DOUGLAS JAMES GOWANG GARRICK

v.

VINCENT JOSEPH COSTELLO

[COURT OF APPEAL, 1974 (Gould V.P., Marsack J.A., Bodilly J.A.), 16th July, 2nd August 1974]

Civil Jurisdiction

Landlord and tenant—trade fixtures and fittings—tenant's right to remove same after expiration of his lease.

***Landlord and tenant—convenant to yield up premises in good and tenantable repair—whether such covenant deprived tenant of right to remove fixtures and fittings—Property Law Act* 1971 *s.*90(*b*).**

Tort—trespass—whether actionable per se—whether nominal damages should be awarded if trespass proved.

On a counterclaim by the appellant for damages for trespass and for wrongful removal of fixtures and fittings by the respondent from a hotel it was held : 1. Although the respondent had occupied the hotel under a series of leases, the first of which being a sublease for ten years less one day, he was not caught by the rule that a tenant who was entitled to remove fixtures, lost the right if he did not remove them before the expiration of the term. He was still entitled to a reasonable time to remove his trade fixtures, and in any event, a new direct lease had been executed and registered before the sublease expired.

2. Although section 90(b) Property Law Act 1971 implied in every lease a covenant to yield up the demised premises in good and tenantable repair, such implied covenant did not take away the ordinary legal rights of a tenant to remove his fixtures without express provision to the contrary.

3. As the respondent did return to the premises after the expiry of his lease to remove a deep freeze unit, trespass was proved, and as trespass was a tort actionable per se, nominal damages should have been awarded.

Cases referred to :

Smith v. City Petroleum Co. Ltd. [1940] 1 All E.R. 260.

Appeal against the judgment of the Supreme Court ordering up the delivery of a deep freeze unit to the respondent and damages for its detention, and dismissing a counterclaim by the appellant for trespass and wrongful removal of fixtures.

R. G. Kermode for the appellant.

I. C. Bond for the respondent.

2nd August 1974.

The following judgments were read :

GOULD V.P. :

A The respondent carried on business as a hotel proprietor in the Garrick Hotel and had done so for many years. When his latest lease of the premises expired he held over on the same terms until the end of September 1969, and then sold by auction a substantial quantity of the fixtures and fittings from the building. He then vacated the premises but about a fortnight later he went back and caused to be dismantled a Kelvinator deep freeze in built unit preparatory to removing it. I will refer to this as " the Unit ".

B The appellant, though not a trustee, represents the beneficiaries of the estate of J. H. Garrick deceased to which belonged the land and the building in question. He took no action to prevent the sale of the fittings and fixtures but, on finding the Unit dismantled, he prevented its removal. The respondent brought action for the possession of the Unit, on the basis that it was a chattel belonging to him, and for damages. The appellant counterclaimed for damages for trespass and damages for the wrongful removal of fittings and C fixtures and for waste.

The learned Judge in the Supreme Court found that the respondent was entitled to remove the Unit as his property. He ordered its delivery in good condition and working order, and the payment of $570 damages for its detention. These orders are all now the subject of appeal.

D As to the counterclaim, the learned Judge found that the respondent was entitled to remove all trade fixtures, that this was a common law right and, provided that the respondent was the owner of such fixtures he did not have to preserve his right in any of his successive leases; the Judge found further as a fact that the respondent was the owner of the fittings and fixtures and that he was entitled to remove them ; on the subject of waste he said " The defendant has complained about damage to walls etc. caused by removing E the fittings, but whether this was excessive he does not say, and he has tendered no estimate of what it would cost to repair such damage. " As to the trespass he found that there was no intention to annoy and no intrinsic damage alleged. In dismissing the counterclaim he said that the respondent had not proved the counterclaim as to the fixtures and he made no award in the claim for trespass. Again, the appeal challenges all these various findings.

F I do not propose to spend time over the question of the ownership of the Unit. The appellant was at a considerable disadvantage throughout the case in that he had been absent from Fiji for many years and could provide no evidence, beyond the production of the leases, of what had happened during the long history of the hotel. The respondent on the other hand, whom the learned Judge regarded as truthful, had operated the hotel throughout. There was originally some confusion between the Unit and a cool room in the hotel, G but this was cleared up and in the Supreme Court Mr Kermode, for the appellant, conceded that the Unit was a chattel. The only quesion for decision was then, who owned it.

In deciding this question in favour of the respondent the learned Judge did not overlook the evidence of an admission allegedly made by the respondent. In spite of this and also of some discrepancy in evidence as to the colour of the Unit, he quite definitely accepted the evidence of the respondent that he H had purchased and paid for the Unit. Such a finding of fact is not to be upset by this Court without very good reason, and I do not find any such reason to exist here; on the contrary the finding appears to me to be in accordance with all the probabilities which arise from the history of the hotel.

Mr Kermode complained of that part of the order which required the Unit to be returned in good condition and working order. It was in a dismantled state when left by the respondent and it was submitted that the appellant should not have to guarantee it. I think there is some validity in this submission ; the appellant, having deliberately detained the Unit, would be obliged to look after it but was not called upon to re-assemble it. I think the order should be amended by striking out the words " in working order ". A

Mr Kermode's next submission was that the sum of $570 awarded as damages for the wrongful detention of the Unit was, though not so designated by the learned Judge, in fact special damage, and as such it was not properly proved. No special damage having been pleaded the award should not have been made. It does appear that the learned Judge calculated this amount with reference to evidence on the purchase of ice by the respondent for a period of eleven months. Mr Bond, for the respondent, did not dispute that, but submitted that the calculation was merely used as a guide to estimate general damages. Having regard to the way it was put in the judgment (simply " $570 being damages for its wrongful detention ") and to the fact that, on the findings, the respondent was clearly entitled to damages, I accept Mr Bond's argument on this point. If intended to be special damages a more accurate and detailed calculation was called for but the evidence was sufficient to support a general damages award. I find that the award was intended to be one of general damages and should stand. B C D

I come now to matters arising out of the appellant's counterclaim. A list of fittings (Ex. D6) and fixtures removed from the hotel was put in by the appellant and agreed to (with some additions) by the respondent. In this case also the learned Judge accepted evidence from the respondent that these were trade fixtures and his own property. The respondent's oral testimony was augmented by documentary evidence that, as far back as 1937 when he took over the hotel, he had paid £4000 for the furniture and fittings. The appellant was quite unable to controvert this evidence. E

In the appeal I do not think that Mr Kermode contended with any conviction that the bulk of the fittings listed in Ex. D6 could not be trade fixtures. Clearly they could be, and the learned Judge found they were. Mr Kermode did submit that taps could not be, but quoted no supporting authority. Mr Kermode's argument on this aspect was twofold. First he relied upon the fact that, whereas the respondent had occupied the hotel premises under a series of leases, the first of them was actually a sublease from Burns Philp (South Sea) Company and was for ten years *less one day*. To draw a sublease in that way is of course common practice, but the submission was that this one day gap before the next lease commenced destroyed the learned Judge's finding that the respondent's tenancy had been continuous. The result, it was suggested, was that the respondent lost the trade fixtures. Secondly Mr Kermode contended that, even if the respondent would have been within his rights in removing the fittings and fixtures, to take such things as taps, washhand basins, mirrors and electric fittings was a breach of covenants in the lease. F G

As to the first of these submissions, it is intended I presume, to be based on the rule that a tenant who is entitled to remove fixtures, loses that right if he does not remove them before the expiration of the term. In such circumstances the fixtures become the absolute property of the reversioner—see 23 H

Halsbury's Laws of England (3rd Edn.) para. 1132. The reversioner (for A one day) would have been Burns Philp (South Sea) Co. Ltd., and their own reversioner the following day would have been the estate now represented by the appellant. I am of opinion that in the circumstances the respondent would not have been deprived of the ownership of his fixtures by this artificial process either (a) because he would have been entitled to a reasonable time to remove his trade fixtures (see *Smith v. City Petroleum Co. Ltd.* [1940] 1 All E.R. 260) or (b) that the respondent would properly be regarded as remaining B in possession of the hotel in circumstances which would entitle him to consider himself a tenant (see Halsbury—op. cit. para. 1132). As to (b) it may be relevant to add that the new direct lease to the respondent, though running from the 1st January 1947, was executed and registered in August 1946, some 4-5 months before the sublease expired.

C I come to the argument that the removal of certain articles was a breach of covenants in the lease. By section 47(b) of the Land (Transfer and Registration) Ordinance (Cap. 136 Laws of Fiji, 1955) which has now been replaced by section 90(b) of the Property Law Act 1971, there is implied in leases a covenant to yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of lease. It is contended that the removal of taps, wash hand basins, mirrors and electric D fittings did not leave the premises in tenantable repair. I do not think that this covenant would negative the right to remove the tenant's own fixtures. As is stated in Halsbury (op. cit. para. 1136)—" For the lease to take away the ordinary legal right of a tenant to remove " tenant's fixtures " the intention to this effect must be clearly expressed. " The question is also linked with the lack of evidence, which is the misfortune rather than the fault of the appellant, of the condition of the premises at the commencement of the lease. E Mr Kermode also submitted that the condition in which the premises were left would have rendered the obtaining of a licence under the Liquor Ordinance (Cap. 167) impossible. But the covenant by the respondent to carry on the business of a publican expired with his tenancy and had no connection with the appellant's subsequent use of the building. If the fittings and fixtures removed were the property of the respondent (as has been held) they were presumably put there by his predecessor in title to render the building useable F as an hotel. It would be open to a future tenant or the reversioner to do the same thing. I think these arguments must fail.

With regard to the appellant's claim for damages for waste the learned Judge said :—

G " The defendant has complained about the damage to walls etc. caused by removing the fittings, but whether this was excessive he does not say, and he has tendered no estimate of what it would cost to repair such damage. "

Mr Kermode sought to challenge this finding by pointing to evidence of the respondent that it would cost $2,000 to re-equip the premises as an hotel. It is H clear, however that this estimate included the cost of replacing fittings and fixures and was not merely (though it may have included) repair of damage to walls etc. I agree with the learned Judge for the reasons he gives, that the appellant did not prove his case in this respect.

Finally, the grounds of appeal allege that having found that the respondent had trespassed on the land in question the learned Judge erred in dismissing the counter-claim. The trespass occurred when the respondent returned to the premises in his attempt to remove the Unit. The learned Judge found that the respondent had difficulty in locating the appellant to ask for permission and that there was no intention to annoy and no intrinsic damage. He found the counterclaim not proved and said he made no award under the claim for trespass. He then dismissed the counter-claim with costs. Technically I consider Mr Kermode's argument is correct. The claim in trespass in fact succeeded and, trespass being a tort actionable *per se*, nominal damages should have been awarded. In view of the very minor part that trespass played in the litigation, however, I do not consider that any alteration should follow in the orders for costs. I would therefore amend the order in respect of the counterclaim to read—" On the counterclaim there will be judgment for the defendant for $1 as damages for trespass but further and otherwise the counterclaim is dismissed with costs. "

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In the result, subject to the variation I have specified above in the order for the return of the Unit and to the amendment to which I have just referred in the order on the counterclaim, I would dismiss the appeal with costs.

BODILLY, J.A.

I have had the benefit of reading the judgment of the learned Vice President in this appeal. I respectfully agree with his conclusions for the reasons he gives and have nothing to add.

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MARSACK, J.A.

I concur.

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Appeal dismissed subject to nominal damages of $1.00 *on the counterclaim.*