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B5/2014/0160

IN THE SUPREME COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM BASILDON COUNTY COURT

(HHJ MOLONEY QC)

Royal Courts of Justice

Strand

London, WC2

Wednesday, 18th June 2014

B E F O R E:

THE CHANCELLOR OF THE HIGH COURT

(SIR TERENCE ETHERTON)]

LORD JUSTICE CHRISTOPHER CLARKE

‑ ‑ ‑ ‑ ‑ ‑ ‑

GOLDPINE ESTATES LTD

Claimant/Applicant

‑v‑

BOOTS UK LTD

Defendant/Respondent

(Digital Audio Transcript of

WordWave International Limited

A Merrill Communications Company

165 Fleet Street, London EC4A 2DY

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Official Shorthand Writers to the Court)

Mr T Roe QC (instructed by Bluetts Solicitors) appeared on behalf of the Applicant

Ms T Cox (instructed by Geldards LLP) appeared on behalf of the Respondent

J U D G M E N T

(Approved)

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1. THE CHANCELLOR OF THE HIGH COURT (Sir Terence Etherton): This is an appeal by the defendant landlord, Goldpine Estates Ltd ("Goldpine"), from the order dated 24 December 2013 of His Honour Judge Moloney QC, sitting in the Basildon County Court, on an appeal by the claimant tenant, Boots UK Limited ("Boots"), from the order dated 23 May 2013 of District Judge Humphreys.

2. By her order the District Judge ordered that Boots' application for the determination of an interim rent under Part II of the Landlord and Tenant Act 1954 ("the 1954 Act") should proceed under section 24D of the 1954 Act.

3. By his order Judge Moloney (1) allowed the appeal; (2) ordered Goldpine to grant Boots forthwith a tenancy in the same terms as those of the draft lease placed before him; and (3) ordered that the interim rent be assessed pursuant to section 24C of the 1954 Act at a further hearing.

4. The two principal areas of contention on the appeal to this court are (1) whether the Judge was correct to have held that Boots' application for interim rent was to be determined in accordance with section 24C rather than section 24D; and (2) whether the Judge was correct to order the grant of a new tenancy pursuant to section 29 of the 1954 Act on the terms of the draft lease placed before him despite Goldpine's contention that the terms of the draft lease had been negotiated and remained "subject to contract".

5. Permission for a second appeal to this court was given by Fulford LJ on 29 February 2014 on the ground that the appeal raises important points of principle and practice.

6. The relevant provisions of the 1954 Act are set out in the Appendix to this judgment.

Background facts

7. Boots is the tenant of the property at 35‑41 High Street, Grays, Essex, under a lease for a term of 25 years from 24 July 1985 at an annual rent of £64,000. Goldpine is the landlord. Boots occupies the property for the purposes of its business and the tenancy is one to which Part II of the 1954 Act applies.

8. On 1 March 2010 Goldpine served on Boots a notice under section 25 of 1954 Act to end the tenancy on 30 September 2010. Goldpine stated in the notice that it was not opposed to the grant of a new tenancy and set out its proposals for the new tenancy, namely a tenancy of the whole of the property comprised in the existing lease, for a term of 25 years from 30 September 2010, at an annual rent of £90,000 exclusive of VAT subject to review every 5 years.

9. The parties having agreed an extension of the statutory period specified in section 29A of the 1954 Act for making an application to the court for an order for the grant of a new tenancy under the 1954 Act, Boots commenced proceedings under section 24 of the 1954 Act on 29 November 2010 in the Basildon County Court for the grant of a new tenancy. Boots proposed in the claim form that the new tenancy should be for 5 years at an annual rent of £45,000 paid monthly in advance, and otherwise on the same terms as the existing lease. The claim form included an application for an order that an interim rent be determined pursuant to section 24A of the 1954 Act.

10. Goldpine served an acknowledgement of service dated 6 April 2011, in which it objected to the terms of the new tenancy proposed by Boots and it counter proposed that the new tenancy should be for 10 years at an annual rent of £90,000, and otherwise on Goldpine's standard lease terms. The acknowledgement of service also contained an application for an order that Boots pay an interim rent under section 24A.

11. In August 2011, by consent, the court gave directions for the exchange of experts' reports in late December 2011 with a view to a trial (if necessary) in early 2012.

12. The parties exchanged experts' reports on rental value in December 2011.

13. The parties then negotiated the terms of the new tenancy. Goldpine says that the negotiations were "without prejudice" to the legal proceedings and were "subject to contract".

14. On 2 October 2012 Goldpine's solicitor left a message on Boots' solicitors' telephone that Goldpine was content with the draft lease that had been negotiated, which was for a 5 year term from the date of execution at an annual rent of £45,000, and was happy to proceed to engrossment subject to receiving a plan from her client.

15. There was then a period of delay as a result of the intervention of the Solicitors' Regulation Authority in the practice of Goldpine's solicitors and the move of the solicitor with the conduct of the matter on Goldpine's behalf to another firm.

16. On 25 January 2013 Boots' solicitors wrote to the court requesting a case management conference as soon as possible.

17. On 9 February 2013 Goldpine's new solicitors sent an e‑mail message to Boots' solicitors saying that the proposed lease and the plan had been approved and all that remained was the issue of interim rent. They said they would discuss the matter with Goldpine and would revert on the point.

18. On 20 March 2013 Goldpine's solicitors wrote to Boots' solicitors saying that Goldpine objected to signing the new lease with the interim rent being payable from the end of the old lease. The letter then set out the reasons for that objection as follows:

"1. By the time the new lease is signed your client would have effectively had an eight year contract. Our client would have had no security for the first three years and there are no provisions for rent review.

2. The rent under the new lease was decided by the experts late into the discussions, around two years after the end of the previous lease, therefore my client considers that the interim rent proposed by your client does not fairly reflect what the interim rent should be as the market dropped significantly at the time the experts produced their reports.

3. Our client feels it has considerably compromised its position from that set out in the section 25 Notice. Our client had actually drawn up plans to redevelop the site and your client had verbally agreed with our client to surrender the upper floors if our client was to serve a notice agreeing to a new lease. Had this not been the case our client would have served a Section 25 Notice under ground F in order to redevelop the site. Our client had the plans drawn up and had entered into discussions with the council.

4. In an effort to reach a compromise our client has had to agree a 5 year lease whereas the previous lease had been a 20 year lease.

In order to progress this matter and to avoid both parties incurring any further legal costs our client proposes the following:

a) The new lease be dated to commence from the end of the old lease; or

b) The new lease be signed immediately to commence from the date of signing at the new rent. The interim rent remain as it currently is as your client is holding over on the terms of the old lease and therefore the old rent should remain payable until the new lease is signed."

19. Notwithstanding that letter Boots' solicitors wrote to the court on the same day, stating that the terms of the lease had been agreed "subject to contract" and that the only point outstanding was in relation to the payment of interim rent. On the following day Goldpine's solicitors also wrote to the court confirming that the terms of the lease had been agreed and that the only issue between the parties was the issue of the interim rent. Boots' solicitors wrote to the court again on 22nd March 2013 repeating that the terms of the lease had been agreed "subject to contract".

20. District Judge Humphreys conducted a case management conference on the telephone on 25 March 2013. There is not an agreed note of that conference in evidence but an attendance note by Boots' solicitor indicates that the solicitors for both parties told the District Judge that all points were agreed save for interim rent and that "this matter ought to be listed straight for trial rather than going through any lengthy direction”. The District Judge ordered that "a final hearing [be listed] on the issue of interim rent only on 23 May 2013... with a time estimate of 2 hours”.

21. In advance of the hearing on 23 May 2013 a witness statement was made by Louise Read, Boots' solicitor, in which she set out the terms of the new lease that had been negotiated, the factual history and some correspondence, including the letter of 20 March 2013 from Goldpine's solicitor to Boots' solicitors. Her witness statement included the following statement:

"26. If the Defendant's contention is that the New Lease terms are not agreed (and thus remain without prejudice) then the trial on the issue of interim rent cannot go ahead and needs to be adjourned so that the matter becomes a trial of the whole lease renewal."

22. Skeleton arguments were served by both sides. Boots' skeleton argument submitted that the interim rent should be determined pursuant to section 24C, neither of the exceptions in section 24C(3) applied, and therefore the interim rent payable from 1 September 2010 should be the annual rent of £45,000 which was the rent payable under and at the commencement of the new lease.

23. Goldpine served a skeleton argument in which it contended there should be no order for interim rent for similar reasons to those stated in its solicitors' letter 20 March 2013 or, alternatively, it should be determined under section 24D since the terms of the new lease were still "subject to contract" and "without prejudice" and so not before the court and a new tenancy had not yet been granted; and in any event Goldpine relied on the exceptions in section 24C(3), again for similar reasons to those stated in its solicitors' letter of 20 March 2013.

24. Boots then served a supplemental skeleton argument in which, among other things, it was acknowledged that the new lease terms might be "subject to contract" but stated (notwithstanding Goldpine's solicitors' letter of 20 March 2013) that neither party appeared to be arguing or even suggesting that it had any intention to resile from its current agreement as to the proper terms of the lease. It went on to say, however, that if, alternatively, Goldpine was suggesting that "there is some extant argument, and it is considered that the possible 'subject to contract' status of the lease is problematic", then the court would have to give directions for the hearing of the whole matter, including all the terms of the lease.

25. Goldpine then served a supplemental skeleton argument. It stated, among other things, that in view of Boots' disclosure of "without prejudice" material, all documents referring to that material should be removed from the court file and the matter be re‑listed before a different judge. The final two paragraphs of the skeleton argument were as follows:

"22. It appears that the parties wish there to be a full trial on the terms of the new lease as well. C's position has changed on 10 May in insisting on completion before the interim rent hearing or requiring a full trial. (C's instructions that the position on interim rent is 'protected' is far from clear.) This would undermine D's position that s.24D applies and mean that s.24C unarguably applied ‑ this difference between the parties was the very reason why interim rent was listed as a separate issue for determination by the court.

23. The parties will, of course, continue to seek to agree terms of the new lease but, since there will need to be an adjournment given the disclosure of without prejudice material, it would be sensible to give directions for a full trial in the meantime."

26. In the light of the differences of approach disclosed in those skeleton arguments it was agreed that the issue whether section 24C or section 24D applied would be determined as a preliminary issue before District Judge Humphreys at the hearing on 23 May 2013.

The hearing on 23 May 2013 and the judgment of the District Judge

27. The transcript of the hearing shows that Goldpine's counsel explained to the District Judge, very much along the lines of the letter from Goldpine's solicitors to Boots' solicitors of 20 March 2013, why it was that Goldpine had been prejudiced by the time the negotiations had taken and accordingly no longer wished to adhere to the "subject to contract" previously agreed terms and there would have to be a full trial as to the rent to be paid under the new lease.

28. It was not disputed by Boots before the District Judge that the negotiations and the agreement had been and remained "subject to contract".

29. The District Judge held that the interim rent was to be determined under section 24D. Her reasoning was that the terms of the new lease were not agreed because the negotiated terms were "subject to contract" and those terms were in any event no longer agreed; no lease had been granted; and it was not a case in which the court should in its discretion refuse to make any order for interim rent.

The appeal to Judge Moloney

30. The Judge allowed Boots' appeal. He ordered that Goldpine grant a new lease to Boots in the terms of the draft lease that had previously been agreed between the parties. He directed that interim rent be assessed pursuant to section 24C.

31. In his judgment the Judge considered in some detail the decision of Oliver J in Derby & Co Ltd ‑v‑ ITC Pension Trust Ltd [1977] 2 AC 890. He said that in that case a distinction had been made between, on the one hand, an agreement for the purposes of an application for the grant of a new tenancy under the 1954 Act Part II which would fall within sections 32 to 35 of the 1954 Act (viz an agreement as to the property to be comprised in the new tenancy, the duration of the new tenancy, the rent under the new tenancy and other terms of the new tenancy) and, on the other hand, an agreement reached in an attempt by the parties to avoid the necessity of proceeding with the application, which would not. He said that, at least by the time of the hearing before the District Judge, following her order at the case management conference, there was an agreement as to the terms of new lease which was final and not subject to any suspensive or other condition. He said that Goldpine's attempt to resile from those terms was "hard to justify and verge[d] on an abuse of process" since any order for different terms should have been sought, and directions given, at the case management conference. So far as concerned any "subject to contract" qualification of the previously agreed terms, the Judge said that whatever right the parties might have had to withdraw from the new lease prior to its execution must be taken to have ceased or been waived once the case management conference had taken place and the court order had been made. He held that the word "grants" in section 24C(1) includes both an actual grant and a grant that is bound to take effect in due course. Finally, he held that in the circumstances there was no need for a determination by the court of the terms of the new lease whether for the purposes of assessing interim rent or at all.

The appeal to the Court of Appeal

32. There are five grounds of appeal as follows:

"1. The learned Judge was wrong in law to hold that a landlord grants a tenancy for the purposes of section 24C of the Landlord and Tenant Act 1954 ('the 1954 Act') where there is no binding agreement between the parties for the grant of a new tenancy, nor a Court order for such a grant, but where the grant is 'bound to take effect in due course'.

2. Accordingly, the learned Judge was wrong in law to hold that section 24C applied to determine interim rent before such time as the parties had reached a binding agreement for the grant of a new tenancy or the Court had ordered such a grant.

3. The learned Judge was wrong in law to hold that parties negotiating a new commercial lease 'subject to contract' and subject to 'without prejudice' privilege could reach a binding agreement solely by informing the Court at a case management conference that the lease terms were agreed 'subject to contract', without executing the lease or exchanging counterparts.

4. The learned Judge was wrong in law to hold that a draft lease negotiated subject to contract and subject to 'without prejudice' privilege was sufficient to constitute an agreement as to the matters contained in sections 32 to 35 of the 1954 Act.

5. Accordingly, the learned Judge was wrong in law to order the Appellant to grant the Respondent a new tenancy in the same terms as the draft lease."

Discussion

33. I do not agree with the Judge that the parties have agreed the rent and other terms of the new lease for the purposes of sections 32 to 35 of the 1954 Act.

34. Boots now disputes that the negotiations and any agreement on the terms of new lease were in fact ever "subject to contract". It is now too late to advance that factual argument. If Boots had wished to make that argument it should have done so at the hearing before the District Judge on 23 May 2013. It was contended by Goldpine at that hearing that the "subject to contract" qualification applied and there was evidence before the District Judge to support that contention, notably the two letters from Boots' own solicitors to the court dated 20 March 2013 and 22 March 2013 stating that the agreement was "subject to contact". Boots did not advance any argument before the District Judge that the negotiations and the agreement were not qualified in that way. Had they done so, then it would have been open to Goldpine to lead evidence, whether written or oral, on that point. In the circumstances, the District Judge was perfectly entitled to proceed as she did on the basis that the previously negotiated terms were and remained "subject to contract".

35. I respectfully do not agree with the Judge that any right to rely upon the "subject to contract qualification ceased or was waived" once the case management conference had taken place and the District Judge had made her order for the hearing of the application for the determination of interim rent. In the light of Goldpine's solicitors' letter of 20 March 2013 to Boots' solicitors it is difficult to understand why the parties' solicitors worded their letters to the court on 20 March 2013 and 21 March 2013 as they did, or why they made similar observations to the District Judge on the telephone in the case management conference. What is clear, however, is that Goldpine's solicitors' letter of 20 March 2013 clearly alerted Boots to the fact that Goldpine no longer stood by the negotiated terms in that Goldpine was no longer willing to execute a lease with those terms.

36. Ms Tasmin Cox, for Boots, has contended in her able submissions that the letter of 20 March 2013 from Goldpine's solicitors did no more than say that the terms previously negotiated were not agreed if and only if interim rent could not be agreed between the parties. The letter of 20 March 2013 is, however, perfectly clear in stating, at the very outset, that Goldpine, in the circumstances that then existed, objected to the signing of the lease. Accordingly it is clear that those terms were not agreed for the purposes of the 1954 Act.

37. That was also made clear by Goldpine in its skeleton arguments for the hearing on 23 May 2013 before the District Judge and by the submissions of its counsel on that hearing. It is clear from Boots' skeleton arguments for the hearing that by that time Boots was well aware that the previously negotiated terms might not be binding for any purpose and, for that reason, Boots invited the court in its supplemental skeleton argument to adjourn all issues, including as to interim rent, to be determined at the same time if indeed the court concluded that the terms were no longer agreed or were in doubt.

38. If and insofar as Goldpine's agreement to the order made at the case management conference is to be viewed as a concession by Goldpine that the terms of the new lease were agreed, then I see no reason why Goldpine should not in all the circumstances have been entitled to withdraw that concession by the time of the hearing on 23 May 2013. Boots advanced no argument to the contrary before the Judge. During the hearing before this court Ms Cox argued strenuously that there is an issue of public policy involved in holding parties to an agreement of this kind.

39. In determining whether or not a concession should be allowed to be withdrawn the court will, of course, consider all the circumstances prevailing. So far as concerns public policy, I agree with the submission of Mr Thomas Roe QC, for Goldpine, that, even if Boots had argued before the District Judge or Judge Moloney that Goldpine had made a concession which it should not be permitted to withdraw, it would have been disproportionate of the court to have held Goldpine to any such concession. It would have been wrong and disproportionate to do so in circumstances where Goldpine no longer agreed to the grant of a property interest to Boots on the terms specified, and in the light of the ability, if appropriate, to penalise Goldpine for any wasted costs and (what on the face of it was) the small amount of time and expense involved in progressing the matter at the CMC up to the date of the hearing before the District Judge on 23 May 2013 when Goldpine's true position as to the terms of the lease no longer being agreed was made perfectly plain.

40. Turning to the significance of the "subject to contract" qualification of the negotiated terms, both parties have made extensive submissions on the judgment of Oliver J in Derby & Co Ltd v ITC Provision Trust Ltd [1977] 2 All ER 890. In that case proceedings by business tenants for the grant of a new tenancy pursuant to Part II of the 1954 Act were followed by negotiations between the parties as to the terms of a new tenancy in an endeavour to dispose of the matter out of court. The parties' agents arrived at terms which were confirmed in a letter from the tenant's agents to the landlord's agents expressed to be "without prejudice" to the tenant's right under the 1954 Act procedures. The letter was marked "subject to contract". A draft lease incorporating those terms was prepared and, after certain amendments, engrossed and sent to the tenants for execution. The tenants did not execute the lease but stated that, in view of changes in the property market, they wished to reconsider certain items in the proposed lease, including the rent and the rent review provisions. The negotiations came to an end and the landlords applied to the court for an order that the terms of the lease to be granted to the tenants pursuant to their application to the court should be those set out in the engrossed but unexecuted lease. The landlords contended that the terms contained in the engrossed lease had been "agreed" between the parties within the meaning of sections 33, 34(1) and 35 of the 1954 Act and therefore the court was bound to order the grant of a new lease in those terms.

41. Oliver J held that the landlords were not entitled to the order sought. His reasoning (at page 895) was that the agreement referred to in those sections "must be as a matter of construction an agreement for the purpose of an application before the court". He said that no such agreement was made in that case for the following reasons. Firstly, what one had there was an attempt by the parties to avoid the necessity of proceeding with the court application as indicated by the letter from the tenants' agents confirming the agreed terms and expressly stating that it was without prejudice to the tenants' right under the 1954 Act procedures. Secondly, the word "agreed" in the relevant sections is a reference to an unconditional and final agreement, that is to say an agreement which is final and not subject to any suspensive or other conditions. Where negotiations for the grant of a lease are carried out "subject to contract" that means that they are conditional on the final engrossment, execution and exchange of the formal lease. That condition had never been fulfilled and the bargain remained conditional. Oliver J said that what one has to look for is to see whether an agreement has been entered into between landlord and tenant, not for the purposes necessarily of the grant of a new lease but for the purposes of an application before the court, and that an agreement "subject to contract" in an endeavour to avoid the necessity of proceeding with the court application cannot be held to be binding for the purposes of the application, if the negotiations are unsuccessful.

42. For the reasons that I have given it is quite clear, and was clear to the District Judge, as it should have been to Boots, that there was no agreement as to the rent and other terms of the new lease by the time of the hearing on 23 May 2013 for the purpose of determining the interim rent or for any other purpose. Accordingly, for that reason, I reject the submission of Ms Cox that the court was not only entitled but bound to order the grant of a new tenancy on the terms previously negotiated, as the Judge in due course did on appeal from the District Judge.

43. I should add at this point that I do not accept the submission of Ms Cox that the order made by the District Judge on the case management conference for "final hearing on the issue of interim rent only on 23rd May 2013" was in effect a direction for a final hearing of the entire proceedings. The court was not and is not now in a position to order the grant of a new tenancy to Boots pursuant to section 29 of the 1954 Act.

44. The order of the Judge that a new lease must be granted on the terms agreed "subject to contract" must therefore be set aside.

45. I turn next to the question whether interim rent in present case should be determined under section 24C or section 24D. This issue has been debated both in this court and in the courts below as raising novel and important issues of principle. The real problem, however, is the procedural muddle stemming from a series of relatively simple misunderstandings. Goldpine's skeleton argument and supplemental skeleton argument on this appeal run to 96 paragraphs and Boots' skeleton argument runs to 89 paragraphs. The points of principle are not, however, complex or difficult.

46. The statutory context for the present dispute and the muddle over this issue is that section 24B provides that interim rent, on an application under 24A(1), is payable from the earliest date of termination that could have been specified in the landlord's section 25 notice. That date is the 1 September 2010 in the present case. The default position under section 24C (viz in a case where the landlord grants a new tenancy pursuant to a court order or otherwise) is that the interim rent is the same as the rent payable under and at the commencement of the new tenancy. Section 24C(3) specifies two situations in which the interim rent may be fixed at a different rate but the burden of satisfying the court that section 24C(3) applies lies on the party so asserting.

47. Section 24D, on the other hand, provides for the interim rent to be such rent as it would be reasonable for the tenant to pay, to be determined on the basis of a tenancy from year to year, on the same terms as the tenancy continuing under section 24 and having regard to the rent payable under that tenancy but otherwise in accordance with section 34(1) and (2). In the present case such a rent is likely to be higher than a rent determined under section 24C.

48. The consequence of the section 25 notice (in which Goldpine said that it was not opposed to granting a new tenancy), Boots' claim in these proceedings for a new tenancy under section 24 and Goldpine's acknowledgement of service is that the present proceedings, which are continuing, will result in the grant of a new tenancy to Boots so long as Boots continues to wish to have one or the tenancy is not forfeited.

49. It follows that Boots' claim for an interim rent in the claim form, when it is heard, will inevitably be determined under section 24C. The circumstances will be precisely those specified in section 24C(1), namely where (a) the landlord gave a notice under section 25 at the time when the tenant was in occupation of the whole of the property comprising the relevant tenancy for business purposes and stated in the notice that he was not opposed to the grant of new tenancy, and (b) the landlord grants a new tenancy of the whole of the property comprising the relevant tenancy to the tenant (whether as a result of an order for the grant of a new tenancy or otherwise). It is clear that the word "grant" in section 24C(1) encompasses an order of the court for the grant of a new tenancy. That is made plain, if confirmation is required, by section 24D(3).

50. Section 24D has no application in the present case because, as section 24D(1) makes clear, section 24D only applies where section 24C does not. Where an application for interim rent is made in a case to which section 24C will apply, then in the ordinary course of events, unless the parties and the court otherwise agree, the interim rent must be determined at the same time as the court determines the terms of the tenancy to be granted and orders the grant of the tenancy, or the landlord has by agreement out of court granted a new tenancy. That is obvious as a matter of statutory language and plain legislative intent.

51. Leaving aside the clarity of the statutory language itself, there are two specific statutory matters that also support those conclusions. Firstly, subsections 24C(3) to (5) specifically address the problem of changes in the rental market during a period of delay between the date on which the interim rent commences under section 24B and the date on which the new tenancy is granted or ordered to be granted such as to make the rent under the new tenancy inappropriate for the interim rent. Secondly, if an interim rent were to be fixed under section 24D in a case to which section 24C(1) will in due course apply, and that rent was higher or lower than the rent payable under the new lease at its commencement, there would be no statutory mechanism under section 24C or section 24D for an adjustment equivalent to that in section 24D(3).

52. Further, as a purely practicable matter it cannot possibly be the case that, where there are proceedings on foot for the grant of a new tenancy under Part II of the 1954 Act and the rent under the new tenancy has not yet been determined by the court or agreed by the parties for the purposes of calculating interim rent, the question whether interim rent is to be calculated under section 24C or section 24D turns on whether or not the court happens to list the application for interim rent for hearing before or at the same time as determining the rent and other terms of the lease. In the present case, it seems clear that, if it had been appreciated that the rent and other terms of the lease were "subject to contract" and were not agreed, neither Boots nor the court would have agreed to the hearing of the application for interim rent to be determined on its own, in advance of determination of the other terms of the new tenancy. They did agree to do so but only as a result of a mistake or misunderstanding.

53. It follows that, in the ordinary course of events, the choice between section 24C and section 24D will not turn on issues such as whether the agreement is or is not "subject to contract" or "without prejudice". If a new lease is to be granted, section 24C will apply and the interim rent will be determined at the same time as the court determines the other terms and makes an order for the grant of the tenancy or after the landlord has granted the new tenancy without any court order. It is theoretically possible that, in advance of the court's determination of the terms of the new tenancy and an order for its grant or the landlord's grant of a new tenancy out of court, the parties could agree specifically for the purpose of section 24C what the new rent will be, even though the parties may be in dispute over other lease terms and matters. No doubt they could request the court, and the court could agree, to make an order for interim rent under section 24C in such circumstances. That, however, is not the position in the present case for the reasons that I have given.

54. It follows that the District Judge was correct to hold that the rent payable under the new lease was not agreed and so there could be no determination of an interim rent under 24C at that point of time. She was wrong, however, to order that the interim rent should be determined under section 24D. She should have ordered that all issues as to the terms of the new tenancy and the amount of interim rent should be dealt with together at a future hearing.

55. It also follows that Judge Moloney was correct to hold that the interim rent is to be determined under section 24C. He should have ordered, however, that the amount of the rent would be determined together with all questions as to the other terms and the grant of new lease at the same time at a further hearing. That is now conceded by Goldpine and so, despite all the time, money and energy devoted to the issue in three courts, it is no longer in issue that section 24C applies to the determination of the interim rent.

Conclusion

56. For the reasons that I have given I would allow the appeal from the order of Judge Moloney to the extent that that he ordered the grant of a new lease on the terms of the draft lease put before him and he directed that the interim rent be assessed under section 24C in advance of the determination of the terms of the new lease and an order for its grant.

APPENDIX

PROVISIONS OF THE 1954 ACT

24.— Continuation of tenancies to which Part II applies and grant of new tenancies.

(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of a new tenancy—

(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy, or

…

24A— Applications for determination of interim rent while tenancy continues

(1) Subject to subsection (2) below, if–

(a) the landlord of a tenancy to which this Part of this Act applies has given notice under section 25 of this Act to terminate the tenancy; or

(b) …

either of them may make an application to the court to determine a rent (an “interim rent”) which the tenant is to pay while the tenancy (“the relevant tenancy”) continues by virtue of section 24 of this Act and the court may order payment of an interim rent in accordance with section 24C or 24D of this Act.

24B— Date from which interim rent is payable

(1) The interim rent determined on an application under section 24A(1) of this Act shall be payable from the appropriate date.

(2) If an application under section 24A(1) of this Act is made in a case where the landlord has given a notice under section 25 of this Act, the appropriate date is the earliest date of termination that could have been specified in the landlord's notice.

…

24C— Amount of interim rent where new tenancy of whole premises granted and landlord not opposed

(1) This section applies where–

(a) the landlord gave a notice under section 25 of this Act at a time when the tenant was in occupation of the whole of the property comprised in the relevant tenancy for purposes such as are mentioned in section 23(1) of this Act and stated in the notice that he was not opposed to the grant of a new tenancy; ….

and the landlord grants a new tenancy of the whole of the property comprised in the relevant tenancy to the tenant (whether as a result of an order for the grant of a new tenancy or otherwise).

(2) Subject to the following provisions of this section, the rent payable under and at the commencement of the new tenancy shall also be the interim rent.

(3) Subsection (2) above does not apply where–

(a) the landlord or the tenant shows to the satisfaction of the court that the interim rent under that subsection differs substantially from the relevant rent; or

(b) the landlord or the tenant shows to the satisfaction of the court that the terms of the new tenancy differ from the terms of the relevant tenancy to such an extent that the interim rent under that subsection is substantially different from the rent which (in default of such agreement) the court would have determined under section 34 of this Act to be payable under a tenancy which commenced on the same day as the new tenancy and whose other terms were the same as the relevant tenancy.

(4) In this section “the relevant rent” means the rent which (in default of agreement between the landlord and the tenant) the court would have determined under section 34 of this Act to be payable under the new tenancy if the new tenancy had commenced on the appropriate date (within the meaning of section 24B of this Act).

(5) The interim rent in a case where subsection (2) above does not apply by virtue only of subsection (3)(a) above is the relevant rent.

(6) The interim rent in a case where subsection (2) above does not apply by virtue only of subsection (3)(b) above, or by virtue of subsection (3)(a) and (b) above, is the rent which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24 of this Act.

(7) In determining the interim rent under subsection (6) above the court shall have regard–

(a) to the rent payable under the terms of the relevant tenancy; and

(b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy,but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court and the duration of that new tenancy were the same as the duration of the new tenancy which is actually granted to the tenant.

(8) In this section and section 24D of this Act “the relevant tenancy”has the same meaning as in section 24A of this Act.

24D— Amount of interim rent in any other case

(1) The interim rent in a case where section 24C of this Act does not apply is the rent which it is reasonable for the tenant to pay while the relevant tenancy continues by virtue of section 24 of this Act.

(2) In determining the interim rent under subsection (1) above the court shall have regard–

(a) to the rent payable under the terms of the relevant tenancy; and

(b) to the rent payable under any sub-tenancy of part of the property comprised in the relevant tenancy, but otherwise subsections (1) and (2) of section 34 of this Act shall apply to the determination as they would apply to the determination of a rent under that section if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court.

(3) If the court–

(a) has made an order for the grant of a new tenancy and has ordered payment of interim rent in accordance with section 24C of this Act, but

(b) either–

(i) it subsequently revokes under section 36(2) of this Act the order for the grant of a new tenancy; or

(ii) the landlord and tenant agree not to act on the order,

the court on the application of the landlord or the tenant shall determine a new interim rent in accordance with subsections (1) and (2) above without a further application under section 24A(1) of this Act.

25.— Termination of tenancy by the landlord.

(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as “the date of termination”):

Provided that this subsection has effect subject to... the provisions of Part IV of this Act as to the interim continuation of tenancies pending the disposal of applications to the court.

(2) Subject to the provisions of the next following subsection, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein.

28. Renewal of tenancies by agreement.

Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies.

29.— Order by court for grant of new tenancy or termination of current tenancy

(1) Subject to the provisions of this Act, on an application under section 24(1) of this Act, the court shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy.

32.— Property to be comprised in new tenancy.

(1) Subject to the following provisions of this section, an order under section 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order.

33. Duration of new tenancy.

Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy.

34.— Rent under new tenancy.

(1) The rent payable under a tenancy granted by order of the court under this Part of this Act shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c) any effect on rent of an improvement to which this paragraph applies,

(d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.

35. — Other terms of the new tenancy.

(1) The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) … shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.

36.— Carrying out of order for new tenancy.

(1) Where under this Part of this Act the court makes an order for the grant of a new tenancy, then, unless the order is revoked under the next following subsection or the landlord and the tenant agree not to act upon the order, the landlord shall be bound to execute or make in favour of the tenant, and the tenant shall be bound to accept, a lease or agreement for a tenancy of the holding embodying the terms agreed between the landlord and the tenant or determined by the court in accordance with the foregoing provisions of this Part of this Act; and where the landlord executes or makes such a lease or agreement the tenant shall be bound, if so required by the landlord, to execute a counterpart or duplicate thereof.

57. LORD JUSTICE CHRISTOPHER CLARKE: I agree. The submissions made to the courts in this case have gone far and wide but the matter boils down essentially to two points. Firstly, I respectfully agree that Judge Moloney was wrong to order the grant of a new lease in the same terms as that of the draft lease, when any agreement that there was in relation to a new lease was subject to contract. That condition meant that there was no question of there being a contract which could by enforced even leaving aside the provisions of the Law of Property (Miscellaneous Provisions) Act 1989, section 2. Nor was there, as it seems to me, an agreement, for the purposes of sections 32 to 35 of the Landlord and Tenant Act 1954, in the light of the “subject to contract” provision and the letter of 20 March 2013 and what followed it, for the reasons explained by Oliver J (as he then was) in Derby at page 895C to G.

58. Secondly, District Judge Humphreys was right not to hold that the lease terms had been agreed, either for the purposes of the contract or for the purposes of section 32 to 35 of the 1954 Act. But she was wrong to decide that the interim rent should be determined under section 24D in circumstances where the reality was that there was to be a new tenancy granted under the Act, there being no opposition to the grant of such a tenancy, so that section 24C would apply. There has been an unfortunate muddle as to the information provided to the court as to what exactly the position was so far as any agreement was concerned and a procedural wrong turning in not having the terms of the new tenancy and the amount of the interim rent determined at the same time. For the reasons given by my Lord, I agree that this appeal should be allowed and the order made as he has described.