IN THE HIGH COURT OF SWAZILAND

CIV. 753/89

In the matter between:

BEHL CONSTRUCTION AND DEVELOPMENT CO. LTD Plaintiff

V.

DENIS HEENAN Defendant

C O R A M F. X. ROONEY

FOR PLAINTIFF SIMMONDS & VILAKATI

FOR DEFENDANT BLACK & SHILUBANE

JUDGMENT

01/03/91 Rooney, A.C.J.

The plaintiff Company (Behl) is the registered owner of Portion 12 of Farm No. 73 in the Hhohho District. The land in question measures almost 600 hectares. This land is mainly used for forest cultivation and there is a dwelling house on it in which the defendant (Heenan) resides and has so resided with his wife since May 1981.

At that time the land was registered in the name of Sydney Harry Blacher. He had an arrangement with Tonkwane Estates Ltd (Tonkwane) who were in actual possessiion of the land in pursuance of a contract under which Tonkwane cut the timber on the land. In 1983 Blacher agreed to sell the property to Tonkwane. On the 9th December 1988 the land was registered in the name of Behl with the consent of Tonkwane. It should be noted in this connection that Tonkwane and another company called Tonkwane Saw Mills Ltd. (Sawmills) are associated. The share holders of these seperate companies are members of the Crabtree family, consisting of David, Solveig, Robert and Rosemary.

These family members may have different holdings or managerial responsibilities in the various companies mentioned, but, I feel it is safe to assume that as this was a family concern the corporate entities did not act as isolated units in ignorance of the plans, policies and intentions of each other.

In this action Behl seeks an order ejecting Heenan from the premises. This follows upon an earlier action in.....this Court instituted .with the same purpose by Tonkwane which was withdrawn before the current proceedings were commenced.

Heenan claims that he is entitled to hold and retain possession of the property by virtue of a lien in respect of necessary or useful improvements effected by him on the

property while he was a bona fide possessor of the premises. He claims to have enhanced the value of the property to the extent of E75,400. He has counterclaimed for payment of that amount.

Heenan says that the improvements he effected were confined to the dwelling house and garden which he occupied and which covered an area not greater than 1.5 hectares. Similarily, his claim to retention is confined to the same area.

In this case Heenan was required to begin as the burden of proff lay upon him. At the begining of 1981 he was employed as a forest manager by a firm at Pigg's Peak. He says that he was approached by Mr David Crabtree (PW1) who invited him to join Tonkwane as sawmill manager. Heenan was not interested in that position, but, later, when a vacancy arose for a forester further discussions took place about Heenan joining Tonkwane.

Heenan said that he made it clear to David Crabtree that his main concern was that he needed a place where he and his wife could reside for the rest of their joint lives. He was shown the house which he now occupies and which was then in a poor state of repair. He says that it was agreed that the house would be put in order and that he could develop the property as he wished.

A contract of employment was entered into. The agreement contained two important clauses as follows:-

5.
Accommodation

5.1 "The Company shall provide Heenan with an unfurnished house with surrounding garden (hereinafter referred to as "the Residence") for occupation by himself and his family, which house has been pointed out to him. 5.2 Hennan shall pay the Company a rental of E5 (Five
Emalangeni per month in respect of the above. 5.3.1 It is recorded that such aforesaid house is in need of repair, renovation and additions thereto.

5.3.2. Such repairs, renovations and additions will be carried out under the supervision of Heenan at the cost of the Company."

And

12.

Lease of Residence on Termination of Services

12.1 Upon termination of Heenan's services, whether at his or the Company's instance Heenan shall be entitled to lease the Residence for his own occupation and for so long as he may wish upon the following terms and conditions:

12.2.1 The rental for the full period of Heenan's occupation thereof shall be

determined according to the year in which Heenan services are terminated and the valuation of the residence as at the date of termination as follows:

Termination year Rental per annum

1st July to 30 June) Expressed in percentage of the valuation

1981/82 15

1982/83 14

1983/84 13

1984/85 12

1985/86 11

1986/87

1988/89 8

1989/90

1990/91 6

1991/92 and thereafter 5

12.2.2 The valuation of the Residence shall be as may be mutually agreed by the parties at the date of termination, and failing agreement, as determined by a Sworn Appraiser nominated by the Chairman of the Swaziland Law Society, whom failing, by the Master of the High Court.

12.3 Heenan shall not be entitled to cede or assign his rights hereunder nor to sublet the Residence or any part thereof.

12.4 Heenan shall use the Residence for residential purposes only.

12.5 Heenan shall be responsible for all maintenance of the Residence, including the structure and he shall be obliged to keep the buildings in a good state of repair.

12.6 Heenan shall be responsible for the supply of water, electricity and telephone to the Residence and pay all charges levied in respect thereof

12.7.1 The Comapany shall not be entitled to terminate Heenan's occupation except upon his breach of any provision of this clause and his failing to remedy the same upon seven days written notice in the case of a failure to pay rentals, and thirty days written notice in the case of any other breach, delivered to him calling upon him to

pay such rentials or rememdy such breach.

12.7.2 Heenan shall be entitled to terminate his occupation upon two months notice in writing to the Company.

5

12.8 The Company shall be responsible for the insurance of the buildings comprising the Residence.

12.9 During the period of Heenan's occupation of the residence under this clause he shall make no alterations or additions to the buildings without the consent in writing of the Company and upon termination of his occupation he shall not be entitled to any compensation in respect of any such alterations or additions or to remove them.

12.10 In the event that Heenan should predecease his wife Jean, she shall be entitled to all Heenan's rights under this clause and be responsible for his.....

12.11 In addition to the rentals payable in terms of 12.2.1, Heenan shall pay the Company, at such intervals as may be agreed, the insurances premiums paid by the Company under 12.8"
Behl has contended that clause 12 above is not a valid lease or agreement to lease. Heenan appears to have accepted that contention. However, the latter relies upon clause 12 to support the view that he was and remains a bona fide possessor of the property and is entitled to be compensated for the improvements which he effected to the property in the course of his occupation.

Heenan said that without clause 12 he would not have entered the employment of Tonkwane. He believed he had secured a permanent residence for the rest of his life which he could enhance for his own use and benefit.

Heenan proceeded to improve the property. He spent money on it, but, kept no account of this expenditure as he did not contemplate that he would ever be required to provide such evidence. Heenan and his wife laid out lawns and planted an orchard. He also built a swimming pool. While he was employed by Tonkwane he used labour supplied by that company. He built a

6

pergola with timbers obtained .. from Tonkwane.- He fenced £ the . property with poles, and put in barbed wire, the latter at his own expense.

Heenan has an interest in cycads. These plants are of great botanical interest as they are living relics of vegetation which existed on the planet 50,000 years ago. They are a protected and endangered order. Heenan introduced a number of these rare plants to the garden. Relying upon his own "expert" knowledge of these rare and fragile plants, Heenan estimates that their value in 1987 was about E50,000.

Other matters touched upon by Heenan in his evidence were the garden area where

he values the improvements at E4,000, a rose garden comprising 25 trees at E5 each, peccan nut trees, valued at E600, taps supplied to the garden at E300, an illuminated fish pond at E400, stone pillars erected at the entrance costing E5,000 and some electric lights installed in the garden at E500.

Cross examined by Mr Simmonds, Heenan agreed that he had never asked Tonkwane to re-imburse him for expenses incurred on the house and garden. He said his contract was with Tonkwane and he was not aware that at the time the agreement was signed the owner of the land was Blacher. He agreed that in the establishment of the garden he had the use of a grader, owned by Tonkwane. He could not calculate how much of his own money was involved.

Heenan left Tonkwane' s employment in May, 1985 and took the leave due to him which extended until September. He remained in occupation of the house. Two years later he made an offer to pay rent through his lawyers. The offer based on Heenan's valuation of the house was not accepted. It appears that no resort was made to clause 12.2.2. of the contract set out above in order to determine the rent. No agreement as to the rent payable was ever reached and in the result Heenan has lived free of rent for five years.

Heenan denied that Crabtree had indicated a much smaller garden area. He denied that he ever worked for Sawmills. He said that in 1985 he asked for a lease of the property. He denied breaches of the terms of his occupation by allowing "his wife to conduct a business from the house. He alleged that the Crabtrees removed his fence wire.

Obviously there was bad feeling between Heenan and the Crabtree family around the time the former left the employment of Tonkwane. He would not go to the office to collect moneys due to him. He sent his wife instead. Subsequently the electricity and water supply to the house was cut off. This led to interdicts applied for and granted in this Court. Attitudes adopted years ago have hardened to the extent that the parties now appear totally intransigent and unyielding.

Heenan agreed that all the improvements claimed by him were completed before he left the employment of Tonkwane. He remained in possession as he wished to take advantage of clause 12. David Crabtree told him the agreement was invalid and was "not worth the paper it was written on".

Heenan called Stuart Fisher (D.2) a valuer of experience to give evidence in support of his claim. Fisher supported his report (Annexure A) compiled on the 8th January 1986, in which he valued improvements under 10 heads to a total value (including the cycads) of E75,400. He considered that the property had been enhanced to that extent.

Fisher acknowledged that the land area was not defined. He did not look at the effect of the perceived improvements on the whole of the forest area of which the house and garden occupied by Heenan forms a very small part.

Mrs Jean Heenan (PW3) completed the defendant's case. She confirmed the state of the premises when they took occupation in 1981 and set out the improvements effected during the years following. She could remember the price paid for fruit trees and rose bushes. But, again no accounts were kept. I do not propose to examine this evidence in detail. In this case the defendant is claiming compensation for enhancing the value of the property.

8

What he may have expended on the property is not relevant unless it is shown that such expenditure improved its value.

David Crabtree (DW:1) agreed that he recruited Heenan. He showed him the house, then derlict, and said that it could be made habitable. There was, he said, about 1/2 acre of land surrounding the building. He denied any knowledge of Heenan's intention to bring his cycad collection from Pigg's Peak and replant it on the property.

Crabtree complained that Heenan started to spend far too much money in materials and labour on the house. The house was intended to be a staff house for a forester. The house was not on a separate plot and had no value seperate from the land upon which it was situated Crabtree conceded that the existence of the house on the land would enhance its value, as if there was no house, one would have to be built.

However, Crabtree dismissed the orchard, rose garden and cycads as of no practical value as they had nothing to do with the production of forest timber. Crabtree said that all repairs to the house was carried out by the timber department of Sawmills.

In 1981 the land was owned by Blacher, but, Sawmills purchased the standing timber which gave them a right to occupy the land. Subsequently the land was purchased from Blacher and as has been seen, transferred to Behl.

David Crabtree said that Heenan was transferred from Tonkwane to Sawmills late in 1981 as a result of a dispute over his expenditure on the house. He accused Heenan of "building a palace". Crabtree alleged that the transfer to Sawmill was on the same terms as Heenan's original agreement with Tonkwane, but, without the benefit of clause 12. This proposition was not put to Heenan in cross examinatiion. Crabtree claimed that Heenan never asserted his right to remain in occupation of the property. He had a poor opinion of the present state of the orchard.

9

Cross examined, David Crabtree said that when he recruited Heenan to work for Tonkwane he was not a director of that company and had no authority to enter into the agreement. He concealed this from Heenan. This was an "oversight" on his part. On the other hand, he said that the severence of his connection with Tonkwane had "partially to do with the agreement he had negotiated with Heenan." At the time the agreement was made, Crabtree thought that it was valid as regards clause 12. I can only assume that by this the witness wished to indicate that he was acting in good faith when he employed Heenan. The defects in the agreement do not excuse

deceit.

Crabtree was aware that Heenan had constructed a swimming pool and that he had planted trees etc. In regard to the fence Crabtree denies that the wire was supplied by Heenan.

I do not propose to deal with this witness's evidence in any great detail. Much of it was designed to justify his own position. He was critical of Fisher's valuation and of the lawyer who drafted the employment contract. Little additional information was contained in the evidence of Robert Crabtree (PW2). He joined in the abuse of Heenan and Fisher and anyone whose view of the case did not conform to his own.

My conclusion on the facts is that Heenan was induced to take up employment with Tonkwane by the representation that he and his wife would enjoy for the rest of their joint lives undisturbed possession of the house situated on the land subsequently acquired by Behl. Heenan was entitled to assume, on the basis of what was contained in clause 12 of the agreement, that he could remain in peaceful and undisturbed possession of the house and that, as it was his permanent home, he could treat it as such. Consequently, he laid out the garden and orchards, built a fence and swimming pool and made other minor improvements in the reasonable expectation that he and his wife would enjoy these benefits. Whether or not the agreement was valid is not relevant. Heenan became a bona fide possessor of the property [Banjo v. Sungrown (Pty) Ltd 1969 (1) S.A 401].

10

It well established law that a bona fide possessor of land has a right of retention (jus retentionis) when he has put money ,or moneys worth into the property of another.

In United Building Society v. Smookler's Trustees 1906 T.S.

623 the general principles are well set out in the judgment of Bristowe J. at 627.

"The authorities classify the expenses which one man may conceivably bestow on the propety of another under three heads: (1) necessaiae impensae, that is, expenses which are necessary for the preservation of the property; (2) utiles impensae, that is, expenses which although they are not necessary to preserve the property, nevertheless improve its market value; and (3) voluptumriae impensae, that is, expenses which neither preserve the propety nor increase its market value but merely gratify the caprice or fancy of a particular individual."

At 630 the learned Judge says that the rule seems to be that salvage and improvement liens prevail against all the world, but, are limited to expenses which have maintained or advanced the market price. He said

"If liens depend on the principle of enrichment, then the extent of the lien must depend on the extent of the enrichment which the lien is intended to obviate, that is to say, the extent to which (but for the lien) the property of one person would be increased in value at the cost of another. Now the only possible criterion of value is how much a thing is wanted. If the person upon whose property the work is done did

not ask to have it done, and was not a consenting party to its being done, then there is nothing to differentiate his view of the value of the work from that of the rest of the world, and the value of the thing plus the work is no greater in his eyes than it. is in the eyes of the public generally. The test of his enrichment is therefore the extent by which the work has advanced the selling or market price."

When a bona fide possessor claims compensation in respect of impensae utiles he is not in any circumstances entitled to any greater. amount than the actual expenses which he has incurred in effecting the iprovements, nor has he any claim in respect of his own labour in connection therewith (Harrison v. Marchant (1941) W.L.D. 16).

If land is transferred while it is occupied by a bona fide possessor it is burdened with the rights of such possessor. [Kom Binnerlandse Inkste v. Anglo Amer. Housing Co. (1960) (3) S.A. 642]. This is because salvage and improvement liens are "real" rights. They are not created by contact but are based on the equitable principle that by the law of nature it is only fair that nobody should because wealthier though the loss and injury of another. [D. Glaser & Sons v. The Master and Another N.O. 1979 (4) S.A. 780]

The person claiming a lien for improvements has a duty to bring before the Court satisfying evidence of the expenditure occurred. There must be evidence as to the measure by which the owner was enriched and the bona fide possessor impoverished. An example of such failure may be found in the judgment of Me lamet J. in Oceana Leasing Service v. B.G. Motors 1980 (3) S.A. at 274.
Of the improvements effected by Heenan during his occupation of the house as an employee of Tonkwane, I would regard the following as neither useful nor necessary and of no benefit either to Tonkwane or Behl.

the rose garden

the fruit orchard

the peccan nut trees

the cycads

the illuminated fish pond

the stone entrance piers

the electrical installations in the garden

In reaching this conclusion I have taken into account that most of the land is used for the exploitation of forest timber and the purpose of the house which Heenan occupies is to provide accommodation for a forester. None of these improvements are likely to entice a prospective employee to ;take up employment in

that capacity. The house is not situated on a sub divided plot and its market value cannot be determined without reference to the remainder of the land of which it forms part.

The contract of employment included an obligation on the part of Tonkwane to make repairs, renovations and additions to the house at its expense. I have no reason to suppose that Heenan incurred any personal expense in carrying out this work. He supervised these improvements and had the use of a grader labour and materials supplied by Tonkwane for that purpose. Indeed there is evidence that the expenditure on the house as authorised by Heenan became a source of friction between Heenan and his employers in 1981. This led to a reallocation of duties at the sawmill. However, I am not satisfied that Heenan accepted Sawmills as his new employer on the condition alledged by David Crabtree or on any other conditions or at all.

It follows that Heenan cannot claim to have effected at his own expense improvements in the grading, levelling and contouring of 1.5 hectares of land. In regard to the swimming pool and water supply, Heenan has produced no evidence as to the extent of his own expenditure on these items and his claims in that regard must fail.

This Court has a wide discretion to make orders in cases such as these to permit the removal of improvements which can be seperated from the land without injury.

In Lakeview (Pty) Ltd v. Sitegi Properties (Pty) Ltd (High Court Civil case 17/88 unreported) decided on the 7th June, 1989, I applied the principles amplified by Villiers J.P. in Meyer's Trustees v. Malan 1911 T.P.D. 559 at 566 and 469 which I do not find necessary to repeat here. I allowed the bona fide possessor to remove buildings he had erected on the land within 60 days.

For the reasons given above I make an order for the ejectment of Heenan from the house, but, I stay the order for 30 days on the following conditions:-

Heenan may remove from the premises a) the rose bushes, six taps and hose points, but, not the pipes unless they are situated above the ground. b) the solar heating and pool cover from the swimming
pool. c) the cycads provided that such removal does not infringe any law in force.

It is a further condition of the stay that Heenan or his agents shall not commit any waste or despoliation of any part of the house or garden not expressly permitted by this order.

The counterclaim is dismissed.

I reserve the question of costs for argument on a date to be fixed by the Registrar.

F. X. ROONEY

ACTING CHIEF JUSTICE