

JERSEY / JUDGMENT

Epoch Properties v BHS and Fall

[2004] JCA 156 (10 September 2004)

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court OF APPEAL th September, 2004 . Before: The Hon. M. J. Beloff, Q. C., President; Sir John Nutting, Q. C.; and D. A. J. Vaughan, Esq., C. B. E., Q. C. Between Epoch Properties Limited Appellant And British Homes Stores (Jersey) Limited First Respondent And Peter Fall as President of the Royal Institution of Chartered Surveyors Second Respondent Appeal by the Appellant against the Judgment of the Royal Court of 26th May, 2004, dismissing the Appellant's Application for a declaration that the appointment by the President of the Royal Institution of Chartered Surveyors of an expert to conduct a rent review was invalid as being contrary to the terms of the lease in question. Advocate M. L. Preston for the Appellant; Advocate K J Lawrence for the First Respondent; Advocate F B Robertson for the Second Respondent.

judgment

THE PRESIDENT:

Introduction

1. This is an appeal by the Appellant ("Epoch") from the Judgment given by the Samedi Division of the Royal Court on 26 th May 2004 ("the Judgment") in which the Royal Court dismissed Epoch's application for a declaration that the appointment of Mr Finn FRICS ("Mr Finn") on 27 th February 2003 by the Second Respondent ("the President") as an independent expert to determine a rent review between Epoch as landlord and British Home Stores (Jersey) Limited ("BHSJ") as tenant was invalid. The lease 2. The lease was entered into on 25 th March 1988 between the Scottish Widows Fund and Life Assurance Society ("Scottish Widows") as owner and BHSJ as tenant in relation to the property at 8-18 King Street and 2-12A Don Street, St Helier ("the premises"). Epoch subsequently acquired the premises from Scottish Widows and is accordingly now the landlord. The Premises 3. The definition of demised premises in the lease is " the land and premises " more particularly described in French in the introduction to this present lease, including " all heating, ventilation and air conditioning plant and equipment, lifts, escalator and lighting but not tenant's display or specialist lighting (xc.1). The French description is (so far as material): "... certain bâtiment comprenant un grand magasin, bureaux, offices, emmagasinage de monte -charge et appartenances connu sous le nom de "British Home Stores" érigé sur le plupart de

l'emplacement sur lequel antérieurement étaient construits les bâtiments formant partie des prémisses connues sous le nom de "Noel & Porter" et comprenant les propriétés numéros huit , dix , douze , quatorze , seize et dix-huit "King Street" et les numéros deux, quatre , six, huit , douze et douze A "Don Street" et un édifice au Nord de ladite propriété numéro douze A "Don Street". 4. The lease provides for periodic rent reviews. The premises are in fact (and were on the valuation date) a British Homes Stores ("BHS") retail store with a lengthy frontage to King Street immediately adjoining Woolworths. 5. The rent review pattern is three-yearly on each third anniversary of the date of grant (the current review was due on 25th March 2003). Under the rent review provisions in Schedule 2, the basic rent is increased by the amount (if any) by which the "Open Market Rent" on the review date in question exceeds the basic rent. 6. "Open Market Rent" is defined in clause 1(1) of the Contract Lease as being (so far as material): "the fair yearly market rent at which the Demised Premises might reasonably be expected to be let at the Relevant Review Date by a willing landlord to a willing tenant in the open market with vacant possession subject to the provisions of this Lease other than the amount of yearly rent hereby reserved but including the provisions for rent review and without fine or premium for a term equal to the greater of fifteen years and the residue of the contractual term hereby granted but commencing on the Relevant Review Date assuming:- (a) if not a fact that the Demised Premises and all buildings comprised therein are then in existence and (if damaged) fully restored and enjoy all rights necessary for the full beneficial use thereof ...

- (d) that (notwithstanding any act, omission or default of the Tenant or other circumstance) the Demised Premises are fit and ready for immediate occupation and use and can lawfully be used for any of the uses permitted under the terms of this Lease ... 7. Paragraph 2 of the Second Schedule to the lease provides that, in the event that the parties cannot agree the Open Market Rent, either may require it to be referred to "The Surveyor who shall be appointed by the Landlord and Tenant or in default of agreement on such appointment by the President (or other the Chief Officer or acting Chief Officer) for the time being of the Royal Institution of Chartered Surveyors." Paragraphs 3 and 4 provide that the Surveyor is to act as an expert and not as an arbitrator unless the parties agree otherwise and his decision is to be final and binding on the parties. 8. The Surveyor is defined in Clause 1(1) of the lease as follows:- "An independent Chartered Surveyor of recognised standing experienced in the valuation and letting of premises so far as practicable of similar character or comparable to the Demised Premises within the Island of Jersey or if there are not such premises within the Island of Jersey then within the Channel Islands or nationally (as the case may require) appointed from time to time to determine the Open Market Rent pursuant to the provisions of the Second Schedule". 9. We also draw attention to the user clause in Schedule 3 to the lease which provides for the covenants and obligations of the tenant, to which we were referred. USER 20.(1) Not to use the Demised Premises or any part thereof nor permit or suffer the same to be used:- (a) for residential purposes or as sleeping accommodation (b) for any noisy, noisome, noxious, offensive or dangerous trade, art, manufacture, business or occupation, or for any sale by auction, public exhibition, political meeting, show, spectacle

or gambling or for any illegal or immoral purpose (c) in any way for any purpose which may be or tend to become a nuisance, damage or disturbance to or prejudice the Landlord or the owners or occupiers of any premises in the ownership of the Landlord adjoining or near the Demised Premises (2) Without prejudice to the generality of the foregoing not to use the Demised Premises nor permit the same to be used other than as a shop or shops for carrying on a retail trade or business or retail trades or businesses within Class 1 of the Island Planning (Use Classes) Order 1965 and as ancillary to that main use showrooms, restaurants or cafeterias, food hall, storerooms, stockrooms and offices and caretaker accommodation and for the subsidiary uses of banking, insurance, estate agency, financial advice or similar financial service uses. The Background Dispute 10. The underlying differences between the parties can be summarised as follows: The premises are occupied by BHSJ which trades there as BHS. BHSJ contends that the premises are to be treated as a variety store. A variety store is simply an expression to indicate a very large store and the now modern expression is "large retail" or "large retail space". The evidence suggests that the rental value of a variety store is assessed by reference to an assessed figure multiplied by the gross internal area of the premises ("the GIA approach"). Epoch, on the other hand, contends that the property should be treated as a prime retail store. The evidence suggests that the rental value of such premises is assessed in zones ("the Zone approach"). The underlying rationale of the Zone approach is that the front of a shop is the most valuable because it is the prime space for selling. Thus Zone A is the area to a depth of 30 feet (in St Helier) from the frontage, the next 20 feet of depth is referred to as Zone B and so on. In valuation terms, each zone is valued at half the rate of the preceding zone. Furthermore, unlike variety stores, the rental value is calculated on the net internal floor area which excludes areas such as staircases, staff toilets, pillars and columns. The correct interpretation of the definition of Surveyor 11. In order to fit within the definition in the lease, the person appointed as Surveyor by the President must be:- (i) a chartered surveyor; (ii) independent; (iii) of recognised standing; and (iv) experienced in the valuation and letting of premises so far as practicable of similar character or comparable to the demised premises within the Island of Jersey ("the relevant experience") or if there are not such premises within the Island of Jersey then within the Channel Islands or nationally as the case may require. 12. The Royal Court noted the parties disagreed on the effect of the inclusion of the words 'so far as practicable', - although the argument was not resurrected before us. 13. The relevant part of the definition in relation to "the Surveyor" in the lease reads: ".... experienced in the valuation of premises so far as practicable of similar character or comparable to the demised premises within the Island of Jersey" In our opinion the location of the phrase in the definition points to its qualifying the word 'premises' rather than the word 'experience'. We consider that it has the effect of marginally diluting the requirement for similarity or comparability to the demised premises. It extends the requirement of relevant experience to premises which are 'broadly similar' or 'broadly comparable' to the demised premises rather than only those which are strictly similar or comparable. "Of similar character or comparable to" appear to postulate two distinct tests: but it is not easy to discern when the application of one will lead to a different conclusion to the application of the other: and resolution of that issue is

immaterial to the present case. 14. It follows that surveyors with relevant experience in Jersey who fulfil criteria (i)

- (iii) are always to be appointed in preference to those without such experience. Only if there is no surveyor with relevant experience in Jersey can someone outside it be appointed. Then whether the surveyor selected is one with relevant experience in the Channel Islands or nationally is a matter for the President. Chronology of material events 15. The circumstances in which the decision was taken to appoint Mr Finn are described in three affidavits (dated 18 th December 2003, th March 2004 and 22 nd March

2004) of Mr Padbury, an employed lawyer and head of the Dispute Resolution Service of the RICS, who effectively took the decision. The President receives about 10,000 applications a year for the appointment of dispute resolvers of which some 8,000 are concerned with rent reviews. These applications are administered by a team of 16 headed by Mr Padbury. 16. On 27 th December 2002 Mr D H Adamson of Allsop & Co., the surveyors acting for BHSJ, submitted an application to the President on a standard application form for the appointment of an expert to determine the forthcoming rent review in relation to the property together with a copy of the lease. In the application form, against the box for 'type of premises', Mr Adamson had inserted 'variety store'. In his covering letter he expanded on this by describing the premises as a 'large retail variety store'. Having set out the definition of 'Surveyor' contained in the lease, he submitted that there were no chartered surveyors practising in Jersey or the Channel Islands with the necessary experience of valuing and letting such properties and he submitted therefore that a chartered surveyor from the United Kingdom would need to be appointed. [The application was acknowledged at which time the RICS also wrote to Mr. L. Baker of Baker Almond, the surveyors advising Epoch.] 17. By letter dated 27 th December, 2002 Mr Adamson made submissions to Mr Padbury as to why it would be "in contravention of the terms of the lease for any partner or employee of a firm on the Island of Jersey or within the Channel Islands to be appointed as "the Surveyor". Mr Adamson asked for these submissions to be taken into account by the President. The letter was not copied to Epoch or its agents [Mr Baker of Baker Almond] by Mr Adamson or even by the RICS. 18. On 13 th January 2003 an assistant appointments officer of the RICS Dispute Resolution Service sent out a pro forma "Case Details" form to both parties. It identified the Premises as a "variety store". A covering letter of the same date asked both parties to inform the President of any potential conflicts of interest. 19. On 24 th January 2003, Mr Adamson's colleague replied asking for all surveyors at 3 large firms of Jersey surveyors to be excluded from consideration and reiterating the submissions about the requirement for a mainland surveyor to be appointed. The letter was not copied to Mr Baker. 20. On 5 th February 2003 Mr Baker responded to the President by letter in which, inter alia, he said that he was firmly of the opinion that the expert should be Jersey based. 21. Between 5 th and 12 th February 2003 the President identified two potential experts at London West End firms (one of whom was Mr Finn) and wrote to each about a potential appointment. 22. On 13 th February 2003 Mr Finn replied confirming his availability and expertise, but adding: "... I

have not been involved in agency business for the last seven years. So I have no experience of letting similar premises in the Island of Jersey or the Channel Islands but I do have experience nationally." 23. On 27 th February 2003 the President appointed Mr Finn as 'the Surveyor' to determine the rent review. It is agreed by all parties that Mr Finn is eminently well qualified in the letting and valuation of variety stores but equally that he has no experience of letting or valuing premises in Jersey or the Channel Islands. 24. Epoch objected to Mr Finn's appointment on the grounds that there were suitable surveyors experienced in the valuation and letting of comparable Jersey properties and that the terms of the lease required such persons to be appointed in preference to someone from the United Kingdom without such experience. 25. However despite Epoch's attempts to persuade Mr Padbury that the President had not complied with the terms of the Contract Lease, the appointment of Mr Finn remained in place and the President adhered to his decision. 26. On 26 th June 2003 Epoch applied to the Royal Court by way of Representation to declare the appointment of Mr Finn invalid and for ancillary relief. The Legal Tests 27. The question arises as to what is the correct test to be applied on a challenge of this kind. Epoch does not criticise the conclusions of the Royal Court as to the general nature of the function that the President carries out in such a case and the legal basis on which the exercise of that function can be challenged. We consider that it was right not to do so. 28. In summary the Royal Court decided that: (i) the position of the President when presented with a request for appointment of an expert (or arbitrator) under the terms of such a lease is to be equated with that of an independent expert; (ii) if the President asks himself the right questions and exercises his jurisdiction accordingly his appointment cannot be challenged on the basis that he made a mistake; (iii) if the President departs from the instructions as set out in the lease, i.e. if he appoints someone who does not fulfil the criteria laid down in the lease, then his decision is invalid; (iv) if the question whether the President has so departed from his instructions involves an area falling within his expertise (e.g. judgment of a surveyor's appropriateness for the task), he will not be found to have departed from his instructions unless he has reached an unreasonable decision which no reasonable President could have reached (i.e. a test analogous to *Wednesbury unreasonableness*). (*Associated Picture Houses -v- Wednesbury Corporation*

[1947] 2 All ER 680). (See *Jones -v- Sherwood Computer Services Limited*

(1992) 1 WLR 277), *Veba Oil Supply and Trading GmbH -v- Petrotrade Inc*

[2001] EWCA Civ 1832), *Nikko Hotels (UK) Limited -v- MEPC plc*

(1991) 28 EG 86, and *Pontsarn Investments Limited -v- Pankki*

(1992) 22 EG 103. 29. To elaborate the point made at paragraph 28(4) some of the stipulated characteristics are listed in Clause 1(i) of the lease. Thus if the President appointed a solicitor instead of a chartered surveyor, the Court would be bound to find that he had departed from his instructions. But some of the characteristics are subjective e.g. standing and experience. In such context the President has to form an appreciation of whether the

qualities enjoyed by his potential appointee are of the required level. In relation to them, there is clearly room for differing views. 30. In our view, when deciding whether the President has departed to a material extent from his instructions in those latter areas where the parties have clearly chosen him for his own expertise, the Court should apply a test analogous to *Wednesbury* unreasonableness. If the decision of the President as to whether his appointee has the stipulated experience or standing is one to which no reasonable President could come, the Court will find that he has departed from his instructions. If, however, the Court is merely of the view that he has reached a decision on these matters other than that which the Court itself would have, it would not interfere. 31. Epoch has not suggested that Mr Finn is not a chartered surveyor or that he is not independent or that he is not of recognised standing. The sole question therefore is whether the decision of the President that Mr Finn's appointment complies with the stipulated requirements of the lease as to relevant experience is one to which the President could reasonably have come. (Royal Court paragraph 20). Reasons for Appointment of Mr Finn 32. In his first affidavit, Mr Padbury explained that the President has a panel of dispute resolvers ("the President's Panel"). Panel members are required to have the necessary qualifications and experience. The Dispute Resolution Policy Committee has a rigorous selection policy including attendance at the relevant course and assessment, submission of written work and interview. 33. Mr Padbury further explained in the same affidavit that the system that the President has put in place operates by identifying from a list or "Panel" of approved valuers a suitable person, that there were no valuers from Jersey on the Panel, but that: "... The problem was not insurmountable in this case because of the wording of the lease in question, which, in my view allowed for the appointment to be made from outside Jersey or the Channel Islands. That is therefore the basis on which the appointment of Mr Finn was made." (emphasis added) 34. As the Royal Court observed, Mr Padbury's first affidavit accordingly gave the clear impression that no Jersey based surveyor was considered in this case simply because no such surveyor was a member of the President's Panel at the material time; in other words membership of the Panel was in practice regarded as being essential to appointment as a surveyor. 35. We agree with the observations, albeit obiter, of the Royal Court that had the decision of the President been taken on the grounds so described in Mr Padbury's first affidavit, the decision would have been vulnerable to quashing. The function of the President under the lease is to appoint an expert in accordance with the terms of the particular lease. The lease in this case makes no reference to the President's Panel; it refers only to persons having experience in the valuation and letting of premises so far as practicable of similar character to the demised premises within the Island of Jersey. The President had therefore to consider whether there were surveyors with suitable Jersey experience who could act as the Surveyor even if they were not on the Panel: only if there were no such surveyors then he could turn to other Channel Islands or United Kingdom surveyors. If there was more than one person who fitted the requirements of the lease, it was open to the President in his discretion to prefer a person who was a member of his Panel; but it was not open to him to ignore the terms of the lease in order to select a person who was a member of the

Panel. 36. In his second and third affidavits Mr Padbury gave a different explanation of the process which the President had followed to the following effect. Because he recalled the property from difficulties which had arisen in connection with the appointment of the Surveyor on previous rent reviews, he had been interested to visit it. Accordingly he took the opportunity of visiting the property in November/December 2002 when he happened to be in Jersey on other business. He formed the view that the property was a variety store based upon (i) his own visit, (ii) his knowledge of the nature of the business carried out by BHSJ, (iii) the fact that the application by Allsop and Co had described the property as a variety store and (iv) the fact that, although the RICS case details sent to Baker Almond on 13 th January had described the property as a variety store, that classification was not challenged by Baker Almond in their reply, albeit that they had argued for the appointment of a Jersey based chartered surveyor. As to (i) in particular he stated: "... that there were few premises in Jersey comparable to the demised premises (i.e. similar in size , layout and character of the BHS premises) and thus little opportunity for any surveyor experienced only in the Jersey market to have acquired the necessary relevant experience in the valuation and letting of such premises ..." [emphasis added] He explains that for those main reasons he formed the view "... that there was no one who had the relevant experience in the letting of premises comparable to the BHS premises within Jersey or Guernsey." 37. In his third affidavit, Mr Padbury elaborated his conclusion: "I had indeed formed the view that British Home Stores was a variety store, and that was how I characterised the premises ... I formed the view that there was unlikely to be anyone who had the relevant experience in the valuation and letting of premises comparable to the British Home Stores premises (i.e. a variety store) within Jersey and Guernsey" "... as there were so few such properties it would not be possible for any surveyor with experience of only the Jersey market to have acquired the necessary relevant expertise required in order to be an expert in the valuation and letting of such premises. I considered that a person would need to have been involved in the valuation and letting of a large number of such premises to be considered an expert" (emphasis added) 38. In summary the President, based on Mr Padbury's advice, concluded that the property was a variety store and that there was unlikely to be anyone who had the relevant experience in the valuation and letting of comparable premises (i.e. variety stores) within Jersey or Guernsey. Accordingly the appointment had been made in favour of a United Kingdom expert experienced in the valuation of variety stores. 39. In their written submission Epoch contended that the Royal Court wrongly took into account (indeed necessarily preferred) the evidence given in Mr Padbury's second and third affidavits which admittedly contain no explanation why (or indeed whether) the explanation given in the first affidavit was wrong. The Royal Court held that his second and third affidavits had to be accepted because he was not challenged about them by cross-examination (para 10). We agree. However delicately Epoch approached the issue, in essence it has hitherto been averring that no or limited credence should be given to the evidence on which Mr Padbury now seeks to rely, the challenge was to his candour, not his memory. In such circumstances Epoch should (as it could) have cross-examined Mr Padbury. "That is not

only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses." *Browne v Dunn* 1894 AC 67 per Lord Herschell at p 70-71. In his oral argument Advocate Preston prudently accepted that, absent such cross-examination, this Court was obliged to accept the second and third affidavits as being the correct explanation of the President's reasoning. The Key Issue 40. We agree with Epoch that it is necessary at the outset to identify and to categorise the demised premises so as to enable consideration to be given to what properties were broadly similar or comparable to them; and to whether any particular potential surveyor had relevant experience. Where we part company from Epoch is in the suggestion that the President failed to carry out just such an exercise. The Valuation Hypothesis 41. Epoch contend that by reason of the provisions in the lease relative to open market rent and use, the premises to be valued are an empty retail unit, in good condition, containing the specified landlord's fixtures ready for fitting out works to start and with an elastic user clause which did not confine them to use as a variety store. By corollary the premises were not the BHS store, nor to be treated as accordingly occupied by the hypothetical tenant BHS. In short the character of the Tenant's actual use and layout of the premises and its trading style are therefore wholly irrelevant. What is to be valued is a larger than average retail store on King Street that, under the hypothetical lease, can be used as "a shop or shops for retail trades or businesses", can be partitioned and can be sub-let in parts. 42. We consider that this submission confuses the role of the President in appointing a surveyor and the role of the surveyor appointed. It is the latter not the former, who has to take account of the definition of open market rent and of the user clause. These bear precisely upon the valuation exercise. By contrast the President has to consider what are the demised premises, which are not defined by reference either to the open market rent or to the user clause, but have their own particular definition [see paragraph 3 above]. 43. Moreover it is clear from the material before the Court that the method employed by the surveying profession is to divide premises into specialist categories, e.g. prime retail, variety store. This was accepted to be necessary by Epoch's expert in order to ensure that the President appointed the right professional horse for the right course. [Supplemental Affidavit: Leslie Baker B.3. p 349 para 4.2] 44. Thus, in the application form to become a member of the President's Panel, there is a list of categories issued by the RICS in relation to rent reviews and any Applicant to join the Panel is asked to tick those categories in which he feels qualified to act as an expert or arbitrator e.g. (materially) Category R1 is described as "prime retail" and Category R9 as "variety stores". 45. The question then became one of whether the President's categorisation could be impugned as perverse. Various criteria were debated between the experts adduced on either side at the trial. They were the same persons who had conduct of the initial correspondence with the President. Both experts argued that size was one of the factors - indeed it seems the key factor which determined whether a property was prime retail or large retail space/variety store. The disagreement was as to the cut off point, which Mr Adamson for BHSJ identified as 20,000 square feet and Mr Baker for Epoch as 50,000 square feet. 46. Mr Adamson's view in summary was that all the characteristics of the property

- he considered, inter alia, location, configuration and shape - were consistent with and pointed towards its being a variety store, the prime characteristic being its size of 35,000 sq.ft. He was of the clear opinion that the property was a variety store and its rental value should be assessed by reference to the GIA approach by an expert experienced in valuing variety stores. Such a person could, of course, having had representations made to him by the parties, make allowances for any particular Jersey factors when assessing the rate to be applied to each square foot of gross internal area. He did not consider that the various stores referred to by Mr Baker on behalf of Epoch provided any useful guidance or comparisons. They were all much smaller premises and not variety stores. Such quantitative differences became qualitative differences too and engaged a particular specialism among surveyors.
47. The Royal Court had the benefit (which we lack) of seeing and hearing the two expert witnesses. They had no hesitation on concluding that it was perfectly reasonable for the President to conclude that the property was a variety store. Indeed, they held that if it had been necessary for them to reach a conclusion on the point, they would have held that he was correct to so find.
48. The Royal Court's reasons for preferring the evidence of Mr Adamson to that of Mr Baker were summarized at paragraph 45 as follows:- (i) Mr. Adamson is a specialist in variety stores; Mr Baker, on his own admission, is not. (ii) As to size, they were convinced by Mr Adamson's evidence. He said that size was the key factor and variety stores ran from a low point of 20,000 sq ft. up to 120,000 sq ft. The property of course is some 35,000 sq ft in terms of gross internal area. Mr. Baker said that the minimum level was 50,000 sq ft and that only a few historical variety stores would be less than 50,000 sq ft. He produced no evidence to support this whereas Mr Adamson produced details of variety stores whose rent had been assessed by his firm since January 2000 and which had been the subject of assessment for rating purposes. Of the 24 variety stores dealt with on rent reviews by his firm since January 2000, only six exceeded 50,000 sq ft; the remaining three quarters were less than 50,000 sq ft. In relation to the 93 variety stores dealt with for rating purposes in the year 2000, just over half were less than 50,000 sq ft. These figures are inconsistent with Mr Baker's assertion and he was unable to come up with any convincing explanation for them. They also accept Mr Adamson's evidence about modern methods of stock control and their effect on the size of variety stores. (iii) As to shape Mr Baker was forced to admit that the figure which he had used for the depth of the property in relation to this aspect was incorrect. They preferred Mr Adamson's evidence on this point. (iv) As to configuration, Mr Baker asserted in his affidavit that the layout of the property, in particular the layout of the pillars, did not fit in with any classic definition of a variety store. He was cross-examined by Miss Lawrence for BHSJ about Mr Adamson's evidence that, on the contrary, this was a standard and ideal layout for a variety store. In the end he was forced to concede that there was nothing about the pillar system and layout which was inconsistent with the property being a variety store. The Royal Court accepted Mr Adamson's evidence on this point. Furthermore it is not wholly irrelevant that the property was built by British Home Stores, presumably with the intention of using the premises as a variety store and of course it has in practice been used by them ever since. On the face of it, it would be somewhat surprising if they had designed and built premises which were not consistent with use as a variety store.

The fact that, in theory the property could be subdivided does not affect the position. No doubt, many, if not most, large premises are capable of such division but this did not lead to them being treated as prime retail rather than variety stores. (v) As to location the Royal Court accepted that variety stores do not need to be in the prime location but also accepted that in many instances they are in such locations, e.g. in St Helier itself, Marks & Spencer and Boots, which lie in King Street and Queen Street respectively. They do not find that the location of the property points against it being a variety store. 49. We adopt and accept these conclusions, which vindicated the President's own views. In particular we have noted Mr Padbury did consider objective criteria, including size (see above paragraph 36). Moreover while the identity of the current tenant could not dictate the categorisation of the demised premises, it was not immaterial to it. At the very least it illustrated that premises of that size were capable of being used as a variety store. 50. It seems to us that once the demised premises had been correctly categorised as a variety store, no premises could be of "broadly similar or comparative character" unless also a variety store. They might be somewhat larger or somewhat smaller: but once they crossed the threshold of 20,000 square feet or less, they became different in kind, not only in degree. 51. The question next arises as to whether it was reasonable for the President, having concluded that the premises were a variety store, to decide that there was no practitioner experienced in valuing and letting Jersey properties of a broadly similar or comparable character. Epoch conceded that it could not challenge the President's conclusion that there was no Jersey practitioner experienced in letting or valuing variety stores and that Woolworths, Marks & Spencer and Boots, because of their own individual circumstances did not provide any comparator for assessing the market rental for variety stores in Jersey. 52. Epoch had a second string to its forensic bow. It suggested that the President's decision was flawed on Wednesbury grounds, not of perversity but rather of having regard to irrelevant and disregarding relevant considerations. However upon analysis it appeared that this was in essence the main argument in different form. If the President asked himself the correct question: - What was the correct categorisation of the demised premises? and came to a rational answer - "a variety store", there appears to be no space for suggesting that he was otherwise guilty of substantial flaws in the decision making process. For example, the fact that, as Mr Padbury said, membership of the RICS Panel was a "significant factor" in Mr Finn's appointment seems to us to betoken no error at all. Once the President had identified what the relevant experience for an appointee was demanded by the lease, it was both good sense and within the scope of his discretion to seek a candidate from the Panel. 53. We make the same observation, *mutatis mutandis*, to Mr Padbury's references to previous appointees under the lease, to the objections of BHS to certain candidates on the grounds of conflict of interest, to the views of both Epoch and BHSJ as being all immaterial. None was immaterial once the President had directed himself correctly in relation to the issue of relevant experience both as to question asked and answer given. At that juncture, it seems again to be well within his discretion to bear such matters in mind. 54. There remains only the third argument i.e. that Epoch were denied due process because not all the correspondence from Allsops was disclosed to Epoch or their own consultant. We are prepared to proceed on the

basis that the President ought at least to notify the other party to a lease that an application has been made for him to exercise his power of appointment by one party - be it landlord or tenant (Board of Education-v-Rice

- (1911) AC 179 per Lord Loreburn at p 182). But that is the limit of any such procedural obligation: it is not suggested that anything equivalent to an oral hearing or prolonged written interchange could be required. But in this case Epoch knew full well that BHS had described the demised premises as a variety store, and had (which it did not take) the opportunity to debate what was (and is) the only true issue in this dispute. 55. In any event
- (i) The content of the Allsop letters which Epoch complained as not being disclosed was the same as the content of Allsops application letters for the 1994, 1997 and 2000 rent reviews.
 - (ii) In particular in the 2000 rent review Epoch submitted a detailed letter to the RICS containing its arguments. These arguments were the same as were advanced in this case.
 - (iii) A dispute of this nature was unusual, as was noted by the President, and so the views of the parties were unlikely to have been forgotten when the same arguments were presented at the next rent review. 56. It is necessary by way of footnote to address certain questions apparently of general concern to the President.
 - (i) We agree that when the issue arises as to whether an appointment he has made is valid, he is not a necessary party to any proceeding. " The President would not have to be a party." See *United Co-operatives Limited v Sun Alliance & London, Assurance Co Ltd* (1987) 1 EGLR 126 per Hoffmann J . The true dispute is of course between landlord and tenant.
 - (ii) It does not follow from (i) that he is not a proper party to be joined. Hoffmann J's dictum does not suggest otherwise. As in this case an exposition of the President's reasoning is vital to the Court's adjudication.
 - (iii) If the President is a party, either because he chooses to intervene (and the Court would be unlikely to refuse an application to be joined) or because he is made a party by the applicant, he is liable to a costs order: non sequitur that he will have one made against him. That will, as always, depend upon all the circumstances of the case.
 - (iv) An appointment made by the President will only be valid if it accords with the provisions of the lease which confer the power to appoint upon him. He is not, however, otherwise concerned with the lease.
 - (v) The President's contract to make an appointment is with the party to the lease who applies to him to make an appointment. If, to use the present case as an example, the tenant asked the President to appoint a surveyor on the basis that the premises to be valued are a variety store, he cannot be liable for breach of contract with the tenant if he makes the appointment on that basis.
 - (vi) It does not follow from (v) that the appointment will therefore be valid. Its validity will depend upon (iv).
 - (vii) At most the President owes a duty of care to the other party e.g. here the landlord (see *United Co-operatives* per Hoffmann J ditto, who raised but did not decide the point).
 - (viii) But if, as here, the landlord does not take issue, prior to the appointment, with the tenant's description of the premises, so leading the President to rely upon that description, he would not be held in breach of any such duty (if any) in making the appointment on that basis.
 - (ix) If the parties are known to be in issue as to the correct categorisation of the premises, the President could prudently decline to make an appointment unless and until

common ground is reached. He is under no duty to make an appointment just because a lease provided him with the power to do so. (x) As Hoffmann J said in *United Co-operatives (ditto)* for practical reasons, related to volume of work, limitations of staff and size of fee, it is not his function "to determine any legal questions which arise in the course of a rent review". 57. For the foregoing reasons, I would dismiss this appeal. nutting ja: 58. I agree. vaughan ja: 59. I agree. Authorities. *Board of Education v. Rice*

[1911] AC 179 *Kanda v. Government of Malaya*

[1962] AC 322 at 337 *New Zealand Government Property Corporation v. H. M. & S. Ltd* [1982] Q. B. 1145 *Ocean Accident & Guarantee Corporation v. Next plc* [1996] 2 EGLR 84. *In re an Advocate* (1978) JJ 193. *Browne-v-Dunn* (1893) 6 R 67 (HL). *Pittalis -v-Grant* [1989] QB 605; [1989] 2 All ER 622 (CA). *Nikko Hotels (UK) Ltd-v-MEPC plc* [1991] 28 EG 86; [1991] 2 EGLR 103. *Pontsarn Investments-v-Pankki* [1992] 1 EGLR 148; [1992] 22 EG 103. *Law Society of Jersey Code of Conduct: Rule 18*. Fordham: *Judicial Review Handbook*: pp.81-87: *Materiality*. *Re Smith-v-Fawcett* (1942) 1 All ER 542 (CA.). *United Cooperatives-v-Sun Alliance & London Assurance Co., Ltd.* [1987] 1 EGLR 126. *Associated Provincial Picture Houses Ltd-v-Wednesbury Corporation*

[1947] 2 All ER 680 . *Jones -v- Sherwood Computer Services Ltd* (1992) 1 WLR 277. *Veba Oil supply & Trading GmbH -v- Petrotrade Inc* [2001]EWCA Civ.1832. Page Last Updated: 15 Oct 2015
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