BLAND LIMITED v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, A.J.): July 19th, 1996

Landlord and Tenant—rent—rent review—demised premises—court to consider whole of lease in identifying demised premises—prima facie refers to premises in existence at grant of lease, not at commencement of term

Landlord and Tenant—rent—rent review—valuation—presumption that terms of notional letting are same as under existing tenancy may be displaced by express words to contrary, even if against obvious commercial purpose of lease, e.g. valuation on basis of ground rent for demised premises, disregarding value of buildings

The plaintiff company applied for a declaration as to the basis for a rent review under a commercial lease.

The plaintiff was the lessee of a ship repair yard comprising two adjacent pieces of land, under long leases from the Government. It renegotiated its occupation of the land with the intention of developing the land as a shopping complex. The existing buildings were demolished some three years before the execution of a new lease and the planned construction of new buildings was completed less than a year later.

The term of the new lease began just over three years prior to the execution of the lease. The plan attached showed unspecified buildings on the site and referred to the site as an engineering works, a term which the parties agreed meant the ship repair yard.

The recitals in the new lease explained that the grant of the premises shown on the plan was in consideration of the plaintiff's surrending to the Government the premises let under the two previous leases (in fact the

same land) and in consideration of the redevelopment and construction work carried out by the plaintiff on those premises by the building of the new shopping complex.

A rent review clause provided that, failing agreement by the parties at a future date, an arbitrator should nominate a yearly rent at which the demised premises might reasonably be expected to be let at the review date, disregarding for this purpose any increase in their value attributable to any buildings erected on them during the three-year period of the term before the execution of lease.

The plaintiff applied to the court for a declaration that the new rent should be assessed by the arbitrator on the basis of the market value of the ground rent alone, disregarding any buildings past or present on the site.

It submitted that (a) since a lease could operate only from the time of its execution, the demised premises referred to in the rent review clause were those in existence at the date of execution, namely the site of the shopping complex and not the original buildings, which had by then been demolished; (b) the recitals in the lease, which referred to the completed building and development works and to the shopping complex by name, showed that this must have been the intention of the parties; (c) furthermore, since the plan attached to the lease did not define the structures on the site as being the original buildings, those buildings could not be taken into account in valuing the land; and (d) since the rent review clause required that an arbitrator disregard any increase in value due to buildings constructed within three years before execution of the lease, an assessment of rent must be based on the ground rent alone.

The Attorney-General submitted in reply that (a) the court should have regard, in deciding upon the basis for the new rent, to both the wording of the lease as a whole and to the commercial purpose of the rent review clause, which was to ensure that long-term increases in the value of property were reflected in the rent charged; (b) it was clear from the wording of the clause itself that the phrase "demised premises" referred to both land and buildings (not least because increases in the value attributable to such buildings were expressly to be disregarded), and, since the term of the lease began more than three years before its execution, the buildings referred to were those on the site at that time, namely the ship yard, its offices, stores and accommodation; (c) the recitals indicated also that the demised premises included the ship repair yard premises let under the two previous leases, since those leases were replaced by the new lease; (d) moreover, the plan attached to the new lease described the premises as the engineering works (*i.e.* the ship repair yard), not a shopping complex, and accordingly the arbitrator should assess the new rent on the basis of the value of the land at the beginning of the term with its original buildings, disregarding any increase due to the subsequent development.

Held, making the declaration sought:

(1) The court was required to consider the terms of the lease as a whole in deciding the proper basis for a rent review. In the present case, it was

clear that the demised premises referred to in the review clause were those in existence at the time of the grant of the lease, namely the shopping complex which stood on the site at the time of execution, since the recitals referred to them by name as a completed project, the lease described them by reference to the plan and the plan showed buildings which must have been there at the time of the drafting. The recitals did not state, as contended by the defendant, that the original premises (with their buildings) let under earlier leases which were surrendered in consideration for the grant of the new lease were to be the demised premises under the new lease. Those buildings had been demolished by the time the lease was executed (page 327, line 39 – page 328, line 36).

(2) As the terms of the rent review clause itself gave rise to ambiguity, it was to be presumed that the notional letting upon which the arbitrator should base his assessment would be on the same terms as the existing tenancy, *subject to express words to the contrary*. Therefore, even though such an interpretation appeared to conflict with the obvious commercial purpose of the lease, the arbitrator should base his assessment of the rent at which the demised premises might reasonably be let on the value of the ground rent alone, since the buildings currently on the site had been constructed after the date expressly specified in the rent review clause (page 328, line 37 – page 329, line 3; page 329, lines 21–37).

Cases cited:
(1) *Basingstoke & Deane Borough Council* v. *Host Group Ltd.*, [1988] 1 W.L.R. 348; [1987] 2 E.G.L.R. 147, *dicta* of Nicholls, L.J. applied.
(2) *Brett* v. *Brett Essex Golf Club Ltd.*, [1986] 1 E.G.L.R. 154; (1986), 52 P. & C.R. 330.
(3) *British Airways PLC* v. *Heathrow Airport Ltd.*, [1992] 1 E.G.L.R. 141.
(4) *British Gas Corp.* v. *Universities Superannuation Scheme Ltd.*, [1986] 1 W.L.R. 398; [1986] 1 E.G.L.R. 120.
(5) *Cadogan (Earl)* v. *Guinness*, [1936] Ch. 515; [1936] 2 All E.R. 29.
(6) *Goh Eng Wah* v. *Yap Phooi Yin*, [1988] 2 E.G.L.R. 148.

A.V. Stagnetto, Q.C. for the plaintiff;
P.J. Isola for the defendant.

PIZZARELLO, A.J.: In this case the plaintiff seeks a declaration that upon the true construction of a lease dated May 2nd, 1989 ("the lease"), made between His Excellency the Governor of Gibraltar and the plaintiff as lessee, on any rent review under the terms of the said lease the new rent is to be assessed on the basis of the market value of the ground rent alone disregarding any buildings constructed thereon or any building which may have been constructed thereon in the past and subsequently demolished.

The facts of the case are agreed and are as follows: By virtue of an indenture of lease made on December 27th, 1951 between Her Majesty's Principal Secretary of State for the War Department and M.H. Bland & Co. Ltd., a plot of land as therein described was leased for a term of 60 years. By virtue of another lease made between the Governor of Gibraltar and M.H. Bland & Co. Ltd., a further piece of land contiguous to the first was leased for a term of 45 years from January 1st, 1967. Both these leases were duly assigned by M.H. Bland & Co. Ltd. to the plaintiff. These premises were known as Bland's Ship Repair Yard.

In or about 1986 the plaintiff was minded to redevelop the site of the repair yard and negotiations followed. These negotiations took place between the plaintiff and the Property Services Agency and there was input by the Government of Gibraltar at a late stage. The negotiations were finalized with the grant of the lease in 1989 to which a plan was annexed. On the plan the site of the repair yard is described as "site of M.H. Bland & Co. Ltd. Engineering Works." Shortly after the negotiations began, the building on the site was demolished and nothing then stood on the site. By April 1986, the demolition was complete. Soon after that the plaintiff constructed the building which today occupies the site and is known as the Rotunda and which was completed by January 1987. In 1989 the lease was granted. Clause 6 of the recitals states:

> "In consideration of the substantial works of redevelopment and construction carried out by the lessee on the first and second demised premises and the redevelopment of the same into a supermarket, restaurant and shops and known as the Rotunda Building and in further consideration of the payment by the lessee to the lessor of a premium of £45,000 the lessor has agreed to grant to the lessee (upon the lessee surrendering to the lessor the first and second leases) a new lease of all those premises described in the First Schedule hereto for a term of 87 years on the terms and conditions hereinafter reserved and contained."

The First Schedule reads as follows:

> "*Premises Demised*
>
> All That piece of ground (at present within the boundaries of land occupied by the Secretary of State for Defence) situate at North Front, Gibraltar which land and buildings are shown coloured pink and blue on the plan annexed hereto and being drawing No. DLA/GIB/14/86 and also all that pier shown coloured black on the said plan and containing in the whole 99,000 sq. ft. or thereabouts."

The clause which requires consideration by this court is contained in the Third Schedule. The Third Schedule reads as follows:

> "THE THIRD SCHEDULE above referred to
>
> The rent payable by the lessees during the period following December 31st, 1991
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> l. In this lease 'review date' means January 1st, 1992 and in every tenth year thereafter and 'review period' means the period

starting with any review date up to the next review date or starting with the last review date up to the end of the term hereof.

2. The yearly rent payable from January 1st, 1992 and during each successive review period shall be a rent equal to the rent previously payable hereunder or such revised rent as may be ascertained as herein provided whichever be the greater.

3. Such revised rent may be agreed at any time between the lessor and the lessee or (in the absence of agreement) determined not earlier than the relevant review date by an arbitrator, such arbitrator to be nominated in the absence of agreement by or on behalf of the President for the time being of the Royal Institution of Chartered Surveyors on the application of the lessor or the lessee made not earlier than six months before the relevant review date but not later than the end of the relevant review period and so that in the case of such arbitration the revised rent to be awarded by the arbitrator shall be such as he shall decide is the yearly rent at which the demised premises might reasonably be expected to be let at the relevant review date—

(A) on the following assumptions at that date:

(i) that the demised premises:

(a) are available to let on the open market without a fine or premium with vacant possession by a willing landlord to a willing tenant for a term of ten years or the residue then unexpired of the term of this lease, (whichever be the longer);

(b) are to be let as a whole subject to the terms of this lease (other than the amount of the rent hereby reserved but including the provisions for review of that rent);

(c) are fit and available for immediate occupation;

(d) may be used for any of the purposes permitted by this lease as varied or extended by any licence granted pursuant thereto;

(ii) that the covenants herein contained on the part of the lessor and the lessee have been fully performed and observed;

(iii) that no work has been carried out to the demised premises which has diminished the rental value and that in case the demised premises have been destroyed or damaged, they have been fully restored;

(iv) that no reduction is to be made to take account of any rental concession which on a new letting with vacant possession might be granted to the incoming tenant for a period within which its fitting out works would take place;

(B) but disregarding:

(i) any effect on rent of the fact that the lessee its sub-lessees or their respective predecessors in title have been in occupation of the demised premises;

(ii) any goodwill attached to the demised premises by reason of the carrying on thereat of the business of the lessee its sub-lessees or their predecessors in title in their respective businesses; and

(iii) any increase in rental value of the demised premises attributable to the existence at the relevant review date of any improvement to the demised premises or any part thereof carried out with consent where required otherwise than in pursuance of an obligation to the lessor or its predecessors in title except obligations requiring compliance with ordinances or derections [*sic*] of local authorities or other bodies exercising powers under Ordinance or Royal Charter by the lessee, its sub-lessee or their respective predecessors in title during the said term or during any period of occupation prior thereto arising out of an agreement to grant such term;

(iv) any increase in rental value of the demised premises attributable to any buildings erected thereon since January 1st, 1986."

I am told that the matter of the review of rent is before an arbitrator but that he requires the opinion of the court to enable him to determine the rent properly.

The clause in issue is cl. 3(B)(iv). Both counsel agreed that I should construe this clause on a reading of the lease alone. The current dispute centres upon the basis on which rent should be assessed. The plaintiff contended that the rent should be based on the rental value of the ground alone because the Rotunda Building cannot be taken into account pursuant to the provision of cl. 3(B)(iv). It submitted further that at the date of the lease in 1989, "the demised premises" meant the premises demised at the time, namely the Rotunda Building, as the old building did not exist. The defendant contended that the revised rent should be based at rack rent on the rental value of the premises as they stood before the old building was demolished. The defendant accepted that the Rotunda cannot be taken into account.

Mr. Stagnetto for the plaintiff argued that whilst each case has to be considered on its own facts, the case of *Brett* v. *Brett Essex Golf Club Ltd.* (2) shows that the "demised premises" should be taken as meaning the premises demised at the time the lease is granted. A lease operates as a grant only from the time of its execution: see *Earl of Cadogan* v. *Guinness* (5) and Woodfall, 1 *Landlord & Tenant*, para. 5.069, at 5/31 (Release 35, January 1996). In this case the operation of the lease takes

effect from May 2nd, 1989. It is the term which is computed from January 1st, 1986. The plaintiff had remained in occupation under the terms of the previous two leases until the premises comprised in and demised under those leases were surrendered on May 2nd, 1989. He submitted that in addition the defendant's arguments were unsound because they were really making an artificial assumption which built hypothesis upon hypothesis. The lease was very clear. It defined the demised premises in the First Schedule. There was a plan and the buildings within the site were not defined, which contrasted with the definition of other buildings which *were* found on the plan and it made no sense to relate the covenants in the lease in respect of the "demised premises" with buildings which had been demolished.

Mr. Isola for the defendant pointed out that in cl. 1 of the lease the lessor granted a new lease of the premises described in the First Schedule which included the first demised premises and the second demised premises. So the terms and conditions of the lease had their effect on the old demised premises. Clause 1 of the lease reads:

> "In consideration of a new lease intended to be granted forthwith by the lessor to the lessee of all those premises described in the First Schedule hereto, the lessee as beneficial owner hereby surrenders unto the lessor all the premises comprised in and demised by the first and second leases to hold the said first demised and second demised premises unto the lessor for all the unexpired residue of the respective terms and interest created by the first and second leases to the intent that the said respective terms and interest may merge and be extinguished in the reversion immediately expectant thereon and to the further intent that the lessor may forthwith grant to the lessee aforesaid a new lease of all those the premises described in the First Schedule hereto which include the first demised premises and the second demised premises on the terms and conditions hereinafter reserved and contained."

Mr. Isola submitted that the "first demised premises" were the premises granted under the 1951 lease and the "second demised premises" were the premises granted under the 1967 lease, that is to say the "engineering works" referred to in the plan annexed to the 1989 lease, which plan clearly delineated the boundary of the site of the repair yard or the engineering works and the Rotunda. As I understand it all three expressions mean the same site. Mr. Isola submitted that as under cl. 2 of the lease the premises were demised to the plaintiff for a term of 87 years from January 1st, 1986, it was important to bear in mind that on that date the engineering works formed part of the demised premises and on the plan attached to the lease, the site of the engineering works was clearly defined. In addition the Third Schedule had the usual rent review clause couched in terms of rack rent in respect of the premises with the buildings thereon showing without a doubt that the parties intended to review rent

as a rack rent and not on ground rent. If ground rent only had been envisaged, he submitted, the clause would not have been so framed and para. 3(B)(iii) implied that there were buildings on the site. The arbitrator must accordingly look at the position of the premises on January 1st, 1986 or immediately before that, since "the demised premises" referred to in the lease must mean the premises as they were on January 1st, 1986. This was not, he said, hypothesis on hypothesis. It was precisely how the parties had agreed the rent should be assessed by the arbitrator and at the relevant date the premises consisted of a ship repair yard, ancillary offices, stores and three flats. Furthermore, since the arbitrator must disregard any increase in rental value of the demised premises attributable to any building erected since January 1st, 1986 this gave extra weight to the view that the rent review was not a rent review of the ground rent.

Mr. Isola referred to the case of *Basingstoke & Deane Borough Council* v. *Host Group Ltd.* (1) in which Nicholls, L.J. said ([1987] 2 E.G.L.R. at 148):

> "While recognising, therefore, that the particular language used will always be of paramount importance, it is proper and only sensible, when construing a rent review clause, to have in mind what normally is the commercial purpose of such a clause."

And quoted from the judgment of Browne-Wilkinson, V.-C. in *British Gas Corp.* v. *Universities Superannuation Scheme Ltd.* (4) ([1986] 1 W.L.R. at 401): "The purpose is to reflect changes in the value of money and real increases in the value of property during a long term." He also prayed in aid *British Airways PLC* v. *Heathrow Airport Ltd.* (3) ([1992] 1 E.G.L.R. at 145): "When reference is made to land *and* buildings collectively a different defining term is usually used, namely 'the demised premises'" and in that case it was held (*ibid.*) that "the general rule that what should be valued is the land with the buildings, is displaced . . . by the language of the lease. . . ."

Mr. Isola argued that in the instant case there was nothing in the wording of the rent review clause, or in the description of the premises and in the plan, to justify a departure from that general rule and that in accordance with the rent review clause regard had to be had to the buildings as at January 1st, 1986 although there was a disregard in relation to the new building. The general rule was referred to in similar terms in the case of *Goh Eng Wah* v. *Yap Phooi Yin* (6).

I have to approach the interpretation of the rent review clause in the context of the lease as a whole. I have some difficulty in this as there appears to be scope for conflicting interpretations. For instance, in my view, the words of the First Schedule cannot be taken by themselves, as was suggested by Mr. Stagnetto. The First Schedule is descriptive of what is demised to the lessee by the terms of the *habendum* cl. 1. The demise is to be made in a new lease which is made in consideration of the surrender

by the lessee of the premises held under the first and second leases and the lease is to be "a new lease of all those premises described in the First Schedule . . . which include the first demised premises and the second demised premises on the terms and conditions reserved and contained." In so far as this is concerned, and if it stood alone, I believe that Mr. Isola was right when he argued that I should take into account the incorporation of the first and second demised premises into the meaning of the First Schedule, and "demised premises" is an expression which usually connotes the presence of buildings.

The matter, however, does not end there, because in cl. 2 of the *habendum* the grant is made by the lessor in consideration of works of development and construction carried out by the lessees on the premises described in the First Schedule and on payment of the sum of £40,000 and in consideration of rent covenants and conditions reserved. The lessors demised all the premises and buildings described in the First Schedule, which expression is qualified by the words in brackets "subject as therein mentioned." What do these words in parenthesis mean? Are they another reference to the first and second demised premises? Clause 2 of the *habendum* makes it clear to me that the reference to works of development and construction refers to works which have been completed. The expression is in the past tense. The draftsman knew what the situation on the ground was at the time the lease was signed in 1989.

The premises described in the First Schedule describe perfectly the Rotunda Building. If the reference to the First Schedule in cl. 2 had incorporated clear words to include the first demised premise and the second demised premises, the First Schedule could be said to describe also the site together with the old buildings. Then Mr. Isola's argument would be perfectly acceptable—but it does not and yet these words must have meaning. I have it clear in my mind that in the circumstances of this case, that is a reference to the building erected on the land and shown pink and blue in drawing No. DLA/GIB/14/86, which in my view of the situation as it existed at the time of the signing of the lease, must mean the Rotunda and nothing else. The plan, despite its obvious derivation from the previous leases, cannot when it is marked "site of M.H. Bland & Co. Ltd. Engineering Works," incorporate of itself the old buildings. In the event, I do not accept Mr. Isola's argument.

So, having come to the conclusion that the proper view is that the First Schedule does not refer to the old buildings at all, the question is how does this affect the rent review clause? With that decision in mind, I consider the provisions of the Third Schedule which provide that the arbitrator shall decide the rent at which the demised premises might reasonably be expected to be let at the relevant review date. Mr. Isola submitted that the relevant clause was couched in the form and terms of rack rent and was not one which was in consonance with a review of the ground rent, but he did not refer me to any authority whereby the form in

which the instant clause was couched was indicative of a rent review at rack rent, nor did he persuade me that the provisions of the clause in the instant case in its context indicated that rack rent alone was contemplated. Indeed I observe that though this review clause appears more complex than that in *Basingstoke & Deane Borough Council* v. *Host Group Ltd.* (1), they are not dissimilar in form. There the situation was that the valuer (who was to act as an expert and not as arbitrator) was to compute the rent as a bare site, and the only difference—which I do not consider significant in so far as form is concerned—is that in the *Basingstoke* case there was specific mention of a bare site only clear of all buildings.

As in the *Basingstoke* case, the plaintiff built the building on the landlord's site at its own expense before the lease was granted. That was inferred there and is a fact in the instant case. A difference here is that the tenant was already in possession under previous leases. Unlike the *Basingstoke* case, where the term was for a bare site clear of all buildings, here it appears on its face to be not so, only that the Rotunda be not taken into account. But an important factor which the trial judge took into consideration in the decision which was overruled by the Court of Appeal was that many of the covenants in the lease were quite inappropriate in the hypothetical lease of a bare site, as many of them were appropriate to a lease of a bare site only so long as the site remained in that state. It seems clear from that case that regard must be had to the terms of the lease. Nicholls, L.J. went on to say ([1987] 2 E.G.L.R. at 149):

> "We approach the construction of [the rent review clause], therefore, on the footing that, unless the [clause] otherwise requires, expressly or by implication, or there is some context indicating otherwise, the parties are to be taken to have intended that the notional letting assumed for the purposes of the rent review assessment was to be on the same terms (other than as to quantum of rent) as those still subsisting between the parties under the actual, existing lease."

In my view, on the true construction of the lease, the old buildings are not to be taken into account and therefore a declaration is made that on any rent review the new rent is to be assessed on the basis of the market value of the ground rent alone, disregarding any buildings constructed thereon prior to January 1st, 1986 or any building which may have been constructed thereon prior to January 1st, 1986 and subsequently demolished.

Declaration accordingly.
