[1991–92 Gib LR 426]

ATTORNEY-GENERAL v. GLOBE TRADING COMPANY LIMITED

SUPREME COURT (Alcantara, A.J.): December 14th, 1992

Landlord and Tenant—rent—rent review—lease not invalidated by uncertainty in rent review clause—court may imply terms for calculation of rent if parties clearly intended review but unable to agree method

The Attorney-General applied for a declaration in relation to a rent review clause in a lease of Crown property.

The Governor granted a lease of a Crown property to a company, which assigned its interest to the defendant. The lease stated that the monthly rent would be reviewed every five years from its commencement. The defendant was informed during the fifth year of the lease that the rent was to be increased fourfold, and complained that since there was no mechanism for carrying out a rent review, no increase could be made without its consent as tenant.

The Attorney-General applied to the court for a declaration that the uncertainty in the rent review clause did not invalidate the lease, and asked the court to lay down its own rent review machinery and set the amount of the increased rent.

Held, adjourning the proceedings:

The lease was not void by reason of the uncertainty in the rent review clause, even though it was an important term of the contract between the parties. Since both parties conceded that some rent was payable under the lease and it had clearly been their intention from the outset that it should be subject to review every five years, the court could imply terms to make the agreement workable. Accordingly, the parties would be given the opportunity to agree a figure for the current rent and produce a suitable method of determining future rent from the date of the next review, failing which the court would do so (para. 2; paras. 7–9).

Cases cited:
(1) *Bates (Thomas) & Son Ltd.* v. *Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505; [1981] 1 All E.R. 1077, distinguished.
(2) *Beer* v. *Bowden*, [1981] 1 W.L.R. 522n; [1981] 1 All E.R. 1070, applied.
(3) *Brown* v. *Gould*, [1972] Ch. 53; [1971] 2 All E.R. 1505, applied.

A.A. Trinidad, *Crown Counsel*, for the Attorney-General;
C.A. Gomez for the defendant.

1 **ALCANTARA, A.J.:** An originating summons on behalf of the lessor ("the plaintiff") was issued on November 3rd, 1991, asking for the following declarations:

> "1. A declaration that the uncertainty in the rent review clause contained in the lease dated February 9th, 1986 between His Excellency Air Chief Marshal Sir Peter Terry, on the one part, and Fabri Constructions Ltd., on the other part, does not invalidate the said lease.
>
> 2. That the court hereby substitute and lay down its own rent review machinery in the lease.
>
> 3. That the court hereby set the amount of the increased rent."

2 The matter came on for hearing exactly a year later, on November 13th, 1992, and after hearing counsel I made the following order:

> "I will give my reasons in due course, but I find that this is a proper case for this court to provide a machinery to make the review clause workable.
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> I propose to adjourn the case to enable both parties to come up with a suitable proposal. If there is no agreement I will declare what the proper machinery should be. That is for the future, *i.e.* for the review clause for the 10th year commencing January 1st, 1996 and thereafter.
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> In so far as the present rent is concerned, *i.e.* the rent commencing January 1st, 1991, I shall declare the same at the adjourned hearing. The parties might agree to it before then. If not, affidavits of value should be filed as soon as possible, including affidavits of market value as at January 1st, 1986.
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> The parties should ask for a date for the adjourned hearing. I have some dates available."

3 Now for the reasons for the above order. By a deed of lease dated February 9th, 1986, His Excellency the Governor granted a term of 21 years to the lessee in respect of a Crown property at 45, Devil's Tower Road, at a rent. The draftsman used the following words in the said lease:

> ". . . [P]aying therefore the rent of three hundred and fifty pounds (£350) per month during the first five years of the term, and subject thereafter to a review at the end of the fifth, tenth, fifteenth and twentieth years."

The premises, with the consent of the lessor, were assigned by the lessee on April 17th, 1989 to the Globe Trading Co. Ltd., the defendant in this action and now the lessee of the premises.

4 Before the end of the fifth year the lessor informed the present lessee that the rent for the premises was going to be increased pursuant to the rent review clause from £350 to £1500 per month. This must have shocked the lessee, which took up the point that there was no machinery for carrying out a rent review. It took the stand that the review had to be by mutual consent, and that it was not consenting to anything.

5 Mr. Trinidad, on behalf of the plaintiff, in a well-prepared address, submitted that the authorities and case law showed that if a rent review clause is uncertain or fails to provide for any formula or machinery to determine a new rent, the courts will determine the question themselves. He added that the courts have shown an unwillingness to allow the parties' intention to be defeated. In support of his submission he has referred me to a number of authorities. I shall start with *Woodfall's Law of Landlord & Tenant*, para. 8.017, at 8/14 (Release 22: May 1991), which states that "the modern tendency, especially in rent review cases is for the court to imply or supply machinery." This was followed by a quotation from Bernstein & Reynolds, in the *Handbook of Rent Review*, para. 3–61, at 317 (Service 4: August 1985): "In general the courts have demonstrated an unwillingness to allow want of, or defective, machinery to defeat the intention of the parties that there should be a review."

6 The first case I want to refer to is *Brown* v. *Gould* (3). That was a case of an option for a further term of 21 years and the rent to be fixed having regard to the market value of the premises, but providing no machinery for fixing the rent. Megarry, J. had this to say, in reference to another decision ([1971] 2 All E.R. at 1510):

> "I do not think that there is anything in that decision to preclude the court from resolving a dispute as to the rent to be made payable under a lease if the parties disagree as to the quantum resulting from the application of a proper formula to the facts of the case. If the parties disagree as to the rent payable under such a formula, then in my judgment, since the lease provides no other machinery, the court has jurisdiction to determine it."

7 The next case is *Beer* v. *Bowden* (2), another rent review case, in which at the end of the first five years, the parties failed to agree on a new rent, and the court provided a machinery to make the defective rent

review workable. I think that the problem which faces the court in these cases comes out with pristine clearance in the judgment of Geoffrey Lane, L.J. ([1981] 1 W.L.R. at 527–528):

> "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 review in March 1973 the contract was void for uncertainty, the parties having failed to agree on a vital term of the contract. But 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.
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> Mr. Jaques, on behalf of the tenant, submits that on the face of the agreement and upon the true construction of it, the landlords have failed to stipulate 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. Mr. Jaques concedes that if that is the case, then upon 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, L.J., that is not a tenable construction of the terms of the lease.
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> 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 reviews a fair rent by agreement between the parties, subject to the provisos which they set out.
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> In the absence of such agreement, the court, as is made clear from the decision of this court in *Foley* v. *Classique Coaches Ltd.* . . . must try to produce the same effect for the parties. It seems to me that the judge's order in this case produces precisely the desirable effect."

8 Now, what was the intention of the parties in the case before me? Construing the lease, I have no doubt that the intention was that there should be a rent review every five years.

9 Part of Mr. Gomez's argument before me is reminiscent of Mr. Jaques's argument before the Court of Appeal in *Beer* v. *Bowden*. He, however, on behalf of the defendant, relies heavily in the case of *Thomas*

Bates & Son Ltd. v. *Wyndham's (Lingerie) Ltd.* (1). That was a case in which the landlords sought rectification of a lease, and of course the issue was what was the common intention of the parties, and evidence was required to counteract the evidence of the instrument. In this case the instrument (the lease) speaks for itself, and the landlords are not seeking to rectify it, but to make the intention (the rent review clause) workable. On the authorities produced by the plaintiff, I am justified in making the order I made on November 13th, 1992.

Application dismissed.
