Royal Bank Of Scotland v Jennings [1996] APP.L.R. 10/24

CA on appeal from Mr Justice Evans-Lombe before the Vice Chancellor, Saville LJ; Potter LJ. 24th October, 1996

THE VICE CHANCELLOR:

1. This is yet another appeal concerned with the true construction of a rent review clause. The rent review clause with which we are concerned is contained in a lease dated 3rd March 1988. The appeal is from the judgment of Mr Justice Evans-Lombe given on 9th December 1994. The judge decided that on the true construction of the relevant rent review provisions it was not open to the landlord unilaterally to prevent the operation of the rent review provisions. I will refer in more detail later to the exact order that the learned judge made to give effect to his conclusion.

2. It is necessary for me to refer to some of the contents of the lease. I describe it as a lease; it is in fact an underlease but nothing turns on that. The "*landlord"* under the lease consisted of a Mr Jennings, a Mr Pezaro and a company, Circuitpoint (Brewery Road) Limited. They are the appellants before us; they were defendants below. The tenant, the plaintiff in the action and respondent before us, is the Royal Bank of Scotland PLC. The term granted by the lease was one of 20 years from 25th December 1987. The demised premises consists of Unit B, 15 Brewery Road, Islington. The initial yearly rent reserved under the lease was £50,000 per annum exclusive. The lease commences with a number of definitions. Of these the "*initial rent"* is defined as "*the sum so specified in the particulars*" - I have already referred to that. The "*rent commencement date*" is defined as 31st March 1988. The "*rent review dates"* are "the dates so specified in the particulars"; they are 25th December 1992, 25th December 1997 and 25th December 2002. The "rental period" is defined as "each period of five years immediately following a rent review date" and the "first rental period" is defined as "the period from the term commencement date until the first review date."

3. I can now pass on to the reddendum to the lease under which the demised premises were demised to the tenant for the specified term:

   "YIELDING AND PAYING

   (a) Firstly the initial yearly rent from [and there then appears a blank] until the 24th day of December 1992. Thereafter during the remainder of the term the yearly rent subject to review as hereinafter mentioned such review to be calculated in accordance with the provisions of the Fourth Schedule such rent to be paid by equal quarterly payments in advance without any deduction or set off whether demanded or not on the usual Quarter Days every year..."

4. Sub-paragraph (b) I need not read. That related to additional sums to be paid by way of further rent on various accounts.

5. I can now turn to the Fourth Schedule which, it will be recalled, contains the details as to how the reviewed rent is to be calculated. Paragraph 1 of the Fourth Schedule reads as follows: *"At the commencement of each Rental Period hereinbefore referred to, the revised rent may be agreed between the Landlord and the Tenant or in the absence of agreement determined by a specialist valuer (acting as an expert and not as an Arbitrator) such valuer to be agreed between the parties or nominated by the President for the time being of the Royal Institution of Chartered Surveyors upon application of the Landlord made at any time after the commencement of the relevant rental period so that in case of such valuation the revised rent to be determined by the valuer (who shall give written reasons for his decision) shall be as in his opinion represents the best yearly rent reasonably obtainable for the Demised Premises and on the supposition (if not a fact)..."*

6. And there then follow five suppositions. I need not refer to them all, but it is perhaps helpful for me to refer to the second of them which is in these terms: *"Of a new letting of the Demised Premises as a whole or in the permitted parts in the open market at the commencement of the relevant Rental Period by a willing Landlord to a willing Tenant without a premium with full vacant possession for a term equal to the term unexpired or a term of ten years whichever is longer as at the commencement of the relevant Rental Period and on similar terms to this lease (other than the rent hereby reserved but including the provisions for the review of rent herein contained)."*

7. There are also some specified disregards to which I need not refer.

8. Paragraph 2 of the Fourth Schedule is, in my opinion, of considerable relevance for the light it casts on the contractual intentions of the parties underlying the first paragraph. Paragraph 2 reads: *"If and so often as any revised rent in respect of any Rental Period has not been ascertained pursuant to the foregoing provisions before the first day hereby appointed for payment of rent for the relevant Rental Period, rent shall continue to be payable during the Rental Period at a rate equal to the highest rent previously payable hereunder until the first day for payment of rent after the revised rent has been ascertained or until the expiration of that Rental Period (whichever shall first happen) and on the first day for payment of rent after the revised rent has been ascertained there shall be payable by way of rent (in addition to the amount of the rent otherwise due on that day) the aggregate of the amounts by which the instalments of rent payable in respect of that Rental Period fell short of the amounts which would have been payable if the revised rent had been ascertained before the first day for payment of rent for the relevant Rental Period and in addition that the tenant shall pay to the Landlord interest on such sum calculated at the Base Rate from time to time of National Westminster Bank PLC calculated on a daily basis from the relevant Review Date until the date of payment."*

9. There are two comments which I would at this stage make on the contents of paragraph 2. One is that the drafting is deficient. A minor point is that the reference to interest to be paid from the relevant review date until the date

of payment must be an error. Interest would need to be paid from the date on which the revised rent would, if it had been ascertained in time, have been paid until the date of payment. Bearing in mind that each successive rental period is a period of five years, and that each year's rent is paid in quarterly instalments on the usual quarter days, it could not possibly be right for the revised rent when ascertained to bear interest from the relevant review date which would be at the beginning of the five year period. That is the first respect in which the contents of this paragraph appear to have been defectively drafted. The other respect is in the failure of the paragraph to provide for what should happen if the revised rent, when ascertained, should turn out to be less than the rent that had previously been paid. Up until the time the revised rent was ascertained, the tenant would have been continuing to pay quarterly rent on the old basis. The amount of the new rent will have been based upon the best yearly rent reasonably obtainable for the premises as at the commencement of the relevant rental period and it may be that that will be less than the rent previously payable. In the heady days when this clause was first drafted, and perhaps still in 1988 when this lease was granted, it may have occurred to nobody, or at any rate not to those who were concerned with this property, that there might come a time when rental values of property such as this would fall. But it is the case that from, I am told, about 1990 commercial rents, at least for properties such as the property comprised in this lease, did fall. The draughtsmen of these rent review provisions did not take that possibility into account and, accordingly, there is no provision in paragraph 2 for the repayment by the landlord to the tenant of the excess amount of rent that will have been paid if a revised rent is fixed at for the review date at a lower figure than the rent that had previously been paid.

10. In the course of the hearing below, Mr Lewison QC, counsel for the landlord conceded that an appropriate implied term providing for repayment in the eventuality that I have described needed to be added to paragraph 2. I have no doubt that that concession was rightly made.

11. Mr Lewison conceded also, and this concession too was in my judgment unquestionably correct, that in the context of the lease construed as a whole, it is clear that the revised rent may be an upward revision or a downward revision of the previous rent. It may be that in the euphoria of the 1988 property market nobody thought the time might come when rent would have to be revised down in order to accord with best yearly rents at the time; but nonetheless as a matter of construction the rent to be fixed for the new rental periods as they arrive is clearly to be the best yearly rent whatever that may be and whether above or below the current rent.

12. Those are the rent review provisions. But I should refer also to one other clause of this lease, clause 5. I refer to it because it bears upon some of the arguments that have been addressed to us regarding the correct construction of the rent review provisions. Clause 5 of the lease is headed *"Rent Cesser"* and deals with what is to happen regarding payment of rent during the period when the premises are unfit for occupation or use having been destroyed or damaged by some insured risk. The clause provides that: *"...the rents hereby reserved or a fair proportion thereof according to the nature and extent of the damage sustained shall be suspended until the Demised Premises shall have again been rendered fit for occupation or use by the Tenant or until the expiration of three years from the date of the damage or destruction whichever shall be earlier and in any dispute shall be referred to the award of a single arbitrator to be appointed in default of agreement upon the application of either party to the President for the time being of the Royal Institution of Chartered Surveyors in accordance with the provisions of the Arbitration Act 1980 or any statutory modifications thereof*."

13. Attention has been drawn to the clear difference between this provision in clause 5 and the rent review provisions. The clause 5 provision contemplates an arbitration in accordance with the provisions of the Arbitration Act, whereas the rent review provisions contemplate a specialist valuer acting as an expert not as an arbitrator in fixing the revised rent of the premises. But, nonetheless, there clause 5 provides expressly that the application for the President of the RICS to appoint an arbitrator may be an application made by either party, whereas the rent review provisions provide that the appointment by the President of the RICS of a specialist valuer is to be "*upon application of the landlord*."

14. In the present case correspondence took place between the tenant and the landlord as to the ascertaining of a revised rent for the rent period commencing 25th December 1992. It appears from the evidence that the tactic of the landlord was simply to leave letters on this subject from the tenant unanswered. In her affidavit sworn on 25th May 1994 on behalf of the tenant, Nicola Jane Seagar said that the chartered surveyors instructed by the plaintiff had put forward the names of three proposed valuers with a view to a valuer being agreed pursuant to the provisions of paragraph 1 of the Fourth Schedule to the underlease. She went on: *"The defendants have not responded in open correspondence. The valuer has thus not been agreed. The plaintiff's surveyors have then requested the defendants to apply to the President of the Royal Institution of Chartered Surveyors to make a nomination. There has been no response in open correspondence. The defendants have not applied to the President to make a nomination*."

15. She then said this: *"It seems that the Defendants' position is that it is a matter for them whether or not to apply to the President for a nomination, or, in other words, it is a matter for them whether or not any review takes place."*

16. That indeed is the crux of the matter. It is the landlord's contention, put very cogently by Mr Lewison on their behalf, that on its true construction paragraph 1 of the Fourth Schedule places the question of whether there will or will not be a rent review for any particular review period at the option of the landlord. It is a fairly common feature of rent review provisions in leases that the landlord is given the option whether or not to invoke the rent review machinery. This is commonly done by providing that the rent review machinery may be invoked by a notice in writing served by the landlord not later than some specified date. Clauses of that character have given rise to

a number of cases and gave rise, in particular, to the leading case, ***United Scientific Holdings Limited v Burnley Borough Council*** (1978) AC 904, in which the House of Lords ruled that the time limitations in rent review clauses were normally not to be treated as of the essence of the agreement so that a failure by the landlord to comply with the requisite time limits did not necessarily preclude the service out of time of an effective notice invoking the rent review machinery. But in those cases the lessor had expressly been given the option whether or not to serve a notice invoking the rent review machinery. The present lease contains no such express option. Indeed, in my view, the implication to be gained from the lease as a whole, in particular the reddendum which I have read and paragraphs 1 and 2 of the Fourth Schedule, is that there will be a rent review for each of the rental periods. It will be recalled that paragraph 2 provides that if the revised rent in respect of a new rental period has not been ascertained by the first day for payment of rent during that rental period, rent shall continue to be paid during that rental period at a rate equal to the highest rent payable previously *"until the first day for payment of rent after the revised rent has been ascertained or until the expiration of that Rental Period (whichever shall first happen)"*. The paragraph then continues: *"...and on the first day for payment of rent after the revised rent has been ascertained there shall be payment by way of rent [of the additional sums necessary to bring the previous payments up to the requisite level]."*

17. That language, to my mind, shows that the parties contemplated that for each new rental period there would be a rent review and a revised rent.

18. The contention that the landlord has an option whether or not to invoke the rent review machinery is based on the provision in paragraph 1 of the Fourth Schedule that the nomination by the President of the requisite specialist valuer shall be "upon the application of the landlord."

19. Mr Justice Evans-Lombe took the view that that part of the rent revision provisions was no more than machinery and was not intended to vest in the landlord an option as to whether there should or should not be a rent review. Mr Lewison has argued that that is wrong and that that provision does enable the landlord, by declining to apply to the President for the nomination of the specialist valuer, to prevent a rent review from being carried out.

20. In my judgment the issue depends upon whether construing the lease as a whole, the conclusion is justified that the landlord was intended to have that option. If the landlord was intended to have that option, the landlord was entitled to exercise it and to decide whether or not there should not be a rent review. But if the judge below was right in concluding that the provision in question was no more than mere machinery for the carrying out of rent reviews which were intended to happen in any event, then, on authority, there is no reason why the landlord's failure to make the application should be allowed to frustrate the contractual intention discerned from the lease as a whole. The court will in that event if necessary supply machinery to prevent that frustrating refusal from achieving its purpose.

21. In his judgment Mr Justice Evans-Lombe concluded that: *"...the provisions of paragraph 1 of the Fourth Schedule are to be construed as placing an enforceable requirement on the defendants as Landlord to apply to the President in the event that the plaintiff has sought a review of rent and the parties have failed to agree the level of such rent or the identity of a valuer to determine that level in default of agreement."*

22. I am not sure that I would support that reasoning. I agree with the judge that the provision relating to the nomination by the President being made upon the application of the landlord is a matter of machinery and not a matter of substance. But it does not follow that the provision should be read as placing an enforceable contractual requirement on the landlord to apply. I would prefer, for my part, the alternative ground on which Mr Justice Evans-Lombe placed his conclusion, namely that if the machinery provided by paragraph 1 should break down the court would supplement it. Authority that that can and should be done is to be found in the judgment of the House of Lords in ***Sudbrooke Trading Estate Limited v Eggleton*** (1983) AC 444 which indeed was the authority relied upon by the judge. The case did not involve a rent review clause in a lease. It involved an option to purchase contained in a lease. The option was exercised by the lessee. The option provision in the lease provided that the price at which the property would, if the option were exercised, be sold, would be "*such a price not being less than £12,000 as may be agreed upon by two valuers, one to be nominated by the lessor and the other by the lessee and in default of such agreement by umpire appointed by the valuers.*" The problem in the case was that the lessor had refused to appoint a valuer and so there were no two valuers either to settle the price or to appoint the umpire. The House of Lords held that the case was one in which the agreement was for a sale of the premises at a fair and reasonable price to be ascertained by the application of the objective standards that would have been applied by the valuers and that the provisions relating to the appointment of the valuers was no more than machinery for the ascertaining of that fair and reasonable price so that if the machinery broke down for any reason the court would substitute its own machinery in order to enable the fair and reasonable price to be ascertained.

23. Mr Lewison distinguishes that case on the ground that there, by reason of the exercise of the option, there was an enforceable contract for sale and purchase. But, on my construction of the rent review provisions in the present case, there is a contract between lessor and lessee for a revised rent to be ascertained in accordance with the best yearly rent formula to be found in paragraph 1 and to be substituted for the previous rent. The contents of paragraph 1 regarding the appointment of valuers and the application for the President to nominate a valuer is, in my view, as much machinery as was the corresponding machinery referred to in the ***Sudbrooke Trading Estate Limited v Eggleton case.***

24. In my judgment, the judge below came to the correct conclusion in regarding the case as one in which the landlord could not choose to frustrate the rent review provisions and in which the court would, if necessary, provide the requisite machinery. Whether, if I had been deciding the case at trial I would have chosen the route adopted by the judge, namely, imposing a mandatory obligation on the landlord to make the requisite application to the President, I am not sure. That was the route chosen by the judge and perhaps it followed from his conclusion that an implied term with mandatory effect could be read into the rent review provisions. The mandatory order has been complied with by the landlord. In obedience to the order the landlord has applied to the President for the appointment of a specialist valuer. The specialist valuer has fixed a revised rent on the best yearly rent formula. The revised rent is, by some considerable sum, lower than the previous rent. In the circumstances, therefore, it is a matter of no materiality whether the judge was correct in choosing the mandatory obligation route as the appropriate form of relief or whether he should have devised some form of machinery to be substituted for the machinery in paragraph 1 of the Fourth Schedule that the landlord had refused to operate. It may make a difference when subsequent rent periods arrive. But the decision in this case that the landlord does not have an option as to whether the rent review procedure is to be invoked or not will, I imagine, prevent any silly dispute arising in the future as to what should be done. I think the judge came to the correct conclusion for the reasons I have given and I would dismiss this appeal.

LORD JUSTICE SAVILLE: I agree.

LORD JUSTICE POTTER: I too agree.

MR POWELL-JONES: I am very much obliged to your Lordship for your Lordship's judgment. I ask that the appeal be dismissed with costs.

MR LEWISON: I cannot resist the order my learned friend Proposes.

THE VICE CHANCELLOR: Thank you. The appeal will be dismissed with costs.

ORDER: Appeal dismissed with costs.

MR LEWISON QC (instructed by Messrs John Summers & Co., London W1) appeared on behalf of the Appellant
MR R POWELL JONES (instructed by Messrs Stephenson Harwood, London EC4) appeared on behalf of the Respondent