Privy Council Appeal No. 21 of 1961

Albert James Mauritzen trading as A. J. Mauritzen & Co. – *Appellant*

v.

Gordon Grant and Company Limited – – – – – *Respondent*

FROM

THE FEDERAL SUPREME COURT OF THE WEST INDIES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MAY, 1964

Present at the Hearing:
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD DONOVAN.
[*Delivered by* LORD PEARCE]

The appellant (hereinafter called the tenant) is a freight forwarding agent who carries on his business in a first-storey bay or section of a large two-storey block of offices in St. Vincent Street, Port of Spain. The respondents (hereinafter called the landlords) own the whole office block and occupy *inter alia* the ground floor below the tenant for the purposes of their coffee business. The office block was constructed of stone with a galvanised iron roof. Along one side of the first storey ran an enclosed wooden balcony projecting over the footway. The tenant's premises consisted of one large room and the balcony outside it. Prior to September 1958 the tenant occupied the premises by virtue of an oral monthly tenancy.

On the 11th September 1958 a windstorm caused considerable havoc to some buildings in Port of Spain, including the office block in question. The roof of the main building was damaged, the roof of the balcony was completely blown away, a number of windows in the balcony balustrade were broken, and the parapet above the balcony was cracked. The landlords' architect decided that reinstatement was uneconomic, and on 30th September served a notice on the tenant requiring him to give up possession of the premises on the 31st October. Similar notices were served on the other tenants. The City Engineer took the view that certain parts of the building had been made dangerous by the windstorm and on the 4th October served a notice on the landlords requiring them " to take down the roof, the parapet wall along the southern and western sides of the building, and the balcony over the footways " within thirty days. The landlords took the view that this work should be done and never sought to challenge the notice. They forwarded it to the tenant who promised to leave as soon as he could obtain suitable alternative accommodation. As from the 31st October 1958 he became a statutory tenant under the Rent Restriction Ordinance (Cap. 27 No. 18) which is in general similar to the Rent Restriction Acts in this country, save that it also applies to public and commercial buildings. The other tenants left their premises, but the tenant continued in occupation. On December 13th the landlords started certain demolition work. Amongst other things they removed portions of the roof and parapet wall and balcony of the premises next to the plaintiff's bay, and replaced the roof over those premises at a level 3 ft. above the level of the first floor with the result that the first floor accommodation in that part of the premises ceased to exist. They put some rough rails to fence the outside of the tenant's balcony. The effect of these alterations was to leave the tenant's bay projecting above the level of the

neighbouring roof so that its roof was vulnerable to high wind and therefore dangerous. The balustrade and the broken windows on the front of the tenant's balcony were removed. The landlords discourteously failed to obtain the tenant's permission for the work done on the tenant's premises. He obviously suffered great inconvenience, especially since the exposure of the flank of his bay (despite protective galvanised iron sheeting) allowed dust from the demolition and husks from the landlords' coffee hulling operations to enter the tenant's premises.

On February 4th 1959 the tenant started the present proceedings claiming an injunction and damages for nuisance, and breach of the implied covenant for quiet enjoyment and/or trespass. The landlords counter-claimed for possession. Phillips J. dismissed the tenant's claim and made an order for possession, giving costs to the landlords. On appeal the Federal Supreme Court confirmed that judgment in all respects save that they reversed his finding on nuisance and substituted a judgment for 100 dollars damages. They considered, however, that this issue was so small, that they made no variation of the order for costs and gave the landlord the costs of the appeal.

Mr. Albery, who argued the appeal very forcefully, did not dispute the finding of the Courts below that the " condition of the balustrade and windows of the balcony within the demised premises after the occurrence of the windstorm did constitute a danger to passers-by as well as to persons entering the demised premises " (per Phillips J.). The Courts below considered various authorities including *Mint v. Good* [1950] 2 All E.R. 1159, and Mr. Albery did not dispute that they were right in holding that the landlords had an implied right to enter onto the premises for the purpose of effecting repairs. They further held that the landlords' liability to passers-by put on them a duty to abate the dangerous condition of the balustrade. It was also held that the landlords were obliged to repair as between themselves and the tenant, but this is not of relevance to this appeal since the tenant is not claiming damages for contractual breach of an obligation to repair.

Mr. Albery argued that a right to repair does not include a right to demolish (except in so far as the demolition is part of a process of reinstatement) and that since the landlords were demolishing without any intention to repair or reinstate, they committed trespass. No question of *mala fides* arises, since the landlords never pretended, while demolishing, that they were intending to reinstate. There was a plain difference of opinion, the tenant taking the view that he was entitled to reinstatement as before, the landlords taking the view that owing to what had occurred and to the City Engineer's notice and their architects opinion they were entitled to demolish, without reinstating, that which was dangerous. Certain it is that one or other of these courses had to be taken with despatch. The City Surveyor's notice did not in itself give the landlords any right of entry which they would not otherwise have (see *Trotter v. Louth* 43 T.L.R. 335). But the notice did underline the fact that the landlords would be liable if injury was caused by the dangerous condition of the premises and that they must without delay abate the dangers existing on the premises. It may be that in certain circumstances, especially if there was any *mala fides*, a demolition which was not followed by reinstatement could constitute a trespass even when done by a landlord with a right to effect repairs. But that is not this case. Here there were concurrent findings that there was a dangerous state of affairs and that the landlords had a right and duty to remove any danger to the public arising from disrepair. If the tenant had any rights based on the failure to reinstate it would arise under breach of covenant to repair. Their Lordships take the view that the Courts below were entitled to hold that there was no trespass and that they did not err in law.

The more substantial issue in this case is whether the landlords are entitled to possession. The relevant terms of the Rent Restriction Ordinance are as follows:—

> " 14. (1) No order or judgment for the recovery of possession of any premises to which this Ordinance applies, or for the ejectment of a tenant therefrom, shall . . . be made or given unless.....

> (l) the dwelling-house, or the public or commercial building, ... is required by law to be demolished;..... and unless in addition, in any such case as aforesaid, the court asked to make the order or give the judgment considers it reasonable to make such order or give such judgment: "

Sub-section (3) says " Nothing in this Ordinance shall prevent the making of an order for the ejectment of any person where, in the opinion of the court asked to make the order, the ejectment is expedient in the interest of public health or public safety ".

Both courts below held that an order for possession should be made both under 14(1)(l) and under 14(3). With regard to the latter Phillips J. said " It seems to me that having regard to the dangerous situation that *now* exists (the italics are inserted by their Lordships) in connection with the portion of the roof (including the roof of the demised premises) that remains standing and bearing in mind the location of the building situated as it is in a densely populated part of the business area of Port of Spain and adjoining the public highway, it is expedient in the interest of public safety that an order for possession should be made ".

Lewis F. J. in the Federal Supreme Court on this point said, " I do not consider it necessary to deal fully with the question whether in view of the condition of the building at the time of the trial an order for possession should have been made under section 14(3) of the Rent Restriction Ordinance which permits an order to be made when in the opinion of the Court the ejectment is expedient in the interest of public health or safety. It is sufficient to state that having considered the arguments adduced by Counsel for the appellant, I am clearly of the opinion that the order was justified on this ground also.".

In the light of those concurrent findings of fact with which their Lordships see no reason to disagree, it would be impossible to set aside the order for possession. Mr. Albery sought to argue that the trial Judge erred in not directing his mind to the relevant date, namely the date of trial, in considering whether public safety justified the order. It is said that he must have erred because in one passage he preferred the evidence of the landlords' architect on the ground that he had inspected the damage immediately after the storm (although he had not inspected it more recently) whereas the tenant's architect had inspected it at a later date. It seems to their Lordships that the learned trial Judge was there referring to the tenant's contention that the landlords unnecessarily and unjustifiably pulled down the adjacent first floor and that even so, the projecting premises of the plaintiff could now be safely married by some kind of steel structure to the adjacent lowered roof of the building in order to prevent the danger caused by exposure to wind of the flank of the tenant's projecting premises. In that context his observations would be wholly reasonable and in no way inconsistent with a consideration of the danger (admittedly existing at the date of the trial) from the exposed flank of the tenant's premises. Be that as it may, the use of the word " now " shows clearly that the learned trial Judge was addressing his mind to the relevant date, namely the date of the trial. The fact that he considered an order to be expedient seems to indicate that he did not accept the tenant's contention as to a steel structure marrying the different levels of the roof.

It follows that the order for possession was rightly made under section 14(3). The question whether it was also justified under section 14(1) (l) does not therefore strictly arise, but it has been fully argued and their Lordships have been asked to express an opinion on it.

A consideration of whether an order could be made under section 14 (1)(l) depends on two questions. First, when the landlords had been served with the notice of the City Engineer requiring them to demolish, were the premises " required by law to be demolished "? And secondly, if the notice was a requirement by law, did it, in spite of the fact that it required partial, and not total, demolition justify a possession order?

The trial Judge and the members of the Federal Supreme Court were unanimous in giving an affirmative answer to the first question. The second question was argued by the tenant's counsel at the trial but not before the Federal Supreme Court; their Lordships Board however allowed it to be revived.

The requirement of the City Engineer was made under section 208(2) of the Port of Spain Corporation Ordinance which provides

> " Where any structure within the City shall be deemed by the City Engineer to be ruinous or so far dilapidated as thereby to have become or to be unfit for use or occupation or to be from any cause whatever in a structural condition dangerous or prejudicial to the property in or the inhabitants of the neighbourhood the City Engineer may give notice in writing to the owner of such structure requiring him forthwith to take down . . . as the case may require to the satisfaction of the City Engineer within a time to be specified in such notice.".

The notice in the present case after setting out particulars of the condition of the premises continued " You are therefore required under section 208(2) . . . to take down the roof . . . within 30 days of the receipt of this notice.".

By section 208(4) if the owner fails to comply with a notice the Corporation or any person authorised by them in writing " may make complaint thereof before the magistrate and it shall be lawful for the magistrate to order the owner to carry out the requirements of such notice within a time to be fixed by him in such order.". How far the requirement can be challenged before the magistrate is not clear, but it is not suggested that he has a discretion to alter the requirements. It would appear that at most he would have a discretion whether to enforce it or not.

On that assumption no penal consequences other than, it may be, the payment of costs on a successful complaint to the magistrate, attend a failure to comply with the notice; and it is not until the magistrate, if in his discretion he thinks proper to do so, makes the order that the compulsion of the law is applied to the owner. For this reason, Mr. Albery argues, on receipt of the notice the premises, albeit " required ", are not " required by law ", to be demolished. The notice is, he contends, merely a procedural step, which only becomes a requirement by law when it is enforced by a magistrate. He refers in contrast to section 192 where failure to comply with the notice is attended by penalties in section 195. But section 192 deals with notices requiring amendment of work done in contravention of regulations and it is the contravention of the regulations rather than the failure to carry out the requirements of the notice which attracts the penalties under section 195.

In the case of *Lalchan Pooran v. Kuar Singh and others* No. 164 of 1958 the Federal Supreme Court held that the service of a notice by the Town Engineer under section 201 of the San Fernando Corporation Ordinance containing terms similar to those of section 208 of the Port of Spain Corporation Ordinance was a requirement by law for demolition within the meaning of section 14 (1) (l) of the Rent Restriction Ordinance. A similar view was taken by the majority of the Court of Appeal in the case of *Prime and Tang v. Serrettee* but Phillips F. J. expressed a strong dissenting opinion. In the latter case Hyatali J. A. said " Clearly the object and intention of the provision is to repose in the Town Engineer the initial right to decide this question and after he has so decided to serve a notice on the landlord requiring him to pull down the structure. Such a notice it seems to me becomes the equivalent of a requirement by statute with which the landlord must comply; for if he does not he is *prima facie* in breach of the statute which entitles the Town Engineer under the provisions of section 201(4), to complain to a magistrate that the landlord has committed such a breach.".

In the present case Lewis F. J. with whom the other learned Judges of the Supreme Court agreed took substantially the same view.

Prima facie the use of the words " required by law " instead of the word " ordered " would seem to indicate that the Act intends to refer to notices which can lawfully be served under Corporation Ordinances rather than to subsequent orders of the magistrate which may follow them. The word

" required " is regularly used in connection with statutory demands. The words " fail to comply " and " complaint " (section 208 (4)) are regularly used in connection with a failure to carry out a legal duty. The words " by law " do not necessarily import that the requirement must be one which, if disobeyed, is followed by immediate (as opposed to ultimate) penal consequences. The requirement is made by the person duly authorised in accordance with powers given by statute. When it is made, the recipient is under a legal duty to comply with it, and compliance may fairly be said to be " required by law ".

It would seem an artificial construction to read the words " required by law " as carrying an implied proviso that the requirement is such that disobedience to it is attended by automatic or immediate penal consequences. Moreover there is no consideration of common sense or the general policy of this Ordinance that impels one so to read the words. It is true that, as Mr. Albery points out, an owner may use a demolition notice in an application for possession although in fact it may never be enforced. But there is no reason to suppose that the Corporation will fail in its duty by first requiring demolition and then failing to see that it is carried out. On the other side it may be said that in cases where a Corporation by its Engineer thinks that premises ought to be demolished, the legislature would hardly intend the demolition to be held up unduly by the private convenience of either tenants or owner. There is force in both these arguments but neither seems conclusive. But there is expressed an added protection to the tenant in the words that no order shall be made " unless in addition in any such case as aforesaid the Court . . . considers it reasonable to make such order ". The fact that the Court before making an order under section 14 (1)(l) must consider it reasonable to do so seems to favour the view that a demolition notice is sufficient to open the door to its discretion. The fact that it must consider it reasonable is sufficient guard against the abuse of demolition notices by plaintiffs seeking possession. If however one were to hold that the judge has no discretion to give possession until the magistrate has actually ordered the demolition, it follows that the judge must be using his discretion on whether to make the magistrate's order possible of fulfilment. It seems odd that he should have " in addition " to consider it reasonable to make an order when any failure to do so will hold up indefinitely a demolition which has both been required by the Corporation's officer and ordered by the Court, and will deprive the owner of the power to do that which the Court has ordered him to do.

The provision therefore that the Court must also in addition consider it reasonable is more consistent with the view that the words " required by law " denote a statutory notice than with the view that they are satisfied by nothing short of an order with penal consequences.

In their Lordships' view *Pooran's* case and the case of *Prime and Tang v. Surrettee* rightly decided that the notice under section 208 was a requirement by law within section 14(1)(l) of the Rent Restriction Ordinance. In those cases the Court also expressed certain views as to the power of the magistrate on a complaint that a notice had not been complied with, but their Lordships have not heard argument on that matter since it was not necessary to their Lordships' decision and they prefer to reserve that point.

On the second question the wording of the section does not provide a certain answer. The learned trial Judge held that the intention of the legislature in creating this relaxation of the restrictions on a landlord's right to obtain possession of demised premises would be rendered nugatory unless the Court were enabled to make an order for possession where only a portion of the premises is required by law to be demolished. It would certainly be strange if it was not intended that possesion could be ordered when demolition of a substantial portion of the premises was required. In this context also it is relevant to consider the added protection to the tenant that no order for possession shall be made " unless in addition the court considers it reasonable to make such order ". It must be a question of fact and degree whether the demolition requirements are sufficiently substantial to enable a Court to hold that the premises are required by law to be demolished. No

doubt a requirement for demolition of a trivial part would not be held sufficient; nor in such a case would the Court consider it reasonable to make an order. In their Lordships' opinion a requirement for partial demolition empowers the Court to make an order in cases where the Court also considers it reasonable to do so. They see no reason to doubt that the Court was entitled to do so in the present case. The work specified in the notice would have made the appellant's accommodation unusable.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal. The appellant will pay the costs of the appeal.

(90019) Wt. 8052/97 80 6/64 Hw.

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