Case No: A1/2009/0846

Neutral Citation Number: [2009] EWCA Civ 1478

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE TECHNOLOGY AND CONSTRUCTION COURT QBD
(HIS HONOUR JUDGE WILCOX)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 3rd December 2009

Before:

THE PRESIDENT OF THE QUEEN'S BENCH
(SIR ANTHONY MAY)
LORD JUSTICE JACOB
MR JUSTICE LEWISON

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Between:

VAN DAL FOOTWEAR LTD — **Appellant**

– and –

RYMAN LTD — **Respondent**

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(DAR Transcript of
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Mr Jonathan Gaunt, QC (instructed by Denton Wilde Sapte) appeared on behalf of the **Appellant**.

Mr Mark Wonnacott (instructed by Davenport Lyons) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Mr Justice Lewison:

1. Ryman Limited were the tenants of a 17th century listed building at 18–20 Butter Market in Ipswich. The whole building was let to them under a lease dated 21 September 1995. The lease contained a covenant to keep the property in repair and to yield it up in repair. Although the lease was within Part II of the Landlord and Tenant Act 1954, Ryman lost their protection under that Act because an application for a new tenancy was not made in time.

2. Ryman remained in occupation under a series of tenancies at will, the last of which came to an end on 28 July 2007. It is common ground that the repairing obligations under the lease were carried forward into the tenancies at will. One of the reasons why the tenancy at will was granted was to allow the parties the opportunity to reach agreement on the terms of the new lease if they could. Ryman made two offers to the landlord, Van Dal Footwear Ltd, proposing terms on which it would take either a new lease of the whole building or a new lease of the ground floor, which was the part of the building from which they traded. These offers were made on 9 December 2005 and 31 July 2006. Neither was acceptable to the landlord.

3. When Ryman vacated the building on 28 July 2007 it was left in disrepair. HHJ Wilcox had the task of assessing the correct measure of damages for the disrepair. He assessed the costs of carrying out the works necessary for compliance with Ryman's obligations at £135,606. He then had to consider whether this sum was capped by the provisions of Section 18(1) of the Landlord and Tenant Act 1927. That subsection provides, so far as relevant, that damages for breach of a covenant or agreement to keep or to put premises in repair during the currency of the lease, or to leave or put premises in repair at the termination of the lease whether such covenant or agreement is expressed or implied and whether general or specific shall in no place exceed the amount, if any, by which the value of the reversion whether immediate or not, in the premises is diminished, owing to the breach of such covenant or agreement as foresaid.

4. In paragraph 41 of his judgment the judge correctly held that:

   > "The diminution in value is assessed by assuming an outright sale of landlord's interests in the property on the term date in the open market, on the basis that the Defendant had done all the work which the tenant ought to have done and on the basis of its actual state and condition. The difference between these two values is the diminution in value caused by the breaches."

5. In performing this task the judge had the benefit of expert evidence on both sides. The experts agreed that in order for the property to have been sold in its actual condition on 28 July 2007 it would have been necessary

to have marketed the property for six months beforehand. The judge also correctly held that the sale would be a sale with vacant possession. The judge found that the value of the building in repair would have been £1,068,838 and that the value of the building in its actual condition would have been £950,000.

6. However, Ryman argued that during the hypothetical marketing period it would have repeated its offers to take a new lease to a prospective purchaser. The judge found that an offer to take a lease of the ground floor of the building in its actual condition would have been an attractive offer because:

> "The purchaser would have had the benefit of a blue chip covenant and would not have suffered any void period whilst trying to find a new tenant."

7. He thus found that Ryman would have repeated its offer to take a lease of the ground floor to the hypothetical purchaser of the reversion and that the purchaser would have accepted the offer, with a result that the purchaser would have had a contract in place with Ryman committing Ryman to take the new lease at the same time as committing itself to purchase the property. The purchase of the reversion and the grant of a new lease would thus in the judge's words have been "back to back". The judge found that if that offer had been made and accepted the purchaser would have increased his bid by 7.4%. Thus the judge increased his valuation of the property in its actual condition by 7.4%, giving him a value of £1,020,300. Subtracting that figure from the value of the building in repair gave him a difference of £48,538, which was the figure he assessed as the appropriate measure of damages. With the permission of Aikens LJ the landlord appealed.

8. In my judgment, the judge was wrong to have increased his original valuation figure by 7.4% for the following reasons. Under section 18(1) of the Landlord and Tenant Act 1927 the judge had to assess the amount by which the value of the reversion in the premises is diminished owing to the breach. The reversion is: "The landlords then interest in the premises" (see Smiley v Townsend [1950] 2 KB 311 at page 320, Denning LJ); or:

> "The freehold as it has come back into the hands of the landlord before he lets it out again."

(See Jaquin v Holland [1950] 1WLR 258 at 267, Devlin LJ.)

9. As Mr Gaunt QC submitted, the reversion means the property as it reverts to the landlord. Secondly, any reversionary lease, whether made before or after the term date, and whether made with the same tenant or a different tenant is left out of account; and third, what is to be valued is the freehold reversion at the moment when it vested in the landlord unencumbered by the old lease or any new lease. In my judgment these propositions are established by the authorities to which Mr Gaunt referred us, namely

Hanson v Newman [1934] 1 Ch 298, and Smiley v Townsend, and Jaquin v Holland to which I have already referred.

10. Thus, what the judge was required to do was to value the bundle of rights that the landlord actually had on the valuation date. On the valuation date the landlord did not have the benefit of an agreement for a lease with Ryman or even an offer capable of acceptance. Such offers as Ryman had made had been rejected; and in any event were made before the beginning of the hypothetical marketing period.

11. The judge said that he had to decide whether Ryman would have repeated the offers to a purchaser. In my judgment that was not a relevant question. What the judge embarked upon was a determination of a hypothetical fact. The only hypotheses required or permitted by section 18(1) are, first the hypothesis that there are two simultaneous sales of the reversion; and, second the hypothesis, that, in relation to one of those sales, the property was in the physical condition required by the repairing covenants. No other hypothetical facts are required or permitted. The judge's answer to the hypothetical question that he posed led him to value the reversion on the basis that there was a contract in place for Ryman for a new lease. This had the result that the judge did not value the landlord's reversion. He valued the freehold with the benefit of an agreement for lease with Ryman. That was not a right that the landlord had, and was not therefore part of the reversion.

12. Mr Wonnacott relied on Inland Revenue v Commissioners v Clay [1914] 3KC 466 as showing that the property must be assumed to be exposed to the market. That does not change the subject matter of the valuation. Nor does it dictate that a special purchaser must be found. If there is an actual special purchaser who exists in reality, no doubt his bid may be taken into account, but that does not justify the invention of a special purchaser. In addition the proposition that property must be assumed to have been exposed to the market does not entail reconstructing that hypothetical marketing period. It is not more than an assumption required to enable the valuation to take place.

13. In my judgment the judge mis-identified the subject of the valuation. Put shortly, he valued the wrong thing. In my judgment, therefore, the uplift of 7.4% on the out of repair value cannot stand. I would allow the appeal.

Lord Justice Jacob:

14. I agree.

Sir Anthony May:

15. I agree that this appeal should be allowed for the reasons given by Lewison J. The two authorities which, in my judgment, are determinative of this appeal are Hanson v Newman [1934] 1 Ch 298, where at page 305 Lawrence LJ said:

> "In my judgment what the Court has to do in assessing damages under the section in the circumstances of this case is to ascertain the actual value of the property at the date of re–entry and the value in which the property would then have had if there had been no breach of covenant"

And, secondly, the passage to which my Lord has already referred in Jaquin v Holland [1960] 1WLR 258 in the judgment of Devlin LJ at page 266, at the very foot of the page:

> "There must always be a notional moment of time, even if one lease immediately succeeds the other, in which the estate finds it way back into the hands of the landlord, and a value of the reversion is therefore the value of the freehold as it has come back into the hands of the landlord before he lets it out again."

16. The simple fact in the present case is that, on the valuation date there, was no contract for a lease with the outgoing tenant, nor was there any prospect of such a contract taking place. Accordingly, the facts which the judge took into account, with reference to an entirely notional preceding marketing date, were of no relevance whatever to the valuation which Section 18 of the Act requires. For these reasons and those given by Mr Lord, I would allow this appeal.

Order: Application Allowed