Montana Law Review

Volume 19
Issue 2 *Spring 1958*

Article 8

January 1958

Landlord and Tenant—Waste—Implied Covenant Restricting Use of Premises

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when he enters the contract. He probably is unaware of the importance of his venue rights and consequently can see no harm in such a condition. When litigation does arise he quite unexpectedly finds himself at a serious disadvantage as against an adversary who has chosen his forum well. For example, a buyer might have to travel hundreds of miles to defend himself in the court of the vendor's choosing. The court was aware of the problem of overreaching and pointed out that it was not shown to exist in this case, but it is rather the possibility of overreaching which concerns us, since it is that which lends weight to the proposition that it is not necessarily in the public interest to permit contracting away venue rights.

The second consideration is that of possible economic coercion. A buyer of small means is often in no position to haggle over details, and if sellers as a class should require waiver of venue rights as a standard contract provision, the freedom of contract which the majority position envisions would be illusory. It may be the better part of public policy to protect such persons against their own economic weakness. At least the contrary rule adopted here is not unassailable.

Thus there is a sharp contrast between agreeing to a particular place of trial *after* the litigation has commenced, when the effect of the agreement is apparent and the parties are on equal terms, and setting venue by contract in advance. The statute permitting changing of venue by stipulation in court may have been intended by the legislature to mean just that and no more.

JAMES SORTE

LANDLORD AND TENANT — WASTE — IMPLIED COVENANT RESTRICTING USE OF PREMISES—Plaintiff leased premises to Safeway Stores, the lease allowing the lessee to make alterations necessary for "its use" of the building, and also permitting assignment and subletting. A sublessee, the Roosevelt-Osborne Motor Co., was using the premises as a garage, and was about to cut a fourteen-foot doorway in the front of the building. Plaintiff sought a declaratory judgment to the effect that such use was contrary to the terms of the lease. The district court dismissed the complaint. On appeal to the Montana Supreme Court, *held,* affirmed. The alterations were permitted by the terms of the lease, and no implied covenant restricting the use of the leased premises will be raised. *Turman v. Safeway Stores, Inc.,* 317 P.2d 302 (Mont. 1957). (Justices Bottomly and Adair dissenting).

In the instant case the court decided two issues—whether the alteration would constitute waste and whether there was an implied covenant to use the premises only for food store purposes. Although somewhat interrelated in the present case, these issues are separable and will be so treated here.

Ordinarily, as the court itself concedes, an alteration such as that contemplated by the garage company (a fourteen-foot doorway cut in the front of the building) would constitute waste—a permanent, physical injury to the freehold. Therefore the question confronting the court was whether this alteration by the sublessee was authorized by the alteration clause.

The majority held that the clause which provided: "Lessee may make such . . . alterations . . . as it may deem desirable for its use," plainly and unambiguously permitted Safeway to alter the premises for whatever use it might have for them, and that by virtue of the clause permitting subletting the same permission was extended to any sublessee. Consequently the doorway was authorized as desirable for the use which the sublessee was making of the premises.

On the other hand, the dissent also insisted that the words of the lease are plain and unambiguous, and that "its use" referred only to Safeway and only to alterations for food store purposes. This writer's opinion is that the phrase "its use" is obviously ambiguous. The fact that the court is divided shows this. If this be true, it would appear that the court should have considered appellant's offered parol evidence in an attempt to resolve the ambiguity and explain what the parties meant by "its use."[1]

The second issue was whether an implied covenant could be found restricting the use of the demised premises to that which the parties contemplated at the time of the lease. The question of waste is entirely separate, for it is quite obvious that a restriction on use may be breached without waste and, on the other hand, waste may be committed without breach of an implied restriction. However, in this case if an implied restriction had been found which excluded use as a garage, both contentions of the appellant would have been satisfied: the cutting of the doorway would have been waste, and the implied covenant would have been breached. Thus the two issues are interrelated, though capable of separate treatment, as stated above.

The court admits that the lease itself and the evidence show unmistakably that the contemplation of the parties at the time they entered into the lease was that the building would be used for food store purposes.[2] In the court's opinion, however, this was not sufficient to raise an implied restriction on use. Since words indicating a particular use, or authorizing that use, are generally held to be permissive rather than restrictive, the majority felt that an intended use, regardless of how strong that intent may be, can be only permissive. The court, however, indicated that there was one situation in which an implied covenant may be recognized. This is where the implication would be necessary to effectuate express language in the lease as distinguished from the intent of the parties.

Tiffany states that in the absence of statute or express stipulation, a tenant is in no way restricted in his use of the premises, except that he may not commit waste or create a nuisance.[3] This appears to be the general rule in the United States. Furthermore, the prevailing view throughout

[1]Plaintiff's offer of proof was to the effect that when Safeway's agents were asked the reasons for the assignment clause they advised that it was necessary for intercorporate transfers among the different organizations through which Safeway operated.

[2]Instant case at 306. Descriptive words in the lease provided that the premises were to comply with all regulations applicable to a building to be used for the sale of food, and that the lessor was not to let any other building within fifty feet under his control be used to store or sell groceries, meat, fruit, vegetables or bakery goods.

[3]1 TIFFANY, LANDLORD AND TENANT § 122 (1910).

the country is that no implied covenant is raised by the intended use of the premises.[4]

The contrary argument, in favor of implied restrictions, finds its historical basis in the early Alabama case of *Nave v. Berry*.[5] That case established a rule which has received wide support from the courts. It was there held that the lessee has the right to make any use of the premises not materially different from that in which they were usually employed, or for which they were adapted or constructed.[6] *F. W. Woolworth Co. v. Nelson*,[7] a recent Alabama case having facts quite similar to the present case and therefore cited by the dissent, affirmed the rule of the *Berry* case.

The dissent's position in the present case, however, goes one step further than the Alabama rule. The dissent would base an implied restriction on the use contemplated by the parties to the lease—not merely the use for which the building was constructed or adapted. In support of this position they relied on the Louisiana case of *Boh v. Pan American Petroleum Corporation*.[8] Although Louisiana has a statute providing that no covenant will be implied in any conveyance of real estate, the court held that the "circumstances surrounding the execution of the lease may be looked to in order to determine the use contemplated by the parties, and the intention of the parties is controlling." The persuasiveness of this holding is diminished, however, by the fact that it is based on authority derived from European Civil Law. The construction applied by the Louisiana courts is admitted by them to be substantially the same as that applied by the French courts to the corresponding provision of the French Civil Code of 1729.[9] Montana also has a statute which has been held to prohibit all implied covenants but two.[10] Since it applies to conveyances which pass a possessory title, leases would seem to be included. Whether the statute in question prohibits implied restrictions on the use of premises by a lessee has not been decided in this state; but under the recent decision construing the statute, implied easements have been abolished.[11]

The dissent relies heavily on the Montana hiring statute,[12] taking the position that under this statute the intended use of the premises controls

[4]See Ann., 46 A.L.R. 1134 (1927); 148 A.L.R. 583 (1944); 2 A.L.R. 2d 1148 (1948).

[5]22 Ala. 382 (1853).

[6]See 1 TIFFANY, LANDLORD AND TENANT § 122 (1910); 36 C.J., *Landlord and Tenant* § 710; 51 C.J.S., *Landlord and Tenant* § 326; 32 AM. JUR., *Landlord and Tenant* § 203. In 1 TIFFANY, *op. cit. supra*, at 799, in reference to Nave v. Berry, the author writes: "On the other hand it has been said in one case that the tenant can use the premises for that purpose only in which they are usually employed, to which they are adapted, and for which they were constructed, a criterion, it may be remarked, which appears somewhat lacking in definiteness."

[7]204 Ala. 172, 85 So. 449, 13 A.L.R. 820 (1920).

[8]128 F.2d 864 (5th Cir. 1942).

[9]New Orleans and C. R. Co. v. Darms, 39 La. Ann. 766, 2 So. 230 (1887).

[10]REVISED CODES OF MONTANA, 1947, § 67-1616, as construed in Simonson v. McDonald, 311 P.2d 982 (Mont. 1957). The statute allows two implied covenants from use of the word "grant": (1) that the grantor has not previously conveyed the estate to any other person, and (2) that the estate is free from any encumbrances.

[11]Simonson v. McDonald, 311 P.2d 982 (Mont. 1957), 19 MONTANA L. REV. 73 (1957).

[12]REVISED CODES OF MONTANA, 1947, § 42-106: "When a thing is let for a particular purpose, the hirer must not use it for any other purposes; and if he does, the latter may hold him responsible for its safety during such use in all events, or may treat the contract as thereby rescinded."

and may be shown by parol. Under an identical statute in California,[13] it was held that unless the lease specifically limits the use, or raises a restriction necessarily implied from the language employed, it is not forfeited by a different use, even if illegal.[14]

The decision is specific: The Montana Supreme Court will not raise an implied covenant restricting the use of leased property to the use contemplated by the parties. The court may well have regarded the general prohibition against waste as a sufficient safeguard of the lessor's interest, but it is arguable that it is an inadequate safeguard in the light of the present decision.[15] At any rate it is clear that the apparent harshness of the present decision arises from the majority's position that the use of a food store building for the purpose of a garage, in and of itself, is not a substantial injury to the inheritance and therefore waste. Whether or not this is so, it seems, is a question to be resolved according to the facts of each case.

The instant case gives warning to lawyers, in their capacity as drafters of lease agreements, to deal explicitly with possibilities of use, and not to rely on reasonable implications which arise from the circumstances of the agreement.

WILLIAM CONKLIN

WORKMEN'S COMPENSATION — ASSERTION OF CLAIMS — TIME LIMITATION—Claimant was involved in an accident during an oil drilling operation of his employer, but suffered no apparent present harm. A rib injury was discovered approximately one year later. Within 120 days thereafter he brought action under the Kansas workmen's compensation statute, which required written claim "within one hundred twenty days after the accident." Claimant recovered judgment in the district court allowing compensation. On appeal to the Supreme Court of Kansas, *held,* reversed. Where the statute requires claim to be filed within 120 days from the date of accident, it is irrelevant that the resulting injury was not discovered until that time had elapsed. *Rutledge v. Sandlin,* 310 P.2d 950 (Kan. 1957).

The workmen's compensation laws of all states but two provide for time limitations on filing claims for compensation.[1] The statutes of a majority of the states include provisions that no claim for compensation will be allowed unless filed within a certain period of time after the *injury*.[2] The courts of those states whose limitation statutes use the word

[13]CAL. CIV. CODE, § 1930 (Deering 1949).

[14]Keating v. Preston, 42 Cal. App. 2d 110, 108 P.2d 479 (1950).

[15]The instant case points up a dilemma which may arise by reason of the holding. Alterations are permitted by the lease if deemed desirable for the lessee's use. Under the rule announced by the court there is no restriction regarding the use of the premises. Since any use of the building is allowed, any alterations consistent with that use would also be allowed. Under such a construction as this the lessor must have granted much more than he intended.

[1]See Landauer v. State Industrial Accident Commission, 175 Ore. 418, 154 P.2d 189, 197 (1944) (dictum).

[2]*Id.*, 154 P.2d at 201.