IN THE SUPREME COURT OF QUEENSLAND No. 5096 of 1983

BETWEEN:

THE PROPRIETORS THE CENTRE BUILDING UNITS PLAN NO. 343 Plaintiff

AND:

MICHAEL R. BOURNE Trading under the unregistered firm name or style of "Discount Fashions" Defendant

JUDGMENT - DERRINGTON J.

Delivered the 5th day of March, 1984.

The plaintiff is the body corporate of a building called The Centre at Surfers Paradise, containing an arcade of shops. Pedestrian traffic through the common property of the arcade is heavy. The defendant is the lessee of a unit consisting of shop premises in the arcade. On 15th December, 1983, Thomas J. granted to the plaintiff an injunction against the defendant in the following terms:

> "Until further order the defendant, his servants and agents be restrained from trespassing on the common property of the plaintiff contained in Building Units Plan Number 343 in the County of Ward, Parish of Gilston."

This was based, upon the refusal by the defendant to refrain from placing in the common area outside his shop racks of clothing forming part of his wares. He is not alone in this respect, for many other tenants or owners of shops in the arcade do the same. The body corporate has expressed the intention of preventing this transgression by all, and commenced with the defendant. It made demand on him to refrain from that course of conduct, but he persisted and even expressed an intention to continue to do so.

The plaintiff now seeks to have the defendant committed for contempt because, despite the injunction, until very recently he continued his conduct as before. He undertakes to continue to refrain until the present issue is determined. He argues that he is not in trespass in acting as he does and says that the correct form of remedy against him, if any, would have been to restrain his acting in breach of the Building Units and Group Titles Act and/or the relevant by-laws of the building. He denies any such breach.

The basis of his denial of trespass is that he claims during the term of his lease to have an interest as tenant-in-common as lessee over the common property, or at least the possessory rights associated with such a tenancy-in-common, and except in respect of ouster, a tenant-in-common cannot be in trespass.

The Building Units Titles Act, 1965, and by-laws thereunder (s. 13) originally applied to this building but it has generally been superseded by the Building Units and Group Titles Act 1980. However, the transitional provisions in s. 5(10) of the later Act retain the application of the former by-laws, which were contained in the First Schedule of the prior Act. The transitional provisions also would seem to apply to former estates or interests in the common property, but that does not appear to be relevant as the relevant provisions of both Acts on this subject are identical.

S. 9 of the former Act and s. 20 of the later Act where relevant provide as follows:—

> "(1) The common property shall be held by the proprietors as tenants in common in shares proportional to the lot (unit) entitlements of their respective lots (units).
>
> . . .

(3) Save as in this Act provided, no share in the common property shall be disposed of except as appurtenant to the lot (unit) of the proprietor and any assurance of a lot (unit) shall operate to assure the share of the disposing party in the common property without express reference thereto."

The plaintiff argues that in some way the provisions of ss. 9 and 20 (supra) do not constitute the defendant a tenant-in-common in the common property in respect of his estate for years created by the lease and that he is endowed with inferior rights compared with his lessor. The former proposition does enliven some doubt but it is impossible to say that a lessee does not receive for the term of the lease an assurance of all the rights of his lessor.

It is necessary first to consider the restrictions imposed by the new Act and the former by-laws upon the total proprietorial rights of a tenant-in-common of the common property.

The by-law relied upon by the plaintiff is by-law 1(d) of the former Act which reads as follows:—

"A proprietor shall -

(d) use and enjoy the common property in such manner as not unreasonably to interfere with the use and enjoyment thereof by other proprietors or the members of their households or their visitors."

In addition, the plaintiff relies upon a similar provision contained in s. 51(c) of the later Act which where relevant, reads as follows:—

"A proprietor, a lessee or occupier of a lot shall not -

(c) use or enjoy the common property in such a manner

"or for such a purpose as to interfere unreasonably with the use or enjoyment of the common property by the occupier of any other lot (whether that person is

> a proprietor or not) or by any other person entitled to the use and enjoyment of the common property."

In addition, s. 30(5) provides as follows:—

> "Without limiting the operation of any other provision of this Act, the by-laws for the time being in force bind the body corporate and the proprietors . . . , lessee or occupier of a lot to the same extent as if the by-law had been signed and sealed by the body corporate and each proprietor and each such . . . lessee and occupier respectively and as if they contained mutual convenants to observe and perform all the provisions of the by-laws."

The defendant claims that his conduct is not in any way in breach of his entitlement to act in respect of the common property in that in fact it does not interfere with others in any manner or mode prohibited by the above section, covenant and by-law. I find as a fact that since the date of the order, he has continued to place his racks of merchandise on the common property so as to be in breach of each of them.

As to his argument on trespass the defendant is supported by the statement in a multitude of the authorities that except as to ouster or its equivalent and not otherwise, a tenant in common cannot be held to be in trespass of the land the subject of the tenancy. See e.g. Clerk and Lindsell on Torts 15th Ed. para. 22-18; Pollock on Torts 15th Ed. p. 278; Halsbury 3rd Ed. Vol. 38 para, 1217 etc. Pollock says:—

> "As between tenants in common of either land or chattels there cannot be trespass unless the act amounts to an actual ouster, i.e., dispossession. Short of that trespass will not lie by the one against the other so far as the land is concerned". Lord Hatherley, Jacobs v. Seward (1872) L.R. 5 H.L. 464, 472, 41 L.J.C.P. 221.
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> . . .
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> There is no wrong to the co-tenant's right of property until there is an act inconsistent with the enjoyment of

> the property by both. For every tenant or owner in common is equally entitled to the occupation and use of the tenement or property Litt s. 323; he can therefore become a trespasser only by the manifest assumption of an exclusive and hostile possession. It was for some time doubted whether even an actual expulsion of one tenant in common by another were a trespass; but the law was settled, in the latest period of the old forms of pleading, that it is. Murray v. Hall (1849) 7 C.B. 441, 18 L.J.C.P. 161, and Bigelow L.G. 343. At first sight this seems an exception to the rule that a person who is lawfully in possession cannot commit trespass: but it is not so, for a tenant in common has legal possession only of his own share. Acts which involve the destruction of the property held in common, such as digging up and carrying away the soil, are deemed to include ouster Wilkinson v. Haygarth (1846) 12 Q.B. 837, 16 L.J.Q.B. 103, Co. Litt. 200; unless, of course, the very nature of the property (a coal-mine for example) be such that the working out of it is the natural and necessary course of use and enjoyment, in which case the working is treated as rightfully undertaken for the benefit of all entitled, and there is no question of trespass to property, but only, if dispute arises, of accounting for the proceeds. Job v. Potton (1875) L.R. 20 Eq. 84, 44 L.J.Ch. 262."

In Lit. sect. 322, Lord Coke commented merely:

> "That albeit one tenant in common takes the whole profits, the other hath no remedy by law against him, for the taking of the whole profits is no ejectment: but if he drive out of the land any of the cattle of the other tenant in common; or do not suffer him to enter or occupy the land, this is ejectment or expulsion whereupon he may have an ejectionae firmae for the one moiety, etc."

There appears however to have been no case in which there has been a clear or complete discussion of a situation such as here.

On a preliminary point it is necessary to decide the question of the status and rights of the defendant. Tenants-in-common are entitled to grant leases of their respective shares, and any of them may make a lease of his share - Woodfall's Landlord and Tenant 19th Ed. p. 14; Halsbury 1st Ed. Vol. 18 para. 780; Foa's Landlord and

Tenant 6th Ed. p. 39; Redman Landlord and Tenant 7th Ed. 60. Unfortunately none of these authorities speaks of the question whether the lessee becomes a tenant-in-common in respect of his estate, the lessor remaining a tenant-in-common in respect of his reversion. It is difficult to see why it should not be so for the lessor cannot be a tenant-in-common in respect of the estate for the term of years which has passed to the lessee upon the demise and yet a tenancy-in-common in respect of that portion of the estate must continue. Moreover there need be no unity of interest. Halsbury 4th Ed. Vol. 39 para. 547. Authorities are difficult to find. In Re: Marcellos, it was held that the lessee of one tenant-in-common is not co-owner of the undivided interest within the meaning of s. 66F(1) of the Conveyancing Act 1919 (N.S.W.) so that his estate might be diminished or destroyed upon a sale in lieu of partition under that section. The reasoning relates to that subject only and is limited to the operation of that Act. In Cornish v. Gest 2 Cox 27, it was suggested by counsel arguendo that a lessee from a tenant-in-common himself becomes a tenant-in-common in respect of his estate. Such a suggestion was neither approved nor disclaimed by the Court.

In Goodlittle v. Tombs (1770) 3 Wlls. K.B. 118; 95 E.R. 965, a lessee of one tenant in common was spoken of and treated in every respect in the argument and judgment as a tenant-in-common. In Jacobs v. Seward (1872) L.R. 5 H.L. 464 where the parties were lessees from different tenants-in-common, their own positions were assumed to be as tenants-in-common though a tinge of doubt permeates the report. The word “assumed” appears more than once.

It is however unnecessary to decide this refinement because, even apart from s. 20(3) of the Act, a lease of his interest by a tenant-in-common has the effect of granting to the lessee for the period of the demise all the rights of the lessor in the demised land. Accordingly, whether a lessee is nominally a tenant-in-common or not, he has all the rights of one, including, most importantly, a

right to possession equivalent to that of a tenant-in-common. This is because a tenant might license the doing of whatever he might do himself. Wilkinson v. Haygarth (1847) 12 Q.B. 837 per Coleridge J. at p. 846. There is ample authority to the effect that one, acting under the licence of a co-owner and within the powers granted by that licence, is under no greater liability to a charge of trespass than the co-owner himself - Job v. Potton (1875) B.R. 20 Eq. Gas. 84 per Bacon V.C. at p. 93; Jacobs v. Seward (1872) L.R. 5 H.L. 464.

The defendant's case then is that, having at least the rights of a tenant-in-common, although there are certain proscriptions imposed by the statute and by-laws upon his conduct, he cannot be guilty of trespass towards other co-owners except by ouster. Ouster is not suggested here. Conformable with his other arguments, counsel for the plaintiff would argue that the defendant's rights are no more than the residue after deducting from the rights of a tenant-in-common those rights which are lost by virtue of the proscriptions, because the lessor cannot pass any greater rights than he has. Alternatively he would argue that even a tenant-in-common is liable to trespass if he exceeds his rights in relation to his co-owners.

Some support might be suggested for the latter argument in the words of Lord Hatherley L.C. in Jacobs v. Seward (supra) where he says at p. 474:—

> "So long as a tenant in common is only exercising lawfully the rights he has as tenant in common, no action can lie against him by his co-tenant."

and at p. 475:—

> "As long as the tenant in common is confining his use of that property to its legitimate purpose trover will not lie against him. But the moment he steps from the legitimate use to that which is illegitimate, as the sheriff seems to have done in that case by disposing absolutely of the common property as if the one partner had been the sole owner, trover will lie."

However, those remarks were made in the context of a discussion concerning ouster by destruction of the land by the removal of an essential part of it such as the soil; and destruction of the subject-matter of the co-ownership and exclusion of the co-owner are the chief forms of ouster.

By way of comparison it is instructive to see the position where a co-owner commits an act which is an interference with the rights of his fellows but which is less than that absolute exclusion or destruction which would amount to ouster. In Cubott v. Porter 8 B. & C. 265, Bayley J. said:—

> "One tenant in common has upon that which is the subject-matter of the tenancy in common laid bricks and heightened the wall. Yet that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have." - cited with approval in Watson v. Gray (1880) 14 Ch. D. 192 per Fry J. at pp. 195-6.

That might be compared with Stedman v. Smith 8 E. & B. 1 where, in addition to heightening the wall in which the parties were tenants-in-common, the offending co-owner so acted as to claim exclusive rights, and was thereby guilty of ouster.

Otherwise there is a dearth of authorities discussing the liability in trespass of a co-owner, or someone taking under him, who has some basic restriction upon his conduct and acts in excess of that restriction.

The plaintiff uses as an analogy the line of cases relating to trespass by a licensee who, whilst on land in accordance with his licence exceeds its terms or remains unlawfully after it has expired. See Clerk and Lindsell op. cit. para. 22-29. In the present case, it is argued, the defendant's rights in respect of the common area are similarly limited by reason of the provisions of ss. 30(5), 51(c) and the by-laws; and to the extent that he

transgresses these, he acts outside his rights and is in trespass.

The defendant responds that by virtue of his title he is entitled to possession and that, whilst any transgressions might be the subject of an injunction, they cannot he trespass because of his entitlement to possession. By way of counter-analogy, he refers to the position of a lessee whose lease contains certain covenants restricting his activities upon the demised premises. If he is in breach of such a covenant, the argument runs, he may be in peril of termination of the lease or for an action for breach of covenant, but he cannot be said to be in trespass. Despite the elegant simplicity of this analogue, it fails because the reason why trespass is not there relevant is that there is no other person in possession who could complain of trespass. Indeed a lessee who holds over after the expiration of his term may be liable in an action of ejectment, but trespass is not available against him because he is lawfully in possession of the land though he wrongly refuses to give it up - Hey v. Moorehouse (1839) 6 Bing. N.C. 52; Fleming on Torts 6th Ed. p. 39.

However the argument bears the seeds of merit in its reference to the significance of the possession to which the defendant is entitled. Trespass is a remedy for the protection of the possession of one entitled to it against one who is not so entitled for it consists of an unauthorized intrusion on land in the exclusive possession of another - Fleming op. cit. p, 36; Clerk and Lindsell op. cit. para. 22-01. But if the entry is authorized, as in this case, then the element of unauthorized entry is missing.

The difference between the defendant's position, where he has the rights of a tenant-in-common subject to certain restrictions, and that of the licensee referred to by the plaintiff's argument is that the defendant has a right to possession but a licensee merely holds a licence to do that which but for the consent would be wrongful. He has no

right to possession - Clerk and Lindsell op. cit, 22-35. A licence is "that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which the consent is given from being wrongful". Pollock on Torts 15th Ed. p. 284; Winfield and Jolowicz on Tort 10th Ed, p. 307. It is for this reason that, whilst conduct in excess of a licence is in general a trespass, the same reasoning is not applicable to one who is in possession and who acts in excess of certain restrictions upon his conduct. It is the distinction as to the right to possession that is decisive.

Consistent with this analysis is the comment in Fleming op. cit, p. 384 where the author says:—

> "The gist of private nuisance is interference with an occupier's interest in the beneficial use of his land. The action is thus complementary to trespass which protects his related interest in exclusive possession."

Because the possession of the co-owners of the common property here is not exclusive of that of the defendant, his interference in their rights constitutes a breach of the statute and by-laws or a nuisance, but not trespass. Cf. Ferguson v. Miller (1978) 1 N.Z.L.R. 819 at p. 827.

As the defendant is not guilty of trespass, he is not in breach of the injunction, though I have no doubt that he knew what was intended to be enjoined. However, that is not to the point except perhaps in costs, and the application for attachment for contempt must be dismissed.

The respondent having given an undertaking which achieves the results required by the Applicant, I order that the injunction of Mr. Justice Thomas of 15 December 1983 be dissolved.

I order that each party bear his own costs including reserved costs.