Appeal Reference: CH/2010/0551

Neutral Citation Number: [2011] EWHC 3130 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FRON THE LEICESTER COUNTY COURT

The Rolls Building, Royal Courts of Justice
7 Rolls Buildings, London EC4A 1NL

Date: 28/11/2011

Before :

MR JUSTICE NEWEY

- -

Between :

GLENFIELD MOTOR SPARES LIMITED	**Claimant and Respondent**
- and -	
BRIAN SMITH	**Defendant and Appellant**

- -
- -

Miss Christine Cooper (instructed by **Crane & Walton, Leicester**) for the **Claimant**
Mr Stephen Taylor (instructed by **Douglas Wemyss Solicitors LLP, Leicester**) for the **Defendant**

Hearing dates: 1 November 2011

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Judgment

Mr Justice Newey :

1. In January of last year, Her Honour Judge Hampton, sitting in the Leicester County Court, determined that a site in a suburb of Leicester, of which the Claimant, Glenfield Motor Spares Limited ("Glenfield"), is the tenant and the Defendant the landlord, has a usable area of 3,330 square yards. The landlord appeals against that decision.

2. Glenfield carries on a vehicle-dismantling business at the site. The site has, I gather, been occupied by a business trading as "Glenfield Motor Spares" for some 30 years. Glenfield was not incorporated until about 10 years ago, but there had previously been an unincorporated business.

3. There was a rent review in respect of the site in the early 1990s. The matter was referred for expert determination by Mr William Simpson, a chartered surveyor. Written representations were made to Mr Simpson by a chartered surveyor on behalf of each party: by Mr R.M. Cattrell for the tenant and by Mr J.H. Clarke for the landlord. On 3 April 1991, Mr Simpson determined the open market rental value on 31 May 1990 at £7,500 per annum. As Mr Simpson explained, he had "not been asked to give a Reasoned Determination and [did] not therefore do so". However, a manuscript note obtained from the firm at which Mr Simpson was then working tends to suggest that, in arriving at his valuation, Mr Simpson took the usable area of the site to be 3,333 square yards, the figure advanced by Mr Cattrell. Mr Clarke had put the usable area at 4,800 square yards.

4. In 2008, Glenfield applied for a new tenancy to be granted under the Landlord and Tenant Act 1954. The matter came before Her Honour Judge Hampton in January 2010. She heard evidence from two chartered surveyors. Mr Cattrell was once again acting for the tenant, and on this occasion Mr Peter Hotchin was called by the landlord. As before, Mr Cattrell put the site's usable area at "in the order of 3,333 square yards". Mr Hotchin calculated the usable site area to be 4,600 square yards.

5. As already mentioned, the Judge determined that the site had a usable area of 3,330 square yards. She also concluded that the site had an annual rental value of £5 per square yard. Multiplying the two figures together, the total rental value was assessed at £16,665 per annum.

6. As was pointed out to me by Miss Christine Cooper, who appeared for Glenfield, there was no dispute as to the site's *gross* area. It was common ground between the experts that this was about 1.1 acres, which equates to some 5,300 square yards. It was also common ground that the site was not all usable. What was at issue was the extent of the area that could not be used.

7. In her judgment, the Judge noted that Mr Cattrell had "in the past ... undertaken measurements inside the site", but that Mr Hotchin had "not had the opportunity to do so". The Judge recognised that Mr Hotchin had tried to deduce the usable area from measurements he had recently taken on site, but said that "one of her great reservations ... about the exercise was that ... he could not get alongside the brook [i.e. the brook on the south-eastern side of the site]". The Judge said that, as she understood Mr Cattrell's evidence, "the unusable area is caused not only by liability to flooding and the berm [a word defined in the Oxford English Dictionary as "a

narrow space or ledge"] alongside the brook but also by the encroachment of vegetation along the whole of the boundary".

8. The Judge devoted a full paragraph of her relatively brief judgment to the 1991 rent review. She said this:

> "I also note that in 1991 the area of the site which was subject to the rent, was contested at a contested rent review. The assessment for the landlord then, was that the relevant area was 4,800 yards; Mr Hotchin says it is actually slightly less, 4,600 and Mr Cattrell for the tenant gave the area at 3330 at that time. Mr Simpson, a qualified surveyor appointed as the independent arbitrator by the parties, therefore, with much greater experience than a county court judge would have of assessing relevant areas, who it can be seen from C11 of the court's bundle, inspected the premises. He did not give a reasoned decision and it is not clear whether he carried out any measurements. He accepted Mr Cattrell's contentions for the relevant area to which the appropriate rent should be applied. That seems to me to be very convincing evidence as to the appropriate usable area that the court ought to adopt for the purpose of these proceedings."

9. The Judge concluded:

> "Noting that this matter has been contested in 1991 and Mr Cattrell's evidence was that the site has not changed a great deal, if at all, since then, he having had familiarity with the site ever since, … on the balance of probabilities on the available evidence I have, the usable area is that which was found by Mr Simpson as 3330 yards."

10. Mr Stephen Taylor, who appeared before me for the landlord (as he had before Judge Hampton), challenged the Judge's decision as to the usable area. He argued that the evidence did not justify the Judge's conclusion. He contended, in particular, that the Judge had been mistaken in attaching weight to the 1991 rent review determination by Mr Simpson. Mr Taylor summarised his case in this respect as follows in his skeleton argument:

> "It is submitted that in truth the Learned Judge did not properly prefer one expert's view over the other but, rather, placed great weight on the fact that the independent arbitrator from [1991] had adopted Mr Cattrell's evidence. It is submitted that the Learned Judge erred in placing reliance on a witness who had not been heard or cross examined, who had expressly stated that he gave no reasons for his decision and when there was no evidence that he had measured the site himself."

11. A somewhat analogous point arose in *Land Securities plc v Westminster City Council* [1993] 1 WLR 286. That case was concerned with whether an arbitrator's award determining the market rent of a property was admissible evidence in a rent review

arbitration relating to a comparable property, Westminster City Hall. Hoffmann J concluded that it was not.

12. Hoffmann J observed (at 288):

> "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties".

It was submitted to Hoffmann J that *Hollington v F. Hewthorn & Co Ltd* [1943] KB 587, the leading authority for this proposition, was based on the rule which excludes opinion evidence and so had no application to an award made by an expert valuer. One of the grounds on which this submission was rejected depended on the fact that the award had been made by an arbitrator. Hoffmann J said (at 289):

> "Mr Clark [the arbitrator] is no doubt an expert valuer but I do not think he gave his award in that capacity. An arbitrator is obliged to act solely on the evidence adduced by the parties. Mr Clark may, by reason of his expertise, have known about matters which cast doubt on points which went unchallenged in the arbitration. If he had been acting as an expert he would have been able to take this knowledge into account. As an arbitrator he would not. His position, in my judgment, was no different from that of a judge determining the rent of a new lease of premises under the Landlord and Tenant Act 1954. The admissibility of his judgment as evidence of the value of the premises in proceedings between different parties cannot depend on whether he happens to have expertise in valuation".

13. Hoffmann J went on to explain that there was a further basis for *Hollington v F. Hewthorn & Co Ltd*. He said (at 289):

> "[T]he opinion rule was not the only basis of the decision in *Hollington v F. Hewthorn & Co Ltd*. There is also the hearsay rule, which appears in Goddard LJ's judgment [in *Hollington v F. Hewthorn & Co Ltd*] disguised as the best evidence rule. The arbitrator's award, expert or not, is an assertion as to the value of a comparable property made by a person not called as a witness and used to prove the truth of that assertion".

14. To overcome any hearsay problem, counsel for the landlord said that he would call Mr Clark, the arbitrator, as a witness. Hoffmann J, however, did not regard this as a solution. He said (at 290-291):

> "… Mr. Clark, if tendered as an expert witness, would be liable to cross-examination like any other expert. Once one goes to that point, however, one has moved a long way from the admissibility of the award as such. If Mr. Clark can be called on to justify his opinion of the rental value of the comparable property, that opinion ceases to have any evidential value. His

> opinion would presumably be based on the evidence of real comparables presented to him in his own arbitration. But Mr. Clark is not in a position to give admissible evidence of those comparables. He can only say what he was told by the witnesses at his arbitration. It follows that there will be no admissible evidence to support his opinion.
>
> Even if Mr. Clark or someone else were in a position to give admissible evidence of the comparables that support his opinion, I think that his award would still be inadmissible on another ground. It would involve a collateral inquiry as to whether Mr. Clark came to the right decision in his own arbitration. The result of such an inquiry would, in my judgment, have insufficient relevance to the issue in the present arbitration to justify undertaking it. So far as the comparables relied on by Mr. Clark are relevant to the value of Westminster City Hall they could have been used as such by the landlord's experts. In so far as they would not have been relevant I do not think they can be smuggled in by using them to establish Mr. Clark's opinion of the value of a comparable property and then using that conclusion to support a valuation of Westminster City Hall."

Hoffmann J concluded (at 291):

> "Properly analysed I think that the arbitrator's award has in itself insufficient weight to justify the exploration of otherwise irrelevant issues which its admissibility would require."

15. The present case is distinguishable from *Land Securities plc v Westminster City Council* in more than one respect. In the first place, Mr Simpson made his determination as an expert rather than an arbitrator. Whereas, therefore, the arbitrator with whose award Hoffmann J was concerned had been "obliged to act solely on the evidence adduced by the parties", Mr Simpson was not so constrained. His determination can be said to represent his opinion. A second point is that the rule against hearsay has now been swept away by the Civil Evidence Act 1995. Section 1(1) of that Act states that, in civil proceedings, "evidence shall not be excluded on the ground that it is hearsay".

16. Even so, it seems to me that Hoffmann J's judgment in the *Land Securities* case has a resonance in the present one. The fact that evidence is hearsay is likely to affect its weight even if it does not nowadays render it inadmissible. Further, there continue to be objections to conducting a "collateral inquiry" as to whether a previous decision-maker came to the right conclusion. One of the grounds on which Hoffmann J considered that the "result of such an inquiry would ... have insufficient relevance ... to justify undertaking it" was that relevant comparables could have been used by the landlord's experts anyway. Similarly, in the present case Glenfield was able to rely on Mr Cattrell's views without any inquiry being conducted into the basis for Mr Simpson's determination.

17. Mr Simpson's determination provides evidence that he considered the site to have had a particular rental value as at a particular date. Of itself, that can be of no help to Glenfield in the present case. The manuscript note from Mr Simpson's firm is said to show that he approached matters on the basis that the site had a usable area of 3,333 square yards, but there is nothing to that effect in the actual determination, which was expressly stated not to be a reasoned one. Moreover, Mr Simpson was not available to confirm whether he did indeed assume the usable area to be 3,333 square yards or, if so, to explain his reasons. While it is apparent from the determination that Mr Simpson visited the site, there is no evidence that he attempted to measure it for himself. As Mr Taylor pointed out, the very fact that the 3,333 figure accords with Mr Cattrell's estimate of the usable area suggests that Mr Simpson adopted Mr Cattrell's representation to that effect rather than undertaking an independent assessment. If that is indeed how Mr Simpson arrived at his valuation, it is difficult to see that he could have given evidence of much value even if he had been a witness: Mr Cattrell was before the Court to give and justify his views for himself, and it was incumbent on the Judge to assess them. That Mr Simpson had on an earlier occasion found them persuasive would, by itself, surely have been of no real importance. That is especially so since the materials before the Judge differed from those available to Mr Simpson (notably, because Mr Simpson, unlike the Judge, had neither evidence nor representations from Mr Hotchin). As it is, Mr Simpson was not a witness and so was not available to explain why he had accepted Mr Cattrell's view (if he did); in particular, there was obviously no opportunity for cross-examination. In all the circumstances, I agree with Mr Taylor that the Judge was not entitled to attach any substantial weight to Mr Simpson's determination.

18. As I read her judgment, the determination was in fact central to the Judge's decision. She said that she regarded Mr Simpson's acceptance of Mr Cattrell's contentions as "very convincing evidence" and concluded that the usable area was "that which was found by Mr Simpson as 3330 yards". To my mind, this approach was, with respect, flawed.

19. Given her comments on Mr Hotchin's evidence, it seems most unlikely that the Judge would have accepted the figure he put forward (viz. 4,600 square yards) even if she had seen Mr Simpson's determination as less important than she did. However, it may very well be that, but for the weight she attached to the determination, the Judge would have concluded that the usable area lay somewhere between Mr Hotchin's 4,600 square yards and Mr Cattrell's 3,333 square yards.

20. In the circumstances, notwithstanding Miss Cooper's attractively-presented submissions, I shall allow the landlord's appeal and set aside the Judge's decision as to the usable area of the site. I am, however, in no position to determine the usable area myself. The right course, I think, is to remit the issue to the Leicester County Court for rehearing.