NAUSORI MEAT COMPANY LIMITED A

v.

FIJI ELECTRIC LIMITED

[COURT OF APPEAL—Speight, J. A., Mishra, J. A. Quilliam, J. A.] B

Date of Hearing: 21 July 1983
Delivery of Judgment: 28 July 1983

(Damages—Action between co-owners—position "artificial"—where each entitled to possession—a solution is to divide the property equally or order sale and division—unless some wrongful act—then position may be different.) C

H. K. Nagin for the Appellant
P. I. Knight for the Respondent

This is an appeal against a decision of Mr Justice Kermode in the Supreme Court in Suva on the 29 October. 1981, whereby he ordered that a sum of $14.400.00 which had been paid into Court by the present Respondent and uplifted by the present D appellant under conditions, be treated as the total amount of compensation payable by the respondent to the appellant in this civil action.

The claim had been, in the Supreme Court for monetary compensation for a period prior to a sale (see below) when respondent occupied the premises to the exclusion of the appellant.

E

Facts which the Court of Appeal accepted included—

The parties had been co-owners of a shop building property in Usher Street, Suva.

It had been owned for years by W.E. McGowan Ltd. (McGowan) and leased to the respondent under agreement of 9 November, 1962 for 15 years at $240 per-month. During the term of the lease, respondent purchasd an undivided half F share in the lease so that "technically speaking, it became a tenant of the co-owners i.e. itself and McGowan".

Thereafter respondent paid only half the rent to McGowan.

The lease expired on 3 October 1977, respondent continuing in occupation as a monthly tenant paying at the same rent. G

On 22 August, 1978 Harrys (South Pacific) Limited (Harrys) purchased the McGowan interest and thus became the registered proprietor of that 1/2 interest. Respondent continued and pay rent, it was not accepted. Harrys attempted to persuade respondent to vacate; this was declined. Harrys attempted to occupy half the property; the respondent refused entry claiming to be entitled to sole possession as H

A tenant. Harrys sold its interest to the appellant (becoming registered proprietor of the undivided 1/2 interest) with whom litigation began. As a settlement Harrys assigned to the apellant all rights Harrys had had to compensation against the present respondent in respect of the exclusion of Harrys from the premises from the time it purchased until it sold to the appellant.

Appellant then claimed damages against the respondent as assignee of Harrys
B and for loss of use or occupation on its own behalf since purchase from Harrys and an injunction to prevent the respondent from excluding it from using/occupying the property.

By agreement the property was sold with the proceeds to be divided.

Respondent paid into court $14,440 in full settlement. This sum had been
C calculated as the rent paid at the time of Harrys' purchase, and later at an increased rental approved in February 1980 by the Prices and Incomes Board as a maximum rent for the undivided half portion of the premises at $775 per month.

Kermode, J. brought in a verdict for $14,440 plus $2,131 calculated at a rate of $775 per month for a broken period during which respondent remained in posses-
D sion immediately after the sale.

Appellant claimed to be entitled to damages measured by estimating profits which appellant and Harrys each could have made if allowed into possession. The sum arrived was calculated on the basis (notional) that Harrys had occupied the whole premises, carried on business and allowed a reduction for the half interest.

E

The learned Judge at first instance rejected this calculation.

Held: The position of co-owners, as the trial Judge found is an artificial one where each is entitled in law to possession in common with the other. When parties cannot agree the only solution the law can offer is divide the property, if that is legally possible, between them or
F order a sale and division of the proceeds. In cases where one co-owner has unlawfully ejected the other, that may amount to a trespass or other legal wrong. That was not the case here. The respondent had always been in possession and lawfully entitled to continue. The Judge rejected any claim of an unlawful act. The position between co-owners where there is no agreement is referred to in Land Law by Hinde McMorland and Sim in Vol. 2 p. 909.

G

The learned trial Judge had taken an eminently practical solution. As the respondent had conceded more than it needed (i.e. in paying mesne profits) it was appropriate to fix an award of compensation on that basis. This was an appropriate solution.

H Appeal dismissed with costs.

Cases referred to:

McCormick v. McCormick (1921) N.Z.L.R. 384.
Jones v. Jones (1977) 2 All E.R. 231.

Dennis v. McDonald (1982) FAM 63.
Bull v. Bull (1955) 1 All E.R. 253.
Leigh & Another v. Dickeson 15 Q.B.D. 60.

SPEIGHT, Judge of Appeal.

Judgement of the Court

This is an appeal against a decision of Mr Justice Kermode in the Supreme Court in Suva on the 29th October, 1981, whereby he ordered that a sum of $14,440.00 which had been paid into Court by the the present Respondent and uplifted by the present Appellant under conditions, be treated as the total amount of compensation payable by the Respondent to the Appellant in this civil action. The facts will be outlined shortly, but in brief the parties had been co-owners of a property in Usher Street; the Appellant had bought out the Respondent's interest and the claim before the Court was for monetary compensation for a period prior to the sale when the Respondent had wholly occupied the premises to the exclusion of the Apellant.

The history is clearly set out in the learned Judge's decision under appeal.

The property is a shop building in Usher Street opposite the Municipal Market. It was owned for many years by W.E. McGowan Limited and had been leased under a agreement to lease of the 9th November, 1962, to the Respondent Company for 15 years at a rental of $240.00 a month. While that lease was still current, namely in 1969, the Respondent Company purchased an undivided half share in the lease so that technically speaking it became a tenant of two co-owners, namely, itself and W.E. McGowan Limited. In fact, of course, what happened was that the Respondent from then on paid only half the rent to W.E. McGowan Limited.

When the lease expired on the 31st October, 1977 the Respondent continued in occupation apparently as a monthly tenant paying half rental as before. On the 22nd August, 1978, Harrys (South Pacific) Limited purchased the interest of W. E. McGowan Limited and became the registered proprietor of that Company's undivided half interest. The Respondent endeavoured to pay half the rent to that Company but it was not accepted and Harrys (as it will be called) attempted to persuade Respondent to vacate but this was declined. It also sought to occupy half the premises but this too the Respondent refused, claiming to be entitled to sole possession as tenant. Harrys took Court proceedings in unsuccessful attempts to obtain physical possession of half of the premises. These were resisted. Harrys then sold its interest in the property to the present Appellant company. There was then litigation between Harrys and the Appellant Company. That was settled on terms including as assignment to the Appellant of all rights which Harrys had had to compensation, damages or otherwise against the present Respondent in respect of the exclusion of Harrys from the premises from the time it purchased until it sold to the Appellant.

Consequent upon the purchase Appellant in its turn became registered as proprietor of the undivided half interest in the property.

The Appellant then commenced proceedings against the Respondent claiming:

(a) Damages as assignee of Harrys as already mentioned;

A (b) Damages for loss of use or occupation on its own behalf since purchase from Harrys;

(c) An injunction to prevent the Respondent from excluding it from using or occupying the property.

At the hearing an alternative claim was added seeking mesne profits or rent. When the action came on for hearing on the 24th June, 1981, consent orders were B made ordering the property to be sold by auction with the proceeds of sale to be divided.

The Respondent had in the meantime paid into the Court the sum of $14,440.00 claiming that that was sufficient to satisfy any entitlement of the Appellant to "rent and/or mesne profits and/or damages". This sum was calculated as the rent paid at the time of Harry's purchase and thereafter at an increase subequently approved in C February 1980 by the Prices and Incomes Board as a maximum rent for undivided half portion of the premises at $775.00 per month. At the settlement just referred to it was agreed that this sum, which had been paid in, could be uplifted by the Apellant on terms that the claim for compensation or damages would have to be resolved by the Court and that should a sum of less than $14,400 be awarded the Appellant would refund the surplus.

D The matter came on again before Kermode J. and on 29th October, 1982, judgment was delivered awarding the sum of $14,400 and a further sum of $2,131.00 calculated at the same rate of $775.00 per month for a further broken period during which Respondent had remained in possession immediately after the sale.

From this award the appeal is lodged on the basis that the assessment of compensation on a rent equivalent basis is inappropriate and inadequate. The E Appellant claimed that it is entitled to damages and that these should be measured by estimating the profit which the Appellant Company and Harrys would each have made had they been allowed into possession and had traded from the premises. As we understand it from Counsel it was a calculation made on the assumption that Harrys and then the Appellants had obtained possession of the entire premises and carried on business there—but with a proportionate reduction to allow for the half interest. The learned Judge entirely rejected the submission. He examined the con- F cept of co-ownership and then considered the problems which arise when one co-owner is excluded. We entirely agree with his summary of the law that the position of co-owners is an artificial one where each is entitled in law to possession in common with the other. The difficulty of course arises when the parties cannot agree and the only solution that the law can offer, as with partners who cannot agree, is either to divide the property equally between them if that is the legal possibility, or else to order a sale and division of the proceeds. It was thought at one stage that in an earlier G case that the Respondent might have been willing to make some physical division down the middle of the shop but the Respondent took the view that this was not reasonable or practicable and would not agree and of course it could not be compelled to do this. In some cases with larger properties which can be *legally* subdivided the Court may make such an order but this remedy was not available in the present case so that the sale as eventually consented to was the only solution which H the law could offer. In cases where one co-owner has unlawfully ejected the other co-owner he has deprived the co-owner of his lawful entitlement and that may amount to a trespass or other legal wrong but this is not such a case. The Respondent had always been in possession and was entitled lawfully to so continue. Damages as

contended for on behalf of the Appellant both in the Supreme Court and in this Court can only be payable in respect of a wrongful act and the learned trial Judge rejected to a claim put forward on that basis. A

We agree. The Respondent was exercising his lawful entitlement.

It must be recognised as the learned Judge said that both Harrys and the Appellants bought their half interest with their eyes open. It must have been known that the Respondent was in occupation and was trading. In acquiring rather complicated form of ownership with the inherent difficulties relating to possession it does not lie in the Appellants mouth to say that he was entitled to expect vacant possession to carry on his own business. All he could expect was such relief as the law provides in these cases when the other co-owner does not consent to partition or where partition is not legally possible. This comprises only an order for sale and compensation in some cases of special circumstances. B C

The position between co-owners where there is no agreement is discussed in the work *Land Law by Hinde MacMorland and Sim* in Vol. 2 p. 909 the author says:

> "Difficulties sometimes arise when one co-owner is in sole occupation of the land. Each co-owner has a right to the possession and enjoyment of the whole of the concurrently-owned property, and it has been said: "Considerations of justice and convenience have led to the recognition of the general principle that one co-owner cannot by failing to exercise his right of use and occupation establish a claim for compensation against another co-owner for the lawful exercise of his own equal right". Therefore no co-owner who has failed to exercise his right of possession is entitled to claim rent from another co-owner even though that other occupies the whole of the land." D

That proposition is supported by two most erudite expositions viz by Salmond J. in *McCormick v. McCormick* 1921 N.Z.L.R. 384 particularly at 386 and by Lord Denning M.R. in *Jones v. Jones* 1977 2 All E.R. 231 particularly at 235. It is otherwise however in certain exceptional cases referred to by the authors Hinde and others on the same page. One of these is unlawful ouster which was the basis of Mr Nagin's argument and that also was recognised in *McCormick v. McCormick* and *Jones v. Jones*. A similar situation arose in the very recent case referred to us by Mr Knight *Dennis v. MacDonald* 1982 FAM 63 where compensation was allowed in respect of an absentee wife but on the gound that she had been forced from the home by the continuing violence on the part of the husband—held to be expulsion ouster—but even then the Court of Appeal held that the correct measure was to be assessed as the equivalent of a rental charge. E F

In *Bull v. Bull* 1955 1 All E.R. 253 Lord Denning had also said in respect of co-owners: G

> "Neither can turn the other out but if one of them should take more than his appropriate share the injured party can bring an action for an account if one of them should go so far as to oust the other he is guilty of trespass."

That case was however solely an action for possession and did not deal with any question as to the ascertainment of compensation. It does give a hint however to the proposition that a co-owner who refuses to allow the other any beneficial rights may have to pay some compensation for his usage and in *Jones v. Jones* already mentioned Roskill L.J. while agreeing with Lord Denning that no rent should be payable H

A seemed to base that conclusion on the fact that the occupant had in part been induced to take possession. See p. 236 at paragraph H.

There is ample authority for the proposition however that if the occupant was a former lessee who was holding over at the expiration of the term the relation of landlord and tenant had not been determined so that partial rent was payable to the co-owner. This is the fourth exception mentioned by *Hinde* at 910. See *Leigh & Another v. Dickeson* 1515 Q.B.D. 60 particularly at 68.

B

Now in the present case Mr Nagin claims that notice to quit had been given, so that the Respondent was not a person holding over. If this contention is right then his argument is against the proposition that even the equivalent of rent could be recovered. Obviously the learned trial Judge was in some dilemma as to whether or not the holding over situation had in fact been terminated. The point does not require to be decided here and we do not pronounce conclusively upon it but merely raise the query as to whether one co-owner could give notice to quit against the wishes of the other.

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Be that as it may the learned trial Judge took the eminently practicable solution here that as the Respondent had conceded more than he probably need namely that he should pay mesne profits it was appropriate to fix an award of compensation on that basis. This seems the entirely appropriate solution and we see no reason to disturb the finding made on that basis.

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Accordingly the appeal is dismissed with costs.

Appeal dismissed.

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