

1967

\*May 11  
June 26WESTOWN PLAZA LIMITED (*Plaintiff*) .. APPELLANT;

AND

STEINBERG'S LIMITED (*Defendant*) .. RESPONDENT.

## ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Landlord and tenant—Lease—Lessor's covenant to pay taxes on real property—Lessee's covenant to pay taxes on personal property—Trade fixtures property of lessee—Whether lessee liable to pay that part of municipal taxes levied in respect of demised premises attributable to value of fixtures—The Assessment Act, R.S.O. 1960, c. 23, ss. 1(i)(iv), 4.*

The appellant was the owner of a parcel of land on which it constructed a shopping centre including a store built to the respondent's specifications and leased to the respondent by a lease executed under seal by both parties. Under the terms of the lease, the respondent as lessee covenanted to pay all taxes imposed in respect of the personal property, business or income of the lessee pertaining to the demised premises, and the appellant as lessor covenanted to pay all real property taxes assessed thereon. The lease also provided that trade or tenant's fixtures installed by the lessee should remain the property of the lessee and might be removed by it at any time during its occupancy of the demised premises.

The appellant brought action for a declaration that the respondent was liable to pay that part of the municipal taxes levied in respect of the demised premises which was attributable to the value of the fixtures installed by the lessee in the said premises and asked for a reference to determine the amounts payable and for consequential relief. The action failed at trial, and, on appeal, the judgment of the trial judge was affirmed by the Court of Appeal. The appellant then appealed to this Court.

*Held:* The appeal should be dismissed.

The assessment on which the taxes in question were based was made on land and both by statute and the common law the buildings and the fixtures placed upon the assessed land were a part thereof. Until the lessee exercised its rights to remove the fixtures they were, even as between it and the lessor, a part of the realty rather than personalty; but the real question was not as to the type of the individual items of property making up the total assessment but as to the type of tax. It was impossible to say that these were other than "real property taxes".

*Bain v. Brand* (1876), 1 App. Cas. 762, applied.

APPEAL from a judgment of the Court of Appeal for Ontario<sup>1</sup>, dismissing an appeal from a judgment of Schatz J. Appeal dismissed.

\*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

<sup>1</sup> [1964] 1 O.R. 167, 41 D.L.R. (2d) 450.

*Mayer Lerner, Q.C., and B. T. Granger*, for the plaintiff,  
appellant.

*Douglas K. Laidlaw*, for the defendant, respondent.

1967  
WESTOWN  
PLAZA LTD.  
v.  
STEINBERG'S  
LTD.  
—

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Court of Appeal<sup>1</sup> affirming a judgment of Schatz J.

The appellant is the owner of a parcel of land in London, Ontario, on which it has constructed a shopping centre including a store built to the respondent's specifications and leased to the respondent by a lease dated December 28, 1959, and executed under seal by both parties.

The appellant brought action for a declaration that the respondent was liable to pay that part of the municipal taxes levied in respect of the demised premises which was attributable to the value of the fixtures installed by the lessee in the demised premises and asked for a reference to determine the amounts payable and for consequential relief.

The term commenced on July 1, 1960, and was for a period of 20 years, ending June 30, 1980. It provided for a minimum annual rent of \$32,500 with additional rent equal to the amount, if any, by which one per cent of gross sales during each lease year exceeded the minimum rent, but not to exceed \$45,000.

The lease contains the following terms which are relevant to the determination of this appeal:

8. THE LESSEE COVENANTS WITH THE LESSOR:

- (c) To pay all taxes, charges, rates and licence fees assessed, rated or imposed in respect of the personal property, business or income of the Lessee pertaining to the demised premises, as and when the same become due and payable, subject to any proceedings which may be taken by the Lessee by way of appeal of or from any such taxes, charges, rates, or fees or the assessment thereof;

If the real property taxes, including local improvement rates, upon the demised premises shall be increased after the "base tax year", during the term of this lease, the Lessee shall pay each and every such increase of taxes that may be levied, rated, charged or assessed against the demised premises or any part thereof and if

<sup>1</sup> [1964] 1 O.R. 167, 41 D.L.R. (2d) 450.

1967

WESTOWN  
PLAZA LTD.

v.

STEINBERG'S  
LTD.

Cartwright J.

such property taxes including local improvement rates shall be increased during any renewal term of this lease, the Lessee shall pay fifty percent (50%) of each and every such increase; for the purposes of this paragraph (c) and during the original term of this lease and each renewal term thereof, the third full calendar year of the term of this lease shall be the "base tax year"; the taxes payable for the base tax year shall be the "base taxes" for the term of this lease and each renewal term hereof.

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The term "real property taxes" as used in this lease shall include all real estate taxes, rates, duties and assessments whatsoever, whether Municipal, Provincial or Dominion, or imposed by any other competent taxing authority; provided, however, that nothing in this lease contained shall require the Lessee to pay any franchise, corporate, estate, inheritance, succession, capital levy or transfer tax of the Lessor or any income or profits tax upon the rent payable by the Lessee under this lease or any levy or tax of a similar kind and nature whatsoever;

10. Provided that any trade or tenants fixtures installed in or attached to the demised premises by and at the expense of the Lessee shall remain the property of the Lessee and Lessor agrees that the Lessee shall have the right at any time and from time to time during its occupancy of the demised premises to remove any and all of such fixtures but in the event the Lessee shall in such removal do damage to the demised premises it shall make good any damage which it may occasion thereto;

#### 11. THE LESSOR COVENANTS WITH THE LESSEE:

- (c) To pay all real property taxes, rates, levies, duties, charges, assessments and impositions whatsoever whether Municipal, Parliamentary or otherwise that may be levied, rated, charged or assessed upon the demised premises and upon all driveways, parking and loading areas and sidewalks in the Shopping Centre during the original term of this lease or any renewal thereof save and except such taxes, charges, rates and licence fees as the Lessee covenants to pay as hereinbefore provided.

In my view, the relevant words of the lease are free from ambiguity, either patent or latent, and the decision of the appeal must turn upon the true construction of the words which the parties have used.

The taxes which the appellant seeks to have apportioned between the parties are those levied by the municipality in pursuance of *The Assessment Act*, R.S.O. 1960, c. 23. Section 4 of that Act provides that, subject to certain exemptions with which we are not concerned, "all real property in Ontario is liable to assessment and taxation". Section 1(i)(iv) defines "real property" as including, *inter alia*:

- (iv) all buildings, or any part of any building, and all structures, machinery and fixtures erected or placed upon, in, over, under or affixed to land. . .

Quite apart from this statutory provision it is, I think, settled law that the lessee's fixtures become part of the land although it has, of course, the right to remove them. In *Bain v. Brand*<sup>1</sup>, the Lord Chancellor said at p. 770:

1967  
WESTOWN  
PLAZA LTD.  
v.  
STEINBERG'S  
LTD.

Cartwright J.

The fixture does become part of the inheritance; it does not remain a moveable *quoad omnia*; there does exist on the part of the tenant a right to remove that which has been thus fixed, but if he does not exercise that right it continues to be that which it became when it was first fixed, a part of the inheritance.

The assessment on which the taxes in question are based is made on land and both by statute and the common law the buildings and the fixtures placed upon the assessed land are a part thereof. Until the lessee exercises its right to remove the fixtures they are, even as between it and the lessor, a part of the realty rather than personalty; but the real question is not as to the type of the individual items of property making up the total assessment but as to the type of tax. I find it impossible to say that these are other than "real property taxes".

The appellant argues that the words "the demised premises" as used in this lease mean only the land and the empty building erected upon it. I am unable to adopt this construction. By paras. 1 and 2 of the lease,

The Lessor doth hereby demise and lease unto the lessee its successors and assigns:

- (a) All and singular that messuage and tenement, situate lying and being in the Township of London, in the County of Middlesex, and being composed of the lands and premises shown outlined in Green in Schedule "B" hereto annexed; (together with a right of way)

to have and to hold the demised premises for and during the said term of 20 years. . .

The lands outlined in green in Schedule "B" consist of a rectangular parcel of land 144 feet 9 inches by 132 feet 2 inches within which a part is outlined in red and marked "Steinberg's". I can find nothing in the lease or the sketch to support the view that the words "the demised premises" do not include whatever should from time to time become a part of the parcel of land demised.

Had it been the intention of the parties that the lessee should pay a proportion of the municipal taxes in the ratio of the assessed value of its fixtures to the assessed value of the land and building excluding the fixtures it would have

<sup>1</sup> (1876), 1 App. Cas. 762.

1967  
WESTOWN  
PLAZA LTD.  
v.  
STEINBERG'S  
LTD.  
Cartwright J. been a simple matter to so provide in the lease, and it would seem probable that some form of procedure would have been provided for determining what proportion of the total assessment was attributable to the value of the fixtures, for the notice of assessment would not place any separate value on fixtures.

I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

*Solicitors for the plaintiff, appellant: Lerner, Lerner, Bradley & Cherniak, London.*

*Solicitors for the defendant, respondent: Siskind, Taggart & Cromarty, London.*

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