England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2007] EWCA Civ 1368
Case No: B2/2006/2265

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HHJ LINDSAY Q.C.
Claim No LB224259

Royal Courts of Justice
Strand, London, WC2A 2LL
19/12/2007

B e f o r e :

LORD JUSTICE MUMMERY
LORD JUSTICE JACOB
and
MR JUSTICE MANN

Between:

RAVENGATE ESTATES LIMITED — **Claimant/ Appellant**

- and -

(1) HORIZON HOUSING GROUP LIMITED — **First Defendant/ Respondent**

(2) PERSONS UNKNOWN — **Second Defendant**

MR. PETER KNOX Q.C. (instructed by Mesrrs. Martin Shepherd & Co) for the Appellant.
MR. MARTIN HUTCHINGS (instructed by Cook & Partners Solicitors) for the Respondent.
Hearing dates : 5th and 6th December 2007

HTML VERSION OF JUDGMENT

Mr Justice Mann :

Introduction

1. This is an appeal from a decision of HHJ Crawford Lindsay Q.C. given in the Central London County Court on 11th October 2006 on a claim by the claimant ("Ravengate") for dilapidations in respect of a lease comprising six flats at 225 Streatham High Road, London SW16. The effect of his judgment was to award damages for breach of a tenant's repairing obligation in the sum of £61,349.25, made up of three elements. First, there was £50,000 being the amount of the diminution in the value of the reversion caused by the want of repair; second there was a sum of £2,333 as the cost of the schedule of dilapidations; and third was a sum of £9,116.25 as loss of rental. The part of those sums which is the subject of appeal is the first of them. The decision on that sum amounted to a victory in principle for the defendant ("Horizon") which had said that the damages should be capped pursuant to the provisions of s.18(1) of the Landlord and Tenant Act 1927. Ravengate had claimed damages based on the cost of remedial works, which was well over twice the sum in respect of which the judge gave judgment. Ravengate appeals that decision on the basis that the judge was wrong to hold that the sum found by him was the amount of the diminution in the value of the reversion. The principal issue at the hearing of this dispute is the effect on the claim of potential redevelopment.

The lease and the premises

2. Various points of construction relating to the operation of the lease were decided at a preliminary hearing before the trial of the amount. It is not necessary to go into the procedural history of this matter, or at least not in that respect. However, one potentially significant question of construction arose at the trial and on this appeal, namely the extent to which the demise in this question includes certain air space. It will be convenient to get that point out of the way at this stage of this judgment.

3. The premises demised by the lease in question did not include the whole of the premises at 225 Streatham High Road. In the basement of that building there is a nightclub. On part of the ground floor and first floor there is a post office. Those premises were not included within the demise. The overall premises comprise the following:

   i) On the ground floor across most of the frontage there is the post office and an entrance to the nightclub. To the right there is an entrance to a passage giving access to the rear of the premises. Roughly speaking, the rear one-third of the premises comprises two flats. One flat lies across the entire width of the rear of the premises. The other flat is somewhat forward of that. It gives on to a central lightwell which is roughly square. One side of the well is bounded by an access passage leading from the front of the premises to the rear flats; one side is bounded by part of the flat just referred to; a third side is bounded partly by another part of that flat and partly by the post office; and the fourth side is bounded by the post office.

   ii) On the first floor there is a single flat giving on to the rear of the premises at one side and on to the lightwell on the other. Apart from an area which is given up to a common staircase, it spans the entire rear of the building. Across the front there is the post office again.

   iii) The second floor contains two flats. One flat fronts on to the street, and its rear gives on to the lightwell. The other flat gives on to the rear of the property on one side and the lightwell on the other. It does not span the entire width of the building; on one short side there is a balcony whose floor is also a roof of the first floor flats below. Over the top of the rear flat there is a flat roof; there is no accommodation above that flat roof. The possibility of developing so as to use the space above that flat roof, and to incorporate the balcony within the living accommodation, is one of the matters which forms the background to the present dispute.

   iv) On the third floor there is just one flat. It is at the front of the building. The rear of the flat contains a short balcony, whose floor forms part of the roof to the front flat on the (second) floor below. The balcony gives on to the central lightwell. Behind that balcony there is not only the lightwell, but across the other side of the lightwell one would look down on to the flat roof covering the second floor flat. Again, development plans include the incorporation of the balcony to form part of the living accommodation at that level.

4. One of the important aspects of this case is the possibility of developing two parts of what are described by Ravengate as the air space relating to this building. The first is the air space above

the flat roof over the second floor, over which there is a prospect of building so as to create additional accommodation up to the same height as the third floor, giving to the rear of the premises and on to the lightwell. The other part of this air space is the area occupied by the second and third floor balconies, which it is proposed to incorporate into living accommodation. Because of the way the case was put below, it was and is relevant to consider whether this air space formed part of the demise or not in order to identify the physical scope of the reversion for the purposes of section 18(1). Mr Peter Knox QC, who appeared for Ravengate, said it did not; Mr Martin Hutchings for the defendants said that it did. In the court below, Judge Lindsay does not seem to have made any express determination on this point, but his decision seems to proceed on the footing that the air space was not included in the demise, though he found that its potential for development affected the value of the reversion of the premises that were demised.

5. This issue turns on the proper construction of the lease. It was dated 17th June 1996 and its term of 6 years commenced on the same date. The rent was nothing for the first 16 weeks and £750 per month thereafter. The reason that the rent was so low was that the tenant (a housing association) was under an obligation to carry out certain very significant works in order to create the flats. The Demised Premises were described as follows:

> "The rear section of the ground floor, the rear section of the first floor and the whole of the second and third floors of 225 Streatham High Road London SW16 as is for the purposes of identification only edged red on the attached plan together with all necessary rights of access to and from the Demised Premises."

The "attached plan" is in fact four plans, one for each floor, and each apparently signed by a representative of each party. On the ground floor the red edging comprises everything except the post office and the entrance to the nightclub. In other words, it runs from the front of the building down the long side, across the shorter rear of the building, back halfway up the other side and then turning to delineate the precise boundary of the ground floor flat and running round the lightwell so as to encompass it. At this level, therefore, it seems that the lease includes the lightwell. The first floor plan is similar – the red line encloses the flat, the common passage and the lightwell. On the second and third floors the red outlining runs around the entirety of the building shape. It is therefore rectangular. As a plan, it clearly indicates that at floor level the demise includes the flat, the balcony and (at the same level) the roof over the second floor, together with the lightwell in between. Obviously it is not intended to operate only at floor level so far as the flat is concerned; it is intended to denote and carry with it the volume occupied by the flat. The question for us is whether it also includes the volume occupied by the balconies and by the air space from the second floor roof up to third floor roof level.

6. I have no doubt that the air space was in fact included. There can be no real doubt at all about the air space occupied by the balcony. Mr Knox sought to argue, albeit with an increasing degree of faintness, that only the floor of the balcony was included and that somehow the air space above it was not, or at least not above some notional reasonable height. He did not press his submissions particularly vigorously when it was pointed out to him that that might pose legal difficulties for

very tall people (whose anatomy might lead to a trespass, on Mr Knox's submissions), and the truth of the matter is that it is obvious that the full height of the air space of the balcony is included in the demise. I consider that it is equally obvious that the air space above the second floor flat roof is also included. Had it been intended to exclude it, then it would have been an easy matter to draw the red line so as to exclude the area of the roof, and even to exclude the area of the central lightwell had that been desired. The parties did neither of those. The inevitable inference is that the entire volume of this building, bounded by the horizontal plain of the uppermost part of it, was intended to be included within the demise. Nothing else makes sense of the plan. True it is that the plan is for identification purposes only, but in the absence of some contra-indication in the express wording of some other part of the lease, there is no reason not to give effect to the plan. There is no other way of really addressing the point other than by reference to the plan.

7. Mr Knox identified three parts of the lease which pointed away from that conclusion:

i) The parcels clause refers to the "whole of the third floor". He said that this could only refer to the flat at the front. There was nothing other than the flat which could be described as the third floor, so the airspace to the rear was excluded. The answer to that has been supplied above. If it had been intended to exclude the airspace above second floor level, the plan would have been drawn differently to delineate only the flat. It was not.

ii) Clause 2 contains the tenant's covenants, and sub-clause (h) provides as follows:

> "(h) To keep the Demised Premises and all window glass to include such part of the roof as are [sic] above the Demised Premises in good and tenantable repair damaged by risks insured by the landlord… excepted…"

That clause tends to suggest that the roof might not be within the demise because it is described as "the roof…above the Demised Premises". However, in my view that is not a very strong indication at all. It is no more than inelegant wording reflecting a desire to make it clear that the tenant's part of the roof is to be repaired, as opposed to some other part of the roof. In fact, as far as I can see, every bit of roof covers the Demised Premises anyway, so the clause seeks to draw a distinction which does not exist on the ground (as it were). For that reason alone I do not think that any weight can be given to this clause as something which potentially modifies the clear effect of the plans. The plans are extremely clear and what one takes from them is not materially affected by this clause.

iii) Clause 2(u) contains an obligation to contribute to expenses:

> "To pay to the Landlord 46.25% of all costs and expenses incurred and expended by the Landlord on or in connection with the repair and maintenance replacement rebuilding cleansing and lighting of

> the Building or any part or parts thereof (other than the Demised Premises or such parts of the roof as the Tenant is bound to maintain) (including without prejudice to the generality of the foregoing such parts of the roof and the roof timbers as are not the responsibility of the Tenant…)"

Mr Knox relied on this as demonstrating that there were two types of roof, one included in the demise and one not. He said that the third floor plan was operating at ground floor level so far as the red lining goes. The purpose of the completely rectangular red line on the third floor plan was designed to make it clear that the roof over the second floor was included in the demise, but did not go so far as to enclose the airspace above it (and ostensibly within the line). The third floor roof was said to be not included in the demise. This was his explanation of how it could be that the red lining on the third floor plan could be intended to achieve something useful without including the airspace above the second floor flat. In my view it is an extremely tortuous process of construction designed to find an explanation of the third floor plan consistent with the result he wishes to achieve rather than a process designed to work out what the lease overall means. It does not, either by itself or with any of the other indicia relied on by Mr Knox, provide material which gainsays the clear impression given by the third floor plan.

8. In my view, therefore, the relevant air space for the purposes of these proceedings is expressly included within the demise. That conclusion is reached on the basis of the true construction of the lease. It is therefore not necessary to consider the various authorities placed before us as to the extent to which air space is and is not carried with a grant of land, though for my part had it been necessary to do so I would have found in favour of the application of the presumption that a grant normally carries the airspace. It also makes it unnecessary for us to consider the point found by the judge as to the extent to which it is right to take into account prospective development of adjoining land, not included in the demise, when valuing the subject land. He found that on the facts of this case it was appropriate to take that into account (the adjoining land for these purposes being the airspace). I would not wish to be seen to be casting any doubt on the correctness of the judge's decision in this respect.

The want of repair and the commencement of these proceedings

9. Horizon having carried out the work necessary to create the six flats, it then appointed Tamil Community Housing Association Limited its agent for letting the flats out to individual tenants. On the expiry of the lease on 18th June 2002 all the flats were still occupied, but by 7th August 2002 two were vacant. On that date an inspection was carried out by Ravengate's architect, and that inspection found serious want of repair of the flats and of the common parts. On 18th October 2002 Ravengate began proceedings claiming possession and damages for breach of repairing covenant. A possession order was in due course made, and it is unnecessary to refer to that further. Vacant possession of all six flats was given on 24th March 2003. On 6th June 2003 a further inspection took place and a schedule of dilapidations was drawn up. The cost of works

necessary to put the flats and common parts into a good state of repair was estimated at just over £317,000 (inclusive of VAT).

10. On 17th October 2003 Ravengate applied for planning permission to develop the flats and the air space. It sought to enclose the balconies at second and third floor levels so as to increase the living space of the flats at those levels, to subdivide some of the larger flats and to build other flats in the air space above the flat roof over the second floor. The effect of that development would be to create 14 flats where there had hitherto been six. The works of repair were not done. Planning permission for that development was given on 10th March 2004. Quotes were obtained for the required building works. It is said by Ravengate that that costing turned out to be very much higher than anticipated, and indeed prevented the development at the time because it made the project unaffordable. The trial judge made no express finding about that, but we have seen the costings relied on. It was said in correspondence that the costs would be between £1m and £1.15m, as against an estimated cost of £600,000 to £700,000.

11. The premises remained in disrepair and in October 2004 Ravengate obtained a further schedule of dilapidations which reduced the estimated costs of carrying out the necessary repairs to just short of £289,000. In the meanwhile, the current proceedings were being pursued on the footing that Ravengate were claiming the cost of carrying out the repairs. Directions were made (and from time to time not complied with) in order to get the various issues resolved, and there were at least two preliminary hearings at which certain points of principle were determined. It is unnecessary to go into that detail in this judgment.

The trial and judgment below

12. By the time the matter arrived before Judge Lindsay the principal question before him was whether the damages for breach of the repairing covenant were to be measured by the cost of carrying out the work or whether the cap imposed by the first limb of s.18(1) of the 1927 Act operated so as to limit the damages to a much lesser sum. Section 18(1) provides:

> "(1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case 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 aforesaid and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

13. Ravengate's case was simple. It claimed the cost of repairing the works. It said there was no evidence that the damage to the value of its reversion was any less than the cost of doing the works. Horizon's case was, in essence, that a purchaser of the reversion would look at the property and see the potential for development in accordance with the planning permission. It would, Horizon maintained, be plainly advantageous to carry out the works necessary to develop the property. Those works would render otiose the bulk of the dilapidations work. A part of those works relating to the common parts would still be carried out by the purchaser, and that notional purchaser would require a reduction in the purchase price in the amount of the cost of carrying out those works. To that extent there was diminution in the value of the reversion. That was the cap which operated via s.18(1). Originally Mr Balmforth, Horizon's surveyor, put the cost of carrying out those works at £33,000, though he made some additional concessions later.

14. One of the ripostes of Ravengate to that argument was to rely on an argument about the air space. It was argued that s.18(1) required one to assess the value of the reversion to the Demised Premises. One could not simply treat the notional development as being that for which planning permission had been obtained, because that involved developing areas in the air space which were outside the demise and therefore not part of the reversion. Various consequences were said to flow from this. As I have indicated above, the judge dealt with this argument by in effect saying that on the footing that the airspace was excluded from the demise, on the facts of this case it was right to have regard to the prospects of developing non-demised land along with the demised land in order to assess the diminution in the value of the reversion of the latter. I have considered it appropriate to deal with the point in a different way, namely that determined above. The air space was in fact part of the demise. Accordingly, the spatial premise on which Ravengate invited the court to proceed is incorrect. When considering the values for the purpose of the s.18(1) test, it is appropriate to consider the value of the building and the air space, and therefore to consider potential development of that entire area.

15. The judgment below starts by reciting a lot of the factual and expert evidence. At paragraph 110 Judge Crawford Lindsay starts to make his findings of fact. He was critical of the quality of the evidence of Ravengate's principal factual witness, and found against Ravengate on the question of whether it intended to carry out the work to remedy the dilapidations – he found it did not so intend. He expressly rejected evidence that no structural alterations would be undertaken at the premises and evidence that if Ravengate had had the money in 2005 it would have spent it on repairs. He found that development had been in the mind of Mr Patel (the director of Ravengate) from when he initially purchased the building, which seems to have been in 1991. He expressly found (in paragraph 116) that:

> "….Mr Hutchings is right in his final submission where he asserts that in this case the Claimants are waiting for its dilapidations 'payout' before undertaking a major redevelopment.
>
> 117. I have no hesitation in concluding that the Claimants do not intend to carry

> out any repairs. They intend to carry out a scheme of refurbishment in order to maximise the value of the reversion."

16. Having thus determined, he considered that he should then have regard to the observations of Neuberger J in *Craven (Builders) Limited v Secretary of State for Health* [2000] 1 EGLR 128:

> "In a case where the landlord has carried out the works or clearly intends to carry out the works then the cost of the works is, or at the very least can be, prima facie evidence of the diminution in value. However in a case where the landlord has not carried out the works, and there is no evidence that he intends to carry them out, then the cost of the works is of no assistance. One cannot say that a costed schedule of dilapidations of itself, in the absence of any other evidence, constitutes even prima facie evidence of the diminution in the value of the reversion, let alone that there is any sort of prima face evidence of the actual diminution." (see pages 131 and 132)

17. Having determined that significant piece of factual background, the judge then turned to deal with various of the issues that arose. The first five raised points which are not the subject of this appeal, and it is unnecessary to refer to them. Issue 6 is described by him as follows:

> "126. ….Has the claimant satisfied the court that there is a diminution in value arising from the disrepair; if so (a) to what extent does that cap the Claimant's claim to damages; (b) how should those damages be assessed?"

Since the cap imposed by section 18(1) was very much in play in this case, those were two very important questions. Unfortunately, in setting about answering them the judge did not adopt any particularly clear structure, though at the end of the day he does seem to have addressed the questions that he posed. He had heard evidence from surveyors for the claimant and defendant (Mr Langley and Mr Balmforth respectively). Mr Langley's initial valuation valued each of the existing 6 flats as if in proper repair (totalling £1.44m) and set out their letting values. He then carried out a "Section 18 valuation" which merely set out the costs of the works (£288,976) and added £30,600 for six months loss of rent during a deemed period of remedial works. He then had one paragraph headed "Diminution value of the reversion" [sic] in which he stated that "we consider that the flats would have been unlettable/unsaleable at the time and therefore the correct valuation approach could only be the cost of the works as this would be the only way for which the landlord could obtain recompense." He prepared that valuation in September 2005. In October 2005 Mr Balmforth prepared a valuation, again on a flat by flat basis, which stated his view that the flats would be saleable in disrepair, but each at a reduced price. That led to a diminution in the value of the reversion (on his figures) of £70,500, when calculated on that basis. However, he attached this to a witness statement served in January 2006 in which stated:

> "7. In my Valuation I have looked at the capital value flat-by-flat, simply because

> that was the way that Mr Langley did it in his Report. But I consider the whole of the residential element of the building has a significant value particularly to developers. The fact that there is a valid planning permission for increasing the number of flats to 14 significantly enhances the value, especially to Housing Associations.
>
> "11. My view is that whoever bought the flats as a whole would regard it as an on-going development scheme …"

18. This view that the premises were ripe for development became an important one at the trial. Mr Balmforth sought to support it immediately before the trial with a further witness statement containing, inter alia, schedules setting out development costs (Appendix III) and a residual valuation (Appendix IV). He expressed the view that if the premises had been marketed with the prospect of, but without the actual benefit of, planning permission he would expect bids in excess of £850,000, and if marketed with the benefit of planning permission he would expect bids in excess of £950,000. He concluded:

> "With regard to the foregoing, therefore, I am of the view that the breaches of repairing covenant did not result in any substantial diminution in the value of the demised premises, in fact had the landlords chosen to offer the property for sale in the Open Market, they would have achieved a higher price than the current use value of the demise if sold in the best condition required under the lease.
>
> The diminution in value is restricted to the costs (including profit element) of undertaking the 'survival items of disrepair' outlined in Appendix VI. I assess this in the sum of £30,500".

19. It is necessary to refer to this detail in order to make sense of what the judge decided, because he does not refer to it himself in his judgment despite the fact that it seems to be central to an understanding of the case. What the judge determined in the course of deciding his issue 6 is as follows[1]:

i) "It was always intended and intends [sic] to undertake some form of refurbishment to the premises. The best solution is to carry out the Balmforth plan or proposals of a similar nature." (para 2). By the Balmforth proposals the judge means development proposals of the nature set out above (the redevelopment to create 12 or 14 flats).

ii) He identified Mr Langley's contention as being that the diminution in the value of the reversion was represented by the cost of repairs.

iii) He made remarks indicating that he found Mr Balmforth a careful and good witness.

iv) He considered and ruled on various adjustments that he said fell to be made to Mr Balmforth's residual value calculation and other points arising out of the putative development.

v) At paragraph 23 he found :

> "If Mr Balmforth's plan could have been undertaken, despite adjustments made by him, and notwithstanding Mr Knox's criticisms, I consider a residential developer could have made a profit and would have been the likely bidder at the end of the term."

vi) He then turned to the cost of the "survival items" and ruled on various adjustments to be made to them. He valued them at £50,000 to include fees and overheads (para 27).

vii) He summarised what he saw as being the thrust of Mr Balmforth's evidence in relation to purchasers. Mr Balmforth had to consider at what price a developer would be likely to buy in the property, and is recorded as saying that £800,000 would not be attractive to the existing vendor, and £950,000 (a figure at the other extreme of figures being bandied around) would be too much for a developer. "This could lead to a potential impasse – no incentive on the vendor to sell at £800,000 and no incentive for the purchaser to buy at £900,000."

viii) He did not resolve that apparent impasse at that stage of his judgment, but instead went on to deal with the airspace point, which he dealt with in the manner referred to above.

ix) Having determined that the demised premises would be sold with the airspace, so as to permit development of it all together, he found:

> "38. Without hesitation I find that in this case from the time of purchase and at the end of the lease and currently Mr Patel intended and intends to develop the premises. Lack of funds prevented the development at the termination of the lease.
>
> 39. The redevelopment will involve making maximum use of the available space in the premises. … The premises at all material times have been ripe for development by the Claimant or by a purchaser."

That last sentence is a particularly important finding.

x) He pointed out that Mr Patel awaits the outcome of the proceedings before developing either in stages or as one project, and that Ravengate's evidence did not include its own residual valuation;

it had pinned its colours to a costs of repair-based valuation.

xi) He set out submissions made by Mr Hutchings on behalf of Horizon, which depended on certain evidence given by Mr Balmforth in cross-examination. He records Mr Balmforth as saying:

> "By spending another £500,000 maximum [on carrying out building works to develop the building] this increases the flow [ie rental] to over £100,000. By developing this from 5 to 7% … it would make sense for the Developer to develop it on a letting scheme … if the developer spent £500,000 this increased income from 6 to 12 flats … gross income goes up to £100,000 … this increases the return on the overall capital investment. "

Mr Hutchings submitted that on a sale a purchaser would pay a sum between £800,000 and £950,000 and was "bound to carry out the development because he knows his return on the extra investment would be healthy", and that if the claimant intended to develop the property with a scheme similar to the Balmforth scheme then that was compelling evidence of what a purchaser would do. The judge expressly accepted those submissions.

xii) In paragraph 48 the judge identified the relevant question under section 18(1) as being to ask whether a hypothetical purchaser of the reversion would reduce his bid because of any identified disrepair, and if so by how much, and accepted a submission from Mr Hutchings that any potential purchaser would have done what the claimant was intending to do, because the premises were ripe for development.

> "50 Any hypothetical purchaser would have considered development, would have come to the conclusion that Planning Permission would be granted and that Mr Balmforth's plan or some similar plan could have been carried through at the term date.
>
> "51. I likewise agree with Mr Hutchings' additional submissions that the purchaser of the reversion would carry out the Balmforth plan or some similar scheme whatever he paid for the reversion because of the potential return.
>
> "52. In my judgment the answer to the question,

> assuming a sale what difference does the repair make the answer is none. The diminution in value in my judgment is limited to the cost of the survival items to which I have referred above."

The arguments on this appeal

20. Thus the central conclusions to which the judge came were that:

    i) The premises were ripe for development.

    ii) Any potential purchaser would give effect to development.

    iii) That development would render otiose the carrying out of most of the repairs claimed by Ravengate. The only things that would make a difference to the developer would be survival items, and he would require a deduction for those.

21. It is important to bear in mind that a section 18(1) exercise involves determining a difference in value. That in turn involves 2 imaginary sales – one sale of the demised property in proper repair, and one of the property not in repair. The difference between those two values is the diminution in the value of the reversion. One would often expect a section 18(1) exercise to set out each figure, with justifications for each, so that the merits of each figure can be assessed by the judge and the relevant mathematical exercise carried out. In order to ascertain the two sale prices it will usually be necessary to identify the nature of the market and therefore the nature of the purchaser – see the approach of Neuberger J in *Craven (Builders) Ltd v Secretary of State for Health* [2000] 1 EGLR 128. Mr Balmforth's approach, and the approach of the judge in his judgment, did not carry out the first of those exercises. Having identified the likely purchaser as a developer, and being of the opinion that such a developer would not be concerned by most of the dilapidations, it seems to have been thought by Mr Balmforth (and apparently by the judge) to be unnecessary to carry out the "2 valuations" exercise.

22. The judge's logic and findings work if he was right to say that any purchaser would buy with an eye to development, or to put it in Mr Knox's words to us, that the entire universe of purchasers comprised would-be developers. Mr Knox accepted as much. His criticism of the judgment centred around that proposition, which he said was contrary to the evidence. In order to make good that point he put before us a series of sets of figures designed to show that when one took into account purchase costs, development costs, receipts and the need for a reasonable profit, the price that a developer would pay would be less than the current use value of the land and less than the value of the land to a purchaser who kept the land for letting to get a return from the flats. Accordingly, he said, the entire universe of purchasers would not be made up of developers, so the judge's thesis was wrong. A "normal" purchaser (ie one who did not intend to develop) would pay more, and such a purchaser would expect a reduction in the purchase price of the land

equivalent to the cost of all the repairs, so that the diminution in the value of the reversion was the equivalent to that cost.

23. Mr Knox's exercise was seductive but ultimately unconvincing. It was to a considerable extent based on sections of Mr Balmforth's evidence (both his evidence in chief and his cross-examination), in that it claimed to deploy either his figures, or adjustments to his figures that he agreed in cross-examination. During the course of his cross-examination of Mr Balmforth, Mr Knox put to him various points about various deductions which fell to be made from an overall valuation of the property in order to arrive at a profit figure, but those points were scattered around his cross-examination and not under one head. The judge pulled them together in paragraphs 8 to 22 of the second part of his judgment. However, Mr Balmforth was not given the opportunity to see the figures in the manner in which they were presented to us and to comment on them all together. Nor was the series of calculations put to him. I do not say that critically – Mr Knox had had to deal with late evidence from Mr Balmforth – but it is a fact. It means that we should be cautious about drawing conclusions from the exercise.

24. However, more significantly than that, Mr Knox's exercise does not really deal with Mr Balmforth's main point, which is that it did not make sense for a purchaser not to carry out the redevelopment. His evidence on this is contained in the passage which was purportedly quoted by the judge as referred to above. What Mr Balmforth actually said at that point in his evidence, and subsequently, was:

> "You caught me a bit on the hop yesterday with the way you changed tack and it was only sitting on the train, as I probably do sitting in my office, reflecting, that I thought well in actual fact this scheme makes sense to keep as a letting scheme. We talked yesterday about: 'Well, why would you want to sell this when he has £55,000 a year in income?' Well, in actual fact by spending another £50,000 maximum it actually increases income flow on the basis of the figures which we have agreed for [mesne] profits to over £100,000 a year. In actual fact, by developing this he would increase his return on capital on a return at the moment of about 5% to nearly 7%. So in actual fact it would make sense for a developer to develop it and keep it as just a letting, investment scheme".

Having confirmed his evidence that a developer looking at the property with a view to redeveloping into 14 flats and then selling them would find the project too marginal at a price of £950,000 Mr Balmforth elaborated on this in an answer to the judge as follows:

> "Q. Would you like to elaborate on this then? What you are now saying, as I understand it, is your developer would look at this and say: "If I spent £500,000" on what though?
>
> A. On the redevelopment, as it were, which is more than was in my figure but I just

> said £500,000 is a round figure. If you are doing it to the buy for let scheme you might actually – or doing it as a letting scheme you might do it to a lesser specification, but I have not bothered with that. My model is £500,000 and you would increase your income based on going from six flats to 12 flats on –
>
> Q. So no sales, no capital sales?
>
> A. Your gross income would go to over £100,000. Allowing 30% deduction for what we talked about yesterday, your net income would be nearer £70,000 which actually produced an increased return on your overall capital investment so it is about balancing the beast which you are dealing with, and this is factored into risk. What is plan B? Most developers would think if plan A does not work what is plan B? Plan B would be this would service borrowings as a letting scheme on net income. I am sorry I did not discuss it before, but it only came up in cross-examination yesterday on that basis."

25. It is plain enough from that evidence why the judge came to the conclusion that he did. Mr Balmforth was saying that it made sense to develop this site because by spending the building costs one could increase the rental return on the property very markedly. Mr Knox accepted that his evidence was to the effect that any purchaser would spend the £500,000 on developing, so the question becomes whether the judge was entitled to accept that evidence, which he apparently did.

26. The judge had previously recorded that he thought that Mr Balmforth was a careful and reliable witness, and at one or two points he expressly preferred his evidence over that of others. It is plain that the judge did accept this evidence, and it is not surprising that he did. As well as having the evidence of Mr Balmforth, which the judge clearly respected and generally accepted, he had additional material. He had the fact that Ravengate itself had always contemplated redevelopment; he made an express finding that Mr Patel did not intend to use any damages in order to repair the property but intended to redevelop it; and he had the evidence that Ravengate had applied for planning permission on the expiry of the lease. For what it is worth we have been told (and it is not disputed – we have seen photographs) that Ravengate is currently carrying out a redevelopment. True it is that Ravengate's original view (after the expiry of the lease) was said to be that the costs were too high, but the judge does not seem to have found that that view persisted, and it is implicit in his findings that Ravengate were going to find a way round this. In other words, everything was pointing towards a redevelopment of these premises. The only thing that does not is Mr Knox's schedules, on which Mr Balmforth did not fully comment and to which Mr Balmforth's other evidence, as set out above, provided an answer. It is true that the effect of part of Mr Balmforth's cross-examination was to resile from his assertion that a developer purchaser would pay in excess of £950,000 for the property, because he was satisfied that a proper computation of the costs would make a purchase at £950,000 too unattractive, but that does not of itself detract from the thesis that the intention of anyone purchasing this property would be to redevelop it, either to sell as individual flats or to let individual flats (or sell for

letting).

27. In the circumstances I consider that the judge was right to find that any purchaser of these premises would purchase with an eye to redevelopment. That means that any purchaser would not need, require or expect a reduction in respect of a large part of the repairs. Once one gets this far then the judge's finding that the purchaser would require a reduction in respect of the "survival items" becomes understandable and plainly right. Indeed, Mr Knox did not dispute that, if the reasoning is against him thus far.

The value of the survival items

28. When the matter was opened to us there was one dispute as to the value of those items. Mr Knox did not dispute the judge's methodology at this point so far as it went. But he said it accidentally omitted an item valued at £5,840. He said that everyone had overlooked this item until he was able to look at the transcript and identify that it had been omitted. The transcript was said to reveal that Mr Hutchings accepted that this item should be added to the survival items. Mr Knox sought, and was given, permission to amend his notice of appeal to take this point.

29. Closer scrutiny of the relevant part of the transcript shows that the debate at this point of the case was about something else. It was not about survival items. It was about the costs of development. When that was pointed out, Mr Knox abandoned the point.

30. It therefore follows that the judge's figure of £50,000 for the survival items stands unchallenged.

Conclusion

31. The consequence of this is that the judge was right to find that the amount of the diminution in the value of the reversion brought about by the want of repair was less than the cost of repairs, and therefore to apply that as the relevant measure of damage. He was also right to assess that value by reference to the amount which a developer purchaser (in effect the only likely purchaser) would require to be deducted from the purchase price, which in turn is to be assessed by reference to items of repair which the developer would have to carry out himself. There was no sustained appeal from the amount that he actually found. Accordingly I would dismiss this appeal.

Lord Justice Mummery

32. I agree.

Lord Justice Jacob

33. I also agree.

Note 1 In what follows references are to paragraphs in the judgment. At this point in the judgment the paragraphs start numbering from 1 again. [Back]
