors than other residents, there were no particulars as to who these were, apart from the foreman, Burrows. It was, in any event, apparent from all accounts that Doig was very seldom at his apartment during the day. He would normally be out at 7:30 a.m. and he would seldom return before 5:00 p.m. The detectives normally carried out observations on the lobby of Sulgrave between 9:00 a.m. and 6:00 p.m.

There are, however, facts which have been indisputably established. Doig does operate the business of property management and landscaping through the vehicle of Interex. That firm has some 16 clients, most of them at Lyford Cay. It owns trucks and employs workmen, among them a foreman, Burrows. The only document tendered in evidence which carried an address to which communications could be sent and a telephone number at which contact could be made bore the address and telephone number of Doig's flat at Sulgrave. That document was in use until at least the end of 1984. When it was replaced the replacement carried no address or telephone number. It was not until the latter part of 1985 or early 1986 that Interex had a box number other than Doig's apartment. Doig gave evidence that

Interex engaged at different times two secretaries, Mrs. Molly Chapell and Mrs. Jennifer Mackenzie. The present secretary is Mrs. Mackenzie. She has a flat above Malcolm Auto Parts where company files are kept and where she does such secretarial work as may be needed - especially the preparation of paysheets. Doig checks the paysheets. He also prepares invoices billing customers for services rendered.

Interex was never listed in the telephone directory. It secured clients by word of mouth recommendation from existing clients. Clients would have Doig's telephone number at Paradise Island Resorts Ltd. where he was employed or at his apartment. They contacted him either of these places. Such equipment as the company owned was kept in a locker at Lyford Cay where most of the gardening was done. Burrows did on occasion call on Doig at Sulgrave to leave messages or take instructions. These visits have now ceased. Burrows drives to an adjacent parking area for the Ambassador Hotel and Doig meets him there.

On this basis I find that operations in connection with the operations of the business of Interex were carried out at three locations - the clients' gardens and houses where Burrows and his men actually performed the tasks the company had undertaken to perform; the office of the paid secretary where files were kept and the necessary secretarial work was done and Doig's apartment from which he managed the company and at which clients for the most part contacted him. I find therefore, that the flat was used for the purpose of carrying on the business of Interex. The restriction required that it should not be used otherwise than as a private dwelling house. There was, therefore, a breach of this restriction.

The lease provided that the restrictions had been imposed -

> "to the intent that any tenant for the time being of any part of Sulgrave Manor may be able to enforce the observance and performance of the said restrictions by the tenants or occupiers for the time being of the other parts of Sulgrave Manor."

Doig is an occupier of Sulgrave. He was certainly aware, at least from the date he became a director, of the restrictions in the lease. He should have been aware of them before. It was Kramer's duty on letting him into possession of the apartment to inform him of the restrictions in the main lease. Doig is accordingly liable for the

breach of the restriction which I have found proved.

Mr. Duncombe submitted that there was no evidence that Interex was either a tenant or an occupier of Apartment 102. He pointed out that its registered office was not there. Of itself that fact is not significant. A company may be held to be resident in the place of its central management and control. This can be the place from which the company official directing its business in fact performs this activity. The fact that Doig - the Vice President and Treasurer and indeed sole manager - managed the business from Apartment 102 is enough to make the company an occupier of that apartment. The company is therefore liable for breach of the covenant as an occupier.

The fact that Interex is liable does not, however, make Myers as a director of Interex liable. There is no evidence that he was in any way involved with the actual operation of the company. There is no evidence that he authorised the breach and to draw the inference from the fact that he was a director and sole shareholder would be manifestly wrong - British Thomson-Houston Company Limited v Sterling Accessories Limited (1924) 2 Ch. 33 at p.40. His contractual liability under the lease not to use the demised premises except as a private dwelling house was in respect of Apartment 304. He would also have been under an obligation not to do or permit any act or thing to be done about Sulgrave Manor which may be or become a nuisance. I am satisfied that Myers did not do any such act on or about the premises nor is there evidence that he permitted any such act to be done. Accordingly, I do not find him liable, and the case against him is dismissed.

The statement of claim as originally filed alleged in paragraph 15 that the second defendant, Kramer, was a director both of Interex and of Sulgrave Management Limited and in these capacities was aware of the breaches of the covenant resulting from the use of Apartment 102 as a place of business for Interex.

The second defendant in his defence denied that he was a director of Interex specifically and denied the allegations in paragraph 15 generally. Paragraph 15 was subsequently amended. The allegation that the second defendant was an officer of Interex was dropped. Instead it was alleged:-

> "The Second Defendant is in breach of the said provisions in that although he knows of the said violations by the other defendants herein, acquiesces in the said breaches and maintains the said tenancy of the First Defendant, notwithstanding his personal knowledge of the said restrictions."

In paragraph 7 of his defence the second defendant pleads:-

> "As to paragraph 16 of the Statement of Claim the Second defendant admits that by letter dated the 18th day of April 1984 addressed to the Director of Sulgrave Management Limited

> the Plaintiff stated (inter alia) that the First Defendant was operating a retail landscaping and property service business from the said Apartment Number 102 in the said "Sulgrave Manor" and requested that the said Directors "take appropriate action to terminate the state of affairs." The Second Defendant denies that any action was required to be taken by him in his capacity as a Director of the said Sulgrave Management Limited because the First Defendant was not conducting the alleged business from the said Apartment.

There is no evidence that the second defendant was a director of Sulgrave Management Limited. In his evidence the plaintiff refers to three directors - Mr. Doty, Doig and Myers who were all participating in the breach of the covenant. The Minutes of the Annual General Meeting held on 1st March, 1984 shows that he was not elected a director for the ensuing year. The plaintiff's first written notification to the Directors that Doig was breaching the covenant was on 17 February 1983, in a letter to the Directors. Mr. Banister who was then President of Sulgrave Management Limited replied to that letter and did not deal with this aspect of the plaintiff's letter. The plaintiff's answer to Mr. Banister's reply was equally silent on that point. The formal complaint came in April 1984 when the second defendant was not on the Board.

There is no evidence that the second defendant was aware, other than from information from the plaintiff, of the breaches of the covenant by Doig. The plaintiff's statement of claim as amended stated in paragraph 9 that the operations began in 1980 in a covert manner. The second defendant would not have been aware of the conversations between the plaintiff and Doig in which Doig disclosed that he was about to start a business. There is no evidence that the second defendant would have seen the invoices of Interex setting out the telephone number and the post office box number. It is not unreasonable to conclude that he may have seen the Interex truck driven by Burrows at Sulgrave but unless alerted there is no reason why he should have known that Doig was connected with that company as consultant and vice-president, treasurer. The plaintiff who was interested was himself not fully seised of what was transpiring until Dale handed him the invoice and he researched the files of the Registrar General.

In all the circumstances I cannot hold that the plaintiff has established that the second defendant knew of the violations and

acquicesced by maintaining Doig's tenancy.

Doig's evidence on the point, which I accept, is that when the formal complaint was made the Board took steps to see the activity carried on at the Apartment in relation to the business of Interex should be brought to a halt. Steps were taken to keep Burrows off the premises and the new printing of invoices no longer carried the telephone number and the post office box number of the apartment.

I find that the plaintiff has not made out his case against the second defendant either for breach of covenant or for nuisance and accordingly his action against him is dismissed.

The plaintiff has not, in my view, established a case of nuisance against either the first or the fourth defendant. Although the premises were used in breach of the covenant the user in no sense amounted to a nuisance. The evidence of unusually heavy traffic in relation to the business was unsatisfactory. The additional traffic amounted to no more than the visits by Burrows in his lorry.

The plaintiff has, however, succeeded in establishing a breach of covenant against use other than as a residence. The evidence has indicated that it is unlikely that the breach of the covenant will continue. The invoices have been changed and efforts to sell the company are under way. Nonetheless I am of the view that the plaintiff having proved his case is entitled to an injunction.

The first and fourth defendants will pay the plaintiff's cost excluding such costs as were incurred by the joinder of the second and third defendants. The plaintiff will pay the costs of the second and third defendants.

DATED this 23rd day of January, 1987

P. Telford Georges,
C.J.