REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO 61A OF 1976

SHAH & SHAH .....LARDLORD

VERSUS

FRANCIS TITUS KAGUNDA.....TENANT

JUDGMENT

This is an appeal from a decision of the Business Premises Rent Tribunal reducing, on a tenant's notice to obtain a re-assessment of rent, a rent from Shs 3500 to Shs 2200 with effect from 1st April 1975: the amount and effective date sought by the tenant.

Two reports by valuers were submitted. The landlord's valuer used comparables from a different area, as there were difficulties in finding comparables in the area of the premises in question (such comparables being under the same ownership), and assessed the rent at Shs 3600. The tribunal's valuer took nearby premises as comparables and assessed the rent at Shs 1790 per month. The difference was such that an order was made by consent in the following terms: The two valuers, Mr Mbuu and Mr Robertson Dunn to try and get a common agreed figure as to what is a fair rent". They produced a figure of Shs 2900 per month. Mr DN Khanna for the landlord accepted this. Mr GM Mbogo for the tenant did not accept it. The tribunal announced a date for its ruling.

Before us Mr Khanna contended that it had been agreed that the dispute be resolved in this way and that there was no point in having an agreed valuation unless consent to accept the figure was implied. Mr Mbogo said the tribunal thought that there must have been some mistake; hence the need for a third report. There was no agreement that this joint report would be accepted by the tribunal and would be binding on the parties.

Mr Khanna's interpretation of the order is the more logical one; but there is undoubtedly room for misunderstanding. I am unable to read into the order, as recorded by the tribunal, a consent that the joint valuation instructed by the tribunal would be accepted by both parties as the agreed rental of the premises. Accordingly, I do not think that the tenant is bound by it.

In its ruling the tribunal considered all three reports and concluded: The difference between the original valuation is

> incredible; almost 100 per cent increase. The tenant had agreed on a monthly rental of Shs 2200 which is a higher rate than Wairagu & Co had recommended. This works out to over 20 per cent increase; and we feel that figure should not be disturbed. So we order a monthly rental of Shs 2200 with effect from 1st April 1975 namely the effective date of the tenant's notice.

The tribunal overlooked the fact that Wairagu & Co had revised its earlier recommendations. It was not entitled to disregard arbitrarily the joint recommendation made as a result of its direction and the recommendation of the landlord's valuer. Even if it took the view that its valuer had not corrected his first valuation it should, before deciding to accept his first and superseded recommendation, have heard at least the evidence of the two valuers. Without such evidence it was not in a position to choose which expert or which recommendation to follow.

When the tribunal adjourned to consider its ruling, it had before it three valuations, two of which had in effect been discarded by the valuers concerned. In my view it had no alternative but to accept the remaining valuation, ie Shs 2900.

Mr Khanna invited us to interpret the words in section 9(2) (a) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act:

> Having regard to the terms thereof [ie of the tenancy] and to the rent at which the premises concerned might reasonably be expected to be let in the open market

as requiring an objective test obliging the tribunal to balance the evidence, expert and otherwise, of the market rent. He said that, while some judges took the view that this was the proper test, others thought that a subjective test should be applied: that the tribunal should consider what is reasonable, irrespective of the evidence. He referred to the judgment of Wicks J in *Mbuni Dry Cleaners Ltd v Barclays Bank DCO* [1972] E A 188 and the judgment of Kneller J in *Karibu House (1973) Ltd v Travel Bureau Ltd* [1980] page 27, ante; but I do not understand either of these judges to say that reasonableness is to be determined irrespective of the evidence. We are indebted to Mr Khanna for his lucid and persuasive argument, but even if there were two distinct approaches (the subjective and the objective to use Mr Khanna's terms) it is not in my opinion necessary to adopt one or the other in the appeal. It is I think generally accepted that the tribunal has a discretion which must be exercised judicially having regard to the evidence before it.

In the present case not only did the tribunal disregard the agreed valuation. It accepted a valuation which had been rejected by the valuer himself. It overlooked the fact that the tenant had agreed to pay a rent of Shs 3500 and the absence of any evidence of any change of circumstances affecting the value of the premises apart from two leaks in the roof. It also failed to take account of inflation as a result of which premises let for Shs 2200 prior to June 1974 (how long prior to that date is not disclosed) could command a considerably higher rent in July 1976, the date of its decision.

In my opinion the tribunal failed to exercise its discretion judicially and its decision must be set aside. There being an agreed valuation on the record in substitution for earlier and discarded valuations and no other evidence, we are I think entitled to accept that figure. To remit the matter to the tribunal would result in unnecessary delay and expense.

Mr Khanna further contended that the new rent should start from 1st July 1976, the tribunal's ruling having been given on 23rd June 1976. He pointed out that there was no common law right to have the new rent back-dated nor did the Act say that the decision should have effect from the date specified in the notice. The landlord, he submitted, was entitled to the contractual rent until the date on which it was reduced.

It is an attractive argument until one considers the delays which occur between the signature of a notice and the decision of the tribunal, delays which can be deliberately created. The tribunal is given power in the Act to approve the terms of a notice either in their entirely or subject to such amendment or alteration as it thinks just, having regard to all the circumstances of the case. Thus it is given a wide discretion as to the effective date, which of course should be exercised judicially. In the present case, although it might have been desirable to give reasons, I can see nothing wrong with making the order effective from the date specified in the tenant's notice, indeed I think that it is the appropriate date in all the circumstances.

I would allow the appeal and order the tenant to pay a monthly rental of Shs 2900 with effect from 1st

April 1975. Since Chesoni J agrees it is so ordered. The tenant will pay the landlord's costs.

Appeal allowed with costs.

Dated and delivered at Nairobi this 22nd day of February 1978.

A.H SIMPSON

JUDGE.

Z.R CHESONI

JUDGE .