BASMA *v.* NOURELDINE

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Smith, C.J. (Sierra Leone) and Coussey, J.A.): December 12th, 1952
(W.A.C.A. Civil App. No. 12/52)

[1] **Civil Procedure—appeals—appeal against exercise of judicial discretion—appeal court will interfere if decision given on wrong principle of law or otherwise results in injustice:** While an appeal court in the exercise of its appellate power will not normally interfere with the exercise of a judge's discretion except on grounds of law, it has the power and duty to remedy any injustice resulting from the decision on other grounds (page 276, line 38—page 277, line 12).

[2] **Equity—relief against forfeiture—compensation payable by tenant—interest recoverable on amount due to landlord—failure to pay interest will not bar relief where amount negligible:** Before a landlord may claim the forfeiture of a tenant's interest for breach of a covenant in the lease, he must require compensation from the tenant for any loss incurred which the tenant has not otherwise made good, and a court may award similar compensation to the landlord in granting a tenant relief from forfeiture; but although the landlord will be entitled to interest on any outstanding sum due to him, failure on the part of the tenant to pay a negligible amount of interest will not bar relief against forfeiture (page 274, line 27—page 275, line 13).

[3] **Landlord and Tenant—determination of tenancies—forfeiture—landlord must first require compensation from tenant for any loss incurred—compensation may include interest on outstanding sums:** See [2] above.

[4] **Landlord and Tenant—determination of tenancies—forfeiture—relief against forfeiture—compensation payable by tenant—interest recoverable on amount due to landlord—failure to pay interest will not bar relief where amount negligible:** See [2] above.

The appellant brought an action against the respondent in the Supreme Court to recover possession of premises leased to the respondent.

The appellant leased certain premises to the respondent who covenanted, *inter alia*, to pay and discharge all rates, taxes and other assessments and to keep the premises in good and tenantable repair. The appellant subsequently served separate notices on the respondent alleging breach of each covenant and requiring them to be remedied. The respondent tendered to the appellant the amount due on the rates, which had already been paid by the appellant, but he offered no interest for the period between payment

and reimbursement. The appellant refused the amount tendered but it was paid into his bank account, and a few days later he instituted the present proceedings against the respondent to recover possession of the premises.

At the trial it was established that the respondent had not completed the repairs specified as being necessary in the appellant's notice. The Supreme Court (Beoku-Betts, J.), having held that the appellant could not claim forfeiture for breach of the covenant to pay the rates because the notice given was inadequate, and that the respondent had shown regret for breach of the covenant of repair, exercised its discretion under s.14(2) of the Conveyancing Act, 1881 to grant the respondent relief from forfeiture. The proceedings before the Supreme Court are reported in 1950–56 ALR S.L. 234.

On appeal, the West African Court of Appeal considered whether it was competent to review the exercise of the trial judge's discretion, whether the trial judge had in fact exercised his discretion correctly in the circumstances of the case, and what was the nature of the compensation payable by a tenant.

Cases referred to:

(1) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646, *dicta* of Lord Wright and Lord Atkin applied.

(2) *Skinners' Co.* v. *Knight*, [1891] 2 Q.B. 542; (1891), 65 L.T. 240, *dicta* of Fry, L.J. applied.

Legislation construed:

Conveyancing Act, 1881 (44 & 45 Vict., c.41), s.14(1):
The relevant terms of this sub-section are set out at page 273, lines 21–30.

s.14(2): The relevant terms of this sub-section are set out at page 273, lines 32–41; page 277, lines 28–30.

C.B. Rogers-Wright for the appellant;
R.B. Marke for the respondent.

FOSTER-SUTTON, P.:

By a lease dated June 21st, 1948, the appellant demised premises known as Nos. 3 and 3A Kissy Street, Freetown, for a term now unexpired to the respondent who covenanted, *inter alia*, to pay and discharge all rates, taxes and assessments charged or imposed upon the premises demised and to keep such premises and

the fixtures, painting and decorations thereof in good and tenantable repair, order and condition, internally and externally.

On May 18th, 1949, the appellant, through his solicitor, served on the respondent a notice alleging that the latter had broken his covenant to keep the premises in good and tenantable repair, specifying the breaches complained of and requiring that they be remedied within two calendar months from the date of the notice. A further notice, dated May 24th, 1950, was served on the respondent, alleging that he had broken his covenant to pay the rates assessed on the premises and requiring him to remedy the breach and pay reasonable compensation on or before May 27th, 1950.

On June 27th, 1950, the appellant filed the writ in these proceedings claiming recovery of possession of the premises in question, alleging that the respondent had made default in his covenants to pay the rates and keep the premises in good and tenantable repair. The trial of the action was commenced on November 21st, 1951, and the premises were inspected by the learned trial judge, accompanied by counsel and the parties, on November 22nd, 1951.

The question turns on sub-ss. (1) and (2) of s.14 of the Conveyancing Act, 1881. Sub-section (1) provides:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for breach of any covenant . . . , shall not be enforceable . . . unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make compensation in money, to the satisfaction of the lessor, for the breach."

Sub-section (2) provides:

> "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, . . . apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, . . . as the Court, in the circumstances of each case, thinks fit."

Regarding the rates, the appellant proved through his witness, the city bailiff, that the notice of assessment of rates in respect of the premises for the municipal year November 1st, 1949 to October 31st, 1950 was served on the respondent on November 9th, 1949. Owing to the respondent's failure to pay on the due date, that is to say, on or before January 31st, 1950, the sum of £2. 12s. 0d. became payable by way of poundage under the provisions of s.84 of the Freetown Municipality Ordinance (*cap.* 91), and as the rates and poundage had not been paid by the end of the first week in May 1950 the total amount due, £26. 18s. 0d., was paid by the appellant to the Freetown City Council on May 11th, 1950. On May 27th, 1950, the sum of £26. 18s. 0d. was tendered to the appellant, on behalf of the respondent, and the appellant having refused to accept the payment it was paid into his banking account on May 30th, 1950, but no offer of compensation was made.

The trial judge found as a fact that there had been a breach of the covenant to pay the rates, but as the appellant could not claim forfeiture until a notice of the breach had been served on the respondent and a reasonable time given to him in which to remedy the breach, he held that the three days given in the notice was not a reasonable time.

It was submitted on behalf of the appellant that the refusal to accept the amount tendered on May 27th, 1950 was justified because no compensation was offered, and that the trial judge erred in holding that the appellant was not entitled to any in respect of this breach of covenant.

The question whether compensation is payable in every case of a breach is discussed in the judgment of the court, delivered by Fry, L.J., in the case of *Skinners' Co.* v. *Knight* (2), where he said ([1891] 2 Q.B. at 544–545; 65 L.T. at 242):

> "The section creates some difficulty, because it seems to contemplate compensation as payable in every case of a breach; and because it uses, not the familiar word 'damages' for a breach, but 'compensation.' But it is evident that many cases may occur in which, where the breach has been perfectly made good and no expense or loss incurred, there may be nothing for which to make compensation, and we are therefore of opinion that, notwithstanding the general terms of the notice required by the statute, the lessee is bound to make compensation, not absolutely in every case, but only where there is something to compensate. With regard to the word 'compensation,' we incline

to the view that the word 'damages' was not used because that is most appropriate to the compensation for a breach when ascertained by the verdict of a jury or the judgment of a Court; but that compensation under the section in question is to be measured by the same rule as damages in an action for the breach."

It seems to me that the only compensation payable in the case before us would be interest on the amount paid by the appellant from the date he made the payment, May 11th, 1950, to May 27th, 1950, the date upon which the amount was tendered to him on behalf of the respondent. Such a sum would have been negligible and the failure to offer it would not, in my view, have justified the court in declining to grant relief from forfeiture on that score.

The respondent gave evidence at the trial that he had done all the repairs specified in the notice which was served upon him on May 18th, 1949. This evidence was contradicted by the architect called as a witness on his behalf, who testified that he was engaged by the respondent in the year 1949 to effect repairs to the premises in question, but that the respondent was not prepared to furnish the materials required to do them. In answer to a question put by the court this witness said: "He furnished me with half the materials I required." He also gave evidence that the materials required to do the repairs were available for purchase, and in re-examination he said: "I do not think the defendant was prepared to part with the funds to do all the repairs that were required."

It is abundantly clear from the evidence that the respondent had not completed the repairs specified in the notice of May 18th, 1949 at the time the writ in this action was filed, and that this state of affairs still prevailed when the court made its inspection of the premises on November 22nd, 1951. It is also clear from the evidence that the respondent was well aware of his default, because he knew on November 21st, 1951 that the premises were to be inspected on the following day and hurriedly painted a portion of the premises and laid some linoleum down to cover floor-boarding which was rotten and required replacement.

In dealing with this aspect of the case, the learned trial judge said (1950–56 ALR S.L. at 237–238):

"In this case, the defendant committed a breach of the covenant in failing to do repairs which would make the premises in good and tenantable condition. From the evidence, the defendant did not spend even what his architect decided was neces-

sary to do the repairs. When he was required to spend what would be sufficient to meet the repairs, he decided what was sufficient, and as a result the premises were not repaired as was necessary. The defendant tried to gloss over the matter and to hide his neglect, put down a new piece of linoleum, and hurriedly painted part of the property. He did not allow the plaintiff to inspect the property and on the whole was most indiscreet in his attitude. The defendant has however shown complete regret for his action and learned counsel for the defendant has stated that his client is willing that all the necessary repairs should be done by Boston, the architect of the plaintiff, to the satisfaction of the plaintiff. It is the law that the discretion of the court is such that even where the premises are in a very bad condition of repair the court may still grant relief against forfeiture. I have carefully considered the whole case and I think this is a case in which I should exercise my discretion in favour of the defendant."

Counsel for the appellant submitted that the trial judge was wrong in exercising his discretion in the respondent's favour by relieving him from forfeiture, and that the respondent's conduct in committing the breach of covenant to pay the rates should have been examined, not as an isolated incident, but in the light of his conduct over the repairs. Counsel also submitted that the learned trial judge "exercised his discretion on wrong principles or no principles at all."

The respondent's counsel submitted that in exercising his discretion in the respondent's favour the trial judge was no doubt influenced by the amount of damage likely to have been caused to the reversion by the breach of covenant to repair, which he suggested was nil, and he argued that the trial judge had all the facts before him and that this court should not, therefore, interfere with a discretion exercised in such circumstances.

The principles which should guide a court of appeal when considering the question whether it should not interfere with the discretion of a trial judge are clearly set out in the judgment of Lord Wright in the case of *Evans* v. *Bartlam* (1), where he said ([1937] A.C. at 486; [1937] 2 All E.R. at 654):

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction

and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order."

And in the same case Lord Atkin said (*ibid.*, at 480–481; 650):

"[W]hile the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

In this case, the respondent in his statement of defence alleged that he had caused the premises to be repaired pursuant to the notice dated May 18th, 1949 "insofar as the age of the premises permitted," and, as I have already pointed out, he asserted in his evidence at the trial that he had done all the repairs specified in the notice. It is true that he also said: "If it is found out that some repairs remain to be done, I am ready to do them to the satisfaction of the plaintiff," but this change of front took place two years and seven months after the notice had been served upon him and then only after he had deliberately tried to mislead the court by painting a portion of the premises and laying down linoleum in an endeavour to conceal what he must himself have considered an obvious breach of his covenant to repair.

There is no doubt that the discretion conferred upon the court to grant relief from forfeiture by sub-s. (2) of s.14 of the Conveyancing Act 1881 is very wide, but the sub-section also requires the court to have regard to "the proceedings and conduct of the parties . . . and to all the other circumstances."

The learned trial judge said: "I have carefully considered the whole case and I think this is a case in which I should exercise my discretion in favour of the defendant." Apart, however, from the statement in his judgment that "the defendant has however shown complete regret for his action and learned counsel for the defendant has stated that his client is willing that all the necessary repairs should be done by Boston, the architect of the plaintiff, to the satisfaction of the plaintiff," the circumstances which led him to exercise his discretion in favour of the respondent, in connection with the breach of covenant to repair, are not apparent. Nor can

I find any "regret" of the nature that a court should take cognisance of in the conduct of the respondent.

I have already indicated that I do not think the complaint that the learned trial judge wrongly exercised his discretion in connection with the breach of covenant regarding the rates is well founded, but, in my view, in the circumstances of this case, the trial judge was clearly wrong in exercising his discretion in favour of the respondent on the breach of the covenant to repair.

I would, therefore, allow this appeal with costs to be taxed, and set aside that portion of the judgment of the court below which grants relief from forfeiture and direct that the respondent deliver up to the appellant the premises at Nos. 3 and 3A Kissy Street, Freetown, within three calendar months from December 31st, 1952.

SMITH, C.J. (Sierra Leone) and COUSSEY, J.A. concurred.

Appeal allowed.

KHOURY *v.* TABBARA

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Coussey, J.A. and Kingsley, J. (Sierra Leone)): January 12th, 1953
(W.A.C.A. Civ. App. No. 16/52)

[1] **Criminal Procedure—withdrawal of prosecution—nolle prosequi—entry of nolle prosequi sufficient termination of proceedings in plaintiff's favour to support action for malicious prosecution:** Proof of the entry of a *nolle prosequi* is sufficient evidence of the termination of proceedings in the plaintiff's favour to support an action for malicious prosecution (page 283, lines 5–22).

[2] **Tort—malicious prosecution—essentials of action:** In an action for malicious prosecution it is necessary for the plaintiff to prove that the proceedings were brought against him by the defendant maliciously and without reasonable or probable cause, and that the proceedings terminated in his favour (page 280, lines 36–40).

[3] **Tort—malicious prosecution—essentials of action—termination of proceedings in plaintiff's favour—entry of nolle prosequi regarded as termination in plaintiff's favour:** See [1] above.

[4] **Tort—malicious prosecution—essentials of action—termination of proceedings in plaintiff's favour—proceedings need not be prosecution if plaintiff given opportunity to appear and dispute complaint:** Proceedings of a criminal nature which do not amount to a prosecution