Court of Appeal
B e f o r e :
Lord Justice KERR, Lord Justice DILLON and Sir George WALLER

Between:

MANCETTER DEVELOPMENTS LTD
V
GARMANSON LTD AND ANOTHER

Nicholas Nardecchia (instructed by Robbins Olivey & Blake Lapthorn, agents for Leeds Smith, of
Sandy, Beds) appeared on behalf of the appellant; Oliver Smith (instructed by F B Hancock & Co, of
Banbury) represented the respondents.

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1. Giving judgment, DILLON LJ said: This is an appeal by the second defendant in the action, Mr Givertz, against an order made by Sir Ian Percival QC, sitting as a deputy official referee, on May 25 1984. By that order the plaintiffs were given judgment against Mr Givertz in the sum of £ 524.87 with the costs of the action on the county court scale; the plaintiffs were also given judgment against the first defendant in the action, Garmanson Ltd ('Garmanson') in the sum of £ 771.58 with like costs, but Garmanson, being insolvent and in liquidation, does not appeal.

2. The plaintiffs are the owners of industrial premises known as Unit 33, Willow Road, on the Brackley Industrial Estate at Brackley in Northamptonshire. On January 29 1973 the plaintiffs let these premises to a company called Pilot Chemical Co Ltd ('Pilot') by a lease for a term of 42 years from June 24 1972 at a rent of £ 3,160 pa for the first five years and then as reviewed, and with full repairing obligations on the tenant. Pilot used the premises for a chemical business and to that end put in various pipes which pierced the outside walls of the building and also put extractor fans in the outside walls. The outside 20 December 1985 walls were of brick to about halfway up; above that there was a steel frame covered with sheets of cladding on the outside and lined with sheets of plasterboard on the inside. The putting in of the extractor fans involved cutting holes in the cladding and lining; the putting in of the pipes involved making holes either in the cladding and lining or, if the pipes were lower, in the brickwork. It is to be inferred that the putting in of the extractor fans and pipes was done with the plaintiffs' consent or that any ground of objection the plaintiffs may have had was waived by the acceptance of rent from Pilot. It is common ground that the extractor fans and pipes were tenant's fixtures which Pilot would have been entitled to remove during the term of the lease.

3. Unfortunately Pilot failed to keep the premises in repair and got into financial difficulties. Ultimately, on January 6 1978, a receiver of the undertaking and assets of Pilot was appointed. By an agreement for sale of January 30 1978, which seems to have been a usual form of hiving-down operation, the receiver agreed to transfer the assets of Pilot, including the lease, the tenant's fixtures and Pilot's stocks of chemicals, to a company formed or acquired for the purpose, which was Garmanson, and a few days later, on February 6 1978, the receiver sold and transferred the entire issued share capital of Garmanson - two shares of a nominal value of £ 1 each - to a company called Food Drugs and Cosmetic Colours Ltd, of which Mr Givertz was managing director. Mr Givertz thereupon became a director of Garmanson and he was the only active director of Garmanson until it, too, went into liquidation as hereinafter appears.

4. Garmanson went into occupation of the premises on or immediately after February 6 1978. It seems that Mr Givertz originally hoped that Garmanson might be able to trade profitably from the premises, and from March to July 1978 there were negotiations between the plaintiffs and Garmanson with a view to the grant to Garmanson of a new lease of the premises. During this period Garmanson paid, and the plaintiffs accepted, the instalments of rent which fell due under the existing 42-year lease on the March and June quarter days in 1978. However, Garmanson decided that it was not viable to continue trading in the premises, and accordingly, having given some notice to the plaintiffs, Garmanson left the premises and delivered up possession to the plaintiffs on October 5 or 6 1978.

5. Before delivering up possession of the premises, however, Garmanson removed all the tenant's fixtures installed by Pilot, and in particular the extractor fans and pipes which I have mentioned. This was done by employees of Garmanson and removal contractors, instructed in each case by Mr Givertz. It involved reopening the holes in the brickwork and in the cladding and lining above which had been made when the fixtures were installed by Pilot. No attempt was made to fill up or make good the holes. I would infer that Mr Givertz never gave any instructions, and never had any intention, that the holes should be filled up or made good.

6. In September 1978 the plaintiffs gave Pilot formal licence to assign the lease to Garmanson, and it was in fact so assigned on March 26 1979. In 1981 Garmanson went into liquidation; it is insolvent and any judgment against it is of little more than academic interest.

7. Immediately after Garmanson gave up possession in October 1978 the plaintiffs sent in surveyors to prepare a comprehensive schedule of dilapidations. There is no doubt that the plaintiffs have suffered damage from the disrepair of the premises, since when, after several months, they relet to new tenants, they had to allow the new tenants a seven-month rent-free period because of the disrepair.

8. It does not of course follow, because the plaintiffs have suffered damage, that Mr Givertz is personally liable to the plaintiffs for any of that damage. In this court we only have to consider the personal liability of Mr Givertz to the plaintiffs; the claims that the plaintiffs have against Garmanson are relevant only in so far as they provide the basis for a claim by the plaintiffs against Mr Givertz personally as the sole active director of Garmanson who gave the instructions for what was done by Garmanson. It is important to keep in mind that Mr Givertz is under no liability in contract to the plaintiffs; in particular he was never a guarantor of the original lease of the premises or of any arrangements under which Garmanson were let into possession of the premises.

9. There are, however, cases which establish that if a director of a company gives instructions for the commission of a tort by the company, the director may be personally liable in damages to the injured party for the tort although the tort was the act of the company. It is sufficient to refer to the speech of Lord Buckmaster in *Rainham Chemical Works Ltd* v *Belvedere Fish Guano Co Ltd* [1921] 2 AC 465 at p 476 and to the judgment of Atkin LJ in *Performing Rights Society Ltd* v *Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1 at pp 14-15 where he refers to directors being liable if they have themselves directed or procured the commission of the tortious act.

10. Although a full schedule of dilapidations had been prepared for the plaintiffs, the case at the trial of this action turned only on the damage caused by the removal of the tenant's fixtures without making good the holes. The learned deputy official referee held that, in removing the fixtures without making good the holes in the brickwork, cladding and lining, Garmanson committed acts of waste which were tortious. He further held that as Mr Givertz had himself directed or procured the tortious acts, he was personally liable in damages to the plaintiffs. The learned deputy official referee fixed those damages at the sum of £ 524.87, which represents the cost of making good the holes; in fact, the cost of making good the holes in the brickwork is very small, and by far the greater part of the sum represents the cost of providing and fixing new sheets of cladding and lining in the place of those left with holes in them. The learned deputy

official referee held Garmanson liable in the higher sum of £ 771.58, which represents the £ 524.87 plus a further sum for damage, which went beyond Mr Givertz's instructions, caused to the premises by those who actually did the removal, eg damage to other parts of the premises caused by carelessness in taking out parts of the chemical plant which were tenant's fixtures. This appeal is, however, an appeal on principle and is not concerned with precise figures.

11. If the judge were right that the acts of Garmanson in removing the tenant's fixtures were acts of waste, it seems to me that the personal liability of Mr Givertz must follow, on the authorities mentioned above, because he directed and procured those acts. So far as the personal liability of a director is concerned, I can see no distinction between giving instructions for those acts, if they are acts of waste, and giving instructions for any other acts of waste, such as breaking down walls or removing landlord's fixtures. The key question on this appeal is therefore whether the acts of Garmanson were acts of waste, ie were tortious.

12. The judge delivered his judgment on the basis that by the end of the argument it had been conceded by the plaintiffs that Garmanson had the right to remove the tenant's fixtures. He says at one point that the question of 'removability' was not an issue, and at another point he describes as central to the case a proposition of Mr Oliver Smith for the plaintiffs that, though Garmanson had a right to remove the equipment in question as trade fixtures, it had no right to do injury or damage to the property. When this appeal was called on, Mr Oliver Smith asserted that the judge was mistaken in supposing that he ever conceded that Garmanson had any right to remove tenant's fixtures; his main point had been, from first to last, that, though Pilot had had the right to remove the fixtures, Garmanson, being in occupation as licensee (on Mr Smith's submissions) and not as assignee of the lease, had not. I can well appreciate that there may have been a misunderstanding, but no objection was taken by Mr Smith in the lower court after the judgment was delivered. The point only surfaced in his skeleton argument delivered just before the hearing in this court. In view of this, and as it seemed that, if this court had to decide, in the absence of concession, the exact basis of Garmanson's occupation of the premises, we might need transcripts of the oral evidence at the trial which had not been bespoken, we ruled that Mr Smith was bound by the concession which the judge - understandably - supposed him to have made. I would add, as my own preliminary reaction, that, in the circumstances of this case, as rent was paid by Garmanson under the lease, a licence to assign was granted and the lease was in fact later assigned to Garmanson. I would be surprised if Garmanson did not have the same right to remove the tenant's fixtures as Pilot had had.

13. 'Waste' is defined in *Woodfall's Law of Landlord and Tenant*, vol 1, at p 644, as being 'a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the injury of the reversion of inheritance.' It is divided into two main categories, voluntary waste and permissive waste. Permissive waste, which is not in question here, is a matter of suffering buildings to fall into disrepair by neglect. Voluntary waste, which is in question, is said in *Woodfall* to be actual or commissive, as by pulling down houses or altering their structure. Waste is a somewhat archaic subject, now seldom mentioned; actions in respect of disrepair are now usually brought on the covenant. But I see no reason to doubt the continuing validity, as a statement of the current law, of the following passage in *Woodfall* at p 679, viz: When fixtures which have become part of the realty and irremovable according to law have been removed, the landlord may sue as for waste: for such removal amounts to an injury to the reversion, which the law considers waste. Where such waste amounts to a breach of covenant, the landlord may sue either in tort, or on the covenant, at his election.

14. If the removal of fixtures which have become part of the realty and irremovable according to law - ie of landlord's fixtures - is actionable as for waste, what is the position where tenant's fixtures are lawfully removed but the places where they were installed are not made good?

15. The law of fixtures is of very ancient origin. Originally the position was simply that anything affixed to the land became part of the land and passed with the land - *quicquid plantatur solo, solo cedit*. The development of a tenant's right to remove tenant's or trade fixtures was a

mitigation of that rule; it came about not by any change in the concept of what is a fixture but by a qualification of the tenant's obligation not to remove fixtures once they had been affixed to the land. See per Kindersley V-C in *Gibson* v *Hammersmith and City Railway Co* (1862) 2 Dr & Sm 603 at p 608. It is possible that, when a tenant's right to remove trade fixtures was first recognised by the courts, that right was upheld irrespective of any damage caused to the premises by the removal; thus in *Poole's* case as reported in (1703) 1 Salk 367 at p 368 it seems to have been held that the sheriff levying execution to enforce a judgment against a subtenant was entitled to remove trade fixtures installed by the subtenant in premises notwithstanding that the premises were thereby rendered ruinous and the liability to make good the damage was left to fall on the sublessor under his own covenants in his head lease. Whatever the initial view of the courts, however, the position that developed was, as put in *Amos and Ferard on the Law of Fixtures*, 3rd ed at p 124, that: It appears to have been generally understood in practice that, as well where trading as where ornamental fixtures are taken down, the tenant is liable to repair the injury the premises may sustain by the act of removal.

16. The extent of the liability is expressed in *Foley* v *Addenbrooke* (1844) 13 M & W 174 at pp 196 and 199 as being that the tenant must leave the premises in such a state as would be most useful and beneficial to the lessors or those who might next take the premises and must not leave the premises in such a state as not to be conveniently applicable to the same purpose. I would interpret this as a requirement of the law that if tenant's fixtures are removed the premises must be made good to the extent of being left in a reasonable condition.

17. The right of a tenant to remove tenant's or trade fixtures arose by the common law independently of contract, though the right might be confirmed or excluded by contract. So equally, in my judgment, the obligation on the tenant to make good the damage, if tenant's fixtures were removed, arose at common law irrespective of contract, although there might also in a particular case be a relevant contract. This is demonstrated by the fact that, as between tenant for life of land and the remaindermen, the tenant for life had a similar right to remove tenant's fixtures and a similar obligation to make good damage, even though there would not have been any contract between the tenant for life and the remaindermen: see *Re De Falbe, Ward* v *Taylor* [1901] 1 Ch 523 at p 542.

18. The liability to make good the damage, or to repair the injury the premises may sustain by the act of removal of tenant's fixtures, must, in so far as it is a liability at common law and not under a contract, be the liability of the person who removes the fixtures, and not of the person, if different, who originally installed the fixtures and left them there. The analysis of the liability at common law is, in my judgment, that the liability to make good the damage is a condition of the tenant's right to remove tenant's fixtures; therefore, removal of the fixtures without making good the damage, being in excess of the tenant's right of removal, is waste, actionable in tort, just as much as removal by the tenant of a landlord's fixture which the tenant has no right to remove is waste. As appears from the passage in *Woodfall* quoted earlier in this judgment, the landlord has an election whether to sue in tort or on the covenant if the damage is also covered by a relevant covenant. The act of the tenant, or in the present case Garmanson, in removing the tenant's fixtures without making good was commissive rather than permissive, as I understand those terms used in the definitions of 'waste', 'permissive waste' and 'voluntary waste' in *Woodfall*.

19. The main argument of the appellant on this part of the case was to the effect that armanson's liability for injury sustained by the premises by the removal of the fixtures was limited to extra damage caused by the removal and did not require Garmanson to fill up or make good the holes in the brickwork and cladding which had been lawfully made by Pilot. It seems to me, however, contrary to common sense and contrary to my understanding of the concept of voluntary waste, as something that applies even in the absence of any contract, or repairing covenant, that a tenant who for his own convenience installs tenant's fixtures, and who has, in order to do so, to make holes in the walls of his landlord's building which are filled by those fixtures while they remain installed, should be allowed to remove the fixtures without filling the holes. So long as the fixtures remain installed, the building is wind and weather proof and there is no damage to the

reversion. Once affixed, the fixtures become part of the freehold. If they are removed, albeit legitimately, and the holes are not filled, the reversion then suffers damage. To make good that damage by filling in the holes (which involves, in part, replacing sheets of cladding and lining with holes in them) is part of the condition attached by law to Garmanson's right to remove the fixtures.

20. The filling of screw holes or nail holes where a fixture is removed which has been screwed or nailed to a wall may be a matter *de minimis*, and the comments of Rigby LJ in *Re De Falbe* at p 542 show that the tenant's obligation does not extend to redecorating a wall where a fixture has been removed. But the leaving of holes, such as those in question here, affects the structure and is not a matter of mere decoration.

21. I agree with the reasoning of the learned deputy official referee in his very careful judgment, and for my part I would dismiss this appeal.

22. Dissenting, SIR GEORGE WALLER said: This appeal is concerned with the liability of a director of a company for the actions of the company's servants. If a director authorises an employee of the company to do something which is a tortious act he, the director, will be personally liable. If, however, the instructions given do not authorise a tortious act, the director will not be liable for the consequences (see *Wah Tat Bank Ltd* v *Chan Cheng Kum* [1975] AC 507).

23. The facts have been fully set out in the judgment of Dillon LJ and there is no need to repeat them. When the occupation by Garmanson Ltd ('Garmanson') ended, the landlord had a schedule of dilapidations prepared. There was a dispute as to the status of Garmanson, who occupied the premises for six months having purchased the trade fixtures from Pilot Ltd ('Pilot'), the previous tenants. Whether Garmanson was a tenant or licensee, it was certainly not an assignee of Pilot's tenancy at the time when Garmanson left. When Pilot became the tenant, it installed a ventilation system for its chemical manufacturing. This included exhaust fans in the walls and it made holes in the walls to hold these exhaust fans and also holes in the walls for piping. When Garmanson left, it removed these trade fixtures which it had purchased. This was done, according to the finding of the learned judge, without causing any damage to the fabric, but nothing was done to fill the holes left behind. I agree with Dillon LJ's view that Garmanson probably had the same right to remove the tenant's fixtures as Pilot had. In my view, whether it was as tenant or licensee, the right to remove would include an obligation to restore the realty to its condition before the original lease was entered into. See *Re De Falbe* [1901] 1 Ch 523.

24. The judge found that Garmanson was not liable for many of the items but found that it was liable for leaving the holes unfilled. The judge further said:
It is my view and conclusion that Garmanson, in removing each of the items in question from its hole, and leaving the hole, did do injury and damage to the buildings and therefore to the plaintiff and that each was a wrongful act. It therefore had all the ingredients of a tort. I do not think it necessary to endeavour to put a label on it.
The judge has refrained from giving any name to the tortious act, but in my judgment, unless he were creating a new tort, the only possible tort is the tort of waste. Dillon LJ has already quoted the definition of 'waste' from *Woodfall* and I do not need to repeat it here. In essence there has to be a 'spoil or destruction' to the building 'to the injury of the reversion'. No question arises of permissive waste which is caused by long-term neglect. The question here is whether Garmanson committed voluntary waste.
The earlier authorities dealing with voluntary waste are all concerned with substantial damage to the reversion. In *Yool on Waste* (1869), for example, there is no mention anywhere of damage as slight as a hole in the wall. In more modern cases, however, it is different. In *Re De Falbe* (*supra*) the question arose as to whether tapestries fixed to the walls passed to the freeholder on the death of the tenant for life or whether they could be removed by the executors. It was held that they could be removed but that the executors must pay the cost of any damage done in the course of removing them, but not for the consequential cost of redecorating. So there is no doubt

that if damage is caused to the fabric when fixtures are removed, the person who causes that damage will be liable to put that damage right or to pay damages being the cost of doing so. A similar case was *Spyer* v *Phillipson* [1931] 2 Ch 183, where valuable panelling was held to be a tenant's fixture but damage to the realty caused by its removal had to be paid for. It follows from the other passage quoted from *Woodfall* by Dillon LJ that if the paneling had become part of the realty, its removal would have been waste quite apart from any damage caused in the course of removal. In *Marsden* v *Edward Heyes Ltd* [1927] 2 KB 1 the tenant removed an internal partition wall. Bankes LJ, relying on the words of Lord Loreburn in *Hyman* v *Rose* [1912] AC 623 at p 632, 'It is a question of fact whether such an act changes the nature of the thing demised . . .', held that it was an act of waste, that which had been a shop with living rooms behind had been made into a large shop. Although the partition wall had been removed 10 years before so that the original act was statute barred, it was held to be a continuing act to maintain the building in the same condition.

25. In the present case there can be little doubt that Pilot when they made the holes were guilty of waste. What they had done was a 'spoil or destruction' to the building. If Pilot had remained in occupation and then removed the fittings and left the premises without repairing the holes, they would have been guilty of continuing the waste up to the time of leaving. Indeed, even if they had left the fittings in place contrary to the wishes of the landlord, they might well have been said to be continuing the act of waste. The basic tortious act was making the holes.

26. The question which this court has to decide is whether or not Garmanson committed a tortious act when it removed the fittings from the holes. All that Garmanson did was to remove its own property without doing any damage to the walls. The realty was a wall with a hole in it and was not a wall with a hole filled with an exhaust fan. In the course of argument counsel were unable to draw our attention to any case where it was held that voluntary waste could be committed by an omission to do something and I have not been able to find any such case. Since it is accepted that no damage was caused to the walls when the fittings were removed, I have come to the conclusion that it is not possible to say that Garmanson was guilty of waste in removing the fittings. There was no tortious act at that time.
Accordingly it follows that the appellant cannot be guilty of authorising a tort and I would allow this appeal.

27. Agreeing that the appeal should be dismissed, KERR LJ said: My mind has wavered during this appeal, and having had the opportunity of reading the judgments of Dillon LJ and Sir George Waller I confess that I remained in doubt for some time. In the end, however - and contrary to my earlier impression - I have come to the conclusion that the appeal should be dismissed for the reasons stated in the judgment of Dillon LJ. To these I would respectfully add the following comments, particularly in the context of the contrary views expressed by Sir George Waller.

28. First, it is important to bear in mind the highly unusual facts of this case, in relation to which Mr Givertz's liability for the tort of waste falls to be considered. The issue whether or not this tort results from a failure to reinstate or repair premises arises in the present case independently from any contractual stipulations which normally cover the same ground, usually in the form of covenants in leases. Such covenants will bind not only the original tenant but also any assignee of the lease and any licensee occupying the premises with the freeholder's consent subject to an express or implied condition that he is to be subject to the same obligations. In most of these situations I doubt – without expressing any concluded opinion - whether there would be much scope for the application of the tort of waste, because the act or omission complained of will usually be governed by contractual stipulations. I doubt whether the law goes so far as to permit an alternative claim in contract or tort in the majority of such cases. Prior to the passage in *Woodfall* concerning the wrongful removal of landlord's fixtures which Dillon LJ has quoted, stating that the landlord may sue either in tort or on the covenant, there is a reference in para 1-1514 at p 644 to *Jones* v *Hill* (1817) 7 Taunt 392. In that case a tenant was sued for permissive waste although his lease contained a full repairing covenant. It was held that the facts did not amount to permissive waste, but in delivering the judgment of the court Gibbs CJ also said at p

396: 'Waste can only lie for that which would be waste if there were no stipulation respecting it . . .', and this is the situation in relation to the tort of waste as summarised in para 1-1514 of *Woodfall*. In this connection one should also bear in mind the restricted meaning which was given in the authorities mentioned below to acts constituting waste by tenants who were subject to the usual covenants.

29. If that is the correct approach, two consequences follow. First, in the great majority of cases the present problem would not arise, because the owner of the premises would be bound to sue on the reinstatement of repairing covenants, or contractually binding conditions *vis-a-vis* licensees, and not on the basis of the tort of waste. What I have in mind is that a failure by a tenant or licensee company to reinstate or repair could not normally be visited upon a director of the tenant or licensee, by seeking to make him personally liable in tort on the ground that he directed or procured what would in effect have been a breach of contract by his company. This issue would arise only in exceptional cases like the present where the company - in this case Garmanson Ltd - was not subject to any contractual requirements, because its occupation of the premises occurred without the attachment of any relevant contractual stipulations, and where the act complained of is properly to be regarded as constituting the tort of waste.

30. Second, and more directly material to the problems raised by the present case, it would follow that when Pilot made the holes or apertures in the fabric of the building in order to accommodate the pipes for their machinery and the extractor fans, Pilot were not there and then committing any act of waste.
With respect to the contrary view expressed by Sir George Waller, I cannot agree with his conclusion on this point. The decision of this court in *Marsden* v *Edward Heyes Ltd* [1927] 2 KB 1 proceeded on the basis that the structural alterations made by the defendant were such as to show that he had not used the premises 'in a husbandlike manner' (per Bankes LJ at p 6, quoting Gibbs CJ in *Horsefall* v *Mather* (1815) Holt NP 7) or 'in a tenantlike manner' (per Scrutton LJ at p 7) and Atkin LJ at p 8 used both these expressions. Moreover, Bankes LJ relied upon the test laid down in *West Ham Central Charity Board* v *East London Waterworks Co* [1900] 1 Ch 624, which is correctly summarised in *Woodfall* (para 1-1522) by saying that 'an act which alters the nature of the thing demised is waste'.
The wrongful removal of landlord's fixtures, as referred to by *Woodfall* in the passage quoted by Dillon LJ, may fall within this category and may therefore give alternative rights of suit in contract and tort. But I cannot accept that the same could be said of Pilot's acts in making the holes. We have not seen the lease between the plaintiffs and Pilot or any other material showing the purposes for which Pilot were entitled to use the premises. But we know that they were used for a chemical business, as Pilot's name indicates, and it is an overwhelmingly probable inference that in making these holes Pilot were not acting so inconsistently with the terms of their lease that they could be said thereby to have acted in an untenantlike manner. One can test this by asking oneself whether the plaintiffs could possibly have sued Pilot for the tort of waste there and then, as soon as the holes had been made. In my view, the answer would clearly be in the negative. It would have been held that although the fabric of the premises had been damaged, there was no act of waste, since the interference with the fabric of the premises did not go so far as to have this effect in the circumstances. The holes clearly required to be made good under the covenants in the lease by reinstatement or repair if the machinery and extractor fans were removed at the termination of the tenancy. But making the holes was not waste, since these covenants - and any other terms in the lease dealing with Pilot's right to occupy and use the premises for a chemical business - should be treated as 'stipulations respecting' acts of this kind, to use the words of Gibbs CJ in *Jones* v *Hill*.

31. If the making of the holes by Pilot was not an act of waste, then it necessarily follows that Pilot were not guilty of any act of waste at all. With the machinery pipes and extractor fans in position, the deputy official referee rightly said: 'I do not think that anyone, landlord, tenant or passer-by, would have said at that point that any injury or damage had been caused to the building.'

32. When one then turns to the acts of Garmanson Ltd or their removal contractors, as directed by Mr Givertz, there is virtually nothing which I can usefully add to the analysis in the judgment of Dillon LJ. I respectfully agree with Sir George Waller than an omission to do something can hardly - and perhaps never - constitute an act of voluntary waste. But in the present case there was a voluntary act, the removal of the machinery and the extractor fans. Admittedly, there was a right to remove them, although they had been affixed to the realty. But if their removal caused the fabric of the premises to cease to be wind and water tight due to the exposure of the holes, as was the case, then the act of removal also had the effect of causing the building to become damaged when it could not be considered to have been relevantly damaged before. I therefore see no escape from the conclusion that a direction to carry out the removal without reinstating the holes was an act for which a claim in the tort of waste must lie. Accordingly I would dismiss this appeal.

The appeal was dismissed with costs.