Washington Law Review

Volume 24 | Number 2

5-1-1949

# Effect of Lessee's "Covenant to Leave Improvements" on the Doctrine of Trade Fixtures

Norbert F. Knecht

# WASHINGTON LAW REVIEW

AND

STATE BAR JOURNAL




# COMMENT

## EFFECT OF LESSEE'S "COVENANT TO LEAVE IMPROVEMENTS" ON THE DOCTRINE OF TRADE FIXTURES


NORBERT F. KNECHT


Although the common law rules regarding ownership and removability of trade fixtures are too well known and too often employed to necessitate comment, the application of these rules has caused some courts substantial difficulty in cases where the lease in question contains a covenant by the lessee during the term to become the property of the lessor. The Supreme Court of Washington has considered leases containing this type of clause in two cases[1] involving contests between landlords and tenants over the ownership of chattels installed on the

[1] Olympia Lodge No. 1, F & A. M. v. Keller, 142 Wash. 93, 252 Pac. 121, 52 A.L.R. 795 (1927), Forman v. Columbia Theatre Co., 20 Wn.(2d) 685, 148 P.(2d) 951 (1944).

premises by the tenant and has laid down the rule that when such a covenant is used the law of trade fixtures is not applicable. This holding is very similar to, and has the same effect as earlier, decisions in other jurisdictions dealing with the same problem,[2] but the Washington holding is not in line with the more modern decisions in the same jurisdictions,[3] nor does it accord with the majority view.[4]

In *Olympia Lodge No. 1, F & A. M. v. Keller*[5] the lease of unimproved property for a twenty-year term provided that "the lessee intends to use said property for an auto park, with auto camps, service station " and further that "at the expiration of lease, lessee agrees to quit the premises and leave all improvements thereon which shall become the property of the [lessor] In the event that for any reason this lease is forfeited, all improvements at such time made and placed upon said premises by lessee shall be forfeited by him to the lessor." The lessee erected on the property an automobile service station, complete with the necessary equipment. After three years, upon a failure to pay the annual rent, the lessor exercised his option to declare a forfeiture and so notified the lessee. Before relinquishing the key to the service station the lessee removed two gas pumps, an air compressor, a "Lubo system," and several oil containers. The lessor brought action for conversion, contending that title to the items removed had passed to the lessor under the terms of the lease. The lessee not only denied the lessor's ownership of these articles already removed from the premises, but also asserted his right to dig up the gasoline storage tanks and to remove the toilet fixtures from the rest room and the electric sign over the driveway

In affirming the lower court's judgment in favor of the lessor, the court remarked that "they are what are customarily known as trade

[2] Loeser v. Liebman, 137 N.Y. 163, 33 N.E. 147 (1893), French v. Mayor etc. of New York, 29 Barb. (N.Y.) 363, 16 How. Pr. 220 (1859), Parker v. Wulstein, 48 N.J. Eq. 94, 21 Atl. 623 (1891), Martyr v. Bradley, 9 Bing. 24, 131 Eng. Reprint 523 (1832), Realty Dock & Improvement Corp. v. Anderson, 174 Cal. 672, 164 Pac. 4, (1917), Shipler v. Potomac Copper Co., 69 Mont. 86, 220 Pac. 1097 (1923), Isman v. Hanscom, 217 Pa. 133, 66 Atl. 329 (1907).

[3] Ames v. Trenton Brewing Co., 56 N.J. Eq. 309, 38 At. 858 (1897), Smusch v. Kohn, 22 Misc. 344, 49 N.Y.S. 176 (1898), United Booking Offices v. Pittsburgh Life & Trust Co., 65 Misc. 31, 119 N.Y.S. 216 (1909), Provident Mutual Life Ins. Co. of Philadelphia v. Doughty, 125 N.J. Eq. 442, 6A.(2d) 184 (1939). *But see* Union Bldg. Co. of Pennsylvania v. Pennell, 78 F.(2d) 959 (C.C.A. 3rd, 1935).

[4] Wright v. La May, 155 Mich. 119, 118 N.W 964 (1908), Walker v. Tillis, 188 Ala. 313, 66 So. 54 (1914), Irvin v. Smith, 185 Ga. 386, 194 S.E. 906 (1938), McFadden v. Smith, 185 Ga. 386, 194 S.E. 906 (1938), McFadden v. Lick Pier Co., 101 Cal. App. 12, 281 Pac. 429 (1929), Matv v. Miami Club Restaurant, 339 Mo. 1133, 127 S.W.(2d) 738 (1939), Sanders v. Lefkowitz, 292 S.W 596 (Tex. 1927), Nine Hundred Main, Inc., v. City of Houston, 150 S.W.(2d) 468 (Tex. 1941).

[5] Cases cited note 1 *supra.*

fixtures, there can be but little doubt" and "if nothing more were here involved than the general rule applicable to landlord and tenant, the tenant on termination of the lease, whether by lapse of time or by forfeiture, would have the right to remove the articles mentioned on the ground that they are trade fixtures. But the parties may, by their contract of lease, provide for a different rule, and the more narrow question here is, have they so provided?"

The court cited no authority in arriving at this decision, with the exception of *Sieglock v. Iroquois Mining Co.*[6] and *Reeder v. Hudson Consol. Mines Co.*[7] upon which the court based its interpretation of the term "improvements." Both of these cases were concerned with the ownership of improvements placed upon mining property which was the subject of a sale—not a lease.[8] Referring to the above-mentioned cases in the *Olympia Lodge* case the court said, "In these cases, it was recognized that the term 'improvements' was of broader signification than the term 'fixture,' and that much would be included under the former term that would be excluded under the latter."

In a more recent case, *Forman v. Columbia Theatre Co.*,[9] the Washington court reaffirmed its position in regard to the inclusiveness of the word "improvements" in "covenants to leave improvements," and reasserted its opinion concerning the effect of such covenants upon the common law doctrine of trade fixtures. In that case, the vendee of the original lessor sued to restrain the lessee from removing certain chattels placed in a theatre building by the lessee under a lease containing a clause stipulating "that on termination of this lease they [the lessees] will leave on said premises all permanent improvements and repairs made during the term." In deciding ownership of these articles the court, relying on *Olympia Lodge No. 1, F & A. M. v. Keller*[10] and two older cases, one from New York[11] and one from New Jersey,[12] said:

"As to these items, counsel have ably briefed the law of fixtures.

[6] 106 Wash. 632, 181 Pac. 51 (1919).
[7] 118 Wash. 505, 203 Pac. 951 (1922).
[8] Under the law of fixtures, when the contract vendee installs chattels on the property subject of the sale, he is presumed to have intended to permanently enrich the freehold, whereas the lessee of porperty is presumed not to have so intended. Strong v. Sunset Copper Co., 9 Wn.(2d) 214, 114 P.(2d) 526, 135 A.L.R. 423 (1941), Nearhoff v. Rucker, 156 Wash. 621, 287 Pac. 658 (1930), Hall v. Dare, 142 Wash. 222, 252 Pac. 926 (1927), Cutler v. Keller, 88 Wash. 334, 153 Pac. 15 (1915), Filley v. Christopher, 39 Wash. 22, 80 Pac. 834 (1905).
[9] Cases cited note 1 *supra*.
[10] *Ibid.*
[11] French v. Mayor etc. of New York, 29 Barb. (N.Y.) 363, 16 How. Pr. 220 (1859).
[12] Parker v. Wulstein, 48 N.J. Eq. 94, 21 Atl. 623 (1891).

However, we do not believe that law is applicable to the case at bar. Our conclusion is that the contract between the parties determines the ownership of the property in question and for that reason, the rights of the parties depend entirely upon the proper interpretation of that instrument."

The court further stated that if the lease had been silent as to the ownership of the items in dispute, then ownership would necessarily have to depend upon whether or not they were fixtures, but when the landlord and tenant enter a lease containing stipulations relative to the ownership of chattels which may be placed upon the leased premises by the tenant, "the agreement will be enforced regardless of what might be the rights of the parties at common law In cases of that character, the contract is the law made by the parties themselves which must determine their rights."

The Washington court leaves no doubt as to its opinion of the definition of the word "improvements." That term is construed to mean *all* improvements made to the demised premises, including those which, under the common law rules of trade fixtures, are considered to be removable by the tenant. The only modification the court attaches to the meaning of the word when employed in a "covenant to leave improvements" is that the improvements must "savor of the realty"[13] However, in view of the further explanation that "the term would not include mere loose articles about the premises in no way attached to the freehold," it seems that his limitation goes no further than the usual fixtures rules.[14]

The position of the court is clear on the question of the effect of a "covenant to leave improvements" upon the operation of the doctrine of trade fixtures. When such a covenant is present in the lease, the doctrine simply *has no* operation. This effect is most clearly shown by contrasting the decisions in the *Olympia Lodge* and *Forman* cases with the holdings in cases where no such covenant was present in the lease. In *Ballard v. Alaska Theatre Co.*[15] the situation was much the same as that in the *Forman* case, except that there was no "covenant to leave improvements" in the lease. The court held in the *Ballard* case that

[13] Olympia Lodge No. 1 F & A. M. v. Keller, 142 Wash. 93, 97, 252 Pac. 121, 123 (1927), Forman v. Columbia Theatre Co., 20 Wn.(2d) 685, 694, 148 P.(2d) 951, 955 (1944).

[14] In Ballard v. Alaska Theatre Co., 93 Wash. 655, 161 Pac. 478 (1916), it was held that similar chattels similarly annexed were not "part of the realty," and that chattels in no way annexed are personality, no matter by whom installed.

[15] Note 14 *supra.*

articles similar to those in the *Forman* case were trade fixtures, and as such were the property of, and removable by, the tenant.

In *Whitney et al. v. Hahn*[16] the tenant installed a furnace in the leased premises; the court held that since the tenant was in possession under an oral month to month agreement, the "covenant to leave improvements" contained in the written lease did not carry over into the oral agrement, so that the doctrine of trade fixtures applied and the tenant was allowed to remove his furnace. It is an obvious inference from the opinion that had the lease provisions carried over into the oral agreement, the furnace would have been considered an "improvement" within the terms of the lease, and the rules of trade fixtures would not have applied.

The reasoning of the court in the two cases wherein the lease contained a covenant to leave improvements is simple and logical. It has been often asserted that the basis for the rule that trade fixtures may be removed by the tenant is the intention of the tenant-annexor, implied from the circumstances.[17] One of the "circumstances" from which the tenant's intention is to be determined is the lease agreement with the landlord. Because the word "improvemnts" includes all additions that may be made by the tenant,[18] the "covenant to leave improvements" conclusively shows the tenant's intention was that all chattels he should install on the premises would be left thereon to become the property of the landlord.[19]

The only weak link in the court's chain of reasoning is the assumption that the parties to the lease, by the word "improvements," meant items which are normally considered to be trade fixtures and removable by the tenant. Despite the fact that many of the earlier decisions in other jurisdictions used language just as inclusive as that used by the Washington court,[20] it is generally held today that trade fixtures are not within the contemplation of the parties when they insert a "covenant to leave improvements" in the lease, and consequently the rules of trade fixtures apply in such cases despite the covenant.[21] The usual tests are applied in these cases to determine whether the items in dispute are trade fixtures and as such may be removed by the tenant,

---

[16] 18 Wn.(2d) 198, 138 P.(2d) 669 (1943).

[17] Ballard v. Alaska Theatre Co., note 14 *supra*, Strong v. Sunset Copper Co., 9 Wn.(2d) 214, 114 P.(2d) 526, 135 A.L.R. 423 (1941).

[18] Cases cited note 1 *supra*.

[19] *Ibid.*

[20] Cases cited note 2 *supra*.

[21] Cases cited note 4 *supra*.

or whether they have become a part of the realty and so pass to the landlord as "improvements" within the meaning of that term as used in the covenant.[22]

There are a few modern cases in which the courts have placed more emphasis upon the covenant in the lease than upon the doctrine of trade fixtures in determining the ownership of chattels attached to the premises by the tenant.[23] Although the language used by the courts in these cases is quite broad and may lead the casual reader to believe that the law of trade fixtures is not applicable in the face of a "covenant to leave improvements" in the lease, the cases may be distinguished on their facts, particularly on the fact that the articles in dispute are so annexed to the realty that the issue of their removability by the tenant would be difficult to decide even without a covenant in the lease.[24]

There is one possible limitation to the application of the broad rule as articulated in the *Olympia Lodge* and *Forman* cases. In both opinions the court emphasizes the fact that the leases were drawn with the intent, in each case, that a particular enterprise be carried on upon the premises, and that the installations were made for the sole purpose of improving the premises for that use. The court concludes that the fixtures installed to further the specified business were within the contemplation of the parties when they provided that improvemnts should become the property of the landlord. It sems probable, therefore, that if a case should be presented in which no particular use of the property is contemplated by both parties to the lease, the court could decide that trade fixtures installed by the tenant are not "improvements" within the meaning of that word as employed in the covenant and therefore the normal rules of trade fixtures would apply [25]

Some courts retaining a broad definition of "improvements" have excepted trade fixtures from the term.[26] Courts which were early con-

[22] Ames v. Trenton Brewing Co., note 3 *supra;* Sanders v. Lefkowitz, note 4 *supra;* Nine Hundred Main, Inc., v. City of Houston, note 4 *supra.*

[23] *In re* Herold, 57 F Supp. 359 (D.N.J. 1943), Tobias v. Scloss, 6 La. App. 200 (1928), Union Building Co. of Pennsylvania v. Pennell, note 3 *supra.*

[24] Lighting equipment so built into the leased building as to become a part of the system already present, *In re* Herold, note 23 *supra;* and gas station fixtures substantially annexed, Tobias v. Schloss, note 23 *supra.* In Union Building Co. of Pennsylvania v. Pennell, note 3 *supra,* the court was aided in its decision against the lessee by the so-called "Pennsylvania Rule" that "if the article (installed by the tenant) whether fast or loose be indispensable in carrying on the specific business, it becomes a part of the realty," and the property of the landlord.

[25] It is interesting to note that in the *Ballard* case, note 15 *supra,* the court rejected the lessor's argument that since the premises were leased for the specific purpose of building, equipping and operating a theatre, the parties contemplated that a completely equipped theatre was to be turned over to the lessor at the termination of the lease.

[26] Cases cited notes 3 and 4 *supra.*

fronted with the problem of determining ownership of such articles as herein discussed have over the years relaxed their strict rule regarding the effect of such covenants and now allow the tenant to remove those articles which come within the definition of trade fixtures.[27] There is a possibility that despite the effect given to a "covenant to leave improvements" by the Washington court, the same process of evolution will take place to lessen the harshness of the rule on tenants. However, in the meantime, counsel who represent lessees during negotiations for a lease of commercial property would be wise to keep in mind the effect of such a covenant upon the lessee's rights to remove property he may place upon the premises, and any limitations or modifications on a "covenant to leave improvements" which the lessee may desire must be written into the covenant in terms not to be misunderstood—terms which will guarantee to the lessee the rights which he desires.

[27] Cases cited note 3 *supra*.