Case No: HC09C02374

**Neutral Citation Number: [2009] EWHC 3769 (Ch)**
**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 4 December 2009

BEFORE:

**HIS HONOUR JUDGE PURLE QC**
sitting as a High Court Judge

---

BETWEEN:

**ROSEOAK INVESTMENTS LIMITED and ANOTHER**
Applicants/Claimants

- and -

**(1) NETWORK RAIL INFRASTRUCTURE LIMITED**
**(2) ANDREW BAKER**
Respondents/Defendants

---

MR DAVEY appeared in person on behalf of himself and Roseoak Investments Ltd

MR KREMEN (instructed by Thomas Eggar) appeared on behalf of the First Defendant

---

**Approved Judgment**


---

Digital Transcript of Wordwave International, a Merrill Communications Company
101 Finsbury Pavement London EC2A 1ER
Tel No: 020 7421 6131 Fax No: 020 7421 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

No of words: 2,804
No of folios: 39

1. JUDGE PURLE: This is an application to set aside a judgment, and in addition to strike out the proceedings in which the judgment was obtained. The background is this: a Statutory Demand was issued against a Mr Davey, who is one of the claimants, as a guarantor of two leases granted to a company he controls called Roseoak Investments Limited ("Roseoak") of premises near Paddington Railway Station, used to service the taxicab industry.

2. The matter came before the deputy district judge, who refused to set aside the Statutory Demand on 6 May 2008, and on 17 February 2009, Lewison J in the Chancery Division refused permission to appeal. Undaunted, Mr Davey issued proceedings both in the name of Roseoak and in his own name against the issuer of the Statutory Demand, Network Rail Infrastructure Limited ("Network"), and one of their property managers, Mr Andy Bacon ("Mr Bacon"). Having obtained no joy from the Chancery Division, he issued those proceedings in the Commercial Court. Mr Davey contended before me that this was not a Chancery matter. He is a qualified barrister, though non-practising, and how he could ever have thought that the issues (which as alleged relate mainly to quiet enjoyment, derogation from grant, and deficient estate management of Network as landlord of the properties of which Roseoak's two leases form part) were appropriate for the Commercial Court defeats me. I am more inclined to the view that his motive was to keep well away from the Chancery Division.

3. That did not avail him, because the matter was promptly transferred on paper to the Chancery Division, but, owing to the delays in allocating a Chancery number to the case, the defendants' attempt to issue an application for an extension of time were thwarted. Mr Davey, both for himself and Roseoak, taking advantage of that, entered a default judgment. The default judgment itself is irregular. The claim is one for unliquidated damages, which are quantified in part at (it is said) £1.5 million. The default judgment is purportedly for a debt (not damages as claimed) slightly in excess of £1.5 million. It was entered on 22 May 2009. That, of course, so long as it stood, put Network in some difficulty in relation to the prosecution of the bankruptcy petition which had in the meantime been presented.

4. The normal position is that once a Statutory Demand has been served, the onus is upon the person upon whom it is served to challenge it by seeking to set it aside. When such a challenge fails, it is not in general open to the recipient of the Statutory Demand to reopen the issues in the absence of a change of circumstances on the hearing of the petition itself (see Brillouet v Hachette Magazines Limited [1996] BPIR 518 and Turner v The Royal Bank of Scotland [2000] BPIR 683). When the basis of the court's decision is (as it was before the deputy district judge and Lewison J) that there is no sustainable cross-claim, the same must apply to any attempt to reopen the matter by separate proceedings, and must also apply to any collateral attach by a connected party such as Roseoak.

5. The entry of judgment was on the face of it a dramatic change of circumstances, but given that the claim upon which the judgment was based was itself a rerun of the matters previously dealt with, that does raise the question of whether the claim should have been brought at all. Mr Davey does not (today) resist the setting aside of the judgment. In my judgment, it should never have been entered and these proceedings are an abuse of process, seeking (as they do) to reopen the hearing before the deputy district judge and Lewison J without there being any change of circumstances. That

consideration would have been sufficient of itself to dispose of this application. However, the merits have been gone into and considerable indulgence has been shown both by Mr Kremen, very properly, for his client, and by me, having regard to Mr Davey's status as a litigant in person, albeit a qualified barrister.

6. I am bound to say that the claim is wholly without merit. I mention straight away the claim against the second defendant, Mr Bacon. Mr Davey tells me he does not really know what his claim against Mr Bacon is, because he does not have the evidence. It appears to be pleaded or intended to be pleaded that Mr Bacon was in some way involved in a fraud. There is not a scintilla of evidence to support that allegation, and I am mortified that a member of the bar, even a non-practising one, should have saw fit to advance such an allegation. It should never have been made.

7. I also mention the status of Mr Davey as a claimant. He has no interest in the land about which complaint is made, save indirectly through Roseoak. His complaint is that he had to borrow money to buy bacon for and pay the business debts of Roseoak. How any of that gives him a cause of action is a mystery to me. There is the hint of a deceit or fraud claim (however it is put) to which I have referred, which would of course potentially give him a claim if he himself had suffered any recoverable damage. However, as I understood what he was telling me, he was borrowing money to pay Roseoak's debts, so his damages would mirror precisely Roseoak's.

8. Leaving aside the infirmities of any supposed cause of action, it seems to me that this causes him great problems in relation to reflective loss. In reality, insofar as his claim is a financial one, he is claiming Roseoak's loss, itself a claimant with him. I have not detected (although I have read the Particulars of Claim carefully more than once) any recognisable cause of action at the suit of Mr Davey.

9. Now, that leaves the claim between Roseoak and Network. So far as Roseoak is concerned, it was not a party to the Statutory Demand, or the proceedings following on from its service. Whether or not it could properly be regarded as a privy of Mr Davey, as I think it probably could, clearly the connection between him and Roseoak is so close that Mr Davey's attempts through Roseoak to reopen the matters debated before the deputy district judge and Lewison J amount, in my judgment, to a further abuse of process. In those circumstances, it seems to me that the claim should be struck out and judgment entered for the defendants under part 24.

10. The claim itself arises out of two leases granted to Roseoak of property adjoining the old Manor Park Station. There is abundant evidence that many unwelcome activities took part on or close to the adjacent land. There is no evidence that Network was responsible for any of this.

11. The claims were pleaded at length, and can be summarised as follows: it is said firstly that Network allowed a cafeteria business to be carried on at the station premises, contrary to an agreement said to have been made with Mr Bacon's predecessor, a Mr Banger, under which (it was alleged) there would be no cafeteria business next door. It is clear from the lease granted to the adjoining tenant, Paddington Central Taxis Ltd, that the running of a cafeteria business was not a permitted use as regards those adjoining premises. Nonetheless, the tenant with chose to open or to allow others to open a cafeteria business there, about which Mr Davey, on behalf of Roseoak,

complained to Network. Network did nothing to stop it. This was said to amount to a derogation from grant.

12. It is well-established that carrying on or allowing to be carried on a competing business is not a derogation from grant. So far as concerns the oral assurance that is alleged to have been given, as to which there is a paucity of evidence, this would contravene section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and therefore be void.

13. Reliance was placed on Oceanic Village Ltd v Shirayama Shokusan Co Ltd and others, reported at [2001] L&TR 35, a decision of Mr Nicholas Warren QC (as he then was), where a term was implied protecting the exclusive business of the tenant. However, reliance on that decision is, in my judgment, misconceived, as there were clear provisions in Roseoak's lease (clause 4.2.6) negating any such implication. The effect of clause 4.2.6 was that Network could do what it liked on the adjoining property. The Oceanic case is therefore, in my judgment, of no help to Roseoak. I should mention that before Lewison J it was conceded (though it is no longer conceded before me today) that there might be an arguable derogation from grant claim, but even on that basis, Lewison J was unable to find that there was a claim of sufficient magnitude to overtop the Statutory Demand.

14. Roseoak itself appears only to have carried on a property management business, letting out or licensing parts of the premises to others, and before Lewison J, as he records in his judgment, Mr Davey was unable to say that Roseoak itself had ever carried on its own business on the premises. Mr Davey sought to say the opposite before me, namely that for a short time Roseoak did carry on its own business on the premises. Even assuming that Mr Davey is entitled to that apparent change of position, it makes no difference to my conclusion, because, as I have held, there was no derogation from grant in this case arising from the carrying on of a competing business, or indeed, in any other respect that has been put to me. Moreoever, Roseoak's period of carrying on business on the premises, even on Mr Davey's present case, was very limited, and no substantial loss has been shown to have been occasioned by the activities or alleged omissions of Network during any such period.

15. A further allegation is one of misrepresentation: that no cafeteria use would be permitted. In the absence of a sustainable deceit claim (and none is pleaded or even asserted before me) that is neither here nor there. The representation alleged can have been no more than a statement of intention. If the intention was the opposite (as to which there is no evidence) the claim would be in deceit. If the intention merely changed following the demises, the representation was true.

16. The next allegation is that damage was caused by activities carried on on the adjoining land. These were all activities carried on by the tenant, sub-tenants and customers of the businesses conducted on that land, and not by There was damage to the trim of the wall and fencing (which was part of Roseoak's demise), unauthorised parking of vehicles on its demise, the alleged emission of sewage and oil from the station land (which was Paddington Central Taxis Ltd's demise) on to Roseoak's demise over a period of six months, and the deposit of rubbish at the entrance to the Royal Oak Taxi Centre, which was either part of Roseoak's demise or part of the public highway.

There is no evidence that those matters were caused by Network or that they authorised them, a point made by Lewison J.

17. Complaint is also made of the alleged parking of vehicles by Network and its associates while work was being carried out on nearby railway lines. Clause 4.2.10 of the demises to Roseoak permitted this, so there is nothing in that point.

18. It is then said that Mr Bacon, on behalf of Network, gave various assurances that Network was looking into and taking steps to resolve the complaints. It appears in the correspondence that the matter was raised by Network with the adjoining tenant, Paddington Central Taxis Limited, and that alterations to the lease were considered to remedy the situation, which Network conceived would be acceptable. Network was, in my judgment, entitled to act in its own interests in that respect. Paddington Central Taxis Limited were paying a good rent. Mr Davey complains that Network were only interested in the money. They were entitled to have full regard to the money they were receiving and which was due to them; that distinguished that demise from the demises to Roseoak, where the rent was not being paid.

19. More significantly, Mr Davey, on behalf of Roseoak, founding himself on cases such as Chartered Trust v Davis [1998] 76 P&CR 396, claimed a breach of the covenant of quiet enjoyment or nuisance in allowing all those activities to take place. The Chartered Trust case concerned a landlord which was able, because of the detailed management provisions and rule-making powers which it had under various leases, supported by substantial services charges, to control the activities of the tenants of a high-class shopping mall more rigorously than they in fact ever attempted to do. Cases of that kind are clearly distinguishable from the present case.

20. The matters of which Mr Davey complains were matters which Roseoak could, just as readily as the landlord (if not more readily) have dealt with.

21. It also appears that there were criminal activities on the adjoining premises, but they were in no way criminal activities in which Network was implicated, save that it happened to be the landlord. The criminal activities at the lower end were allowing illegal use of part of the premises, apparently for residential purposes and sleeping, and at the higher end, the carrying out of drug-dealing and gun-running activities, which came to light in February 2008, and led to criminal prosecutions about which I know something, but not very much, as there are reporting restrictions.

22. None of this gives rise to any cause of action against Network, and the Points of Claim, though otherwise very detailed, do not persuade me that there is any reality in this claim. In those circumstances, I will not only set the judgment aside, but strike the Points of Claim out and enter judgment for both defendants, dismissing all claims.

23. I should add that there is a separate claim, though it does not find itself articulated in the prayer to relief directly, for the alleged wrongful retainer of a £25,000 deposit, which could theoretically be freestanding. However, that is overtopped by the rent claim, so there would be a set-off which would operate by way of defence, and Lewison J, on the hypothesis that there was a claim which might be sustainable (which he did not think there was) also ruled in relation to all the complaints that there still remained a substantial amount of rent due. It seems to me that the bankruptcy (if it

occurs) is the appropriate process through which to adjudge the rights of the parties. I say "if it occurs" because there may be a voluntary arrangement. Subject to that, any trustee in bankruptcy will have to have regard to Mr Davey's complaints, insofar as there is any substance in them, but it is no reason for stopping the bankruptcy process, given the clear and careful findings that have previously been made, especially by Lewison J on matters of quantum, showing that there is, on any view, a substantial amount due from Roseoak, and therefore from Mr Davey. The present judgment and proceedings (if allowed to continue) wrongly inhibit that process.

24. Finally, a human rights claim was advanced by Mr Davey, the sincerity of which I do not doubt. This related to the fact that he became homeless, which is very sad, and that his life has been ruined by the activities to which he has been subjected. I should say that it does appear that the adjoining tenants were very undesirable neighbours who have made Mr Davey's life a misery over many years. He appears to have been subjected to unjustified threats of violence and was in genuine fear for his safety. However, none of that can be laid at the door of Network.

25. Looking at the Particulars of Claim, one is under the impression that Mr Davey's (and therefore Roseoak's) real complaint is that Paddington Central Taxis Ltd were ever granted a lease in the first place. I can understand why he feels aggrieved, to put it at its lowest, at having had them as neighbours, but I do not think that that consideration gives rise, even arguably, to a cause of action against Network in the circumstances of this case.

26. In those circumstances, the claims are dismissed.