Bibi v Ndjeutchou Xakeu
(2002) SLR 74

France BONTE for the Plaintiff
Frank ALLY for the Defendant

Judgment delivered on 21 January 2002 by:

PERERA J: The Plaintiff (landlord) sues the Defendant (the tenant) for the recovery of R45,000 being arrears of rent. The matter originated before the Rent Board where the Plaintiff obtained an order of eviction of the Defendant on the ground of non-payment of nine months' rent at the rate of R5000 per month. The instant action was filed on 17 January 2000, after the Defendant vacated the premises.

The Defendant avers that payment of rent was withheld by her since February 1999 as a set off against the cost of repairs effected to put the premises in a tenantable condition due to damage and wear and tear caused by the previous tenant. She claims a sum of R75,000 as such cost, and setting off R45,000 withheld from rent, counterclaims a sum of R35,000. In answer to the counterclaim, the Plaintiff avers that:

> the Defendant agreed to take the premises as it was, and that she was responsible for repairs and renovations to the same including the interior paint and decoration as stipulated in paragraph 5 of the lease agreement dated 23 October 1998.

The Plaintiff further avers that the fact that the Defendant paid rent for the first four months discloses the intention of the parties at the time of signing the agreement.

According to the evidence in the case, the premises in suit, were used as "business premises" as "Vanilla Guest House". Prior to the agreement with the Defendant, the premises were leased to a company called "Dream Tours" for one year. Ericson Larson, the Managing Director of that company testified that although the company was able to run the business for one year, there were several defects in the premises such as a leaking roof over the dining area, and water supply system, which he repaired from time to time. He stated that on several occasions the Ministry of Tourism threatened to withdraw the licence unless major remedial work was undertaken at the Guest House.

The Defendant also produced a letter dated 26 October 1998 (exhibit D1) wherein the Plaintiff had informed the Director, Seychelles Licensing Authority that Mr Larson had vacated the premises on 18 October 1998 and that she had started renovation work on the premises, and that an application for a licence would be made once the work was completed. However, at the time that letter was sent, the Plaintiff had already entered into a lease agreement on 23 October 1998 (exhibit P1) with the present Defendant.

The Defendant testified that upon entering the premises on 1 November 1998, repairs

were effected to the ceiling of the lounge area, fixed "fly netting" to the kitchen windows, constructed a housing for gas cylinders, repaired the toilets and painted the interior and exterior of the premises. She also stated that the roof was repaired, and that pillars were constructed in the verandah, and also that fascia boards were fixed. She claimed that the Plaintiff gave oral permission to effect those repairs before entering the premises, but those repairs were done subsequently and after, paying the Plaintiff four months rent in advance. According to her, the agreement was to set off the cost of such repairs from the rent. She further stated that she leased the premises for a fixed period of 10 years to run a Guest House, and that it was the Plaintiff who undertook to apply for the licence in her capacity of landlord. The Defendant also testified that she spent R33,300 for the repair work and produced through one Jovani Bethew an invoice for that amount less 10% as provisional tax amounting to a net sum of R29,970, (exhibit D2), she also stated that she spent on the general cleaning of the premises and the garden, but produced no proof of the costs.

This dispute has necessarily to be determined within the terms of the lease agreement (exhibit P1). In the agreement, the Plaintiff (lessor) described as "the owner of a property on which is constructed a 4 bedroom Guest House situated at La Passe, La Digue….. and trades under the business name "Vanilla Guest House" the Defendant admittedly leased the premises to run the business of a Guest House. The letter dated 26th October 1998 *(D1)* corroborates the Defendant's assertion that the premises were, at the time she came into occupation, not sufficiently suitable to commence business as a Guest House. Who then was responsible for the repairs and renovations that had arisen from defects prior to the date of the agreement? In respect of leases of houses, Article 1720 of the Civil Code provides that:

> the owner shall be bound to deliver the thing in good repair in all respects. During the continuance of the hire he shall carry out all the repairs which may become necessary except which are the responsibility of the tenant.

The common law position of the United Kingdom however was stated by the *Uthwatt Jenkins Committee on Leasehold, Final Report (*1950) at paragraph 228, thus:

> The landlord may by covenant undertake to do the repairs, or some of them, and it is not uncommon in short leases for the landlord to agree to be liable for external repairs. It is important to observe that except in so far as he expressly covenants to do so, he is generally speaking under no obligation to repair nor in general does he warrant that the premises are fit for occupation for any particular purpose. If therefore the lease is silent as to repairs, the tenant must take the premises as he finds them…….

These common law liabilities and obligations are however modified by agreement. Hence it becomes necessary to consider the provisions of the lease agreement of the parties in the present case. The relevant clauses are the following:

Clause 3 The lessee will keep and maintain the Premises in a good state of repair at all times.

Clause 5 The lessee will be responsible for repairs and renovations to the premises, including the interior paint and decoration

Clause 7 The lessee will not undertake any alterations or additions to the premises without the consent of the lessor in writing.

Clause 13 At the expiration of the lease, the lease, the lessor will become owner of all additions, alterations, renovations or improvements made by the lessee to the leased premises and the lessee will have no right to claim any compensation therefor.

It is here, necessary, to consider the legal connotation of the terms "repairs" "renovations", "improvements" and "alteration". The term "addition" is obviously what it means in ordinary language. Lord Denning in the case of *Morcom v Campbell-Johnson* (1956) 1 QB 115 defined "repairs and improvements" thus:

> If the work which is done is the provision of something new for the benefit of the occupier, that is, properly speaking, an improvement, but if it is only the replacement of something already there, which has become dilapidated or worn out, then, Albeit that it is a replacement by its modern equivalent, it comes within the category or repairs and not improvements.

In distinguishing between "repairs" and "renewal" (or renovation) Buckley LJ stated in the case of *Lurcott v Wakely and Wheeler* (1911) 1 KB 905 that:

> Repair is restoration by renewal or replacement of subsidiary parts of the whole "Renewal" as distinguished for "repair" is reconstruction of the entirety, meaning by the entirety not necessarily the whole, but substantially the whole.

TM Albridge on *Letting Business Premises* states that leases of business premises usually contain a tenant's covenant not to make alterations to the premises, which is an absolute prohibition, or not to make alterations without the landlord's consent. The reason for this, is that additions or alterations enhances the ratable value of the premises. However, "improvements" must be distinguished from "alterations": Improvements have to be considered from the Tenant's point of view and not from the Landlord's. They need not necessarily increase the value of the premises, but they must alter the premises in such a way as to confer positive benefit on the Tenant as occupier.

On the basis of these legal definitions, and by virtue of Clause 13 of the agreement, the lessor would be entitled to all additions, alterations, renovations or improvements to the premises by right of accession contained in Article 552 (1) of the Civil Code which

provides that "Ownership of the soil carries with it the ownership of what is above and what is below it".

The dispute before the Court involves two issues. First, does Clause 13 operate only upon the expiration of the full lease period of 10 years? Secondly, can the lessee set off rent against cost of repairs, renovations, improvements, additions and alterations where the lease has been sooner determined. In this respect, Clause 3 is of paramount importance. The agreement thereunder was to "keep and maintain the premises in good state of repair at all times". *Woodfall on Landlord and Tenant* (Vol 1) paragraph 1-1431 states:

> A lessee who has covenanted to repair and keep in repair the demised premises during the term, must have them in repair at all times during the term,and if they are at any time out of repair, he commits a breach of covenant … A covenant to keep premises in repair and leave them in repair at the end of the term, means, that the lessee will put them into repair if they are not in repair when the tenancy begins; for otherwise they cannot be kept or left in repair pursuant to the covenant. (See also *Proudfoot v Hart* (1890) 25 QBD 42).

Hence Clause 3 would include all repairs done at the commencement of the lease, as well as these done during the term of the lease, if any. By Clause 5, the Defendant, as lessee was responsible for all repairs and renovations, including the interior paint and decoration. According to the invoice produced (exhibit D2), repairs had been effected to the roof, ceiling, door frames, locks, window frames and louvres. There had also been painting of the interior and exterior of the premises, and the "replacing of three timber posts". The Defendant in her testimony stated that there were no pillars in the verandah and hence three pillars were erected. That was therefore an addition and an alteration, and not a repair or a renovation, for which the Defendant had not obtained written consent of the lessor, as stipulated in Clause 9 of the agreement. However in the absence of a specific agreement by the lessor to paint the exterior of the premises, painting by the Defendant was, in the circumstances, an “improvement".

The main thrust of the contention of Counsel for the Defendant was that in the absence of the words "or sooner determination" in Clause 13, the lessor would be entitled to all additions, alterations, renovations or improvements made by the lessee only upon the expiration of the lease at the end of 10 years. Where a tenancy was in writing for a fixed period, it shall, as of right come to an end at the expiry of such term. However by agreement, provision can be made for "sooner determination" In the present agreement, paragraphs 14, 15 and 17 provide three instances when the agreement could be terminated prematurely by the lessor. In these circumstances, the absence of the words "or on sooner determination" in paragraph 13, cannot be interpreted in a manner repugnant to the general agreement by the parties providing for a sooner determination. Moreover, the words used in paragraph 13 are "at the expiration of the lease", and not "expiration of the term or period of the lease". The words "or sooner determination" are therefore implied in paragraph 13.

The lessor obtained an order of eviction from the Rent Board on the ground that the lessee had breached Clause 14 of the agreement, which was a ground for eviction as specified in Section 10(2) (a) of the Control of Rent and Tenancy Agreements Act (Cap 47). There has therefore been a sooner determination of the lease due to a default by the lessee, and hence by virtue of Clause 13, the lessee has no right to compensation.

The second issue to be considered is whether the lessee was entitled to retain rent as a set-off against repairs. In the case of *British Anzani (Felix Stowe) v International Marine Management* [1979] 2 All ER 1063, Forbes J recognised two sets of circumstances in which at common law there can be a set-off against rent, one where the Tenant expends money on repairs to the premises which the Landlord has agreed to carry out, but has failed to do so, and the other, where the Tenant has paid money at the request of the Landlord in respect of some obligation of the Landlord connected with the premises demised. In the present case, the Defendant testified that the Plaintiff agreed orally for repairs to be done initially and for the deduction of a sum from the rent payable. The Plaintiff denied that and stated that the lessee had agreed by Clause 5 of the agreement to be responsible for repairs and renovations, unconditionally, and that although the lessee had also agreed by Clause 7 not be undertake any alterations or additions to the premises without the consent of the lessor in writing, she had made alterations to the verandah by erecting three pillars. Further, although the lessee testified that the lessor agreed to a certain sum was to be deducted from the monthly rent, admittedly she defaulted paying the whole rent since March 1999.

In these circumstances, the Defendant had no right to withhold rent against repairs. Accordingly the Plaintiffs action succeeds, and the counterclaim of the Defendant is dismissed.

Judgment is therefore entered in favour of the Plaintiff in a sum of R45,000, together with interest and costs.

Record: Civil Side No 9 of 2000