I do not think I should exercise that discretion in the present case to forfeit the lease. Judgment must therefore be one of absolution from the instance with costs.

Plaintiff's Attorney: *M. M. Roux;* Defendant's Attorney: *M. Cohn.*

[Reported by *G. Hartog,* Esq., Advocate.]

WITWATERSRAND TOWNSHIP, ESTATE & FINANCE CORPORATION, LTD. v. RITCH.

1913. *June* 11, 19. WARD, J.

Landlord and tenant.—Lease of stand.—Restrictive covenants as to coloured persons.—Living on stand.—Caretaker.

In terms of a lease the lessee was not to allow coloured persons, other than domestic servants, to live or dwell on the premises leased :—*Held,* that it was not a breach of the lease for the lessee to allow a coloured person, not a domestic servant, who had a home of his own, to sleep on the premises as a caretaker.

This was an action in which the Witwatersrand Township, Estate and Finance Corporation, Ltd., claimed an order against the defendant, cancelling certain deeds of lease in respect of Stands 876 and 879, Fordsburg, dated August 31, 1893, by reason of defendant's breach of their terms and conditions, and an order directing him to vacate the stands and the buildings thereon. The plaintiffs claimed as the successors in title of the Ford and Jeppe Estate Co., Ltd., which in 1893 was the registered owner of that portion of the farm Turffontein 19, now known as Fordsburg. Defendant became the lessee of the stands in question on February 16, 1904.

Clause 9 of the lease provided that the lessee should have "no right to open or allow or cause to be opened, any store or any place for explosives. . . . or allow coloured persons, other than domestic servants, to live or dwell on the stand, or do or allow anything to be done which might grow to be a nuisance, disturbance, damage, annoyance, or grievance to the lessors or their tenants, without plaintiff's consent in writing and endorsed upon the lease."

In the event of breach of these provisions the lease was to become null and void.

It was alleged in the declaration that defendant in breach hereof did in June and July, 1909, August and September, 1912, and January and February, 1913, allow coloured persons other than domestics to live on Stand 876, and did in 1904 and ever since open or permit to be opened stores and trading to be carried on on the said premises, all without plaintiff's consent, and in spite of repeated requests to desist.

Defendant admitted in his plea that from 1904 to 1907 he had allowed a tinware factory and business to be carried on on the said stand, and that from 1908 he had allowed the business of a wholesale and retail general merchant to be conducted there without plaintiff's consent in writing and endorsed on the lease. It was also admitted that he persisted in allowing the conduct of such business on the stand, but he denied that this constituted a breach of the lease, or that it was necessary for him to obtain plaintiff's consent in writing or at all before allowing the above businesses to be carried on, or that it was his duty to have any such written consent endorsed upon the lease. Defendant also denied that he had allowed coloured persons on the stand in breach of the lease. The facts appear from the judgment.

C. Jeppe, for the plaintiffs: Store means a place where goods are sold at a profit, not a place of storage. That is its ordinary meaning here, and also in America. Coloured persons have been allowed to work and sleep on the premises. One's dwelling is where one works and sleeps. Eating there is not necessary. See Stroud's *Legal Dictionary*, *sub-voce* Dwelling. See also *Beadle & Co.* v. *Bowley* (12 S.C. 401, at p. 403). Residence is the place where one generally sleeps after the day's work is done. In this case, for many years, in spite of warnings and many promises not to repeat the defendant has allowed coloured persons to work and sleep on the premises.

I admit the tinware factory does not constitute a breach.

J. Stratford, K.C. (with him *R. F. MacWilliam*), for the defendant: The word "store" is popularly used in both senses, as meaning warehouse and shop.

If the lease had intended to prohibit the carrying on of business, it would have said so. Plaintiffs' interpretation is restrictive. The words "containing explosives" obviously refer to "store"; see the punctuation.

[WARD, J.: Why the repetition of the word "any"?]

"Any store" is too specific, so the word "any place" was added, *ex abundanti cautela*. The limitations are all specific, implying that places not specifically barred may be opened. The Court will not lightly construe so as to effect a forfeiture.

As to the words "live or dwell," the underlying idea is the purpose for which the premises are used. The purpose for which you sleep or work at a place is all important as showing whether you reside there or not.

The object of the lease was to prevent a use of the stand for residential purposes. As to what is residence, see *Kerr* v. *Haynes* (29 L.J.Q.B. 70, *per* COCKBURN, L.C.J., at p. 72).

Plaintiffs must contend that sleeping for one night amounts to residence. There is no evidence that the premises were used as a "home" for coloured persons; the evidence is that persons were there under contract; see *Bent* v. *Roberts* (47 L.J.Ex. 112), *per* KELLY, C.B., at p. 114. Mere occupation is not residence, *Fillingham* v. *Bromley* (37 Eng. Rep. 1204), at p. 1206. Residence means "home," where one is always to be found; *In re Moir* (25 Ch. D. 605, at p. 610). See also *Schlimmer* v. *Rising's Executrix* (1904, T.H. 108); *Reg.* v. *North Curry* (107 Eng. Rep. 1313, at p. 1315); *In re Wright* (1907, 1 Ch. 231).

Jeppe, in reply: The word "open" must indicate a shop; one does not speak of "opening" a place for explosives. There is no evidence of these persons being there under contract, nor is there proof of homes elsewhere. On the contrary, these persons were always at the premises. See *In re Wright* (*supra*), at p. 236. The cases quoted for the defendant were all concerned with deciding between two residences.

Once the presence of coloured persons is admitted, the onus is on the defendant.

Cur. adv. vult.

Postea (June 19):—

WARD, J.: The plaintiff company is the successor to the Ford and Jeppe Estate Company, Limited, who, on the 1st August, 1893, granted a lease of stand No. 876 *in longum tempus* to one Joseph Bernstein. This lease was on the 16th February, 1904, transferred to the defendant. The defendant is still the legal holder of the

lease, but has no beneficial interest in it. The beneficial owners form a collection or syndicate of Indians known as the Surati Estate, of which Suliman Mia is the largest individual shareholder, though he does not hold the majority of shares. Cachalia, who is the tenant of the premises, is also a shareholder. From the year 1904 to 1907 the defendant and also the beneficial holders allowed a tinware factory and business to be carried on on the stand. And from the year 1908 and ever since they have allowed the business of a wholesale and retail general merchant to be conducted thereon without the consent of the plaintiff, and persist in allowing the said business. The place has been once or twice broken into, and in consequence Cachalia has since 1907 or 1908 ordered one of his assistants to sleep on the premises. The premises consist of a double story building in which business is carried on, communicating with a lean-to at the back. In this lean-to in 1908 Essop Mohamed, an Indian, a store assistant to Cachalia slept for the purpose of guarding the store. He took his food at Cachalia's house, which is away from the store and stand. He also had his clothes at Cachalia's house. He was married, but his wife was in India. In July, 1908, he was ill, and was moved to a room upstairs by order of Dr. Gilchrist, and was there attended by him for six days. After he left Acoojee Ishat, an Indian, a shop assistant, slept in this lean-to under the same conditions as Essop. Now an Indian, Annjee Karolia, sleeps in the same lean-to. When he is away on duty along the reef a nephew of Cachalia's, a youth said to be sixteen years old, sleeps on the premises, and on those occasions he takes a school companion to keep him company. At times Karolia and the two youths have slept there. There was evidence that one morning coffee was made for these people on the stand. I am not satisfied on the evidence that it was made on the stand, but the caretakers partook of it in the lean-to in which they slept. There was evidence that bedding was seen on the upper verandah in front of the building—presumably for the purpose of being aired. This may have been the bedding of Essop when he was ill, or the bedding stored by Cachalia, for compatriots of his during their absence.

The plaintiff claims that he is entitled to forfeit the lease; firstly, because the defendant has opened a store on the premises; secondly, because he has allowed coloured persons to dwell thereon. Take the first alleged breach—the clause is clause 9 of the lease. It says: "The lessee shall have no right to open or allow or cause to

be opened upon this stand any store or any place containing explosives, or any canteen, restaurant, or place for the sale of wines or spirituous or malt liquors without the consent of the lessor." Mr. *Jeppe* says that in South Africa the word store means, as it does in America, a shop. Now it is quite clear that Cachalia has opened a store. But the point to be decided is whether the word "store" in the above provision is governed by the words "containing explosives." If it is, the plaintiff must fail, if it is not he must succeed. If one pays attention to the punctuation there is no doubt that the comma after "explosives" shows that the sentence should be so read that the words "containing explosives" govern both the word "store" and the word "place." It was admitted that if both readings were open to the Court, that is, if there is an ambiguity, the Court would construe the clause in favour of the lessee, but it was contended that the meaning of the word "store" was confined to a shop; it could not mean a place of storage, and that the word "open" showed that it was intended to prohibit the opening of any shop. Now, it is clear that the word "store" in South Africa generally means "shop"—but it may mean a place of storage—and in any event the word "open" was used to govern all the words used in the sentence. If the lessor intended to forbid the sale or storage of explosives, the words used are the apt words for such a purpose. There is nothing in the whole lease to show that the stands were reserved for residential sites. It was admitted that the carrying on of a noisy trade like a tin factory is permissible—then why should a shop be forbidden? It seems to me that the clause merely forbade certain dangerous trades, such as the selling or storing of explosives, and the sale of intoxicating liquors. I am therefore of opinion that the plaintiff must fail on the first point.

The lease (clause 9), goes on: "The lessee shall not allow coloured persons other than domestic servants to live or dwell on the stand. Nor shall the lessee do or suffer to be done on the said premises anything which may be or grow to be a public or private nuisance or a damage or disturbance, annoyance or grievance to the lessor or to any tenant or occupier of land or buildings for the time being in the neighbourhood." The question is has the defendant or the lessee allowed coloured persons to live or dwell on the stand? It is not contended that Essop Mahomet, and the others who have slept on the premises are domestic servants. Mr. *Jeppe* argued that one lives or dwells where one works and sleeps,—

and that Essop Mahomet worked and slept on the premises. Mr. *Stratford* argued that the test was whether the stand was put to use for residential purposes, and as Essop Mahomet was there by contract he could not be said to reside there. The case is one of grave difficulty. In my opinion it cannot be said that Cachalia's nephew who merely slept on occasions on the premises, lived or dwelt there,—he had his own home with his people,—any more than it could be said that the companion whom he had induced to accompany him dwelt on the premises. It was admitted in argument that the fact that Essop Mahomet lay ill there for some days did not cause him to be regarded as living or dwelling there. But the case of Essop Mahomet and the others are different to that of the nephew. Essop Mahomet slept at the premises continually, and if he did not live at the premises it must be held that he lived at Cachalia's house. He must live somewhere; his wife was in India. The test really is to discover the mischief aimed at by the lease. The object, I take it, was to prevent the stands from being used as dwellings for coloured persons. Domestic servants are excepted, because they are the only class of servant it is necessary to have living on the premises. The other servants could as a rule, without inconvenience to the employer, sleep elsewhere, although they work during the day or even night on the premises, and have their meals there. This would suggest that the place where the person slept was the test, and I think in a great many cases it would be. But I don't think it would be in all cases. It is clear that if a person were employed to work during the night at a place he could not on that account be said to live there. A night-watchman is not forbidden by the clause of the lease. It is perhaps frivolous to suggest that it could make no difference if it should be discovered that the night-watchman habitually slept on duty. The case would be covered by the fact that he had other quarters where he did reside and was supposed to sleep, and also by the fact that the master did not allow him to sleep there. But that brings us to the actual point in the case: why may not the master employ his servant for the purpose of sleeping on the premises where such sleeping is of advantage to the master, and the other conditions of living on the premises are not present? I cannot agree with the contention that the mere fact of there being a contract to sleep on the premises can affect the question, because caretakers who remain on the premises

with their families, who have their rooms set apart for them, undoubtedly do live on the premises. The objection that if the Court holds that the facts in the present case are not covered by the proviso, it will open the door to an easy evasion of the clause has a considerable amount of force. The difference between a man sent down to sleep on the premises, who has a house elsewhere, and one who has not is very slight and very difficult sometimes of proof. But that difficulty can be met by the consideration that the fact of sleeping upon the premises is *prima facie* evidence of residence which it is for the lessee to rebut by showing the person in question actually lives elsewhere. The fact that he does not live elsewhere to my mind conclusively shows that he lives where he sleeps. If he does live elsewhere it is not conclusive because a person may live in more places than one; at the same time if it is shown that a person has a home of his own, and only sleeps on particular premises for the purpose of taking care of them, or for the purpose of his business, I do not think it can be said that he lives where he sleeps. A number of authorities have been quoted, but as is usual in questions affecting the construction of a contract they appear to me to be irrelevant to the present enquiry.

On the whole, though with some doubt, I have come to the conclusion that Essop Mahomet did not live on the premises, but at Cachalia's house. I feel that if any advantage were to be granted to him upon his showing that he lived on the premises, the facts adduced before me would not be sufficient to entitle him to the advantage. The reasoning that applies to Essop Mahomet also applies to his successors who only slept on the premises at the bidding of their master in order to protect his property. It was urged that the defendant had in the letter of the 27th September, 1912, admitted that coloured persons had been permitted to live on the premises. But it appears that this letter was written on behalf of only some of the beneficial owners. I do not think that it should cause me to disbelieve Cachalia's statement as to the actual facts. Messrs. Poore & Roos might well be of opinion that those facts constituted dwelling and living on the premises, as the point is one in my opinion of considerable doubt.

It might be pointed out that with regard to the first point the only objection which the plaintiffs took to the store in the letter of the 11th September, 1912, was that the trading was carried on by coloured persons. This would not, in my opinion, debar them

from succeeding if the word "store" in the agreement clearly covered the business of Cachalia.

Judgment must therefore be for the defendant, with costs.

Plaintiffs' Attorneys: *Van Hulsteyn, Feltham & Ford*; Defendant's Attorney: *G. S. Ritson.*

[Reported by *G. Hartog*, Esq., Advocate.]

LUBKE v. KEGEL.

1913. *June* 18, 23. WARD, J.

Work and labour.—Architest's fees.—Basis of remuneration.

An architect is entitled to a fair and reasonable reward for the amount and quality of his work, but, apart from agreement, the percentage scale upon which that remuneration is customarily calculated by the profession, affords no measure of what is reasonable remuneration. Where there is no such agreement it is the duty of the Court to enquire into the amount and quality of the work actually done.

Action by an architect for remuneration based upon a percentage scale of work done in the preparation of certain plans.

The facts appear from the judgment.

R. Feetham, for the plaintiff: A percentage on the total cost of the works is the usual professional charge in building contracts. Hudson, *Building Contracts* (2nd ed.), p. 114, states that a charge of five per cent. for cost has frequently been found by juries to be reasonable. See also *De Zwaan* v. *Nourse* (1903, T.S. 814); *Rowe* v. *Gotthelf* (18 S.C. 401).

J. Stratford, K.C. (with him *A. Alexander*), for the defendant: The test is what is reasonable; see Hudson, *ibid.*, p. 115; *De Zwaan's* case (*supra*); *Moffat* v. *S.A. Breweries* (1912, W.L.D., (not reported).

Feetham, in reply: I admit there is no authority to the effect that the client is bound by the tariff. I rely on the tariff as a measure of reasonableness only. That tariff should only be departed from where there are special circumstances.