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Beer v Bowden [1981] 1 All ER 1070

COURT OF APPEAL, CIVIL DIVISION

BUCKLEY, GEOFFREY LANE AND GOFF LJJ

1, 2 APRIL 1976

Landlord and tenant - Lease - Rent review clause - Rent payable on review to be fixed by agreement between the parties - Rent not to be less than original rent payable under lease - No arbitration clause or other machinery for fixing rent in default of agreement - Parties failing to agree rent on rent review - Whether court could imply term that market rent was payable in order to give business efficacy to lease - Whether in absence of agreement original rent payable under lease continuing to be payable.

Under the terms of a lease demising premises for a term of 14 years from 25 March 1968 the rent payable by the tenant was to be £ 1,250 per annum for the first five years and was to be reviewed every five years thereafter, the new rent to be 'such rent as shall ... be agreed between the Landlords and the Tenant but no account shall be taken of any improvements carried out by the Tenant in computing the amount of the increase, if any, and in any case [the rent shall be] not less than the yearly rental' of £ 1,250 payable under the lease. The parties failed to agree on the new rent at the end of the first five years and the landlord issued an originating summons seeking determination of the questions whether, on the true construction of the rent review clause, the rent payable during the second five-year period was the proper and reasonable rental for the premises having regard to their market value on 25 March 1973, and, if so, whether the proper and reasonable rental was £ 2,850. The judge held that the tenant was liable to pay a fair rent as at 25 March 1973 excluding tenant's improvements, provided that it was not to be less than £ 1,250, and that the rent for the remainder of the term was to be similarly determined on 25 March 1978. The tenant appealed, contending that either on the true construction of the rent review clause or by an implied term of the lease the rent continued to be £ 1,250 per annum in default of agreement, and that a term that a fair rent was payable could not be implied as there was no arbitration clause or other machinery for fixing the rent in the absence of agreement in the lease.

Held - The appeal would be dismissed for the following reasons--

(1) On the true construction of the rent review clause the 'rent [to] be agreed' by the parties was a fair rent excluding the tenant's improvements, provided however that in the event of depreciation in the value of the premises the rent was not to be reduced below £ 1,250 per annum. The clause could not mean that in default of agreement the rent was to continue at the rate of £ 1,250 per annum because such a construction would render the clause inoperative since the tenant would never agree to pay a higher rent (see p 1073 *c* to *f*, p 1975 *j* and p 1076 *c e g h*, post).

(2) Since there was a subsisting lease and it was conceded that some rent was payable in default of agreement, the court could, despite the absence of an arbitration clause, imply a term to fill the gap in the lease where there was no agreement on the new rent, in order to give business efficacy to the lease, and, since the parties clearly intended that a fair rent should be fixed by agreement on the rent reviews, the court would imply a term that in the absence of agreement

the rent payable during the second five years should be the fair market rent excluding tenant's improvements (see p 1074 *d e h*, p 1075 *g* to *j* and p 1076 *c* to *j*, post); *Foley v Classique Coaches Ltd* [1934] All ER Rep 88 applied.

Notes

For rent review agreements, see 23 *Halsbury's Laws* (3rd Edn) 539, para 1197.

Cases referred to in judgments

Foley v Classique Coaches Ltd [1934] 2 KB 1, [1934] All ER Rep 88, 103 LJKB 550, 151 LT 242, CA, 40 *Digest* (Repl) 359, *2880*.

Kenilworth Industrial Sites Ltd v E C Little & Co Ltd [1975] 1 All ER 53, [1975] 1 WLR 143, 29 P & CR 141, CA; *affg* [1974] 2 All ER 815, [1974] 1 WLR 1069, 28 P & CR 263, *Digest* (Cont Vol D) 580, *3952c*.

King's Motors (Oxford) Ltd v Lax [1969] 3 All ER 665, [1970] 1 WLR 426, 21 P & CR 507, 31(1) *Digest* (Reissue) 277, *2300*.

Moorcock, The (1889) 14 PD 64, [1886-90] All ER Rep 530, 58 LJP 73, 60 LT 654, 6 Asp MLC 373, CA, 12 *Digest* (Reissue) 781, *5395*.

Appeal

By an originating summons the plaintiffs, Anthony Wilders Beer, William Paul Elliott de Beer and Michael Wills de Beer ('the Landlords'), sought the determination of the court on the questions (1) whether on the true construction of clause 1 of a lease dated 17 July 1968 made between them and the defendant, Harold Herbert Bowden ('the tenant'), in regard to premises known as 54-56 Torbay Road, Paignton, Devon, and of a memorandum to the lease dated 17 May 1971, the rental payable under the lease for the period between 25 March 1973 and 24 March 1978 was a proper and reasonable rent having regard to the market value of the premises on 25 March 1973, and (2) if so, whether the sum of £ 2,850 per annum represented a proper and reasonable rent. On 12 June 1975 Foster J gave judgment for the plaintiffs on the summons and ordered that the tenant was liable between 25 March 1973 and 24 March 1978 to pay a rental representing what the demised premises were reasonably worth on 25 March 1973 on a demise for a term of five years therefrom, provided that no account was taken of any improvements carried out by the tenant, and the rental was not to be less than £ 1,250 per annum. The judge ordered similar provisions to apply to the rental payable from 25 March 1978 to the end of the term. The tenant appealed. The facts are set out in the judgment of Goff LJ.

Ellen Solomons for the landlords.

Geoffrey Jaques for the tenant.

2 April 1976. The following judgments were delivered.

GOFF LJ

delivered the first judgment at the invitation of Buckley LJ. This is an appeal from a judgment of Foster J dated 12 June 1975, given in proceedings commenced by originating summons, raising questions as to the effect of the provision as to rent in a lease, dated 17 July 1968, of premises known as 54-56 Torbay Road, Paignton, in the county of Devon.

The appellant was the defendant in the proceedings and tenant under the lease. It is not necessary, I think, to read any part of the lease other than some parts of cl 1, by which clause the premises were demised for a term of ten years from 25 March 1968. The clause then reads--

> 'paying therefor as follows:--Until the 24th day of March 1973 (yearly and proportionately for any fraction of a year) the rent of £ 1,250 per annum and from the 25th day of March 1973 such rent as shall thereupon be agreed between the Landlords and the Tenant but no account shall be taken of any improvements carried out by the Tenant in computing the amount of increase, if any, and in any case not less than the yearly rental payable hereunder such rent to be paid in advance by four equal quarterly payments on the four usual quarter days.'

The term of ten years was increased in 1971 to fourteen years by a memorandum endorsed on the lease which reads as follows:

> 'Memorandum. In consideration of the covenants on the part of the Tenant contained in the within-written Lease the Landlords agree that the term of years

> contained in Clause 1 of the within-written Lease shall be read and construed as if the term of fourteen years were substituted therein in the place of ten years and the reference in the said Clause to a rent review in respect of the rent to be charged for the said premises from the 25th day of March 1975 shall be read and construed as if there were also inserted reference to a rent review for the rent to be charged for the said premises from the 25th day of March 1978 but that in all other respects the covenants conditions and agreements in the within-written Lease shall remain in full force.'

At the end of the first five years, the parties failed to agree on a new rent. In these circumstances, the landlords issued an originating summons, which was amended before the hearing, and, in its amended form, posed two question in these terms:

> '1. Whether upon the true construction of Clause 1 of a Lease made the 17th day of July 1968 between the Plaintiffs as Landlords and the Defendant as Tenant of premises known as 54 and 56 Torbay Road aforesaid and of the memorandum to the said Lease dated the 17th Day of May 1971 the rental payable under the said Lease (subject only to the provisions of Part II of the Counter-Inflation Act 1973 and orders made thereunder) between the 25th days of March 1973 and 1978 is a proper and reasonable rental having regard to the market value of the said premises on the 25th day of March 1973. 2. If yes, whether the sum of £ 2850 per annum represents such a proper and reasonable rental.'

It is not absolutely plain what happened at the hearing, because the judge came to the conclusion that he had decided something which was not in accordance with the submissions of either party, and on that account he made no order as to costs. But, as far as I can gather, except that he imported the restriction that one should not take account of tenant's improvements in ascertaining the market value of the premises, he did in fact (though perhaps by a different route) accept the submission which was being made on behalf of the landlords, or at any rate arrived at the same result.

In reply, it appears to have been suggested on behalf of the landlords that if the true view were that no rent was reserved at all for the second five years, then the lease was or had become void for uncertainty. That submission arose in that way only, and it was not submitted on behalf of the tenant, nor has it been submitted before us, that the lease was or became void.

The actual order which the judge made was as follows:

> 'This Court doth declare upon the true construction of Clause 1 of the said Lease [then it is described by its date and parties] and of a Memorandum [which is also described] that the [tenant] is liable to pay to the [landlords] (a) between 25th March 1973 and 24th March 1978 (subject only to the provisions of Part II of the Counter-Inflation Act 1973 and orders made thereunder) a rental representing what the demised premises at 54 and 56 Torbay Road Paignton Devon were reasonably worth on 25th March 1973 on a demise for a term of 5 years therefrom provided that (i) in computing such amount no account shall be taken of any improvements carried out by the [tenant] and (ii) the said rental shall not be less than £ 1,250 per annum and (b) between 25th March 1978 and 24th March 1982 a rental representing what the said premises are reasonably worth on 25th March 1978 on a demise for a term of 4 years therefrom subject to the same provisos as are set out in sub-paragraphs (i) and (ii) of paragraph (a) of this Order.'

The expression used there, 'what the said premises are reasonably worth', must, I think, mean what would be a fair rental value for the premises. I cannot see any other meaning which could be attributed to it. I think one should also point out that, of course, so far as para (b) of that order is concerned, it will only become operative subject to any agreement which the parties may make with regard to the rent for the last four years.

The landlords are content to stand on the order, but they have served a respondents' notice in which, should this court be of opinion that the order ought to be reversed or varied, they seek to make certain submissions as to the proper order and to revive the alternative contention that the lease might be void.

Counsel for the tenant, who has taken every point here which could be taken on behalf of the tenant, has put forward as his first submission an argument that the words in cl 1, 'and in any case not less than the yearly rental payable hereunder', on their true construction, mean 'and in default of agreement the yearly rental payable hereunder', that is, £ 1,250. He says that cl 1 is really in three parts: first, it reserves a rent of that amount for the first five years; second, it provides that the rent for the second five years shall be as the parties agree; and, third, so construing the words I have mentioned, he says it provides that in default of agreement the rent shall continue to be £ 1,250. He treats the words, 'but no account shall be taken of any improvements carried out by the Tenant in computing the amount of increase, if any' as if they were in parenthesis, but he does not take into that parenthesis the further words, 'and in any case not less than the yearly rental payable hereunder'.

I think, for my part, that that is an impossible construction. It is not, on the scheme of the clause as a whole, in my view, the natural meaning of the words; and, if one is to treat any part of it as in parenthesis, I think the provision about rent is as much in the parenthesis as the provision about tenant's improvement. But, secondly, that construction would make the clause futile, because, if in default of agreement the rent was to continue to be £ 1,250, obviously the tenant would never agree to pay more, however much the premises might appreciate in value, and conversely, in the unlikely event of them depreciating, the landlord clearly would not agree to accept less. All that that clause was doing, as it seems to me, was setting out the basis on which it was contemplated that the parties would seek to agree on the rent to become payable at the end of the first five years. I think 'such rent as shall thereupon be agreed' must be 'such fair rent'. It does not make sense otherwise. So the basis was that it was to be a fair rent, not taking into account improvements made by the tenant himself, and in the perhaps unlikely event of depreciation, the rent was not to be reduced below £ 1,250. Accordingly, in my judgment, that submission fails.

Then counsel for the tenant seeks to obtain the same result by a different method, by implying a covenant that in the absence of an agreement the rent shall be £ 1,250. In approaching that argument, it must be observed first, as I have said, that the tenant does not suggest that the lease ever was or has become void for uncertainty. If he had done so, I think he would have been in difficulties, but it is not necessary to pause to consider that further, because he has not done so, and the court has to approach this problem on the footing that there is a subsisting lease. Second, he concedes (and, in my judgment, rightly) that he cannot stay on there and pay no rent at all. Quite apart from the fact that one would naturally lean towards that conclusion, he has quite fairly indicated that there are provisions in the lease which support it and indeed render it inevitable. He has referred us to the covenant for quiet enjoyment and the provision about cesser or suspension of rent in the event of damage to the premises by fire.

That being so, we have to imply some term defining what the rent is to be. He submits that there are two alternatives: one £ 1,250; the other, a fair market rent for the premises; of course, subject to the qualification about tenant's improvements. Given, therefore, that some implication has to be made, I asked him on what in the lease he founded the implication that the rent should be £ 1,250. His answer was: 'I say, look at the two alternatives, look at such authorities as there are, and where market rent is implied they show that there must be something in the nature of an arbitration clause to fix a rent. Here there is nothing to justify implication of market rent.' He said: 'If the landlord wants to get an increased rent, there must be something in the lease clearly giving him the right to that advantage.' Buckley LJ has suggested that that might be improved on in this way: cl 1 shows there must be at least £ 1,250 and there is no clear machinery for imposing a higher rent. Whichever way you look at it, I can see no

justification whatever for accepting the alternative implied term which crystallises and fixes the rent for the residue of the 14 years at the sum of £ 1,250.

The authorities on which counsel for the tenant relied were, first, *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426. But that case, in my judgment, is wholly distinguishable and does not really assist at all. That was a case of an option to renew, and the exercise of the option could operate, if at all, only to create a contract. Valid contract it could not be, because an essential term, namely the rent, was neither agreed nor ascertainable. That, in my judgment, poses an entirely different problem from that which arises where one starts with the premise that there is a subsisting lease which creates an estate in the land and with the premise that the court must imply some term, because it is conceded that rent is payable.

The second authority, *Foley v Classique Coaches Ltd* [1934] 2 KB 1, [1934] All ER Rep 88 is relied on by both sides. The landlords in the court below relied on it in support of implying a fair rent by analogy with what was there implied, a reasonable price. But counsel for the tenant relies on it because he says it shows that one could only make an implication of that character if assisted by the presence of an arbitration clause. It is fair to say that if one looks only at the judgment of Maugham LJ he did appear to be relying substantially on the arbitration clause in arriving at his conclusion (see [1934] 2 KB 1 at 16, [1934] All ER Rep 88 at 94). But I do not think that is the true ratio of the case. Where you have got an arbitration clause, then if you imply aterm that there shall be a reasonable price (as it was in that case) or a fair rent (as it would be in this), any dispute as to what is reasonable or fair falls within the arbitration clause; and, if you have not got one, it falls to be resolved by the court. But, in my judgment, the presence or absence of an arbitration

clause does not matter. I would refer to a passage in the judgment of Scrutton LJ where, whilst it is true he referred to an arbitration clause, he put the matter as one of general principle. He said ([1934] 2 KB 1 at 10, [1934] All ER Rep 88 at 91):

> 'In the present case the parties obviously believed they had a contract and they acted for three years as if they had; they had an arbitration clause which relates to the subject-matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price.'

That is what it applies to. Then he goes on:

> 'By analogy to the case of a tied house there is to be implied in this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality. For these reasons I think the Lord Chief Justice was right in holding that there was an effective and enforceable contract, although as to the future no definite price had been agreed with regard to the petrol.'

Greer LJ said ([1934] 2 KB 1 at 11, [1934] all ER Rep 88 at 92):

> 'I think the words of Bowen L.J. in *The Moorcock* ((1889) 14 PD 64, [1886-90] All ER Rep 530) are clearly applicable to a case of this kind, and that in order to give effect to what both parties intended the Court is justified in implying that in the absence of agreement as to price a reasonable price must be paid, and if the parties cannot agree as to what is a reasonable price then arbitration must take place.'

So, again, one implies a term on general principles, and then only turns to the arbitration clause to resolve any dispute arising on the implied term.

The third and last authority on which counsel for the tenant relied was *Kenilworth Industrial Sites Ltd v E C Little & Co Ltd* [1974] 2 All ER 815 at 817-818, [1974] 1 WLR 1069 at 1071 where Megarry J said:

> 'First, the lease reserves no rent beyond the first five years. The question is not one of the landlord having an option to displace an agreed rent for the later years of the term. If no new rent is ever ascertained, then as a matter of obligation under the terms of the lease, no rent at all is reserved for the last 16 years of the term. Counsel

> for the tenant repudiated any idea that the tenant could remain rent-free after the first five years, and accepted and asserted that the tenant must pay rent at the rate initially reserved, namely, £ 2,980 a year. This, however, is not what the lease says, and counsel had to rely on a term to this effect being implied in the lease. Such a term, however, would be entirely contrary to the mechanism laid down by cl 5, and would have to be a term implied if, and only if, the landlord failed to operate cl 5 according to its tenor. There seem to me to be considerable difficulties in implying a conditional term of this kind.'

But, of course, Megarry J did not have the problem whether anything should be implied and, if so, what, before him, because there was a clause which gave the landlord a right to require an increase in rent to be ascertained in accordance with certain prescribed machinery. The point in *Kenilworth's* case was that the landlord failed to serve notice to start that machinery working within the time prescribed. The question at issue was whether time was of the essence and he was therefore too late or not. The judge held that he was within time. Therefore, the machinery operated, and there was no necessity to imply anything, or room for doing so.

That case went to the Court of Appeal, and it is unnecessary to refer to the judgments there except for one passage, where what I have just been saying is clearly pointed out by Megaw LJ. He there said ([1975] 1 All ER 53 at 55, [1975] 1 WLR 143 at 146):

> 'But, says counsel for the tenants, it is proper and necessary to imply into this lease the provision that if the landlords fail within the stated time to give the notice seeking agreement or arbitration, then the rent which was payable in the preceding period shall continue to be the rent to be paid during the succeeding five years. For myself, I am quite unable to see that there is any valid basis for implying such a term in this lease. It would, in my judgment, be inconsistent with the express provisions of cll 1 and 5, whether read separately or together. Moreover, the provisions of the second proviso cannot, in my judgment, be ignored, and if they are not ignored there is no reason for implying such a term.'

That was because the proviso said that the landlord was not to fail in to exercise of ascertainment of the new rent merely because he was out of time.

Therefore, as it seems to me, the authorities do not assist counsel for the tenant. On the contrary, they are against him, because the nearest case to the present one is *Foley's* case, where the court did imply a reasonable price, and did so, as I think, quite clearly without having to rely on the arbitration clause. At all events, in my judgment, such a clause is not essential. Therefore, one is left with the two alternatives which have been posed.

Now, the court must imply a term in order to give business efficacy to the contract, and I ask myself: why should it choose the alternative which is inconsistent with the basis which the parties showed they contemplated, rather than the one that implements it? Really, counsel for the tenant is attempting by an implied term to get himself back into the first submission, that of an implied agreement fixing a rent in default of agreement, and his second argument produces the same futility. It is quite obvious from cl 1 that the parties intended that the rent should be increased if the premises appreciated in value, and none the less so although they used the words 'if any'. They clearly contemplated also, as it seems to me, that the rent should be increased to such amount as would be a fair rent for the premises excluding tenant's improvements. They failed to agree. There is a hiatus. As the judge rightly held, that hiatus has to be filled by an implied term, and it seems to me quite obvious that one must imply the alternative which gives effect to that clearly expressed intention of the parties.

In my judgment, therefore, the judge was right; and I would dismiss the appeal.

GEOFFREY LANE LJ.

I agree. Had this been a contract of sale or an ordinary commercial contract of some sort, there would be a great deal to be said for the view that

from the date of the first rent review in March 1973 the contract was void for uncertainty, the parties having failed to agree on a vital term of the contract. But here there is a subsisting estate, and a subsisting estate in land, the lease, which

is to continue until 1982, 14 years from the date of the lease itself. It is conceded by the tenant that some rent must be paid in respect of these premises by the tenant, and therefore it follows that the court must imply something, some term which will enable a rent to be fixed.

Counsel for the tenant submits that on the face of the agreement and on the true construction of it, the landlord has failed to stipulate for anything more than the original rent of £ 1,250 per annum, and that therefore the court should fix that amount as the proper rent for the next period. Counsel concedes that if that is the case, then on the further review which is due to take place in 1978, exactly the same thing will happen and the tenant will be in the happy position of paying a rent for the whole of the rest of the term which is well below the market value. That is plainly a highly undesirable result on any view, because it would mean in effect that the court would be implying an unfair rent. But, for the reasons which have been set out by Goff LJ, that is not a tenable construction of the terms of the lease.

The court should, if it can, give effect to the intention of the parties as exhibited from the terms of the agreement itself. That intention was quite clearly to fix at these moments of review a fair rent by agreement between the parties, subject to the provisos which they set out.

Now, in the absence of such agreement, the court, as is made quite clear from the decision of this court in *Foley v Classique Coaches* [1934] 2 KB 1, [1934] All ER Rep 88, must try to produce the same effect for the parties. It seems to me that the judge's order in this case produces precisely that desirable effect.

For those reasons, as well as those already advanced by Goff LJ, I too would dismiss this appeal.

BUCKLEY LJ.

I agree. It appears to me that the introduction by implication of a single word in the clause in the lease relating to the rent to be payable solves the problem of this case; that is, the insertion of the word 'fair' between the words 'such' and 'rent'. If some such implication is not made, it seems to me that this would be a completely inoperative rent review provision, because it is not to be expected that the tenant would agree to an increase in the rent if the rent to be agreed was absolutely at large. Clearly the parties contemplated that at the end of five years some adjustment might be necessary to make the position with regard to the rent a fair one, and the rent review provision with which we are concerned was inserted in the lease to enable such an adjustment to be made. The suggestion that on the true construction of the clause it provides that the rent shall continue to be at the rate of £ 1,250 a year unless the parties otherwise agree would, in my opinion, render the provision entirely inoperative, because, as I say, one could not expect the tenant voluntarily to agree to pay a higher rent.

For the reasons which have been developed by Goff and Geoffrey Lane LJJ in the two judgments which they have delivered, I am in agreement that this appeal should be dismissed, the judge having, I think, arrived at the right conclusion.

Appeal dismissed.

Solicitors: Scott, Son & Chitty, Epsom (for the landlords); Boxall & Boxall agents for R Hancock & Son, Callington (for the tenant.

Diana Brahams Barrister.