SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 4 of 1977.

Between :

STANLEY BLACK **Defendant/Appellant.**

and

THE MAYOR AND CITIZENS of Castries a body corporate established and constituted by the Castries Corporation Act, 1967 (No. 22 of 1967) **Plaintiff/Respondent.**

Before :

The Hon. Sir Maurice Davis, Q.C. — Chief Justice
The Honourable Mr. Justice Peterkin
The Honourable Mr. Justice Nedd (Acting)

Appearances :

W. Cenac, Q.C., with him Miss Beryl Edwards for the Appellant.

K. Monplaisir for the Respondent.

1978, February 21 ; May

JUDGMENT

PETERKIN. J.A. :

This is an appeal against the judgment of Renwick J. ordering that the Appellant give up possession of certain premises the property of the Respondents, and for the payment by him of mesne profits.

The facts and circumstances are that by lease dated 31st December, 1964, the Appellant leased from the Respondents a lot of land situate in Castries for a term of five years at an annual rent of forty dollars with an option to renew for a further period of five years. There was no provision in the lease as to the time within which the option was to be exercised during his term of five years, the lessee constructed on the premises a concrete structure with steel reinforcements covered with galvanise, where he carried on the business of a petrol service station.

On 1st June, 1970, six months after the term had expired, the Appellant wrote seeking to exercise his option to renew. After some correspondence, the Respondent offered to renew the lease but at an increased rent of $40.00 per month. The Appellant did not agree. He however continued to occupy the land. By letter dated 25th February, 1972, Respondent gave the Appellant notice to quit not later than 30th April, 1972, but the Appellant continued in occupation on the ground that the acceptance of rent after the expiry of the original term, coupled with his letter of 1/6/70, amounted to a valid exercise of his option to renew the lease for a further five years. This has been conceded. On 24th August, 1976 the Respondent issued a specially endorsed writ claiming from the Appellant (1) possession of the premises, and (2) mesne profits from 31st December, 1974, the date of expiry of the second five-year term.

The Appellant counterclaimed for,

(1) Payment for improvements made ;
(2) A declaration that he had a right to retain possession of the premises until he was re-imbursed for his improvements ;
(3) A set-off of any amount payable to the Respondent against any amount payable to him for improvements.

On 13th May, 1977, Renwick J. made the following Order :
" The Defendant is hereby ordered to deliver up possession of the leased premises on or before 30th June ; to pay to the Plaintiffs $100.00 being the mesne profits claimed from 31st December, 1974, and costs to be taxed. "

Against this decision the Appellant has appealed on the following grounds :

(1) The learned judge erred in law by holding that, because the Respondent did not wish to retain the improvements and additions, the Respondent was not, in all the circumstances, under any legal obligation to compensate the Appellant for the same. He so erred for the following reasons :—
   (a) He misconstrued the meaning and effect of Article 1544 of the Civil Code ;
   (b) He failed adequately or at all to consider the rights of the Appellant to be compensated for the said improvements and additions, and in particular, the right of the Appellant to compensation arising from the Respondent's approval of and consent to the said improvements and additions.

(2) (a) The learned judge erred in law in that although he found that the said additions and improvements had some value, he failed to determine that value or to make any award in favour of the Appellant for the same ;
   (b) The learned judge erred in law in that in ordering the Appellant to deliver up possession of the premises he failed to consider adequately or at all the Appellant's rights in all the circumstances, and especially in view of the Respondent's approval and consent aforesaid, to retain the premises until the Appellant had been reimbursed by the Respondent for the additions and improvements made by the Appellant to the said premises.

(3) The finding of the learned judge that the said additions and improvements had little value is wrong in that it is against the weight of the evidence.

In his judgment of 13th May, 1977, the trial judge found that the structure had been erected with the approval and consent of the Respondents. Counsel for the Respondents has been criticial of this finding, but there has, however, been no cross appeal filed against the judgment. He also went on to find that the Appellant had paid no rent since June, 1970, and indeed, had ceased to operate his service station from about 1971. He found too that on the Appellant's own admission the lease had expired and that whatever tenancy he may have had was duly terminated by notice properly given. The trial judge then referred to Article 1544 of the Civil Code, Cap. 242, and concluded that in his view, although the section gave the lessor an option to retain the improvements and additions on payment of their value, he could not be compelled to do so, but that the lessee had the right to remove the additions. Also, in effect, that since the lessors in the instant case did not wish to retain the improvements, the lessee was not entitled to be reimbursed. He then went on to make the order for possession and mesne profits.

Counsel argued grounds 1 (a) and (b) together. He referred the Court to Articles 337, 338 and 371, and submitted that the judge's decision was erroneous in that he placed too rigid a construction on Article 1544 by failing to construe it in the context of the other relevant provisions of the Civil Code named as well as in the context of the Respondent's approval of and consent to the Appellant's erection of the building. Also, that he should have found that the Respondents had treated the building as having been attached for a permanency to the leased permises and so had exercised their option to retain it. He argued that the Landlords were unjustly enriching themselves, and cited the case of Simeon v Beaubrun, Suit No. 25/55, St. Lucia *Gazette* of 17/1/56.

On grounds (2) and (3) Counsel argued that the judge ought to have found the value of the building as there was sufficient evidence before him to enable him to do so. He then referred the Court to Article 374 of the Civil Code and submitted that the Appellant was entitled to retain possession of the premises until he had been reimbursed by the Respondents. Article 374 reads.

> "374. In case the party in possession is forced to give up the immovable upon which he has made improvements for which he is entitled to be reimbursed, he has a right to retain the property until such reimbursement is made, without prejudice to his personal recourse to obtain repayment; except in the case of surrender in any hypothecary action, as specially provided for in the Book respecting Privileges and Hypothecs."

Counsel for the Respondent has on the other hand made the following submissions :—

(i) That no lessee has any right to retain possession of any property leased to him as a result of making improvements on it.
(ii) That in the instant case the Appellant is a possessor in bad faith.
(iii) That by the nature of the lease and the conduct of the Appellant towards the lease he has waived any rights which he may have had in respect of improvements.

In respect of his first submission Counsel cited the case of Canadian Railway v Andrews, Quebec Law Reports, Vol. 16 9/12/1890, at page 379. In respect of his second and third submissions Counsel has referred the Court to Articles 367 and 372. These Articles read respectively,

> "367. A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutory cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or the resolutory cause are made known to him by proceedings at law."

> "372. When improvements have been made by a possessor with his own materials, the right of the owner to such improvements depends on their nature and the good or bad faith of such possessor."

I shall deal first with the question of possession.

In the case of Simeon v Beaubrun, cited to the Court by Counsel for the Appellant, Lewis J said at page 4 of the judgment,

> "In the case of Chenic Hardware Co., v Laurent, 1 R.J. 278, noted in Beauchamp General Digest, Vol. II Col. 1358, No. 36a, it was held that Article 417 of the Civil Code of Quebec (Our 372) applies in general, only to third parties who possess *animo domini*, for themselves and on their own account, in good or bad faith, and does not apply to those who possess by virtue of a contract, such as farmers, lessees, usufructuaries, etc. In these cases the rights and obligations of the parties are governed by the principles applicable to the contracts by virtue of which they possess.

The position of lessees with respect to improvements made by them is regulated by Article 1544 of the Civil Code (corresponding to the Quebec Civil Code, Article 1640). "

In the case cited to the Court by Counsel for Respondents it was held that the benefit which the tenant derives for the cost of urgent and necessary repairs carried out on the thing leased, and done with the consent of the Landlord, is only personal against the Landlord, and that this benefit in no way confers any privilege and does not in addition give the right to retain the thing leased upon the expiration of the lease. At page 2 of the judgment (Translation), the learned judge states,

> "Several commentators of the Napolionic Code among others Demolombe Vol. 9 Nos. 592 and 593 and other French Jurists classify the farmer or the tenant among third persons for improvements which they have carried out on property ; but their arguments are all based on the fact that Article 555 of the Napoleonic Code uses the word third persons and that this term according to them, includes the farmer as well as the possessor is not, applicable to Article 417 of the Civil Code which uses the word possessor. Let us even suppose that the words third person and possessor might have significance the right of retention until reimbursement which the same French jurists accord to the tenant could not have the same meaning under our law ; for Article 419 of the Civil Code gives this expressly only to a third party retaining possession. "

In my view Article 374 clearly relates to Article 372 and refers only to third parties such as come within the purview of Article 372. (Article 417, Civil Code of Quebec). In the instant case the Appellant who is a lessee does not in my view come under the umbrella of Articles 372 and 374. The lease has terminated, and the Appellant has no right to retain the property until he is reimbursed as counterclaimed. Accordingly, I would sustain the judgment and order for possession with mesne profits.

I turn next to the question of compensation.

I agree that the position of lessees with respect to improvements made by them is regulated not by Article 372 but by Article 1544 of the Civil Code (Article 1640 Quebec Civil Code) which reads,

> " 1544. The lessee has a right to remove, before the expiration of the lease, improvements and additions which he has made, provided he leaves the property in the state in which he received it ; nevertheless, if the improvements or additions be incorporated with the thing leased, with nails, lime, or cement, the lessor may retain them on paying the value."

Mignault, in his treatise on the Civil Law, commenting on Article 1640 of the Quebec Code, at Vol. 7, page 323, states :

> " Either the improvements and additions are susceptible of being removed without deteriorating the immoveable, or they cannot be removed without deteriorating it. In the first case, the lessee cannot compel the owner to pay their value, unless the latter has ordered them to be made. But he can remove them at his own expense, provided he can do so with advantage to himself (argument from art. 417, last paragraph) and provided he re-establishes the property in its former state. However, if the improvements or additions are attached to the property leased by nails, mortar or cement, the law permits the lessor to treat them as having been attached for a permanency, and to retain them on paying their value, but the terms of the article make it clear that this is an option granted to the proprietor. "

In the instant case the trial judge has found that the Respondents gave their approval and consent to the construction of the building on the land leased. The structure is one that was built with concrete blocks, and, in my view, is one " attached to the property leased by nails, mortar or cement. " Having expressly granted their approval and consent the Respondents cannot, I think, stand by and enrich themselves without the just payment of compensation to the Appellant. In my opinion the Respondents must be taken in the circumstances of this case to have exercised their option and to have elected to treat the improvements or additions as having been attached for a permanency, and to retain them on paying their value-

In the result, I would allow (i) and (iii) of the counterclaim and remit the matter for the trial judge to assess the compensation due to the Appellant for the improvements or additions made. Also, I would allow a set-off of any amount payable to the Respondent against any amount payable to the Appellant.

In my view there should be no order made as to costs.

N. A. PETERKIN,
Justice of Appeal.

I agree

R. A. NEDD,
Justice of Appeal (Acting).

I also agree

SIR MAURICE DAVIS,
Chief Justice.