BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: CV2045 of 2009

BETWEEN

MICHAEL JOSEPH O'DOWD **CLAIMANT**

AND

CYNDRA RAMSUNDAR **DEFENDANT**

Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court

2016: March 8
2017: September 8

Appearances:

Mr. Andrew O.G. Pilgrim, Q.C. in association with Ms. Kamisha Benjamin, Attorneys-at-Law on behalf of the Claimant

Ms. Trena A. Kellman, Attorney-at-Law on behalf of the Defendant

DECISION

Introduction

Facts not in Dispute

[1] There are certain facts in this case which are established beyond all controversy and those are set out here.

[2] By an oral agreement entered into on or before September, 2001 between the Claimant and the Defendant, the Claimant rented an apartment known as "Chatham" situated at Chelsea Gardens, St. Michael at a monthly rent of $700.00 inclusive of utilities.

[3] In or about the year 2006 the Claimant gave the Defendant permission to erect a wooden structure onto the premises, which was done.

[4] In or about 2002 Mr. David Ramphal, the common law husband of the Claimant with whom she occupied the apartment, placed some asphalt on the driveway to the apartment.

[5] By letter dated the 30 July, 2009 the Claimant gave the Defendant notice to quit the apartment on or before the 31 August, 2009.

[6] On the 28 August, 2009 the structure was dismantled and removed and the asphalt was removed from the driveway and the Defendant vacated the said apartment.

[7] By Claim Form filed on 11 December, 2009 the Claimant alleged that the Defendant has committed acts of waste on the premises and therefore claim damages against her in the sum of $37,439.17 plus interests, costs and any other relief which the court deems fit.

Facts in Dispute

[8] It is the Claimant's contention that the structure built by the Defendant was of wood and wall and consisted of a kitchen unit with

cupboards. The Defendant contends however that the structure was a wooden structure solely for storage purposes which was to be dismantled and removed at the end of the tenancy. The Claimant disputes this maintaining that he provided the Defendant with half the costs to construct the structure and therefore it was ludicrous to suggest that having invested in the construction of the structure, that he would agree to its dismantling and removal.

[9] The Defendant denies that the Claimant provided any of the costs for the construction of the structure.

[10] With respect to the laying of the asphalt in the driveway, it is the Defendant's position that the Claimant was opposed to it being placed there and even threatened to have it remove the next day, however agreed that it could stay provided that the Claimant have it removed at the end of the tenancy and the area returned to its natural state. The Claimant's posits that even though he was not consulted with respect to the laying of the asphalt and therefore did not consent to its placement, he never suggested or agreed that it be removed at the end of the tenancy.

[11] The Claimant alleges that the removal of the structure including the driveway caused damage to the premises whereas the Defendant alleges that no damage was caused to the Claimant's premises and

that at the end of the tenancy the premises were left in tenantable repair, fair wear and tear excepted.

The Issue(s)

[12] 1. Whether the structure was a fixture and therefore became part of the land.

2. Whether the removal of the structure and asphalt in the driveway constituted an act of waste.

3. Whether the removal of the structure and the driveway constituted acts of waste which entitled the Claimant to damages therefor.

The Law

[13] It is recognized in law that there are two tests for determining whether an object is a fixture or a chattel – (a) the degree of annexation and (b) the purpose of annexation.

[14] According to this test, an article is a fixture if it is attached to land or a building in some substantial manner, such as by nails or screws, and the more firmly or irreversibly the object is affixed to the earth or a building, the more likely is the object to be classified as a fixture – Gray, Elements of Land Law, 2nd Edn, 1993 at p. 12.

[15] In the case of *Holland v. Hodgson (1872) LR 7 CP 328* at p. 335 **Lord Blackburn** observed the following: –

> "...There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for

> this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel. See *Wiltshear v Cottrell*, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land. See *D'Eyncourt v. Gregory*...On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land...Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstance are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

[16] So that "if an object cannot be removed without serious damage to, or destruction of some part of the realty, the case for its having become a fixture is a strong one – per **Scarman LJ** in *Berkley v. Poulett [1977] 1 EGLR 86* at p. 88 – whereas if the article in question is no further attached to the land than by its own weight, it is considered to be a mere chattel" – per **Lord Blackman**, supra.

[17] But the degree of annexation is not conclusive on the status of an item, it merely provides a *prima facie categoriastion* which may be

reversed by contrary evidence as to the purpose for which the item was brought onto the land. Therefore when considering the purpose of annexation if a chattel is placed on land with a view to it being enjoyed in its own right, for example, as an ornament, or an object of utility, then it remains a chattel, irrespective of the fact that it might have been necessary for the chattel to be secured to the land in order to be properly enjoyed or utilized. On the other hand, if a chattel is placed on land with the intention that it should form an integral part of the structure of a building, or part of an architectural design of a building or ground, then, irrespective of whether it rests by its own weight or is in some way fixed, it becomes a fixture and thus part of the land. The test seeks to give effect to the intention of the person who introduced the chattel on to the land – Land Law, Sixth Edition, Reddall, J.G., at p. 55.

The Trial

[18] During the trial some photographs were put before the court in an effort to show the connection between the structure and the apartment – in other words the Claimant was alleging that there was no gap between the green floor of the apartment and the floor of the structure and that it was continuous flooring. The Defendant disputed this and alleged that there was about a one foot gap between the green flooring

of the apartment and the brown flooring of the structure, suggesting therefore that it was a separate structure and was not adjoining the apartment not even at the roof level. The photographs however like all photographs can be deceptive because it depends on the angle they are taken from and viewed.

[19] From the photographs it does appear to the court that there was a gap between the apartment and the structure and that the structure was not attached.

[20] The Claimant also contends that he contributed $600.00 towards the costs of the construction of the structure and that he deducted this amount from the Defendant's monthly rent in two instalments of $300.00 each, so that there is no receipt for same but there is a notation in his personal accounts for March and April, 2006 which reflects this.

[21] This is disputed by the Defendant, her spouse David Ramphal indicated that he sourced the materials for the structure from friends and demolition sites and that he received no money from the Claimant.

[22] The court takes issue with the Claimant's personal accounts as proof of payment since there is no way of authenticating same – this could have been done by having the Defendant or her spouse initial same.

[23] It is the Claimant's position that rebar/steel was used as he told the Defendant that he did not want the structure to place any stress on the apartment building and therefore the support must go to bedrock.

[24] The Defendant's spouse who carried out the works denied using any rebar/steel but did admit that the structure was standing on concrete bricks put together with plate and that he used cement to secure the bricks and then placed the structure on this footing.

[25] From the photographs it could not be readily seen if pieces of steels were left behind after the structure was removed as alleged by the Claimant, but no evidence of damage to the land could be seen.

[26] What is worth noting is that even though the Claimant stated that he consented to the structure and contributed to half the costs of its construction, there is no evidence at all that the Claimant assisted in the design or layout of the structure, offered any advice or even observed its construction.

[27] The court should not at this stage be speculating on whether the structure comprised a kitchen as posited by the Claimant or was used for storage as is the position of the Defendant. One would expect that the Claimant being the landlord of the Defendant for about eight years would have sometime during the tenancy have inspected the premises and be in a better position to assist the court.

[28] With respect to the structure after considering the particular facts and circumstances the court accepts the evidence as given by the Defendant and her spouse. The Defendant was found to be extremely credible, she was forthright and there was no ambiguity or inconsistency in her testimony.

[29] Inspite of the number of years which has since elapse the Claimant was still quite upset and angry over this situation and though understandable, his version of the events was not as believable as that of the Defendant. The photographs clearly showed that the Defendant left the apartment in good condition, fair wear and tear excepted. The court accepts that the structure was solely for storage and as an object of utility it was secured to the land only so that it could be properly utilized and that its removal did not cause any damage to the Claimant's property.

[30] Furthermore from the evidence at trial it would appear that the landlord was present along with members of the Royal Barbados Police Force when the structure was being dismantled and removed – there is no evidence that he *voiced* any objection.

[31] This notwithstanding the court does not find that its dismantling and removal caused any damage whatsoever to the Claimant's apartment or land – there simply is no proof of this. The burden of proof clearly

rest with the Claimant to satisfy the court that the structure was a fixture and therefore must remain with the land. He has failed to meet this burden.

[32] Based on the above it would be difficult to conclude that the tenant committed an act of waste in the removal of the structure. According to *Yellowy v. Gower (1855) 156 ER 833* a tenant is obligated to keep the premises in proper repair in the absence of an express stipulation to the contrary. So that a tenant for a fixed term is liable for both voluntary waste and permissive waste. Voluntary waste can be defined as positive acts of injury to the property, such as altering or destroying it whereas permissive waste refers to allowing the property to become dilapidated, through omission to repair. In an action for voluntary waste which is the one that would be applicable to the present facts, the landlord must show that the waste was caused by an affirmative act of the tenant – that is, the destruction of the premises must be willful or negligent.

Conclusion

[33] There is nothing in the evidence before the court to satisfy it that this structure was intended to or in fact became a permanent fixture affixed to the land and that its removal resulted in a destruction of the Claimant's premises.

[34] As a utility for storage, it was secured to the land in as minimal a way as possible so that it could be properly utilized. Its removal in no way cause any injury to the land or damage to the apartment – in fact the apartment was left in the same condition in which it was leased to the tenant, fair wear and tear excepted.

[35] With respect to the asphalt, the evidence at trial was that it was placed in the driveway by the tenant without the consent of the landlord. The court accepts the evidence of the Defendant and her spouse that the landlord upon seeing the asphalt, threaten to *have* it removed the next day and only relented and allowed it to remain after the tenant indicated that it would be removed at the end of the tenancy and the driveway returned to its natural state. There is no evidence that this position changed throughout the tenancy and therefore the actions of the tenant in removing the asphalt at the end of the tenancy was in accordance with the agreement made between the landlord and the tenant. If it was the landlord's intention that the asphalt should remain at the end of the tenancy then this should have been communicated by the landlord to the tenant – it is not enough to suggest that because the asphalt remained there for a number of years, it became the property of the landlord and therefore should not have been removed without his consent.

[36] It should be noted that previous to the asphalt being placed in the driveway by the Defendant's spouse, the area consisted of some grass and mud – there is no evidence however to suggest that it was lawn grass with a cost attach to it and therefore with time the grass would have grown back in place. Again it cannot be seen how the removal of the asphalt caused any injury to the land.

Disposal

[37] After reviewing all the evidence in this case, taking into account all of the factors stated above, the law and the submissions of the parties the court does not find that the Defendant has breached the covenant to leave the premises in good and tenantable repair. There is no evidence of any permanent damage to the Claimant's property either the apartment or the driveway.

[38] The Claimant having fail to discharged the burden of proof placed upon him in proving that the structure was a fixture and that its removal caused any damage to his property and the Defendant having satisfied the court that she left the premises in good condition, fair wear and tear excepted, the Claimant is not entitled to any compensation from the Defendant.

[39] The Claimant's action is dismissed.

PAMELA A. BECKLES
Judge of the High Court