ACQ/190/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – compulsory purchase – preliminary issue – leaseholder claimant – claim for disturbance – breaches of repairing covenants – whether liability for breaches to be brought into account in assessing compensation – whether effect of such liability confined to assessment of value of leasehold interest – held liability properly to be brought into account and effect could be reflected in disturbance compensation

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **RICHARD PARSONS LTD** **Claimant**

and

BRISTOL CITY COUNCIL **Acquiring Authority**

Re: Bridal Shop
25 Broad Weir
Broadmead
Bristol BS1 3AV

Before: The President and N J Rose FRICS

Sitting at Procession House, 110 New Bridge Street, London EC4V 6JL
on 4 September 2007

Jonathan Karas QC, instructed by TLT Solicitors for the claimant
Rupert Warren instructed by Ashurst on behalf of the acquiring authority

The following cases are referred to in this decision:

Horn v Sunderland Corpn [1941] 2 KB 26
Director of Buildings and Land v Shun Fung Ironworks Ltd [1995] 2 AC 111
Re King [1963] 1 Ch 459

DECISION ON A PRELIMINARY ISSUE

1. The claimant in this case was the underlessee of premises known as 25 Broad Weir, Bristol, that were included as plot 34 in the Bristol City Council (Broadmead Expansion, Bristol) Compulsory Purchase Order 2003. The CPO was made by the acquiring authority under the Town and Country Planning Act 1990, and it authorised the acquiring authority compulsorily to purchase the order land for the purpose of securing and carrying out a comprehensive scheme of redevelopment. The claimant's interest vested in the acquiring authority on 22 September 2005 under a general vesting declaration. The freehold and headlease are also the subject of acquisition, and we approach the issue, as the parties invited us to, on the basis that nothing turns on the particular structure of interests.

2. The premises consisted of a shop, which the claimant occupied for the purposes of the sale and hire of wedding apparel and evening wear pursuant to a franchise agreement under the name "Pronuptia". There was a ground floor retail area with two floors of ancillary accommodation above. The premises have now been demolished in implementation of the scheme. The compensation claim is for £263,303 including loss of profits up to May 2006 but excluding any loss of profits after that date, since this has yet been assessed and can be expected to be added to the claim in due course.

3. The claimant's lease was for a term of 20 years from 1 April 1986, so that at the date of vesting, which is also the valuation date, it had approximately 6 months left to run. It was, however, subject to the provisions of the Landlord and Tenant Act 1954 so that, if the landlord had not agreed to the grant of a new tenancy, in the absence of the CPO the claimant would have been able to apply to the court under section 24 for such tenancy to be granted. Clause 3 of the lease contained repairing covenants on the part of the lessee. The precise terms of those covenants, and of the covenants that are ancillary to or consequential upon them, are not material for present purposes. It is sufficient to note that the acquiring authority assert that the premises were in substantial disrepair at the valuation date, so that the claimant was in breach of covenant, and that the costs of putting them into repair would have been considerable. They say that the landlord could have opposed the grant of a new tenancy because of the breaches of covenant and that the liability of the claimant would have remained after the termination of the tenancy.

4. On 5 February 2007 the acquiring authority's solicitors wrote to the Registrar to request that the reference be dealt with under the Tribunal's special procedure because they considered that there were a number of complicated issues of law and valuation. One issue, they said, was the dilapidated condition of the premises at the valuation date, and their client's position on this was that the cost that the claimant would have incurred in complying with its repairing obligations should be taken into account in the assessment of compensation on the basis that the claimant was relieved of that liability by the compulsory acquisition of its leasehold interest. The letter later referred to "our client's argument that the cost of dilapidations should be deducted from the compensation otherwise payable." The claimant's solicitors wrote to the Tribunal on 9 February 2007 referring to this letter and saying that they agreed to the special

procedure subject to the following being dealt with as a preliminary issue. "Whether as a matter of law the Acquiring Authority is entitled to off-set a claim for dilapidations against an entirely separate element of the claim."

5. In advance of a pre-trial review fixed for 29 March 2007 the parties agreed that the Tribunal should order the disposal of a preliminary issue in terms rather different from those suggested by the claimant:

> "Whether the Acquiring Authority can set off the value of the Claimant's dilapidations liabilities against the claimed compensation figure as a whole."

The Tribunal (Mr Rose) made an order to this effect.

6. At the hearing before us Mr Rupert Warren for the acquiring authority submitted that, given the principle of equivalence and the principle that compensation is in essence one sum, as explained in *Horn v Sunderland Corpn* [1941] 2 KB 26 and *Director of Buildings and Land v Shun Fung Ironworks Ltd* [1995] 2 AC 111, the dilapidations liability which existed at the valuation date was relevant to compensation for the reference land and should be taken into account in reducing the amount of the overall claim. If the effect of the liability was to give the lease a negative value, that negative value should be taken into account in reaching the overall amount of compensation.

7. Mr Jonathan Karas QC for the claimant advanced what he termed the primary case and the secondary case on the issue. The primary case was that, having acquired the claimant's interest, the acquiring authority had the benefit of a separate claim for breach of covenant which survived and was quite separate from the acquisition. That being so, the matters in respect of which a separate claim survived (the breaches of covenant) could not be taken into account in the purchase price. The secondary, alternative, case was that, if it was correct in valuing the land to have regard to the claimant's liability under the covenants, it would be wrong simply to set off the cost of dilapidations against the compensation otherwise payable. How the existence of a dilapidations claim might be taken into account was wholly fact specific. The land was to be valued in the no scheme world, and it could not be assumed that the claimant would have incurred the costs of repair in the no scheme world.

8. Moreover, said Mr Karas, any claim for dilapidations would be subject to section 18 of the Landlord and Tenant Act 1927, which provides that damages for breach of covenant to repair must not exceed the amount (if any) by which the value of the reversion is diminished owing to the breach of covenant. In view of these matters all that the Tribunal would be able to say if the primary case was rejected was that the claimant's repairing obligations might be relevant to the assessment of compensation but that their precise relevance would depend entirely on the evidence.

9. We cannot accept Mr Karas's primary contention. It is the case, as he submitted, that on acquisition of the claimant's interest the acquiring authority obtained the benefit of the covenants in the lease and the entitlement to bring a claim for past breaches of covenant. But

the authority advanced to support this proposition, *Re King* [1963] 1 Ch 459, also shows why, on the facts of the present case, the acquiring authority would not be able to achieve damages for the breaches of the repairing covenants. *Re King* was, like the present case, one where the freehold, a head lease and an underlease were acquired under a CPO by London County Council. The issue was whether the freehold owner (Tagg) retained the right after the transfer of his interest to the council to recover damages for breach of covenant by the lessee (King). The Court of Appeal held that he did not, since that right passed to the council on the assignment of his interest under section 141 of the Law of Property Act 1925. At 484 Lord Denning MR said this:

> "My conclusion is, therefore, that after Tagg assigned this derelict factory to the London County Council, he had no right to sue King's executors for the breaches of the covenant to repair or reinstate. The London County Council alone could sue: but that right is not one which is worth anything to them, seeing that it is their intention to pull down the premises. Indeed, they have never suggested that they wish to claim under it."

10. The factual position in the present case is the same. The acquiring authority acquired the premises so that they could demolish them, and they have indeed done this. Under section 18(1) of the 1927 Act damages for breach of repairing covenants are not recoverable "if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down." There could in these circumstances have been no possibility, in the scheme world, of any damages being recovered by the acquiring authority for breaches of the repairing covenants. The valuation of the claimant's interest, however, is to be made not in the scheme world but in the no scheme world. If the effect of the acquisition has been to relieve the claimant of a liability that, in the no scheme world, it would have had, that would, in our judgment, necessarily fall to be taken into account in assessing compensation.

11. It is, of course, the case that it is a matter of valuation how the breaches of covenant are properly to be reflected. They could in our judgment enter into the assessment at two points. Firstly, any potential liability on the part of an assignee of the lease would reduce the amount that he would pay in the open market for the leasehold interest in the no scheme world. Any such reduction would be reflected under rule (2), but only, we think, to the extent that it did not give the interest a negative value. Secondly, the effect of the acquisition would be to relieve the claimant of the potential liability that he would have had in the no scheme world for the breaches of covenant. The value of such relief would need to be brought into account in any assessment of the loss of profits occasioned by the acquisition. Moreover, it seems to us, if the leasehold interest had a negative value, the compensation would necessarily have to take this into account. We accept Mr Warren's submission that the principle of equivalence and the principle that compensation is in essence one sum would require this to be done.

12. The principle of equivalence requires that the "statutory compensation cannot, and must not, exceed the owner's total loss, for, if it does…it will transgress the principle of equivalence which is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss" (per Scott LJ in *Horn v Sunderland Corpn* [1941] 2 KB 26 at 49).

In *Director of Buildings and Land v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125C-E Lord Nicholls of Birkenhead in another well-known passage said that the purpose of the statutory provisions

> "…is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. No allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fully and fairly for his loss. Conversely, and built into the concept of fair compensation, is the corollary that the claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."

13. The second principle established in *Horn v Sunderland* is that the rules contained in section 5 of the Land Compensation Act 1961 (formerly section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919) provide for the payment of a single sum as compensation for the land acquired. At 32 Sir Wilfred Greene MR, having noted that the principles on which the price or compensation payable for land acquired under the Lands Clauses Acts had been established by a series of decisions, said this:

> "The broad principle was that the price should be fixed on the basis of the value to the owner and this involved taking into consideration a number of matters which I need not mention as they are well known. But one element which the jury was entitled to take into consideration was the damage suffered by the owner from disturbance, for example, of his business. It is important in considering the present case to remember that this was not a separate head of compensation such as compensation for injurious affection, but merely one of the elements going to the build up of the purchase price to which the owner was fairly entitled in all the circumstances of the case."

14. At 34 Sir Wilfred Greene quoted the terms of rule (6): "The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land." He then went on:

> "Now, r. 6 does not confer a right to claim compensation for disturbance. It merely leaves unaffected the right which the owner would before the Act of 1919 have had in a proper case to claim that the compensation to be paid for the land ought to be increased on the ground that he had been disturbed…The truth of the matter is that, as in cases under the Lands Clauses Acts alone, so in cases where the Act of 1919 applies, the sum to be ascertained is in essence one sum, namely the proper price or compensation payable in all the circumstances of the case. If those circumstances are such as to make it impossible for the owner to claim that he has suffered damage through disturbance for which he ought to be compensated, then he is not entitled to have the price or compensation for his land increased by an addition for disturbance even if he has been disturbed. It is a mistake to construe rr. 2 and 6 as though they

conferred two separate and independent rights, one to receive the market value of the land, and the other to receive compensation for disturbance, each of which must be ascertained in isolation."

15. In the present case, if the acquiring authority are right in their contention that at the valuation date the lease had a negative value because of breaches of the repairing covenants and that the effect of the acquisition was to relieve the claimant of the liability for such breaches that he would have had in the no scheme world, it would be wrong in assessing compensation to leave those matters out of account. It would not, however, be a matter simply of deducting the cost of remedying the dilapidations from the amount of compensation that would otherwise be payable by way of disturbance. The effect on the market value of the interest would be a matter of valuation; and the effect of relief from the potential liability on the part of the claimant for the cost of remedying the breaches would not necessarily be reflected by that cost. For this reason, to determine the preliminary issue in the acquiring authority's favour in the terms in which it is expressed would be wrong, and indeed Mr Warren did not seek to argue for this. The determination we make is that any liability of the claimant under its lease for breaches of the repairing covenants is properly to be taken into account in the assessment of compensation, including compensation for disturbance, and that the effect of such liability is a matter of valuation.

16. We would add that no contentions were addressed to us on the identity of the scheme or on what would have happened to the subject property in the no scheme world. Those are matters on which the assessment of compensation could depend. Our determination does not make any assumptions on those matters.

17. The parties are now invited to make representations on the costs of this preliminary issue, and a letter about this accompanies this decision, which will become final when the question of costs has been determined. Directions for the further conduct of the case will then be given.

Dated 13 September 2007

George Bartlett QC, President

N J Rose FRICS