SUPREME COURT OF LOUISIANA

No. 95-C-3058

SHIRLEY HARTMANN,
wife of/and RICHARD CARRIERE

v.

BANK OF LOUISIANA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIFTH CIRCUIT, STATE OF LOUISIANA

KIMBALL, J., dissenting.

I respectfully dissent.

The commercial transaction in this case involved the financing of a business venture on leased land. The right to use and enjoy the leased thing, including the right of occupancy, served as adequate collateral for the lessee to secure the substantial loan needed to make the improvements which the lessor and lessee contemplated in the lease contract. In my view, the lease clearly allowed the bank either of two choices upon the lessee's default of payment: (1) "stand in the shoes" of the lessee, or (2) sell that which was mortgaged through foreclosure proceedings. Here, the bank chose the second option.

The bank's purchase of the building and the lessee's interest in the lease did nothing to disrupt the fact that the bank purchased the *right of occupancy* with the obligation to pay rent remaining with the lessee. For some time, we have recognized the severability of the right of occupancy from the obligation to pay rent. *Walker v. Dohan*, 39 La. Ann. 743, 2 So. 381 (La. 1887). As Judge Tate observed in *Hollier v. Boustany*, 180 So.2d 591 (La.App. 3d Cir. 1965), *writ refused*, 182 So.2d 662 (La. 1966), the purchase of a right of occupancy for the full remaining term of the lease, as distinguished from the purchase of a lease or the unexpired term of a lease, does not include assuming the obligation to pay rent. *See also Morrison v. Faulk*, 158 So.2d 837 (La.App. 4th Cir. 1963), *writ refused*, 160 So.2d 229 (La. 1964). Moreover, like the defendant in *Walker v. Dohan*, the bank cannot be held liable for obligations which it never expressly or impliedly assumed.

The concurrences contend the lessee's default of rent payment revoked the bank's right of occupancy. I disagree. In *Walker*, this court expressly rejected the argument that the lessee's non-fulfillment of the obligation to pay rent, when the obligation is severed from the otherwise correlative right of occupancy and enjoyment, "might defeat the enjoyment of [the] vendee of the right transferred." *Walker*, 2 So. at 383. Justice Fenner summarized, "They have severed the right of occupancy from the obligation of the lease, and have sold the former *simply and alone*." *Id.* (emphasis added). Consequently, I cannot agree that the bankrupt lessee's failure to pay rent disturbs the right of the leasehold interest purchaser, which purchase was made at a sheriff's sale, from enjoying the right of occupancy without the obligation of paying rent from the period of time between the 1989 sheriff's sale and the lease expiration date of October 22, 1992. The lessor's remedy in this circumstance was against Occhipinti, who unfortunately filed for bankruptcy protection in 1988.

I believe, however, that the bank's occupancy of the Carrieres' property subsequent to the date of expiration presents a wholly different problem. The record reflects that no option to extend the lease for the 1992-1997 term had been exercised, and that the lease did not otherwise remain viable after its expiration in October 1992. Therefore, after 1992 the bank's status was that of owner of an immovable separate from the land's ownership. Thus, because the lessor is unable to benefit from the lease after October 1992, the lessor is relegated to an unjust enrichment theory of recovery for the period of the bank's occupation and enjoyment of the land after the lease's expiration. The record reflects the lessor properly pleaded unjust enrichment as an alternative theory of recovery in their First Amending Petition.

Contrary to the Chief Justice's concurrence, however, I do not believe unjust enrichment is a viable remedy for the lessor based on the record evidence. In my view, all of the required elements of unjust enrichment, as articulated by the majority and expanded on by the concurrence, simply are not present in this case. One crucial element--that there be no other remedy at law--is noticeably absent. The lessor had the right to issue a written demand under Civil Code article 493, requiring the bank to remove its building and other improvements permanently attached to the ground at the instant they believed the owner of the building no longer had the right to be on their separately owned land. If within ninety days that removal had not been achieved, the lessor would have acquired ownership of the bank's separately owned building and other permanently attached improvements. This remedy

at law, of which the lessor was aware, was not seized upon by the lessor.[1] It is well-settled that the subsidiary remedy of unjust enrichment requires fulfillment of the five recognized conditions in order to succeed. *Edwards v. Conforto,* 636 So.2d 901, 903 (La. 1993). Thus, I believe the Carrieres, not having availed themselves of a remedy at law--a remedy of which they were aware--are precluded from recovery on an unjust enrichment theory for the bank's occupancy of their property for the period subsequent to the lease's expiration.

This admittedly was complex and protracted litigation, with profound implications not only for the parties involved, but with ramifications far afield in the business of high finance. Based on a review of this record and the law, I must conclude that the bank's purchase of the leasehold interest at the sheriff's sale was a purchase of the right of occupancy on the lessor's land until the lease terminated or expired, with the obligation to pay rent remaining with the lessee. In addition, for the reasons stated more fully above, because the lessor has failed to satisfy all of the required elements of the subsidiary remedy of unjust enrichment for the period of occupation subsequent to the lease's expiration in October 1992, I would reverse the judgment of the court of appeal. Accordingly, I respectfully dissent.

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[1] The Carrieres' attorney, Clarence F. Favret, III, made the following argument on the article 493 issue before the trial judge:

> Our simple allegation is that the Fifth Circuit held the lease is in effect and continues into [sic] effect until terminated or it expires; that the bank is the owner of the building on the land owned by the Carrieres. The lease is in effect as found by the Fifth Circuit, so rent is due. That it's illogical for the bank to take the position that the lease is terminated . . . . And . . . if they say that, then *the law is very clear*, Louisiana law by Codal provision, *they have ninety days, we can require them to remove their building or leave in ninety days* so if they want to take that position and put it on the record, then that's fine because *we'll give them a ninety day letter*.

(R. p. 12) (emphasis added).