

Privy Council Appeal No. 17 of 1994

Inverugie Investments Limited

Appellant

v.

Richard Hackett

Respondent

FROM

THE COURT OF APPEAL OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
27TH FEBRUARY 1995

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD BROWNE-WILKINSON
LORD LLOYD OF BERWICK
LORD STEYN

[Delivered by Lord Lloyd of Berwick]

THE BAHAMAS

This is in form an ordinary claim for mesne profits, that is to say a claim for damages for trespass to land. But the facts are unusual, since the land consists of 30 specified apartments in a much larger hotel. The hotel is owned by the defendants, Inverugie Investments Limited. The plaintiff, the late Mr. Richard Hackett, was the lessor of the apartments under a lease dated 5th June 1970 for a term of 99 years. On 25th November 1974 Mr. Hackett was ejected by the defendants. On 6th March 1975 he brought proceedings for possession. Those proceedings culminated on 19th December 1984 when the Board dismissed Inverugie's appeal against a decision of the Court of Appeal of ~~Jamaica~~ in favour of Mr. Hackett. Despite a further order granted by Malone J. on 23rd June 1986 requiring Inverugie to give up possession forthwith, they did not do so until 12th April 1990. The trespass thus lasted for a continuous period of 15½ years. The question for decision is the appropriate measure of damages.

Mr. Mowbray Q.C. made clear to the Board, as he had already made clear in the courts below, that Mr. Hackett is claiming a reasonable rent for the apartments throughout the period of the trespass. This is the basis on which damages for mesne profits are awarded every day

in the county courts. Mr. Hackett is not asking for an account of profits, perhaps because the hotel was running at a loss, as the defendants have maintained throughout. He is not asserting a restitutionary claim, as an independent cause of action. So the point which divided the Court of Appeal in *Ministry of Defence v. Ashman* [1993] 2 E.G.L.R. 102, and the interesting theoretical questions discussed in Part VII of the Law Commission Paper No. 132 do not arise for decision. They have not been argued. Mr. Price Q.C., for Inverugie, accepts that Mr. Hackett is entitled to a reasonable rent. Accordingly, on the arguments presented, no issue of legal principle arises. The problem is how a reasonable rent should be calculated.

In the ordinary case where the plaintiff is the landlord of domestic premises, and the defendant is or was the tenant, this creates no difficulty. The reasonable rent is almost always the rent reserved under the expiring lease. The difficulty in the present case arises because the facts are the other way round. It is the tenant who is the plaintiff, and the defendants who are the reversioners under the lease.

The hotel in question is known as the Silver Sands Hotel. It is situated on Grand Bahama. It consists of two main blocks and a third, smaller block. There are 164 apartments in all. It was developed in the late 1960's by Myra Investments Limited. The 30 apartments demised to Mr. Hackett were spread over the two main blocks. The consideration for the lease was \$300,000. Thereafter Myra continued to manage the 30 apartments on Mr. Hackett's behalf. However on 29th June 1972 Myra's mortgagee called in the mortgage. There was a sale to Gleneagles Investment Company Ltd. in October 1974, followed by a further sale to Inverugie in November 1974.

The published room rate for the high or winter season was \$22.50 per day in 1974. By 1990 it had risen to \$80.00 per day. But most of the apartments were taken by tour operators at a much reduced rate. The average occupancy was said to be 35%-40%.

The case came before Mr. Registrar Strachan on 29th June 1990. Mr. Hackett's claim was put forward on the basis of two alternative calculations. A calculation based on the published room rate less Mr. Hackett's share of operating expenses gave a figure of \$8,164,590. Another calculation, based on average revenue per apartment less operating expenses, gave a figure of \$3,373,838.

The Registrar rejected both calculations. He held that the justice of the case could best be met by taking Mr. Hackett's original investment of \$300,000 at $12\frac{1}{2}\%$ simple interest over the whole period of $15\frac{1}{2}$ years. In this way he awarded damages of \$577,500. According to the Registrar this was the equivalent of a net rate of \$3.00 per apartment per day.

Mr. Hackett appealed, and Inverugie cross-appealed. In the Court of Appeal Campbell J.A. took as his starting point the gross revenue of the hotel over a period of 15 years and 1 month. He allowed 3½ months for the periods during which the apartments would have had to be unoccupied for refurbishing. From this he calculated the notional gross revenue of the 30 apartments on the basis of 100% occupancy, giving a figure of \$3,872,790. (For convenience and simplicity their Lordships throughout ignore the fact that 6 of the 30 apartments were sold in about 1980). Campbell J.A. then deducted (1) a proportion of the total expenses relating to the 30 apartments, amounting to \$1,832,721 and (2) ground rent under the lease amounting to \$226,800, leaving a balance of \$1,813,269. In taking this approach Campbell J.A. relied on a decision of the Board in *McArthur & Co. v. Cornwall* [1892] A.C. 75.

Melville P. agreed with Campbell J.A. save that he rounded down the figure to \$1,800,000.

Rowe J.A. adopted a radically different approach. He rejected *McArthur & Co. v. Cornwall* as irrelevant. He followed a line of cases starting with *Phillips v. Homfray* (1871) L.R. 6 Ch.App. 770, and including *Whitwham v. Westminster Brymbo Coal and Coke Company* [1896] 2 Ch. 538, *Penarth Dock Engineering Co. Ltd. v. Pounds* [1963] 1 Lloyd's Rep. 359, *Swordheath Properties Ltd. v. Tabet* [1979] 1 W.L.R. 285 and *Bryn Owen Estates Ltd. v. Bourne* (Court of Appeal) (unreported) 21st October 1981. Their Lordships would quote the following passages from Rowe J.A.'s judgment to explain his approach:-

"Inverugie has by trespass made use of Hackett's apartments and Hackett is entitled to receive by way of damages such sum as should reasonably be paid for the use. I therefore agree with the learned Registrar that in assessing damages in the instant case profitability is not a relevant circumstance.

...

Inverugie was in physical possession of the Hackett apartments for 365 days in each year of the trespass and is liable in trespass to pay to Hackett the reasonable rent for the apartments whether or not Inverugie wished to rent them or was able to let them. The guest who from time to time paid for the privilege of occupation of the Hackett apartments was not the trespasser to whom Hackett will look for compensation in damages and I repeat that whether an apartment was occupied or unoccupied Inverugie has an obligation to pay damages to Hackett.

...

On this my approach, the total amounts actually earned by Inverugie for the operation of the Silver

Sands Hotel are irrelevant for the purpose of assessing the damages due to Hackett. An examination of Inverugie's accounts ... would be equally irrelevant."

Turning to the facts he said:-

"It seems to me, based on the findings of fact by the learned Registrar, that the reasonable rent which could be obtained for the Hackett apartments in summer and in winter were the rates which tour operators were prepared to pay and that these rates when properly negotiated would be thirty-five percent lower than the published seasonal rate. This is the rate, which in my opinion, ought to be applied to the Hackett apartments for the 15.16 years of the trespass without any deduction for gaps in the actual occupancy of the apartments."

Having made certain deductions from the gross rental value of the 30 apartments, he arrived at a figure of \$2,437,843.

Inverugie now appeal from the majority decision. Mr. Price hesitates to support the case put forward in the court below that, as the hotel was running at a loss, the damages should be nominal. But he submits nevertheless that the award is inflated. The majority have failed to calculate the expenses correctly, and have thus arrived at a figure which is too high. Mr. Mowbray on the other hand submits that, subject to one qualification, the correct approach was that adopted by Rowe J.A., and that the award is thus too low. But Mr. Hackett does not cross-appeal. He is content with the figure reached by the majority, which is thus, as Mr. Mowbray says, a very "safe" award.

Before stating their own conclusions on the facts, their Lordships should say a brief word on the law. The cases to which they have already referred establish, beyond any doubt, that a person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw L.J. in *Swordheath Properties Ltd. v. Tabet* at page 288 as follows:-

"It appears to me to be clear, both as a matter of principle and authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages."

It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the "loss" which the plaintiff has suffered. As the Earl of Halsbury L.C. pointed out in *The Mediana* [1900] A.C. 113 at page 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

In *Stoke-on-Trent City Council v. W & J Wass Ltd* [1988] 1 W.L.R. 1406 Nicholls L.J., as he then was, called the underlying principle in these cases the "user principle". The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

If this is the correct principle, how does it apply to the facts of the present case? Mr. Mowbray argues that it makes no difference whether there were 30 apartments, or only one. If there had been only one, Inverugie would have been obliged to pay a reasonable rent for the use of the apartment for 365 days in the year, even though the apartment might not be taken by a tour operator, or otherwise occupied, for more than 35% of the time. The same must apply, says Mr. Mowbray, to each of the 30 apartments.

Mr. Price argues that the unusual facts of the present case take it outside the normal rule. Inverugie is a hotel operator. If one assumes that the parties had negotiated a notional rent for the 30 apartments as a whole, they would have taken account of the average occupancy. What has to be valued is the chance of Inverugie making a profit from the letting of the 30 apartments to tour operators, not the rent which an individual operator would pay per apartment. On the basis of \$3.00 per day per apartment - the figure calculated by the Registrar - a hotel proprietor would not have been prepared to pay more than \$400 per apartment per year. In this way Mr. Price arrives at \$159,360 as the appropriate measure of damages.

The point is not altogether easy. But their Lordships have concluded that Mr. Mowbray's argument is to be preferred. If a man hires a concrete mixer, he must pay the daily hire, even though he may not in the event have been able to use the mixer because of rain. So also must a trespasser who takes the mixer without the owner's

consent. He must pay the going rate, even though in the event he has derived no benefit from the use of the mixer. It makes no difference whether the trespasser is a professional builder or, a do-it-yourself enthusiast.

The same applies to residential property. In the present case Inverugie have had the use of all 30 apartments for $15\frac{1}{2}$ years. Applying the user principle, they must pay the going rate, even though they have been unable to derive actual benefit from all the apartments for all the time. The fact that Inverugie is a hotel operator does not take the case out of the ordinary rule. Mr. Hackett is not asking for an account of profits. The chance of making a profit from the use of the apartments is not the correct test for arriving at a reasonable rent.

It follows that their Lordships cannot agree with the judgment of the majority in the court below. *McArthur & Co. v. Cornwall* is not in point since the assessment of damages in that case was not for wrongful occupation of land but for conversion of produce. Their Lordships find themselves in full agreement with the approach adopted by Rowe J.A.

What then is a reasonable rental value for the 30 apartments for 365 days a year? Rowe J.A. might have taken the published rates for each of the apartments. But as has been seen, he took instead the "wholesale" rate paid by tour operators, that is to say, the published rate less 35% in the winter, and 65% in the summer. Their Lordships see no reason to take a different view. For the reasons already explained, it is wholly irrelevant that Mr. Hackett would not himself have been able to let the apartments to tour operators for 365 days in the year.

The final question is what, if any, deductions should be set off against the reasonable rental value of the 30 apartments. Mr. Mowbray concedes that Inverugie are entitled to set off the sums which would have been payable under the lease. The relevant provisions are to be found in the fourth schedule to the lease dated 5th June 1970. Rowe J.A. deducted \$226,800 for ground rent and \$950,331 for the cost of maintaining and refurbishing the common areas, making \$1,177,131 in all. Mr. Mowbray agrees that these were correct deductions. Rowe J.A. also deducted \$974,574 for electricity, and Mr. Hackett's share of the cost of interior maintenance and repairs. This appears to have been conceded below. But Mr. Mowbray does not accept this deduction. Mr. Price submits that Rowe J.A. was right to make this deduction, and should also have deducted \$387,279 for 10% management commission and \$1,832,721 for Mr. Hackett's share of the general expenses of running the hotel.

For the reasons given by Rowe J.A., he was plainly right not to deduct anything for general expenses. They are not a set-off against rent. The same applies to the management commission. The position with regard to electricity and the

cost of interior maintenance and repairs is not so clear. But it matters not. For even if \$974,574 was correctly deducted, the final figure on Rowe J.A.'s approach comes to well in excess of the \$1,800,000 awarded by the majority. Inverugie has thus failed to show that the figure should be reduced.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs before the Board. The orders for costs in the courts below will stand.