

Supreme Court

Spry, C.J.

24, 26 April 1979.

*Landlord and tenant — business premises — assessment of rent — Landlord and Tenant (Miscellaneous Provisions) Ordinance, s.47.*

In determining under s.47 of the Landlord and Tenant (Miscellaneous Provisions) Ordinance (Cap. 83, 1965-69 Ed.) the rent to be paid under a new tenancy of business premises, the court should weigh the general factors, the special factors, the rents of comparable properties and the opinions of professional witnesses, and then arrive at its own conclusion.

### **Originating summons**

This was an application for the grant of a new lease of shop premises in Main Street. All terms had been agreed, except the rent to be paid.

L. W. Triay for the applicant

A. V. Stagnetto for the respondent

9 May 1979: The following judgment was read —

This is an application by originating summons for the grant under Part III of the Landlord and Tenant (Miscellaneous Provisions) Ordinance of a new tenancy of shop premises known as No. 253 Main Street, situate on the corner of George's Lane. The only issue now before me is the rent to be paid.

Under a lease granted in April 1974 the tenant paid a rent of £95 monthly. Mr. Louis Triay, who appeared for the tenant, relying on the evidence of Mr. Prescott, an estate agent and valuer, and an agreed list of more or less comparable properties, offered a rent of £110 per month. Mr. Triay also pointed out that when No. 253 was let, vacant, the lease contained an option for renewal at £105 per month, which was not exercised. Mr. Triay argued that the figure of £105 was not only an indication of the landlord's assessment of the likely rise in rents but

also indicates that the rent reserved was high. Mr. Stagnetto for the landlord, relying on the evidence of Mr Mark Hassan, another estate agent and valuer, asked for a rent of £185 per month.

Mr. Stagnetto's main argument was that the method of using the rents of comparable properties as a yardstick is essentially unsound because it must indicate a level of rents that obtained in the past and not that of today. Therefore, in a time of rising rents it will operate as an inhibiting or depressing factor.

Mr Stagnetto produced a list of six shops in Main Street which had been let with vacant possession and claimed that when the rents reserved were compared with those in Mr Triay's list, it became apparent that there is in practice a differential between the rents of premises let vacant and those where tenancies had been renewed.

Section 47 of the Ordinance provides that a rent determined by the court is to be that at which the premises might reasonably be expected to be let in the open market by a willing lessor, disregarding the fact that the tenant has been in occupation. In other words, the court has to approach the question as if the premises were vacant. Mr. Stagnetto submitted that this has not been done. He cited *Kemchan's Ltd. v. Imossi* (unreported) as a case where the judgment had the effect of depressing rents below the market level

Mr. Stagnetto argued that since the market level may vary from day to day and there are innumerable factors that may affect the rent for any particular property, the court ought to rely on the opinion of a valuer, who will have the feel of the market and who will take all the relevant factors into account. Mr Stagnetto claimed that Mr Prescott had failed to take into account the differential between the rents obtained for vacant premises and those agreed or assessed on renewals and so had in effect failed to observe the requirements of s.47. He asked the court to accept Mr. Hassan's valuation.

I think there is logic in Mr Stagnetto's argument but I cannot accept that the court should accept the opinion of a valuer, however able, to the exclusion of the other evidence. This would be to abdicate its duty. Moreover, there would be the risk that if the valuer's opinion was too high, and valuers can

err, the effect would be to inflate the market. I think the proper course is for the court to assess the general factors, the special factors, the actual rents, taking into account the dates when they were agreed or assessed, of comparable properties and the opinions of the professional witnesses and then arrive at its own conclusion.

I begin with the general factors. First, there was evidence which was not disputed, that the most favoured part of Main Street is between John Mackintosh Square and the intersection of Engineer Lane. No. 253 is to the south of that area. Secondly, it is quite apparent from the agreed lists that, in the absence of special factors, the rents of small shops are relatively higher than those of large shops. No. 253 is a very small shop of 220 square feet, smaller than any of those shown in the agreed lists. Thirdly, vacant shops in Main Street rarely come on the market and when they do, there is no difficulty in finding a tenant. Fourthly, because the market is so restricted, special features and special needs play a disproportionate role in many lettings.

The special factors where No. 253 is concerned are that it is a corner shop, with a modern style frontage, that there is no pavement outside it and that it is exceptionally exposed to the afternoon sun. It does not, according to Mr Prescott, enjoy the normal advantages of a corner shop, because George's Lane is so narrow and carries so much traffic that it is virtually impossible for anyone to stand and look in the window that fronts on the lane. This also precludes the use of an awning to protect the shop from the sun. I have heard no evidence on the state of repair of the shop, so I assume this to be a neutral factor. The agreed term for the lease is two years and eleven months.

Turning now to comparability, I have looked at the particulars of all shops shown in the agreed lists or referred to in evidence. I began by excluding all shops with an area of more than 500 square feet as not being truly comparable. I have also excluded Nos. 145 and 147, the two shops at the front of the Cazes Arcade: this is a new building on what was described by Mr Prescott as the prime site in Main Street, and he was not challenged on this. Also, these two shops were let at the same rent about the same time although the one has an area one third larger than the other, which again indicates that this was a special situation.

That leaves 14 shops, of which 7 are in what was described as the better area and 7 south of that area. (I base this on Mr

Prescott's statement that No. 158 is on the corner of John Mackintosh Square). The rents vary from £2.60 to £8.53 per square foot per annum. The shop with a rent of £8.53 is No.187. According to Mr Prescott, this shop has a wide frontage with large windows, with quite a wide pavement and is in the part to Main Street where traffic is restricted. The rent was agreed this year.

Two rents were agreed last year, No. 246, (488 sq. ft.) at £3.44 and No. 248, (417 sq. ft.) at £3.88. In 1977, rents were agreed for two shops at what is said to be the better end, No. 96 (262 sq. ft.) at £4.58 and No. 94 (230 sq. ft.) at £5.22. In 1976, a rent of £5.47 was agreed for No. 229 (329 sq. ft.).

In 1975, rents were agreed for two shops, No. 300 (447 sq. ft.) at £3.49 and No. 259 (230 sq. ft.) at £5.48. There is no record of rents agreed or assessed for small shops in 1974. There are several shops in respect of which the date when the rent was fixed has not been given. Most leases appear to be for five years but I cannot assume this was so where the particulars are not available. I merely record that if these rents were for five years, they would not depart seriously from the general pattern.

I have dealt with these rents in some detail for two reasons: first, because they indicate a general level of rents for this class of shop between 1975 and 1977, and, secondly, because they tend to negative any substantial rise in the level of rents. It is difficult to draw firm conclusions from a small number of figures, but it would seem that particularly attractive shops attract much higher rents than formerly while the rents of the remainder have shown only a slight rise. This is important, because Mr Stag-netto referred to the rise in the cost of living and appeared to imply that there is a direct relationship between the level of shop rents and the cost of living. There may be, but there is no evidence to prove it and I am not prepared to assume it. I do accept Mr Hassan's evidence that the cost of building and of repairs has risen more than the general cost of living and it is obvious that this must eventually push rents up, although the effect is not necessarily immediate.

There was evidence regarding the Casemates development but I do not think it is of any help. Ninety-nine year leases of newly built shops have been sold for very high prices. They

are in quite a different location. But the reason I disregard them is because such different considerations arise in connection with a ninety-nine years lease as compared with one for less than three years.

On the information before me, I think the shops most comparable with No. 253 are No. 229 and No. 259. Mr Prescott considered No. 229 more desirable than No. 253 because it is fronted by a pavement. Mr Hassan's comment was that if No. 229 were now offered vacant on the open market, it would command a rent of £220-£230 per month, as against the present rent of £150. No. 259 is only very slightly bigger than No. 253, but Mr Prescott preferred it as having two good display windows and a pavement outside. Mr Hassan was not asked his opinion regarding this shop. I would add that I think a rent for less than three years should be somewhat lower than one for five years, both because the tenant has less security and because of the probability of inflation. In comparing these properties, I bear in mind the time that has elapsed since the rents were fixed.

Finally, I come to the opinions of the two professional witnesses. Mr Prescott based his opinion on the general level of rents shown in the list he prepared, qualified because of what he regarded as the particular disadvantages applying to No. 253. He was criticised by Mr Stagnetto for describing certain transactions as "higher than the market." I am not sure if he used those exact words but he certainly referred to certain lettings as above the normal level. I can see nothing wrong in this. As regards a particular shop at a particular time, the market price is the rent which is in fact agreed at arm's length between lessor and lessee, however high or low, but the fact that a tenant is prepared to pay or a lessor to accept a particular rent for a particular property at a particular moment does not necessarily mean that the market has risen or fallen, as the case may be. It may be indicative, but that depends how far it resulted from special considerations.

Mr Hassan said that over the last year he had ceased to think in terms of rent per square foot in comparison with other properties. Also, he did not take inflation into account. His method was to assess all relevant factors, including such matters as return on capital, and decide, on an ad hoc basis, in the light of his experience what rent could be obtained. In dealing with

vacant premises, the element of competition was important: it was this which distinguished the letting of vacant premises from renewals — and under s. 47 the premises had to be considered as if they were vacant. Mr. Stagnetto put the differential at 50% and on that basis submitted that Mr. Hassan's valuation was roughly in accord with the rents of comparable properties and with Mr Prescott's valuation if such a differential were added. I am not persuaded that the evidence establishes so high a differential and, while I accept that landlords and tenants are reluctant to come to court, I cannot believe that a number of landlords over recent years would have agreed to accept rents so much below the true level. Also, there is the other side of the coin: as Mr Prescott said in re-examination, a tenant who does not want to lose the goodwill he has built up may be induced to pay more than he considers appropriate.

In my opinion, Mr Hassan's figure is much too high. I think Mr Prescott's figure is a little on the low side. I assess the rent for No. 253 Main Street at £120 per month (£6.55 per sq. ft. per annum).