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**SUPREME COURT OF NEW SOUTH WALES**

# *WAIGE & CO CONSTRUCTIONS PTY LTD v SUBURBAN TIMBERS PTY LTD*

**Moffitt P, Samuels and Mahoney JJ**

**28 April 1976**

**LANDLORD AND TENANT – LEASE – TIMBER RACK CONSTRUCTED BY LESSEE IN PREMISES LEASED – RACK NOT FIXED TO THE CONCRETE BASE OR THE GROUND – LEASE PROVIDED THAT LESSEE TO YIELD UP ALL "BUILDINGS, ERECTIONS AND FIXTURES" – MEANING OF "FIXTURE" OR "ERECTION" WITHIN TERMS OF LEASE – WHETHER READ *EJUSDEM GENERIS* OR *NOSCITUR A SOCIIS* – WHETHER LESSOR ENTITLED TO RETAIN RACK.**

Lessee constructed a timber rack in premises for purposes of his business. Rack was not fixed to its concrete base, nor affixed to ground. When lessee dismantled and removed it on expiry of lease, lessor sued in conversion. It was agreed that the rack was a chattel and not a fixture; but argued that as the lessee had covenanted in the lease "... to yield up all buildings, erections, and fixtures erected thereon" the construction of the rack was an erection within terms of the lease.

**HELD: The rack was not an erection within the meaning of the covenant. The *ejusdem generis* rule did not apply here because of the absence of the necessary preceding context. But here there were coupled together three words which were susceptible of analogous meanings. Therefore, a somewhat similar principle, that is *noscitur a sociis*, did apply. The words must be understood in their cognate sense. The common characteristic of buildings and fixtures is annexation. The word 'erections', taking colour from its fellows cannot apply to a structure which is unfixed to the land.**

**JUDGMENT:** In considering the effect of the covenant it is necessary to bear generally in mind that at common law a tenant was entitled to remove his trade fixtures at the end of his term or within a reasonable time of its expiration. Had the rack here been fixed to the premises it might well have been a trade fixture and thus removable in the absence of a contrary stipulation in the lease. It is not necessary to decide this point and in fact the rack was not in any way annexed to the ground. Hence it is necessary, if the plaintiff's argument is right, to read the covenant so as to include in the word 'erections' chattels of the lessee which, as the learned judge found, were placed in the premises only for the convenient conduct of the lessee's business. Mr Flannery boldly seized this nettle by submitting that the use of the words "buildings, erections and fixtures" in that collocation pointed to an intention to include in the category of erections structures which were not fixed at all, since buildings and fixtures necessarily import some degree of annexation. With this submission, however, I do not agree. It may be conceded that the absence of particular words preceding the general words in question prevents the application of the *ejusdem generis* rule. But the collocation of words strongly suggests an intended common characteristic of permanence or annexation. Considering the question without the assistance of authority, I would therefore conclude that 'erections' means at least structures intended as permanent additions to or improvements of the premises.

There is, however, authority which strongly obstructs the plaintiff's argument. In the earliest of the cases, *Naylor v Collings* (1807) 1 Taunt 19 the lessee covenanted to yield up to the premises at the expiration of the lease 'with all buildings and erections' thereon. During the lease, and for the purposes of his business, the tenant had built erections which were 'not let into the ground, soil or freehold of the said premises but were built and supported on blocks or pattens of wood laid upon the ground'. At p21 the court said:

> 'The thing removed is described as not let into the soil, but as resting upon blocks or pattens. It is therefore a mere chattel, and is not an erection or building within the meaning of the covenant'.

The next case is I think much to the same effect, *Lambourn v McLellan* (1903) 2 Ch 268.

Machinery was affixed to the premises for its more convenient use. The question was whether that machinery fell within a covenant which provided, so far as material, 'all other erections, buildings, improvements fixtures and things which are now or which at any time during the said term hereby granted shall be fixed, fastened or belong to the demised premises'. At p276 Vaughan Williams LJ said this, dealing with the proper meaning of the term 'erections':—

> 'That word, especially when it is used in immediate collocation with the word "buildings" is not, I think, applicable to machines attached to the floor in the way in which these machines are attached without any idea of adding them to the building'.

I emphasise the concluding words of that statement.

Finally I refer to *HE Dibble Ltd & anor v Moore* (1970) 2 QB 181. There the question was whether greenhouses not secured to the ground but standing of their own weight on concrete dollies were erections which passed on conveyance by dint of s62(1) of the *Law of Property Act* 1925, which is the equivalent of s67(1) of the *Conveyancing Act* 1919 as amended. At p189 Harman LJ said this, referring to the greenhouses:—

> 'But are they "erections" within the meaning of the general words of s62? In my opinion, clearly not. Nothing, I think, is an "erection" within the meaning of that section which is not something which is part and parcel of the land conveyed.'

Then His Lordship went on to refer with approval to *Naylor v Collings* (*supra*).

Clearly *Dibble's case* is distinguishable from the present one because it dealt with the effect to be given to a general statutory provision upon a conveyance of land. Nonetheless it seems to me that the reasoning there is of application to the present problem. Plainly if the plaintiff here had sold this land the conveyance would not have passed this chattel to a purchaser. Why then should it be said that he was entitled to retain the rack upon the determination of the lease? In my opinion the rack was not an erection within the meaning of the covenant. I have said that I do not think that the *ejusdem generis* rule applies here because of the absence of the necessary preceding context. But here there are coupled together three words which are susceptible of analogous meanings. I think therefore that a somewhat similar principle, that is *noscitur a sociis*, does apply. The words must be understood in their cognate sense. The common characteristic of buildings and fixtures is annexation. The word 'erections', taking colour from its fellows cannot in my opinion, apply to a structure which is unfixed to the land.

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