Case No: LATRF/1999/1051

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL(CIVIL DIVISION)
ON APPEAL FROM THE LANDS TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 30 November 2000

B e f o r e:

LORD JUSTICE OTTON
LORD JUSTICE WARD
and
Mr JUSTICE EVANS-LOMBE

- -

MORRIS ROSEN	**Appellant**
- and -	
TRUSTEES OF CAMDEN CHARITIES	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

SIMON BERRY QC/EDWIN JOHNSON (instructed by David Conway for the APPELLANT)
JONATHAN GAUNT QC (instructed by Lee Bolton Lee for the RESPONDENT)

- -

Judgment
As Approved by the Court

MR JUSTICE EVANS-LOMBE:

1. This is an appeal by way of case stated from the decision of The Lands Tribunal given on the 30th July 1999 by His Honour Judge Rich QC, on appeal from a decision of the Leasehold Valuation Tribunal for London, whereby that tribunal determined in accordance with section 9 (1A) of the Leasehold Reform Act 1967 what the price payable by the Appellant for a transfer to him of the freehold of No. 25 Kensington Gate *("No. 25")* by the owner under the provisions of that Act should be.

2. The background facts to this appeal are these: before 1850 the Trustees of the Camden Charities *("the Trustees")* were the owners of the site of the Kensington Workhouse. On the 15th January 1850 there took place an auction at which the Trustees put that site up for sale. At the auction one Inderwick was the successful bidder. His bid resulted in an agreement between the Trustees and himself whereby he undertook to construct 29 houses on the site on the completion of which he was to be granted a 99 year lease of the site from the 25th December 1849. The terms of this agreement have not survived. Before the Tribunal there was expert evidence of what such an agreement would probably have consisted by comparison with other such agreements entered into at around the same time whose terms are known. The experts were agreed on this point. Their conclusion was described in the Tribunal's judgment in this way: -

> *"The experts are agreed that a normal type of building agreement at that time "would provide for mutual obligations - the obligation on the part of the builder to build the houses to carcase and roof stage and the obligation on the part of the Landlord to grant a lease or leases to the builder when that stage had been reached. It would not normally have contained a contingency clause for non—fulfilment"".*

3. The Tribunal emphasised the words *"when that stage had been reached".*

4. On the 9th October 1852 the Trustees granted to Mr Inderwick a 99 year lease of the whole site from the 25th December 1849. It is accepted that by this date the house, which was to become No. 25, was complete and not only built to *"carcase and roof"* stage.

5. By a lease, dated the 8th April 1937, *("the 1937 lease")* the Trustees granted to a Mr Guise a lease of No. 25 Kensington Gate for 66 ½ years from the 29th September 1936. The Appellant is the successor in title to the 1937 lease. He claims to have the freehold of No. 25 transferred to him by the Trustees pursuant to the provisions of the 1967 Act under a notice of claim assigned to him by his predecessor on the 5th July 1994.

6. The relevant provisions of the 1967 Act are these: -

> *"1(1) This part of this Act shall have effect to confer on a Tenant of a Leasehold house, occupying the house as his residence, a right to acquire on fair terms the freehold or an extended lease of the house and premises where -*
>
> > *(a) his tenancy is a long tenancy at a low rent… and*
> >
> > *(b) at the relevant time (that is to say at the time when he gives notice in accordance with this Act of his desire to have the freehold or to have an extended lease, as the case may be) he has been tenant of the house under a long tenancy at a low rent, and occupying it as his residence…*
>
> *2(1) For purposes of this part of this Act, "house" includes any building designed or adapted for living in and reasonably so-called…*
>
> *(3) Subject to the following provisions of this Act where in relation to a house let to and occupied by a tenant reference is made in this part of this Act to the house and premises, the reference to premises is to be taken as referring to any garage, out-house, garden, yard and appurtenances which at the relevant time are let to him with the house*

and are occupied with and used for the purposes of the house or any part of it by him or by another occupant…

3 (3) Where the tenant of any property under a long lease, on the coming to an end of that tenancy, becomes or has become tenant of the property or part of it under another long tenancy, then in relation to the property or that part of it, this part of this Act… shall apply as if there had been a single tenancy granted for a term beginning at the same time as the term under the earlier tenancy and expiring at the same time as the term under the later tenancy.

8 (1) Where a tenant of a house has under this part of this Act a right to acquire the freehold, and gives to the Landlord written notice of his desire to have the freehold, then except as provided by this part of this Act the Landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant's encumbrances, but otherwise free of encumbrances."

7. The amount payable by the enfranchising tenant to the Landlord as consideration for the transfer of the freehold to him falls to be calculated under the provisions of section 9 of the Act. Originally the right to enfranchise extended only to houses in London of a rateable value less than £400. The method of calculation of the consideration payable by the tenant in respect of such houses is set out in section 9(1).

8. The Housing Act 1974 introduced a right to acquire the freehold or long leasehold of premises held on a long lease with a higher rateable value. The method of calculation of the consideration payable by the tenant for the transfer of the freehold of premises having such a higher rateable value is in accordance the provisions of section 9 (1A). It is accepted that the consideration payable by the Appellant for a transfer to him of the freehold of No. 25 fell to be valued in

accordance with that section. So far as material to this appeal it provides as follows: -

> *"9 (1A) Notwithstanding the foregoing subsection, the price payable for a house and premises -*
>
> *(i) ...*
>
> *shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions: -*
>
> *(a)*
>
> *(b)*
>
> *(c)*
>
> *(d) on the assumption that the price be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense;*
>
> *(e) ...*
>
> *(f) ...*

9. The Tribunal concluded that section 3 (3) operated on the facts of this case so that the 1852 and 1937 leases were to be treated as one long lease to which the appellant was successor in title. No challenge is made to that conclusion.

10. The issue on this appeal is whether the original construction of No. 25 Kensington Gate by Inderwick before the grant of the 1852 lease was an *"improvement carried out by the tenant or his predecessors in title at their own expense"* within the meaning of section 9 (1A) (d) of the 1967 Act, so that the

price payable by the tenant is to be diminished to the extent to which the value of the *"house and premises"* has been increased by the value of the original construction.

11. This issue sub-divides into two issues. The first is whether the construction of No. 25 by Inderwick was capable of constituting an *"improvement"* within subsection (d). If so the second issue is whether at the time of the construction Inderwick was the *"predecessor in title"* of the Appellant of the long lease of No. 25 held by him as extended by the effect of section 3 (3) of the 1967 Act.

12. The parties are agreed that if such construction constitutes an improvement by a predecessor in title of the Appellant within sub section (d) the enfranchisement price is £417,000. If not it is £696,000.

13. Sub-section (d) refers to *"any improvement".* It was submitted by Mr Berry for the Appellant that the construction of a house on land was capable of constituting an improvement of that land. Like the Tribunal I accept that submission but also like the Tribunal, I take the view that it is beside the point. It was common ground before the tribunal that the word *"improvement" "imports a relativity, that is there must be some subject matter for improvement."* An improvement cannot come into existence in vacuo. It must constitute an improvement to something. The question therefore is what is the object to which the words *"any improvement*" in subsection (d) are directed.

14. Mr Berry for the Appellant submitted that the object must be the premises let, namely, the land, demised by the lease which at the date of the claim to

enfranchise is constituted by the *"house and premises".* He submitted that subsection (d) does not restrict the scope of the improvement there spoken of nor the identity of that which is to be improved. He submitted that the Act contemplates that an application to enfranchise might be made in respect of land which, when originally let, did not have a house built on it or, if there was a building on the land, one which would not fall within the definition of a house in section 2 (1). Thus *"house and premises"* when used in section 9 (1A) and, in particular, in sub-section (d) is to be read as simply describing the premises let which might originally have consisted of open land or land with buildings on it unconverted to any sort of habitation. It follows, so he submitted, that the construction of a house on such land was capable of constituting an *"improvement"* to that land within subsection (d).

15. The Tribunal dealt with the matter in this way: -

> *"The question is to what must the improvement relate if it is to be a relevant improvement for the purposes of the paragraph? It appears to me that grammatically Mr Gaunt* (for the respondents) *must be right. Mr Berry rightly says that the matter could have been made clear if the draftsman had added the word "thereto" to "improvement" thereby referring back directly to "house and premises". But I think that in the absence of express direction elsewhere, the reference would grammatically be taken back to the last mentioned object. This, for the reasons which I have already given and are common ground, cannot be "the value". The immediate reference back is therefore to the last words of the antecedent phrase that is "the house and premises". Certainly there is no grammatical basis for referring to the demised property which is never mentioned in the sub-sections and is not the subject matter of the valuation.*
>
> *The "house and premises" are defined by section 2 of the Act. It is provided in subsection (3) that "the reference to premises is to be taken as referring to (appurtenances) which at the relevant time are let with the house and are occupied with and used for the purpose of the house." It follows that in the absence of a house there is no house, nor can there be any premises, nor any "house and premises" to improve. From this it must follow that the erection of a house, where*

no house was there before cannot be an improvement within the paragraph."

16. I respectfully agree with the Tribunal. Subsection (d) does not use such words as *"the demised premises"* nor are they used in the Act generally. The term used is *"house and premises"* not *"house or premises".* From the definition of *"house and premises"* in section 2 (3) it is clear that *"premises"* cannot exist independently of a house. The building of a new house on a bare site (whether a green field or a site on which a previous building which was not a house has been demolished) is not the improvement of *"the house and premises"* but the provision of the house.

17. In *Sainty v Minister of Housing and Local Government 1964,15 P&CR p432* the Court of Appeal were considering a case where an appellant proposed to demolish two old cottages and to replace them with two new houses of different design, on slightly different foundations. It was submitted that this proposal fell within the words *"enlargement, improvement or other alteration"* of the cottages within class 1,1 of the Town and Country Planning General Development Order 1963 with the result that planning permission was not required. The relevant order excluded from the requirement for planning permission *"the enlargement, improvement or other alteration of a dwelling house"* so long as the enlargement did not exceed certain dimensions. The Court of Appeal upheld the ministers view that the words of the order *"must refer to a dwelling house which is in existence when the operations mentioned in that class are being carried out."* I accept Mr Gaunt's submission that the case of *Sainty* is analogous to the present case and supports his contentions.

18. I accept the Respondent's submission that their construction of the subsection is supported by the inclusion of the words *"... diminished by the extent to which the value... has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense".*

19. Contrary to the views expressed by the Tribunal, in my judgment, when considered in the context of the provisions of the 1967 Act as a whole, these words cannot be taken to contemplate a situation where a tenant under a long lease has expended money on the relevant property but received equivalent value from the Landlord in exchange, i.e. a valuable lease. The Act is concerned with the position of tenants of houses holding long tenancies at low rents see section 1 (1). In the present case Inderwick, put forward by the Appellant as his predecessor in title within subsection (d), covenanted to build a house on the Respondents' land in exchange for obtaining a 99 year lease at a low rent, a valuable interest in property which he was prepared to accept in exchange for his expenditure in erecting the house on the site of No. 25 amongst the other sites covered by the agreement following on the auction. Had the circumstances been different so that the Respondents had already constructed the house and were offering a long lease of it at a low rent to Inderwick, he would have had to have paid a substantial premium for the grant of such a lease. It cannot be suggested that the payment of such a premium would constitute an *"improvement"* within sub-section (d). There can be no justification for drawing a distinction between the treatment of a Tenant who has acquired his long tenancy by the payment of a premium and one who has done so by the expenditure of a similar sum in the construction of a house on his landlord's land. It follows, it seems to me, that the building lease which Inderwick took from the Respondents was the original bargain, between Inderwick

and the Respondents, performance of which on Inderwick's part cannot be treated as an *"improvement"* within subsection (d).

20. I also accept the submission of the Respondents that the clear purpose of the amendment of the 1967 Act to include section 9 (1A) was to provide a different valuation regime in respect of properties of greater value than those to which the Act had previously applied. Whereas the provisions of section 9 (1), which include the assumption that the property is to be valued on the basis, resulting from the application of section 15 (2) so that the tenancy to be enfranchised has been extended by a further 50 years at a ground rent, are designed to enable the Tenant to acquire the freehold at site value only. By contrast, section 9 (1A) appears to be intended to give the Landlord the open market value of the house and premises with the resident tenant bidding and without the assumption of an extended lease at a ground rent. There is therefore included in the valuation process a method of calculating *"marriage value"* upon the merger of the leasehold with the freehold. If the Appellant's contentions are correct then, in cases such as the present, where the enfranchising Tenant's predecessors in title include the original builder of the house, the valuation can only be based on the site value after all.

21. In my judgment the purpose of sub-section (d) is to guide a valuer so as to exclude from the *"open market"* value of the *"house and premises"* which, by the first

part of section 9 (1A) is to constitute the "*price payable"* by the tenant seeking enfranchisement, *"any improvement carried out by the tenant or his predecessors"* by which *"the value of the house and premises has been increased."* The original construction of the house in question cannot constitute an improvement within subsection (d). This conclusion is not, as submitted by Appellant, affected by the fact that the term of the 1852 lease was expressed to commence on the 25th December 1849, before the house was built, and, indeed, before the auction, and that rent was payable and was paid by Inderwick from that date. A lease takes effect from the time of its grant notwithstanding that it may contain provisions for the backdating of payment of rent.

22. That is sufficient to dispose of the appeal but in deference to the submissions of counsel I will deal with the remaining points if briefly.

23. Those points are directed to whether Inderwick is to be treated as a *"predecessor in title"* of the appellant at the time that No. 25 was constructed within the meaning of sub-sections (d). No. 25 had already been built by him by the time the formal lease was actually granted to him by the Trustees.

24. It was submitted by Mr Berry that Inderwick would have been able to obtain specific performance of the agreement for a lease before No. 25 had been built to carcase and roof stage. Thus, at the time of construction, Inderwick held an equitable lease under the doctrine of *Walsh v Lonsdale (1882) 21 CHD p9* to which the appellant's lease is extended by the operation of section 3 (3). Thus Inderwick was a predecessor in title to the lease held by the appellant as so extended.

25. The Tribunal relying on the authority of *Cornish v Brook Green Laundry Limited 1959 1 QB p394*, a decision of the Court of Appeal, the decision of Cantley J in *Euston Centre Properties Limited v H & J Wilson Limited (1982) 1 EGLR p57*, and of the Court of Appeal in *Henry Smith's Charity Trustees v Hemmings (1983) 1 EGLR p94* concluded that because it was a condition of the agreement for a lease that the granting of the lease to Inderwick was conditional upon the construction of No. 25 to carcase and roof stage, Inderwick would not have become entitled to a decree of specific performance until the construction had reached that stage. The Appellant challenged that conclusion by arguing that, for a condition precedent to preclude a decree of specific performance, the condition had to be beyond the control of the applicant for the decree to perform. The condition to construct the house was not such a condition. In support of this submission the Appellant cited two authorities, *Hasham v Zenab 1960 AC p316* cited in *Michael's v Harley House (Marylebone) Limited 2000 Ch. p104.*

26. The Tribunal dealt with this submission at page 11 of the transcript of the Tribunal's reasons. I agree with the Tribunal's conclusion that the *Michael's* case is no authority for the Appellant's argument. The issue in that case was whether TWD's obligations under its agreement to sell the shares in the subsidiary company, to which it was to transfer the leasehold reversion, to Frogmore, meant that the subsidiary company was no longer an *"associated company"* of TWD within section 4 (2) (l) of the Landlord and Tenant Act 1987. This would have been the case were Frogmore in a position to enforce against TWD the contract of sale of the shares by obtaining specific performance of that contract. The Court of Appeal concluded that Frogmore was in that position. It was in this context

that Robert Walker LJ said (in a passage quoted by the Tribunal) at page 116 G of the report: -

> *"I also agree with the judge that TWD's obligations under the share sale agreement were not dependent on some outside contingency beyond its control (since it could call on TWD to transfer the registered title and it effectively controlled the company). Had TWD not completed on 25th March 1993, it could have been sued for specific performance. Had it repudiated its obligations to Frogmore before that day, it could have been sued for specific performance even before the contractual date for completion: see Hasham v Zenab (1960) AC p316. The conditions in clause 2.1* (the completion of the property sale by TWD) *would have been no defence.*

27. In other words TWD could only resist specific performance if there had been a condition in the contract for the sale of the shares to be performed by TWD which was beyond TWD's ability to perform. By contrast in the present case the question is whether Inderwick could obtain specific performance of the agreement for a lease before performing the condition placed on him by the agreement, namely, the construction of the house. That condition was within his power to perform but he could not have got a decree of specific performance for the grant of the lease to him until he had performed it.

28. *Hasham's* case is no authority for the Appellant's argument either. In that case the Privy Council was considering a contract for the sale of land which provided for completion on a date in the future. Before that date the Vendor repudiated the contract. The opinion of the Privy Council was delivered by Lord Tucker. At page 329 of the report he is reported as saying:

> *"Their Lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which will justify the intervention by a Court of Equity. The purchaser has an equitable interest in the land and could get an*

injunction to prevent the vendor disposing of the property. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions. The first of the forms in volume 3 of the 7th edition of Seaton's Forms of Judgments and Orders, at page 2136, is clearly suitable to a case where the time for performance may not have arrived even at the date of the order, but in such a case, in the event of subsequent non-performance, the Court would not require the issue of a fresh writ for making the consequential directions for performance. The Court will not, of course, compel a party to perform his contract before the contract date arrives and would give relief from any order in the event of an intervening circumstance frustrating the contract."

29. This case shows that a purchaser may commence an action for specific performance of an agreement for the sale of land to him before the actual date for completion has arrived. He will not, however, be able to obtain a decree of specific performance until after the date for completion. Before that date, because, by reason of the contract, he has an interest in the land to be conveyed, he will be able to ask the Court to intervene by way of injunction to prevent the Vendor from disposing of the property elsewhere. In the present case Inderwick would have been able to ask the Court to intervene by way of injunction had the Trustees, after the auction and consequent agreement for a lease, attempted to sell the land free from his interest under the agreement to have a lease granted to him on completion of the construction of the houses.

30. I agree with the Respondent's submission contrary to the Appellant's alternative submission, that the case of *Carrington Manufacturing v Saldin (1925) 133 LT p432* is of no assistance in deciding this issue. The question with which we have to deal is what was the status of Inderwick at the time when he built the house. He was not then a tenant, either at law or in equity, notwithstanding that the lease which was subsequently granted to him extended its term backward to a time before construction started.

31. In the further alternative the Appellant submitted, on the authority of the decision of the Scott J in *Hambro's Bank v Superdrug Stores (1985) 1 EGLR p99* that, notwithstanding that Inderwick was not to be treated as a tenant in equity at the time No. 25 was constructed he has nonetheless to be treated as such a tenant for the purposes of subsection (d). That case concerned the construction of a rent review clause in a lease where there was a plain expectation that it would be unfair for a tenant to be required to pay rent referable to his own voluntary improvements. Sub-section (d) is concerned with the position of a *"predecessor in title"* of the applicant for enfranchisement. Those words cannot apply to somebody who happens, subsequently to doing work to premises, to become its tenant, such as a sub-tenant or licensee. They do apply to a person in whom the applicant ' s tenancy, as extended by section 3 (3), is vested at the time that any improvements to the property in question are made. The present case concerns works which were carried out under covenant as part of the consideration for the grant of a long lease at a ground rent, the benefit of which has been enjoyed by the Appellant and his predecessors in title, and whether those works constitute improvements for the purpose of a valuation process prescribed for a particular statutory purpose in the 1967 Act. Those are entirely different issues to those under consideration by Scott J in the *Hambro's Bank* case. I agree with the tribunal's conclusion that the decision in that the case does not assist the Appellant.

32. It is then submitted by the Appellant that the statutory conditions of sale provided for by section 45 (6) of the Law of Property Act 1925 are to be imported into the contract resulting from section 5 (1) of the 1967 Act and imposed on the parties to an enfranchisement under that Act. Section 45 (6) provides: -

"(6) Recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, 20 years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions."

33. It follows, so it is submitted, that references in the recitals to the 1852 lease to No. 25 being *"put up to be let by public action"*, and similar expressions using the word *"let"* or *"letting",* with relation to the transaction resulting from the auction, require the Respondents to accept that Inderwick was, after the auction, a tenant of No. 25 and so a predecessor in title of the Appellant for the purposes of subsection (d).

34. This contention must fail. Subsection (6) is subject to the proviso *"unless and except so far as they may be proved to be inaccurate…" It* has been established that there was no *"letting"* in the sense of the granting of a lease as a result of the transaction following the auction by reason of the legal consequences of facts which were agreed by the parties experts to have existed at the relevant time. Further the words *"let"* and *"letting"* are not unambiguous and are not inappropriate to describe an agreement for a lease to be granted in the future conditional upon the performance of certain works on the landlord's land.

35. It is finally submitted that a similar result is achieved because the respondents are estopped by deed from denying the meaning of the words *"let"* and *"letting"* contained in the recitals to the 1852 lease. Again it seems to me, that the point fails, again because the words *"let"* and *"letting"* are not unambiguous of meaning. In addition the recitals to the 1852 lease contain a recital that the auctioneer *"at the said letting as agent for and with the authority* (of the Trustees)

made and signed an agreement in writing with the said John Inderwick for a lease of the said premises on the terms hereinafter contained…" It is an agreed fact that the agreement for a lease was subject to a condition for the construction of houses by Inderwick including No. 25.

36. For these reasons I would dismiss the appeal.

LORD JUSTICE WARD:

I agree.

LORD JUSTICE OTTON:

I also agree

ORDER: Appeal dismissed. Leave to appeal to House of Lords refused.