Riduan bin Yusof v Khng Thian Huat and Another (No 2)
[2005] SGCA 39

Case Number : CA 72/2004

Decision Date : 17 August 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Kan Ting Chiu J; Yong Pung How CJ

Counsel Name(s) : Chan Hian Young and Ganga d/o Avadiar (Allen and Gledhill) for the appellant; Hri Kumar and Wilson Wong (Drew and Napier LLC) for the respondents

Parties : Riduan bin Yusof — Khng Thian Huat; Choy Mei Har

Civil Procedure – Costs – Principles – Landlord suing tenant for double rent and damage caused to property by tenant removing authorised alterations to property – Whether trial judge justified in ordering parties to bear own costs of trial – Appropriate costs order to make

Landlord and Tenant – Agreements for leases – Covenants by tenant to deliver up property in condition as at commencement of tenancy – Three tenancy arrangements for same property entered into between parties consecutively on same terms – Tenant altering property after commencement of first tenancy and removing alterations upon termination of third tenancy – Whether tenant obliged to deliver up property in condition as at beginning of first or third tenancy

Landlord and Tenant – Demised premises – Fixtures – Whether tenant's alterations to property at commencement of first tenancy amounting to tenant's fixtures – Whether tenant having right to remove tenant's fixtures upon termination of third tenancy

17 August 2005 *Judgment reserved*.

Chao Hick Tin JA (delivering the judgment of the court):

1 This action relates to certain disputes which arose following the termination of a tenancy where the appellant, Riduan bin Yusof, was the tenant, and the respondents, who are husband and wife, were the owners of the premises located at 95 Telok Kurau Road ("the property"). The main claim in the action instituted by the respondents was for double rent. This claim was dismissed by the trial judge. However, the subsidiary claim by the respondents, relating to damage caused to the property plus consequential losses, was allowed by the trial judge at $79,170.

2 Another issue which is before us relates to costs. Even though the respondents failed on their main claim on double rent, which took much of the time of the trial, and succeeded only on the subsidiary claim where the quantum was well within the jurisdiction of the Subordinate Courts, the judge nevertheless made an order that each party was to bear its own costs.

3 Accordingly, the appellant has appealed against the whole of the judge's decision (see *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR 130).

The background

4 Towards the end of 1993, the appellant and his wife, Sa'adiah binte Mohamed Shaffi, approached the respondents with a view to renting the property for the purpose of relocating a kindergarten, known as "Nur Kindergarten", which they were then operating at another property. Although the property was and is a dwelling house, the respondents were willing to rent it to the

appellant and his wife for that purpose, subject to the approval of the authorities and such alterations as the authorities might require. Consequently, the respondents, as owners, sought the approval of the Urban Redevelopment Authority ("URA") to allow a change of the use of the property. The approval was duly obtained. By a tenancy agreement dated 6 June 1994, the respondents leased the property to the appellant for a period of two years and three months, commencing on 1 January 1995 and expiring on 31 March 1997 ("the first Tenancy Agreement").

5 For the purposes of the present proceedings, two covenants in the first Tenancy Agreement are germane. They are cll 2(C) and 2(I) and they read:

> 2(C) [The tenant] not to make or permit to be made by [*sic*] alterations to the [Property] without prior written consent of the Landlord.
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> 2(I) At the expiration of the said term to peaceably and quietly deliver up to the Landlord the [Property] together with all the fixtures and fittings in like condition as the same were delivered to the Tenant at the commencement of the said term, authorised alterations or additions and damage by fair wear and tear and acts of God excepted.

6 As alterations were necessary to render the property suitable for use as a kindergarten, plans were prepared and submitted by the appellant on behalf of Nur Kindergarten to the authorities for approval. Upon receiving such approval in April 1995, the appellant and his wife proceeded with the renovation works, which included the installation of fire safety features and the construction of children's restrooms. The appellant paid for those works.

7 Time was needed to have all the alterations put in place. Nur Kindergarten eventually commenced its operations at the property in January 1996. Shortly before the expiry of the first Tenancy Agreement, both parties agreed to extend the lease for another three years, *ie*, from 1 April 1997 to 31 March 2000. A formal second tenancy agreement, containing the same terms as the first, was executed by the parties on 15 March 1997 ("the second Tenancy Agreement").

8 Again, shortly before the expiry of the second Tenancy Agreement, the parties agreed to further renew the lease for another period of three years. Thus, on 24 January 2000, the appellant and Khng signed a letter of intent to that effect where it was stated that "[a]ll other terms and conditions shall be stated in an official lease agreement to be signed by both parties". However, no formal agreement was subsequently executed because the relationship between the parties deteriorated. The appellant was frequently late in his rental payments. Apparently, promises made by the appellant were often not fulfilled. However, we should also add that similar accusations of broken promises were also made by the appellant against Khng.

9 Prior to March 2001, the URA had informed the respondents of complaints which it had received from the residents in the neighbourhood relating to noise and heavy traffic and the respondents had, in turn, duly conveyed the same to the appellant. The measures taken by the appellant to overcome the complaints must have been inadequate for in March 2001, the URA gave an ultimatum. Accordingly, the respondents sought to terminate the tenancy. However, the appellant rejected the termination, and he and his wife refused to vacate the property as demanded.

10 It was against this backdrop that the respondents instituted the present action to recover possession, as well as to claim for double rent from 1 May 2001 to 10 April 2003, the latter being the date on which the respondents repossessed the premises upon the appellant's vacation. The position taken by the respondents was that as the parties never signed a third tenancy agreement, the appellant had from 1 April 2000 become a periodic tenant and the respondents thus had the right to

terminate the tenancy at any time by giving one month's notice. We should add that the action was originally instituted in the Subordinate Courts but it was later transferred to the High Court on the respondents' application on the ground that the total amount of the double rent which the respondents were claiming would well exceed the civil jurisdiction of the Subordinate Courts.

11 At the end of the trial, the judge did not allow the respondents' claim for double rent, his reason being (see [8] of his judgment), that although a third tenancy agreement was never signed, the "parties had by their earlier conduct acknowledged and accepted the existence of the third tenancy". The respondents have not appealed against this determination.

12 However, the judge awarded damages against the appellant for his "failure to hand over the property in the same condition as it was at the commencement of the *third* tenancy" [emphasis added]. As the experts of both parties had made rather disparate assessments as to the damage which was attributable to the acts of the appellant as tenant, and which were not due to fair wear and tear, the solicitors for the parties agreed to an assessment being made by a court-appointed expert to identify and quantify the alleged damage to the property, including an assessment as to the time required to undertake the rectification works. Eventually, the court expert assessed the damage caused to be in the sum of $110,575 plus a further sum of $15,595 representing damages acknowledged by the experts of both parties. He also estimated that seven weeks would be required to rectify the damage caused to the property and the sum of $40,250 would represent the loss of rental for that seven-week period. Added to the above sums was the sum of $2,750, being the appellant's share of the court expert's fees paid earlier by the respondents. All the foregoing added up to a total of $169,170. The judge then offset the security deposit of $90,000 held by the respondents against this sum, leaving a balance of $79,170, being the judgment sum ordered to be paid by the appellant to the respondents.

13 The judge said that the sole legal issue which he had to determine in relation to the claim of the respondents for damage to the property was whether the appellant was "obliged to deliver the property inclusive of the additions and alterations made to the property before the commencement of the third tenancy". It is to this issue which we must first turn as the answer of much of the other issues would depend on the answer to the former.

Clause 2(I)

14 We have in [5] above set out the provisions in cl 2(I). It is not in dispute that this clause was identical in both the first and second tenancy agreements. In view of the finding of the judge that the same terms would govern the relationship between the parties, even though a formal third tenancy agreement was never signed between them, we will, for ease of reference, refer to this oral agreement as "the third Tenancy Agreement".

15 The judge held that the phrase "at the commencement of the said term" in cl 2(I) of the third Tenancy Agreement referred to the commencement of the third tenancy and not the commencement of the first tenancy, the latter being the position argued by the appellant. In coming to that view, the judge appeared to have adopted a literal interpretation of the clause.

16 With respect, the judge had erred in taking a wholly literal construction of cl 2(I). It is an established canon of construction that contracts should be construed taking into account the factual matrix: see *Reardon Smith Line Ltd v Yngvar Hansen Tangen* [1976] 1 WLR 989. At the time when the first Tenancy Agreement was entered into, the property was a dwelling house. It was clear to both parties that to convert it for use as a kindergarten, some alterations would have to be made and such alterations should only be made with the consent of the landlord and also of the relevant authorities.

Clause 2(C), a fairly common clause in tenancy agreements in general, is to prevent a tenant from making unauthorised alterations according to his whims and fancies. If there were any unauthorised alterations, the landlord would naturally be entitled to ask the tenant to restore the property to its original position upon the expiry of the tenancy. However, where the alterations were permitted, then the landlord would not be entitled to require the tenant to remove those alterations. This position is reflected in cl 2(I). There can be no doubt that if the first Tenancy Agreement had not been renewed when it expired, the appellant would have been obliged to rectify any unauthorised alterations although he could not be required to do the same with regard to the authorised alterations in the light of the proviso in cl 2(I). Apparently, in this case, the appellant and his wife did carry out some unauthorised alterations to the property besides the authorised ones.

17 We would pause here to point out that cl 2(I) also refers to "in like condition as the same were delivered to the Tenant at the commencement of the said term". How then should one construe this phrase in the second Tenancy Agreement when there was in fact no delivery of the property to the appellant at the time the second tenancy commenced? All that happened was that the appellant continued to occupy the property as before. In our view, the only reasonable and sensible way to look at the situation is to say that the parties had effectively agreed to extend the tenancy for another term, subject to the same provisions as set out in the first Tenancy Agreement, and cl 2(I) of the second Tenancy Agreement should be construed to refer to the condition of the property at the time when the property was first delivered by the respondents to the appellant. Of course, the parties could have adopted the simpler method of just stating in a written note that the first Tenancy Agreement was to be extended by three years on the same conditions. But we do not think the fact that they signed a completely new agreement on identical terms should make any real difference. It is the substance, not the form, that matters. The same reasoning should and can be adopted in relation to the third Tenancy Agreement.

18 The case of *New Zealand Government Property Corporation v HM & S Ltd* [1982] 1 QB 1145 ("*NZ Government Property*") is very much on point. Under common law, a fixture which has been annexed to the land would become part of the land and could not be removed by the tenant. An exception to this common law rule is the case of a tenant's fixture which would not go with the land and could be removed by the tenant. More will be said about tenant's fixtures in a moment. In *NZ Government Property*, upon the expiry of the first tenancy, a new tenancy was entered into between the parties. At that time, some textbook writers seemed to think that if upon the expiry of the first tenancy the tenant's fixtures were not removed, those fixtures would form part of the land for the purposes of the second tenancy. Lord Denning MR held that the views in the textbooks were erroneous and stated that (at 1157–1158):

> In my opinion the tenant remains entitled to remove the "tenant's fixtures" so long as he remains in possession. That was decided in *Penton v. Robart* (1801) 2 East 88. Robart was under-tenant of a yard and buildings at Battlebridge. During his sub-tenancy he erected a wooden shed for the purpose of making varnish. It had a brick foundation. The original term expired at Michaelmas 1800. He remained in possession *for some time afterwards*, and during that time he pulled down the wooden superstructure of the shed and carried away the utensils. The head landlord claimed that they belonged to him. The Court of King's Bench held that the tenant was entitled to remove them. Lord Kenyon C.J. said, at pp. 90-91:
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> > The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier: but in modern times the leaning has always been the other way in favour of the tenant, in support of the interests of trade which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it … Here the defendant did

no more than he had a right to do; *he was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them*.

[emphasis in original]

Lord Denning concluded (at 1160) as follows:

[W]hen an existing lease expires or is surrendered and is followed immediately by another, to the same tenant remaining in possession, the tenant does not lose his right to remove tenant's fixtures. He is entitled to remove them at the end of his new tenancy.

19 In the same case, Fox LJ elaborated on the rationale at 1165 as follows:

It is, of course, true that a tenant can, prior to the grant of a new lease, remove any tenant's fixtures which he attached to the property during the existing term and bring them back after the new term has been granted. But that is expensive and wasteful formalism. It should be possible for the law to preserve the tenant's right to remove fixtures in some more sensible way. In my view it would be a sensible and workable rule that a tenant should have the right to remove his fixtures so long as he remains in possession of the premises as tenant. I think it is open to the court to adopt that rule and I would do so.

20 In *Halsbury's Laws of Singapore* vol 14(2) (LexisNexis, 2005 Reissue) at para 170.0965, the learned authors adopted the legal position as enunciated in *NZ Government Property* as follows:

If the previous tenancy has expired by effluxion of time or is determined by surrender by operation of law, the right to remove fixtures is carried forward into the new tenancy. Where there is an express surrender, the question must be determined in accordance with the provisions of the deed but, in the absence of an express renunciation of the right to remove tenant's fixtures, the right carries forward into the new tenancy.

21 Another way to test the validity of the legal position we have advanced in [17] above is this. In the present case, some unauthorised alterations had been carried out by the appellant to the property. If the argument of the respondents, which was accepted by the judge, is correct, that cl 2(I) of the third Tenancy Agreement should be read to refer to the condition of the property as at the commencement of the third tenancy, it must follow that the respondents would not be able to require the appellant to remove the unauthorised alterations and restore the property to the state at the commencement of the first tenancy. We think this would be wrong and inconsistent with what was stated by Lord Denning in *NZ Government Property* quoted above. The interpretation favoured by the court below would run counter to the scheme implicit in cll 2(C) and 2(I) unless one were to take the position that the phrase "at the commencement of the said terms" refers to the commencement of the first tenancy as far as unauthorised alterations were concerned and to the commencement of the third tenancy as regards the authorised alterations. This, of course, would be absurd.

22 At this juncture, we ought to add that what the proviso to cl 2(I) prescribed is that the landlord cannot require the tenant to remove the authorised alterations. But that is not to say that the tenant cannot remove authorised alterations if he wants to. Neither can it be construed to mean that the landlord has the right to retain the authorised alterations. As the authorised alterations to the property in this case were made by the appellant and his wife, he, as the tenant, would be entitled to remove them on his own accord even though the respondents could not require him to do

so, provided that those alterations did not constitute fixtures which accrued with the land. The appellant would be entitled to remove the tenant's fixtures. To deprive a tenant of his right to remove fixtures erected by him for his trade, sufficiently clear words must be there and the words in cl 2(I) are, in our view, hardly adequate. For illustrations of this rule, see *Godson v P Burns & Company* [1919] 58 SCR 404 and *Homestar Holdings v The Old Country Inn Ltd* [1986] ACWSJ Lexis 34958 at [27].

Chattels and tenant's fixtures

23 *Prima facie*, chattels brought by a tenant onto the property which are easily removable may be taken away by him upon the termination of the tenancy. What is more problematic relates to articles which are attached to the premises such as ceiling fans, airconditioners and machinery. Under general real property law, these articles so attached would be regarded as part of the land and belong to the owner of the property. Generally, anything which is affixed to the land, however slightly, becomes a fixture. However, the case law on the subject is less than consistent. As noted in Lye Lin Heng's *Landlord and Tenant* (Butterworths, 1990) at p 282, "articles which were not attached to the land have been held to be fixtures and others which were attached have been held not to be fixtures".

24 The authorities indicate that there are many formulations or tests for deciding whether a chattel is a fixture, *eg*, mode and extent of annexation, the object or purpose of the annexation, and whether the removal would cause irreparable damage to the demised premise. For the purpose of the present case we do not need to go into that as all the articles were brought in and the alterations carried out in order to meet the requirements laid down by the Ministry of Education and the Fire Safety Bureau for the operation of a kindergarten. In short, the alterations were carried out by the appellant for the purpose of the business. As mentioned before, there is an exception to the general rule that fixtures accrue with the land, prompted no doubt by the consideration that there is no reason why a landlord should be entitled to benefit from valuable fixtures brought by the tenant onto the property for the purposes of his trade or his own personal enjoyment. Such fixtures can be removed by the tenant at any time during the tenancy.

25 Thus, Woodfall's *Landlord and Tenant* (Sweet & Maxwell, Release 38, June 1997) classifies objects under three categories (at para 13.131):

> An object which is brought onto land may be classified under one of three broad heads. It may be
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> (a) a chattel;
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> (b) a fixture; or
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> (c) part and parcel of the land itself.
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> Objects in categories (b) and (c) are treated as being part of the land. In the law of landlord and tenant, although not in all branches of the law, the category of fixtures is further divided into landlord's fixtures, which must be left by the tenant at the expiry of his lease, and tenant's fixtures which the tenant is permitted to remove. This threefold classification, in contrast to the more traditional twofold classification, has been approved by the House of Lords.

26 The policy consideration behind the exception of tenant's fixtures is alluded to in Woodfall's *Landlord and Tenant* at para 13.142 (Sweet & Maxwell, Release 58, May 2004) in these terms:

> The policy of the law which led to the relaxation of the rule prohibiting the removal of trade fixtures is plain. It was evolved "in support of the interests of trade, which have become the pillar of the state." Thus the courts considered that the commercial interests of the country might be advanced by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured for them at the end of their terms.

27 What would constitute fixtures which would become part and parcel of the land and what are tenant's fixtures must depend on the circumstances of the case, in particular, the purpose for which the article is affixed onto the land. Ordinarily, a door or a window built into the structure of the building would be regarded as becoming part of the land. But where doors or windows formed part of a special structure required for the business of the tenant, they could very well remain as tenant's fixtures.

28 A case which is illuminating of the common law position is *Webb v Frank Bevis, Ltd* [1940] 1 All ER 247. The facts of the case are conveniently set out in the headnote to the report which reads as follows:

> The appellant company carried on business as manufacturers of breeze and cement products, and, for the purpose of housing their machinery and warehousing their plant and materials, they erected on the land a shed 135 ft. long and 50 ft. wide. It was built of corrugated iron, and was laid upon a concrete floor. The roof rested upon solid timber posts, which in turn rested on the concrete floor, but they were not embedded in it. Each post was tied to the concrete floor by wrought iron straps on the opposite sides, and was held in position by a bolt which ran horizontally through each post. The straps, which were fixed in and protruded from the concrete floor, were fastened tightly by a nut screwed on one end of the bolt. There was no other attachment to the soil. In the shed, there were three heavy pieces of machinery similarly attached to the concrete floor. Once the roof and sides of the shed had been removed (and these could be removed in panels), the posts could easily be removed by undoing the bolts, and, if need be, the upstanding straps could be cut off level with the floor.

29 At first instance, the judge held that the superstructure of the shed must be regarded as one with the concrete floor. However, the English Court of Appeal held that the two were not to be treated as one unit. Scott LJ explained (at 251):

> The judge held, and I think rightly held, that the superstructure was "to a very large extent" a "temporary" building, by which I understand him to mean that the object and purpose for which the company erected it were its use for such time as they might need it. That view goes a long way, if not all the way, towards the conclusion that, regarded apart from the floor, the shed was in law removable. The very uncertainty of the company's tenure of the site ultimately of necessity determined "the purpose and object" of the erection, and, when the judge found as a fact, as he did, that "it could be taken away, no doubt piecemeal," and re-erected elsewhere, I think he consciously decided that, apart from the floor, it was a tenant's trade fixture, and removable by the tenant as such. His only ground for taking the opposite view was that he thought himself bound to regard the two as one unit, and thought that the floor compelled him to treat the whole as a landlord's fixture. In my respectful judgment, this reasoning rested on a fallacy. If the respondent had already made the concrete floor, as well he might for the purposes of his own business, and the company had then become his tenant at will and put up the self-same superstructure, what relevance would the floor have had? In my view, none. It would not have had any more relevance than would any flat, rigid and unbreakable surface already existing when some heavy superstructure is put upon it, such as a windmill of a century or two ago, or

the actual machines in the present case.

30 In any event, in the present case, it seems to us quite clear that the alterations carried out by the appellant were not intended to be permanent improvements to the land. They were meant to be there so long as the property was being used as a kindergarten. This was also borne out by a 1995 letter from the URA giving provisional approval for the property to be used by the appellant as a kindergarten:

> The addition and alteration works shall be removed and cleared to the satisfaction of the competent authority once the kindergarten ceases operation …

It was obvious that the parties intended, when they executed the first Tenancy Agreement, to comply with the conditions set by the URA in relation to the approval granted. It was never the intention of the respondents to continue using the property as a kindergarten after the appellant had vacated it. The property was to be re-converted to a dwelling house once the appellant ceased to use it as a kindergarten. This was clearly in the mind of all the parties. The intention of the respondents of using the property to run a kindergarten of their own only surfaced much later during the course of the third tenancy.

31 In this regard, it is worth noting the reply of 2 April 2003 of the Building and Construction Authority ("BCA") to the respondents' letter of 28 March 2003. For our present purposes we need only quote the following passage:

> As mentioned in my earlier letter, your tenant was the official applicant for the building plan approval of the addition and alteration works. … Furthermore, in the Written Permission issued by URA to your tenant for the same addition and alteration works, your tenant is required to remove all the addition and alteration works once she ceases her kindergarten operation. Therefore, under the Written Permission, your tenant has the duty and responsibility to remove what she had built as addition and alteration works at your premises. We merely advised your tenant that she did not have to obtain a demolition permit from BCA as the works involved were minor.

This clarification is wholly in line with the terms of approval set by the URA.

32 In an earlier reply dated 27 March 2003, in response to the complaint of the respondents, the BCA informed the respondents that the appellant did not require a permit to remove the "minor works". This include an external steel staircase which was described as "an independent structure affixed to the external wall of the original building" and that "its removal does not affect the original structure".

33 In the light of the foregoing, it is our opinion that:

(a) Upon vacating the property in April 2003, the appellant was obliged to restore it to the original condition as it was in at 1995 when he first took delivery of the property.

(b) At the time the parties executed the first Tenancy Agreement it was clearly within their contemplation that alterations would have to be made to the property as might be required by the authorities in order that it could be lawfully used as a kindergarten and that they would comply with such conditions as the authorities might impose.

(c) The appellant was acting within his rights, and was indeed obliged under the condition imposed by the authorities, to remove the alterations.

34 The court expert had assessed damages on the basis that there should be re-instatement of the property to the condition that the property would have been if the approved plans were carried out fully. In the light of our rulings above, this basis of reinstatement would be clearly erroneous. The appellant was entitled to remove all the alterations. Having done so, the appellant was duty-bound to reinstate the property to the condition it was in 1995. The appellant would have to bear the costs of such reinstatement and the loss of rental on account of the time required to undertake those reinstatement works. In the light of the direction the case had taken at the trial, there is simply no evidence as to the costs required to reinstate the property to the condition in 1995, nor of the period of time required to carry out such reinstatement. In the result, we think it would only be fair that this assessment be carried out in the District Court as the quantum will fall well within the jurisdiction of that court. The question of the costs of the assessment will be left to the discretion of the district judge who will no doubt take into account the positions adopted by the parties at the commencement of the assessment and the eventual ruling of the court.

35 Before we turn away from this issue, we ought to add that the respondents contended that the question of tenant's fixtures was a new point not taken up by the appellant in the court below. In fact the respondents themselves raised the question of tenant's fixtures. Be that as it may, O 57 r 13 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) empowers this court to entertain a new point, and the conditions which must be satisfied before the court will exercise its discretion were declared in *The Tasmania* (1890) 15 App Cas 223 to be: (a) no new evidence is required in relation to the point and (b) no explanation can be usefully offered in relation thereto. *The Tasmania* was followed by this court in *Cheong Kim Hock v Lin Securities (Pte)* [1992] 2 SLR 349. As far as this case is concerned, the point is one of law, on which no new evidence is really required. Neither can any explanation or clarification be usefully offered in connection therewith. Thus, we would exercise our discretion and allow the point to be argued.

Costs

36 We now move on to consider the order on costs made by the court below. In ordering that each party should bear his own costs, the judge had particular regard to the parties' conduct "both prior to and during these proceedings" even though he recognised that the parties had spent much of the time of the trial dealing with the respondents' unsuccessful claim for double rent. In this regard, the appellant pointed out that the observations of the judge at [15] and [16] of his judgment were unwarranted:

> It was abundantly clear that by removing the authorised alterations the defendants were motivated purely by malice and ill will. The plaintiffs had unequivocally requested that they do not tamper with or remove the alterations made to the property. The plaintiffs had intended to continue with the usage of the property as kindergarten premises and the defendants had more than an inkling of such an intention. The approved statutory usage of the property as a kindergarten would expire only on 5 April 2006. The defendants were fully aware that there was no legal requirement to remove the alterations.
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> The defendants' pettiness is patently exemplified by their demand through their solicitors' letters of 12 and 14 March 2003 of "consideration" in return for leaving the "benefit" of the alterations intact. When the plaintiffs refused to accede to this unreasonable demand, the defendants then wilfully removed the alterations, disregarding the plaintiffs' reasonable and legitimate request to leave the property as it stood. In doing so, the defendants wilfully damaged the property. The fact that the defendants went as far as to incur costs to remove the alterations is testament to the lengths they were prepared to go so as to manifestly express their rancour with the plaintiffs, *inter alia*, for initiating these proceedings.

37 These comments of the judge, viewed in the context of his interpretation of cl 2(I), are probably understandable. But those remarks, viewed in the context of the appellant's perception, that he, having put up the fixtures for the purpose of operating the kindergarten, was entitled to take them away, and that if the respondents wanted to have them, as they now intended to use the property as a kindergarten, he was not obliged to do them a favour by passing everything to them without consideration, are probably too harsh. Putting it another way, in the appellant's mind, the respondents wanted to have a ready-made kindergarten without having to pay for it and he was not willing to let them have it. In the light of our views above on cl 2(I), it cannot reasonably be said that the position taken by the appellant was wrong or without any basis. As we see it, the relationship between the parties had soured, and as both sides took a different interpretation of cl 2(I), they thus refused to resolve the impasse sensibly and in a practical fashion. Accordingly, we do not think the conduct of the appellant deserved to be deplored. Neither would we deplore the conduct of the respondents, even though they are now proven wrong. Both sides were simply caught up by their own differing interpretations of their rights under cl 2(I), no doubt acting under legal advice. Because of the poor relationship, the appellant did not even mind having to spend more money in getting the tenant's fixtures removed and having to carry out restoration works rather than allowing the respondents to have the benefit of the tenant's fixtures for free. Moreover, the appellant was not minded to let the respondents have a ready-made kindergarten on the cheap, and to enable them to compete with the appellant's wife's kindergarten, which had moved to another location.

38 We ought to add that the respondents had shifted their case during the course of the proceedings. The original position of the respondents was that the appellant was obliged to reinstate the property to the condition when he first took possession of it. The final position of the respondents was that the appellant should reinstate the property in accordance with the approved plans.

39 Another matter which would affect the question of costs is the fact that it was the respondents who applied and got the case transferred from the Subordinate Courts to the High Court thinking that their claim for double rent would well exceed the jurisdiction of the Subordinate Courts. This claim failed completely. Clearly, the respondents ought to bear the consequences of this move.

Judgment

40 In the premises, we will allow this appeal and set aside the judgment below. We would order that an assessment be carried out in the District Court in the terms described in [34] above, if the parties are still unable, following this judgment, to agree on the proper quantification for the reinstatement as well as the period of time required to undertake the restoration works. The appellant shall have the costs of this appeal. The security for costs shall be refunded to him.

41 As regards the costs below, having regard to the trial judge's comment on the conduct of the appellant's wife during the proceedings, we will award the appellant only 80% of the costs below. However, the appellant and the respondents shall bear equally the fees payable to the court expert in relation to the work done by that expert for the trial.

Appeal allowed.