Case No: (1) B5/2007/2569
(2) B5/2007/2569(Y)

Neutral Citation Number: [2007] EWCA Civ 1168
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HUDDERSFIELD COUNTY COURT
(HIS HONOUR JUDGE STEWART QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 16th October 2007

Before:

LORD JUSTICE WARD
LADY JUSTICE ARDEN
and
LORD JUSTICE SMITH

- -

Between:

HUNTE **Appellant**

- and -

E BOTTOMLEY & SONS LTD **Respondent**

- -

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Mr P Hill (instructed by Messrs Norcliffe & Co) appeared on behalf of the **Appellant**.

Mr D Finlay (instructed by Messrs Chadwick Lawrence Llp) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Ward:

1. This is an appeal from the order of HHJ Stewart QC sitting in the Bradford County Court on 17 November of last year, when he gave judgment for the claimant in the sum of £5,296, inclusive of interest. He ordered that the counter-claim be dismissed.

2. The appeal is brought by the defendant after permission had been granted on limited grounds by Longmore LJ, as I shall indicate in a moment. The relationship between the parties is that of landlord and tenant. The appellant, E Bottomley and Sons Ltd, is the owner of a large industrial complex known as Holme Dyeworks in Yorkshire. By a lease granted in August 2001 to the respondent's predecessor, Bottomley's granted a lease for six years, with a three year break clause. It was assigned to the respondent in April 2003. The lease is in this form. It demises to the lessee a property described as unit 2 of Holme Dyeworks, Bradley, Huddersfield, West Yorkshire, but the grant includes, as set out in Clause 3 of Part 1 of Schedule 1 of the lease:

> "The right to pass with or without vehicles during all such times as the Estate is open over and along the yards and road giving access to Leeds Road ***PROVIDED*** that at all times such right does not cause any obstruction or freedom of access to the Landlord or others users of such yards and road and the Tenant observes all regulations of the Landlord for the time being relating to the parking or unloading of vehicles or the direction of traffic."

   It is the last three words which have assumed significance in this appeal.

3. In addition, the landlord also covenanted, by Clause 5(1) of the lease, that the tenant:

> "…shall…peaceably and quietly hold and enjoy the Demised Premises during the Term without any unlawful interruption or disturbance by the Landlord."

   They are fairly usual terms.

4. Clause 5(4) is also very important. That provides that:

> "…during the Term of this Lease the Demised Premises [should be] used exclusively as a Café [and] the Landlord [covenanted] not [to] grant any other Lease of any other part of the Estate for café use."

   That is all understandable, but to translate those written words into reality requires some explanation of the plan which was attached to the lease, and

more particularly a series of photographs which were prepared for the purposes of the trial.

5. It is highly regrettable that this court has not been provided with the range of photographs which were presented to the trial judge. It has made the understanding of the layout extremely complex. Mr Hill, who appeared for the appellants, has done his best to explain it, and I shall endeavour to summarise the site and the location to it (because this is a claim by the tenant for damages, as a result of the landlord's breach of the covenant of quiet enjoyment and the breach of his right of way, collectively called during the course of the trial a derogation of grant).

6. This is a large industrial site. To the south is a building known as Fernleys Mill. To the north there are an extensive range of industrial buildings, still apparently used as such. Not exactly in the middle, somewhat to the south of the middle, is the café which is on the first floor of one of the buildings on the site. It was originally the canteen for the workers on the site, but has been run independently as a café, latterly, of course, by the respondent.

7. Access to the café can be gained from a major road (not shown on the plans or on the photographs, so difficult for us to have understood where it was), a main road called Leeds Road. At the entrance to the site from Leeds Road, there was an advertising board informing passersby of this café. If one entered from Leeds Road, one would drive along a roadway in the site in more or less a northerly direction, and about a third of the way along one would come to the café, where one could park. To the east is the canal or the river, whatever it may be, and extending northwards, as I have said, are these industrial buildings. If one continued to drive from Leeds Road past the café, one would pass the industrial complex buildings on one's left (that is to say, to the west of the site), one would go up to the north, and the road would then curve round doubling back, and would enter the public highway on Quarry Road, which ran to the west of the site. In other words, trying to compress that description, the roadway within the site and along Quarry Road and along Leeds Road was very roughly an elliptical shape, and one could enter from Leeds Road or one could enter from Quarry Road.

8. What then happened was this. In August of 2004, the defendant gave notice on 19 August that as from the following Monday 23 August, the lower entrance (the southern entrance) to the estate (called the Calder Trading Estate) would be closed. In time -- a matter of days -- workmen instructed by Bottomley's placed signs at the Leeds Road entrance, notifying traffic of two facts: one, that the road was closed (and we have photographs of the Road Closed sign); secondly, a large sign diverting the traffic, so that entry to the site would now cease to be via Leeds Road, but would involve going along Leeds Road, then along Quarry Road, and entering on the north west corner, and doing that circular trip around the industrial site, coming to the café premises from the north. The café sign was removed, as if the café no longer existed.

9. More importantly than that, the Landlord implemented his plan, which was to sell off the Fernley Mill site to the south of this estate for development as private housing; and in order to ensure the greater attractiveness of that site for residential development, and to shield it from the ugliness of the industrial site, Mr Bottomley simply erected a huge and ugly wall (some photographs of which were belatedly produced for us), completely blocking that roadway which ran alongside the river in a north-south direction on the eastern side of the property. The practical effect was, therefore, that neither vehicles nor pedestrians could pass over and along that roadway. It had been blocked and completely obstructed.

10. The judge found, in his judgment, that he had:

> "…no doubt that the erection of the wall and the closure of the road was a substantial derogation from grant".

By that finding, I understand him to find a) that there was a breach of the covenant of quiet enjoyment; and b) that there was a breach of the right of way granted in paragraph 3 of the first schedule. That gives rise to the first challenge in the appeal.

11. The challenge is that the judge erred in law in coming to that conclusion. There is no challenge to the judge's findings of fact. The challenge is completely one of law; and the argument is that, by virtue of the proviso to the right of way, and the terms of which required the tenant to observe all the regulations of the Landlord for the time being, relating to the direction of traffic, there was no breach whatever either of that right of way, or of the covenant for quiet enjoyment. I regard that argument as utterly hopeless. The submission is that the entitlement of the Landlord to direct the traffic meant that he could completely block the roadway and deny any right of way or right of passage over it, because he could say: "Since I am entitled to direct traffic, I direct that you enter (for a period from August until October) from Quarry Road, come up through the ugly road (as the judge found it to be), past the industrial estate, stop at the northern edge of this monstrous wall across the road, get out of your vehicle, enter the buildings, go through the buildings to get to the southern side of the wall, and then gain access to the café and when you have finished, go back the way you came."

12. The submission is that the Landlord was entitled to block the road at the Leeds entrance completely, and say: "Thou shalt not pass over this part of the roadway, certainly from August until October." In October, he relented and allowed entry to be resumed from Leeds Road, but only to the café, where passage was still interrupted by this wall.

13. If any meaning has to be given to a proviso which allows the Landlord to make regulations for the direction of traffic, then the most it can mean is that he is allowed to direct in which way traffic will circulate along this roadway round the site. In other words, the most he could possibly do, in my judgment, is say: "All traffic shall pass in a clockwise direction or "It must go in an

anti-clockwise direction"; but that is not a justification for blocking the road and saying: "You can only come halfway along the road, then you turn back and go the way you came." That, in my judgment, is a wholly fanciful construction of the proviso. It is, in any event, no answer to the judge's finding that there was a breach of a covenant of quiet enjoyment. The proviso, if it meant anything, was a limitation on the right of way; it did not and could not affect the covenant for quiet enjoyment when the lease is read as a whole. This was the lease of a café business; elementary, therefore, that those who wished to get to the café should be able to get without obstruction along the highway, and enter the café without unlawful interruption or disturbance by the landlord. In my view, the judge was fully entitled to conclude in law that the erection of the wall and the closure of the roadway was a substantial derogation from grant. There is nothing in the first ground of appeal.

14. Longmore LJ allowed this appeal to challenge the way the counter-claim had been framed. That counter-claim was for payment of £1272.90, being the sum on a cheque which was dishonoured; and it was pleaded in addition that the claimant had rent arrears at the date of the forfeiture of the lease (the landlord having forfeited in January 2005), made up for the quarters in advance from 1 July in the sum of £992.87, a similar amount of rent for the quarter beginning October, and rent from January for the ten days before the lease was forfeited; and for the provision of electricity from the beginning of May to the end of November 2004, a total of £2,584.

15. The ground of appeal is that the judge was wrong to dismiss the counter-claim:

> "The counter-claim was in the sum of £1272.90 in respect of a stopped cheque and £2,584.14 in respect of unpaid rent. [There was] no defence…filed to the counter-claim".

The defendant was entitled to the whole amount of the counter-claim, subject to any setoff which the claimant might be entitled to make in respect of damages due to him under the claim.

16. May I pause to examine that submission for the moment. It is not strictly correct to say no defence was filed to the counter-claim. There was indeed a defence, and the defence set out in paragraph 7 was:

> "As to…the Counterclaim no admissions are made, until proved in evidence by the Defendant, of the arrears (and proper apportionment of any bills) and the dates contended for. The Claimant will seek to set off any sums as are found to be due from his claim against the Defendant."

17. So the defence was one of setoff; and the grounds of appeal, which I have just read, acknowledge that the defendant would have been entitled to the amount

of his counter-claim, subject to any setoff. So, to examine this claim, one has to see what the judge [inaudible] the claimant. He had firstly to consider what loss of profit had occurred by reason of the derogation of grant. The evidence was not particularly satisfactory, and the judge had to do his best with that deficient evidence. He accepted Mr Finlay's submissions (counsel for the claimant) that the only safe way to approach the loss was as Mr Finlay had set out in an appendix to the skeleton argument; and in that way the judge awarded 70 percent of the sums arrived at by calculating the difference between the sales and the costs of sales; and having done that calculation, it produced a loss the judge assessed at £243.17. He then added the loss of the capital value of the lease, to which I will later refer, allowing £2,000 for that, and the loss of fixtures and fittings, for which he allowed some £1900. The judge then said at the end of his judgment that the loss in total was worth £4,271, but he added:

> "As to the counter-claim I have already deducted the rent which would have been payable during the period from August to December 2004. I consider that as the closure of the business for the reasons outlined was caused in large measure by the defendants' action, the defendant is not entitled to rent for the balance of the period which would ordinarily have become due."

18. Mr Hill's complaint, if I have correctly understood it, is that since there was no defence to the counter-claim, he was entitled to judgment on it for both elements: £1200 odd for the cheque, and £2,500 odd for the arrears of rent. He submits that until the close of the trial, and until the claimant (through counsel) was making closing submissions, there was no suggestion that the dishonoured cheque was in respect of the same amounts covered by the claim for arrears of rent and of electricity; that is to say, that the £1200 odd was part and parcel of the £2,500 odd. Mr Hill protested to the judge at the time, but the judge then gave judgment in the terms I have read.

19. Now, it seems to me that one can arrive at these conclusions. Firstly, the judge expressly said with relation to the counter-claim that he had deducted the rent for the relevant period; in other words, he had set off the counter-claim against the claim as the claimant had pleaded he should, and as the grounds of appeal acknowledged he was entitled to do. The issue then boils down to the procedural difficulty in which Mr Hill found himself that he had no chance to deal with point taken late in the day by the claimant. Mr Finlay has helpfully provided us with a small clip of documents relating to the counter-claim. They include an extract from the defendant's own witness statement, in which Mr Bottomley states:

> "Mr Hunte did not pay the rent that was due on 1 July 2004, the rent that was due on 10 October 2004 or electricity charges which we invoiced for the period 1 April 2004 to 30 November 2004. Therefore, in the Autumn of

> 2005 he owed E Bottomley & Sons Limited £2,464.45."

I interrupt, the figures do not entirely marry with paragraph 24 of the counter-claim, but that is a point of total insignificance.

Paragraph 13 goes on to say:

> "Mr Hunte did provide a cheque dated 5 October 2004 for £1272.90 but on 31 December 2004 our bank returned this cheque unpaid."

20. On that evidence alone, the judge would have been entitled to draw the conclusion that the cheque covered an amount which was included in the total arrears of rent and electricity; but the matter, it seems to me, is made plain beyond peradventure by the invoice that was submitted by Bottomley's to Mr Hunte, dated 28 September 2004, which sets out sums owing by reference to invoices rendered on 31 May 2004: for electricity of some £61; on 30 June, more electricity, some £77; importantly, 1 July, rent £992; more electricity at the end of July; and more electricity at the end of August -- total £1272.90, precisely the sum of the cheque which was tendered. It is as plain as a pikestaff that the cheque covered part of the rent and electricity, which was included in the overall figure pleaded in paragraph 24 of the counter-claim. Since the judge stated expressly that he had deducted the rent, and I would assume also the electricity charges, I see no error in his approach in setting the counter-claim off against the claim, and arriving at the net figure of £243 odd when he calculated a loss of profit. That ground of appeal should also fail.

21. Permission was not granted to appeal the judge's further finding that the lease had a value of £2,000. The challenge to that finding is a procedural one. It is said that that claim was not properly pleaded. The pleading in the claim may not be quite the most eloquent bit of drafting that the world has ever seen, but it does sufficiently, in my view, make the nature of the claim plain. Having pleaded the two breaches of covenant, for the loss of quiet enjoyment and the breach of the right of way, the pleading continues in paragraph 9:

> "As a result of all the matters aforesaid the Claimant has suffered and continues to suffer loss and damage. Particulars."

And then particulars are given, including in (i) the allegation that the claimant would not have taken on the lease if he had advance notice of the alterations that had taken place; but more significantly (iv):

> "The Claimant's remaining lease has been rendered worthless only a short period after he paid for it".

Then in paragraph 7, it is pleaded that the claimant seeks the return of the sums paid for the assignment/purchase of the lease, including the payment of

£10,500 and his associated costs. The figure of £10,500 is actually an error. He paid £7,000 as a premium for the lease and £3,000 for fixtures and fittings.

22. What Mr Hill complains of is that shortly before the trial, application was made to amend that pleading, and to plead, in addition to the words I have read out in sub paragraph 7, a claim expressed in the alternative as:

> "The Claimant claims a sum equivalent to the market value of the lease."

23. Mr Hill says that he was totally taken by surprise when the claimant, in closing submissions made after he had sat down, made the claim for some compensation for the value of this lease. He protested to the judge that he had not had an opportunity to deal with it, but the judge nonetheless did the best he could of the paucity of information as to the capital value of the lease, and arrived at the figure of £2,000.

24. Longmore LJ refused permission to appeal on that ground, saying (rightly, in my judgment) that the other grounds essentially related to quantum; the judge had to do the best he could on the limited material available to him, and is not to be criticised for not developing his reasons more fully than he did. I agree with that. As for the procedural complaint, it seems to me that the claim was sufficiently pleaded in saying it was worthless. There was enough there by way of a pleading for the claimant to persist in that part of his claim, even if he had been refused permission shortly before the trial to make the claim more eloquently as a claim for a sum equivalent to the market value of the lease, but the bad bones were there. In any event, it seems to me that it would be wholly disproportionate for this court to give permission on that ground.

25. This trial over this modest sum of money took an extraordinary length of time -- four days. It took another day plus for argument, and a day for a reserve judgment, and now it has come to us. It would be totally wrong to send this case back for a procedural reason of this kind, and I would not give permission to appeal on that ground. In the result, in my judgment, the appeal should be dismissed.

Lady Justice Arden:

26. I agree. I would like to add some observations on the first issue and on the use of plans and absent diagrams and photographs in this court. As to the first issue: in my judgment, the judge was clearly entitled to find that there was a substantial interference with the right to quiet enjoyment. The premises were demised as a café, and the Landlord undertook that he would not grant another lease on the estate for use as a café. By clause 3 of part 1 of schedule 1 to the leave, the tenant was granted the right to pass along the road around the site with vehicles, but the proviso provided that he observed all the regulations of the Landlord for the time being, relating to parking or unloading of vehicles, or the direction of traffic. Those regulations had to be reasonable: see clause 3 (6) of the lease, which provided that during the term, the tenant would comply

with any reasonable rules and regulations for the estate which were prescribed by the Landlord.

27. The Landlord contends that the new rules for the flow of traffic to having the erection of the wall were regulations for "the direction of traffic". However, the changes made by the Landlord were not done for the purpose of regulating traffic at all, but in order to divide the site into two; and therefore, as it seems to me, the regulations were not within clause 3 of part 1 of schedule 1 of the lease at all. Mr Hill (for the appellants) is driven to submitting that the Landlord could erect what appears to have been an approximately 12 foot solid wall in order to make a regulation for the direction of traffic. In my judgment, it was not reasonable to erect a solid wall of this size for this purpose. In addition, it may very well be that there was a right to pass continuously along the road in one direction, in any event.

28. The judge accepted that as a result of the changes made by the Landlord, the café tenants business suffered. To quote from his judgment, he held:

> "Mr Hunte is adamant, however, that his sales to passing trade dropped substantially as a result of the obstacles to customers. This I accept."

Therefore, there was on the judge's findings, of fact, a breach of the covenant against quiet enjoyment.

29. I need not say anything about the other issues raised by the appellant. I agree with what Ward LJ has held in his judgment, and with the order he proposes. I would, however, like to add some general observations about the use of plans, maps, diagrams and photographs in this court. I make them from the experience in this case and in a number of other cases. Sometimes the parties are unrepresented, and so it seems to me it would be helpful to put these points in a judgment, so that parties can be aware of the problem in the future.

30. The problem is this: there are a significant number of cases which involve this court using plans, maps, diagrams and photographs, and more importantly, understanding them. These cases usually concern land. Many cases of this kind, however, and I am sorry to say that this was one of them, are prepared in a way which makes it very difficult for members of this court, when reading the papers in preparation for the appeal hearing, to read the plan, map, diagram or photograph correctly, or to follow fully the submissions of the parties about those documents or the property which is the subject of the dispute. In these circumstances, the court cannot be certain about what the plan, diagram, map or photograph shows until the appeal is opened and they are fully explained. Those who prepare bundles or skeleton arguments would do well to remember that a plan, map, diagram or photograph which is clear to people who are fully familiar with the case may well not be wholly clear to a judge coming to the case for the first time. The problem is often exacerbated when the case comes to this court, and the parties very properly put into the appeal bundle some only of the maps, plans, diagrams or photographs. When that happens, this court does not have all the information which the court below had. In my

judgment, it is absolutely essential in any case of this kind, where the court is going to have to grapple with plans, maps, diagrams or photographs, that there is at least one plan, photograph or map which leaves the court in no real doubt about the location of all the relevant features. The skeleton arguments should also identify that photograph, map, plan or diagram at an early point, so this court is left in no doubt when it is prereading its papers for the hearing. Very often, in my experience, this court is (for example) either given some only of the plans, or photocopies which do not have the colouring referred to in the original documents or by the judge in his judgment, or copies with parts cut off, or without compass points, or where appropriate, a statement of the scale. Those who prepare skeleton arguments for cases in this court or appeal bundles should please bear in mind that the court has properly and easily to understand any map, plan, diagram or photograph which is material in the appeal.

31. In this case, the court did not have a full set of plans or photographs or a plan which showed all the relevant features. Ward LJ has referred to the difficulties in more detail, and I agree with what he said. When this court sat, we had to have those features of the plan explained to us. That wastes court time and increases the cost for the parties. I hope that these remarks will be taken into account for the future by litigants in this court.

Lord Justice Smith:

32. I agree with both judgments and have nothing to add.

Order: Application dismissed