Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P137 OF 1986

BETWEEN	PRO-JAM LIMITED	PLAINTIFF
AND	GILBRALTAR TRUST LIMITED	1ST DEFENDANT
AND	ISLAND HOMES LIMITED	2ND DEFENDANT

Lord Gifford Q.C. & Mrs. A. Haughton for the plaintiff

Goffe Q.C. & Mrs. Wright-Goffe for defendants

HEARD: July 10, & 11, 1995 & March 20, 1997.

CHESTER ORR , J.

In this action the plaintiff's claim is two fold: (1) Against the first defendant for the return of certain tenant's fixtures on their value and for the value of certain improvements done by the plaintiff to the first defendant's premises.

(2) Against the second defendant for an account of collections by that defendant as agent for the plaintiff. This claim was abandoned at the hearing.

By a Lease dated 13th September, 1983 the first defendant as lessor leased premises to the plaintiff as lessee for a period of three years commencing on the 1st May 1983. Rental was payable by equal monthly instalments with provision for increases in the second and third years respectively.

The plaintiff was evicted from the premises on the 27th March 1986 for non-payment of rent and this action arose as a consequence of the eviction.

THE PLEADINGS

The plaintiff claims as follows:

(1) for the return of the undermentioned tenant's fixtures which the first defendant refused to allow it to remove and which have been wrongfully retained despite demand for their return.

Damages for their retention. Alternatively, the value of

the fixtures and damages for conversion.

The fixtures are:-

" (a) 10 air conditioning units.

(b) carpeting in office and adjoining areas.

(c) Burglar alarm system.

(d) Rods of drapery.

(e) Mirror in bathrooms.

(f) Company directory sign.

(g) Other items."

(2) For the value of the undermentioned immovable leasehold improvements carried out by the plaintiff to the first defendant's premises with the first defendant's permission or in the alternative to the knowledge of and without objection or hindrance from the first defendant.

The improvements are:-

"(a) installation of 220 voltage wiring
(b) installation of panel breakers
(c) installation of control circuit breakers
(d) installation of lighting fixtures
(e) partitioning of officers and seminar rooms
(f) construction of external patio used for cafeteria."

The Defence denied that it had refused to allow the plaintiff to remove the tenant's fixtures. Because of the nature of the fixtures they could not be removed easily by the plaintiff without damaging the first defendant's property.

Further or in the alternative by virtue of the Lessee's covenants contained in clause 2(14) of the Instrument of Lease, the plaintiff was not entitled to remove from the leased premises, any furniture, goods, chattels belonging to the plaintiff unless all liabilities to the first defendant were fully satisfied. Prior to the date of eviction the first defendant had no knowledge of the nature or type of work done by the plaintiff as improvements. The work was done for its own convenience and the plaintiff is not entitled to compensation therefor.

In the Counter Claim the first defendant claimed for damage done to some of its carpets by the plaintiff when it was vacating the premises and for damage by fire

which was discovered after the lease was terminated and for which the plaintiff was responsible to make good under Clause 2(21) of the Lease but failed to do so. There was also a claim for overpayment of the plaintiff's utility charges.

PLAINTIFF'S CASE

The plaintiff provided business and Management services in accordance with the permitted use under the Lease for Business and Commercial Offices. It sought and obtained permission to operate a cafeteria on the premises subject to certain conditions contained in letter dated June 27, 1983 as follows:

> "Projam Limited
> 7 Surbiton Road
> Kingston 10
>
> Dear Sirs:
>
> This is to confirm that we offer no objections to your Company operating a cafeteria at 7 Surbiton Road, to service the clientele of your organisation.
>
> However, we wish to make it clear that no signs of any form advertising the restaurant should be erected on the premises, it is not zoned for this purpose.
>
> Yours truly,
>
> L.C. Lake-Sherwood (Mrs.)
> Managing Director."

Pursuant to the grant of permission the plaintiff erected a patio and advertised the cafeteria in a Brochure Exhibit 3 which advertised the business generally. Under the heading List of Associated Companies appears "Catering Services - (The Garden Cafe and Supper Club).

Mr. Thomas, a Director of the plaintiff company stated that the cafeteria was open to business related persons who paid at the cafeteria. Persons who were not business related if known so to be would be asked to leave but no enquiries were made before such persons were served.

By March 1986 the plaintiff had installed the following items:

10 air conditioning window units.

Carpeting in the entire functional areas of the office.

Burglar alarm system

Rods and drapery

Partitions

Mirrors in bathrooms

2 Company Directory signs, one in concrete and one wooden.

In addition it up-graded the electrical system to 220 voltage and installed lighting fixtures. A Firm, Integrated Quantity Surveyors was employed to value the work done to the premises. Mr. Blankson presented the Report Exhibit 4.

There was correspondence with regard to the improvements as follows:-

"September 26, 1985.

Mrs. L. Sherwood
Managing Director
Island Homes Limited
20 Hope Road
Kingston 10

Dear Mrs. Sherwood:

Pro-Jam Limited has done extensive lease hold improvements including the construction of a building utilized as a cafeteria at 7 Surbiton Road, Kingston 10.

Please advise as to how this situation can be handled for compensation of improvement done by Pro-Jam Limited, should the property be sold to someone other than Pro-Jam Limited.

Thank you for your usual immediate attention.

Yours sincerely,
Pro-Jam Limited
Adolph Thomas
Managing Director."

"October 23, 1985

Mr. Adolph Thomas
c/o 7 Surbiton Road
Kingston 10

Dear Mr. Thomas,

Re: 7 Surbiton Road

We have been instructed to advise you that should the above premises be sold for a price equal to or greater than the market value on an existing or similar use basis as determined by Orville Grey and Associates, we would be prepared to reimburse you up to $45,000. However, this sum would have to be substantiated by our Quantity Surveyors, Goldson Barrett Johnson, as being

permanent (immovable) leasehold improvements, at your expense.

Yours sincerely,
Gibraltar Trust Limited

Egerton M. Chang
Financial Controller."

The rental fell into arrears. On the 6th March 1986 the Attorneys for the first defendant wrote as follows:

"March 6, 1986.

Playfair, Junor & Pearson
Attorneys-at-Law
19, Duke Street
Kingston 10

Attention: Mr. John Junor

Dear Sirs,

Re: 7, Surbiton Road, Kingston 10
Gibraltar Trust Limited to Projam Limited

"Further to our telephone conversation yesterday, was informed by my client that no permission was given to your client to carry out any construction or addition to or on the leased premises.

By letter dated 27th June, 1983 your client was informed that no sign of any form to advertise a restaurant should be displayed on the compound because the area is not zoned for that purpose. Notwithstanding this, your client proceeded to carry out construction on the premises and to operate a restaurant for the general public.

In the premises therefore, I have to advise my client that the Common rule "Whatever attaches to land, forms part of the land and belongs to the owner of the land" applies. My client is therefore, not obliged to pay any compensation for any structure which your client erects on the leased property.

Kindly, therefore, advise your client to deliver up the keys for the premises forthwith.

Yours faithfully,

E.R. Wright-Goffe (Mrs.)"

The plaintiff obtained an Injunction which was discharged on the 27th March 1986 and the plaintiff was evicted. As a result it was unable to remove the items I

had installed on the premises. Mr. Thomas stated that he could not recall having received a Notice of Determination of Lease for non-payment of rent and utilities.

By letter dated 15th May 1986 the plaintiff's Attorney requested the return of the tenants' fixtures. They were not returned.

THE DEFENCE

Mrs. Lois Sherwood a Director of the first defendant company gave evidence that work was done on the premises by the plaintiff including refurbishing, partitioning and installation of air conditioning units and installation of the cafeteria. The rent and utilities fell into arrears and she instructed her Attorneys to send a Notice of Breach of Covenant to the plaintiff and she served a Notice of Determination of tenancy - Exhibit 6 on Mr. Thomas for the plaintiff company on the 3rd March 1986.

The first defendant then took possession of the premises, the plaintiff left and the locks were changed. When the Injunction was served the first defendant obeyed it and gave instructions for it to be discharged. After the Injunction was discharged she served the Order of the Court on Mr. Thomas, on the 27th March 1986 and eviction took place on that date. She observed that a portion of the carpet had been ripped up but had not been removed. It had been glued to the floor. The floor was cleaned at a cost of over $3,000.00.

The office had been damaged by fire and she had repairs effected at a cost of $8,000.00

When the plaintiff company was evicted it took all the movable objects but was ordered not to remove those which were fixed.

THE LEASE

The following clauses are relevant to the installation and removal of items:-

Clause 2 (11)

> "Not without the prior written consent of the Lessor to injure cut or damage any of the walls, floors, beams, ceilings, fixtures or fittings of or in the leased premises nor make any alterations in or to the leased premises or change the location or style of any partitions or permanent fixtures or install any plumbing, piping, wiring, electrical or gas stoves or install any appliances or apparatus which will overload the existing wires or equipment in the leased premises. Any damage done to the leased premises in carrying out such or

> any other work as may be permitted shall be made good immediately by the Lessee at the Lessee's expense.
>
> Clause 2 (14)
>
> Not, without the prior consent of the Lessor in writing, to remove from the leased premises any furniture, goods or chattels belonging to the Lessee except in the ordinary course of business unless all liabilities of the Lessor hereunder whether accrued or contingent are fully satisfied.
>
> Clause 5 (6)
>
> That prior to the determination of the term hereby created, all partitions fixtures and fittings installed by the Lessee shall be taken down and removed by the Lessee the Lessee making good all damage occasioned to the Leased premises by such taking down and removal."

Mr. Goffe submitted that by virtue of clause 2 (14) the plaintiff was not entitled to remove "any furniture goods or chattels" after the first defendant under clause 5 (2) re-entered and re-took possession on the 3rd March and thereby terminated the Lease with immediate effect under clause 5 (20) while preserving its remedy under Clause 2 (14) to protect itself in respect of the Plaintiff's breach of its financial obligations under Clause 2 (1) and (2) by preventing the plaintiff from removing some of its chattels. Clause 5 (20) provides for re-entry and re-possession if the rents are unpaid for fourteen (14) days after becoming due and payable and the immediate determination of the Lease after such re-entry.

The word "lessor" in Clause 2(14) was an obvious error. The Court can interpret the clause as if it said "all liabilities of the lessee" or alternatively can verify the document.

Tenants fixtures are in fact chattels. If they are not chattels they become Landlord's fixtures and remain after the tenant leaves.

Clause 2 (11) stipulates that alterations and fixtures can only be done with the written consent of the Lessor. There was no such consent for the electrical installation and the partitioning. The conditions attached to the patio had been breached. Breaches of the Lease could not attract a claim for improvements.

The items which were attached to the buildings could not be removed without damage being done to the premises which would have had to be made good by

the Lessee. By permitting such removal the first defendant would have had a greater need for security but nothing with which to meet it.

Lord Gifford submitted that the items namely the air conditioning units, carpeting, burglar alarm system, rods of drapery, mirror and Company sign which were left in the premises when the plaintiff was evicted, are properly described as tenants fixtures.

The justification for the detention, namely the provision in Clause 2 (14) is not sustainable for the following reasons:-

Clause 2 (14) was not intended to govern the right of the Lessee to remove tenants fixtures. This is dealt with in Clause 5 (6). The words used in 5 (6) are "partitions, fixtures and fittings". By contrast the words in Clause 2 (14) are "furniture, goods and chattels". "Chattels" should be read in accordance with the eiusdem generis rule to mean chattels of a removable nature like furniture and goods.

Clause 2 (14) is designed to cover one class of items belonging to the tenant and Clause 5 (6) another class, namely fixtures. The clauses contain inconsistent requirements.

There is no ambiguity in Clause 2 (14) which would permit the Court to rectify the Agreement. There was no statutory provision for compensation for the improvements but he relied on the equitable doctrine of estoppel. If the Lessee has expended money in improvements with the consent or encouragement of the Lessor expecting the Lease to continue it would be inequitable for the Lessor to benefit from those improvements without paying reasonable compensation therefor.

FINDINGS

What are tenant's fixtures? The learned authors of Woodfall Landlord and Tenant 1994 edition state at 13.141.

> "A tenant's fixture is a chattel which is;
>
> (a) annexed by the tenant to the land;
>
> (b) is so annexed either for the purposes of his trade or for mere ornament and convenience; and
>
> (c) physically capable of removal without causing substantial damage to the land and without losing its essential utility as a result of the removal."

I adopt this definition and hold that the following items are tenants fixtures:

10 air conditioning units

Carpeting

Burglar alarm system

Mirrors

Company directory sign

On a balance of probabilities I hold that there was a burglar alarm system on the premises.

I hold that the removal of these items is governed by Clause 5(6) and not 2 (14) of the Lease. I agree with the submission of Lord Gifford that the clauses relate to different classes of items and different circumstances of removal.

The tenancy was finally determined on the 27th March 1986 when the Injunction was discharged. The plaintiff should have been given a reasonable time to remove the tenants fixtures. In **Smith v City Petroleum Co. Ltd. [1940] 1 All E.R. 260** Stable J. said at 262.

> "For example, if the landlords had determined the weekly tenancy and it had been impossible for Ridge to have removed the pumps within a week, I think that the law would have permitted him a reasonable time after the weekly tenancy had expired to remove them."

Re Improvements

Clause 2 (11) enjoins the Lessee

> "not without the prior written consent of the Lessor to ... change the location or style of any partition or install any plumbing piping wiring ...."

There is no evidence that written consent was obtained but it is clear from the correspondence that no objection was made to the improvements. The question of their disposal on a sale of the premises was decided but no decision was taken in the event of the determination of the tenancy.

The first defendant unilaterally denied not to permit the plaintiff to remove them at the end of the tenancy. In the circumstances it would be inequitable for the defendant to retain the benefit of these improvements without compensating the plaintiff.

In respect of the damage to the premises by fire it was agreed that the relevant Clauses were 5(3) and 2(21).

Clause 5 (3) relieves the lessee from liability for damage to the premises unless such damage was not done by his act or negligence on his part or that of his servants or agents. There is no evidence that the plaintiff was not negligent.

Clause 2 (21) requires the lessee at the determination of the lease to deliver up the premises in good condition.

The plaintiff is therefore liable for the damage by fire for which I award the sum of $8,000.00.

The claim for non-payment of the plaintiff's utility charges was not established.

There will therefore be judgment for the plaintiff on the Claim for $413,795.48 and Judgment for the first defendant on the Counter Claim for $11,000.00. Interest on the Counter Claim @ 15% per annum for eight (8) years. Total $24,200.00. Costs of Counter Claim to first defendant to be taxed if not agreed.

Final Judgment for the plaintiff for $389,595.48 with costs to be taxed if not agreed.

Finally let me apologize for the delay in the delivery of this Judgment.

The first defendant unilaterally decided not to permit the plaintiff to remove them at the end of the tenancy. In the circumstances it would be inequitable for the defendant to retain the benefit of these improvements without compensating the plaintiff.

Re Damages

Mr. Blankson presented a Summary of his Report - Exhibit 4 (a).

Rods and drapery

Mrs. Sherwood stated that the plaintiff took the drapes and left the rods. There was no separate valuation of the rods. Lord Gifford submitted that these should be valued at 10% of the total value $42,560.00 = $4,256.00. That a deduction of 20% of the value of all the items should be made to allow for deterioration as the items were valued as new in 1986.

Mr. Goffe submitted that there was nothing to justify using a percentage.

In **Sachs v Miklos [1948] 1 All E.R. 67** Lord Goddard C.J. said at 69

> "Counsel for the plaintiff has relied principally on a recent case in this court Rosenthal v. Alderton & Sons, Ltd. (3). What that case lays down is, I think, correctly stated in the headnote [1946] 1 K.B. 374:
>
> " In an action of detinue, the value of the goods to be paid by the defendant to the plaintiff in the event of the defendant failing to return the goods to the plaintiff must be assessed as at the date of the verdict or judgment in his favour and not at that of the defendant's refusal to return the goods, and the same principle applies whether the defendant has converted the goods by selling them or has refused to return them for some other reason."

I award the value at the date of judgment. I agree with Lord Gifford that some deduction should be made for deterioration and accept the figure of 20%. Total $307,788.80. I add the sum of $60,575.25 in respect of compensation for the improvements and on this figure I award interest for a period of five (5) years @ 15% per annum making a total of $106,006.68.

Re Counter Claim

I accept the evidence of Mrs. Sherwood that there was damage to the floor as a result of an attempt to remove the carpet and award the sum of $3,500.00.