



Neutral Citation Number: [2019] EWHC 2747 (Ch)

Claim No: PT-2018-000911

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 21 October 2019

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

Between :

BELLA ITALIA RESTAURANTS LIMITED

Claimant

- and -

(1) STANE PARK LIMITED
(2) STEPHEN MONTAGUE CLARK, FELICITY
AMANDA CLARK and PENSIONEER TRUSTEES
(LONDON) LIMITED, as the trustees for the time
being of the Churchmanor Pension Scheme
(3) ROPEMAKER PROPERTIES LIMITED

Defendants

Tom Weekes QC (instructed by Freeths LLP) for the Claimant
Tim Calland (instructed by Birketts LLP) for the Defendants

Hearing dates: 9–10 October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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KELYN BACON QC

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction and factual background

1. This is a dispute between the Claimant (“Bella”), and the Defendants, concerning an agreement to lease premises in Colchester. The dispute arises from the fact that the agreement for lease was concluded between Bella and among others the first and second Defendants (who I will refer to collectively as “the Trustees”), providing for Bella to lease the premises from the Trustees once they had been constructed; but during the construction process the Trustees sold their interest in the premises to the third Defendant (“Ropemaker”). Bella purported to rescind the agreement on the grounds that it was entitled to refuse to accept a lease from Ropemaker, since Ropemaker was not the original contracting party under the agreement. The Defendants dispute this and say that the agreement was not validly terminated.
2. There was no dispute as to the facts, which can be shortly summarised. The property in question is a new development of retail premises on a site in Colchester that was owned by the Trustees. On 11 November 2014 Bella signed the agreement for lease, with the Trustees as the named freeholder of the site and the landlord under the prospective lease. The other parties to the agreement were the Churchmanor Estates Company plc (“Churchmanor”), referred to in the agreement as the developer, and Tragus Holdings Limited, which was the guarantor of Bella’s obligations under the agreement.
3. The agreement was subject to various conditions on matters such as planning and licensing, which were conditions precedent to the obligations to build the property and then to grant and take the lease. On 30 August 2016 the Trustees notified Bella’s solicitors that they considered the conditions to have been satisfied. Unfortunately, however, the notice was not correctly served on Bella, so was ineffective.
4. By some time in 2017, Bella had decided that it wished to extricate itself from the agreement. On 16 May 2017 it notified the Trustees that it wished to terminate the agreement. On 1 August 2017 the Trustees served a further notice on Bella stating that the conditions under the agreement were satisfied. Bella in turn served a further notice to terminate on 26 September 2017.
5. There was then a trial as to the validity of Bella’s notices to terminate. Fancourt J held that Bella’s first termination notice was invalid; the Trustees’ notice on 1 August 2017 was therefore valid and had the effect of rendering the agreement unconditional by that date (at the latest); Bella’s second attempt to terminate the agreement thereafter was therefore ineffective: see *Ropemaker Properties Ltd v Bella Italia Ltd* [2018] EWHC 1002 (Ch).
6. Meanwhile on 30 March 2017 the Trustees transferred their interest in the property to Ropemaker. It is common ground that, because of the sequence of events set out above, the agreement for lease had not become unconditional at the time that the transfer took place. In August 2018 the construction of the premises was completed and on 29 August 2018 Bella’s solicitors served a notice to complete on the Trustees, giving them 10 working days to complete.

The Trustees responded questioning why this had been sent to them rather than to Ropemaker, but confirmed that Ropemaker was ready, willing and able to complete the lease. Alternatively, if Bella preferred, the Trustees stated that they could grant the lease pursuant to a headlease from Ropemaker. In either event they proposed a completion date of 7 September 2018.

7. Bella insisted on a completion date of 13 September 2018, i.e. the last day possible under the notice to complete. It did not respond as to how it wished to proceed to complete the lease. On the appointed day Bella then declined to complete the lease on the basis that the agreement for lease had been concluded with the Trustees and not Ropemaker, and it considered that the Trustees (no longer having the freehold title to the premises) were not in a position to complete on the terms of the agreement. The next day Bella wrote to the Trustees terminating the agreement for failure to complete.
8. The Trustees refused to accept that Bella's termination of the agreement was valid. On 4 December 2018 Bella therefore brought the present proceedings, seeking a declaration that the agreement was terminated or in the alternative a declaration that Bella was not in breach of the agreement. In response the Defendants seek a declaration that the agreement has not been terminated and that Bella is liable to complete the lease offered by Ropemaker. The Defendants have also (separately) brought their own claim seeking specific performance of the agreement for lease.

Issues

9. By the time of the hearing the parties had agreed that there were only two issues for determination by the Court in this claim:
 - i) The issue of *contractual interpretation*: whether the agreement for lease, properly interpreted, required the lease to be granted by the Trustees, or whether the Trustees' obligation to grant the lease could be performed by Ropemaker.
 - ii) The issue of *statutory interpretation*: whether the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act") had the effect of transferring to Ropemaker both the benefit and the burden of the agreement for lease, such that (irrespective of the position as a matter of contractual construction) the obligation to grant the lease could be performed by Ropemaker.
10. Both Mr Weekes QC, representing the Claimant, and Mr Calland, representing the Defendants, acknowledged that if I found in favour of the Defendants on the contractual interpretation issue then that would be the end of the matter and I would not need to determine the Defendants' alternative case on statutory interpretation. If, however, I were to find in favour of the Claimants on the contractual interpretation issue, then it would be necessary to consider the statutory interpretation point.

Contractual interpretation issue

11. The key provision of the agreement for lease is clause 15, which merits setting out in full:
 - “15.1 In consideration of the Tenant’s obligations under this Agreement, the Landlord shall (at the direction of the Developer) grant to the Tenant and the Tenant shall accept from the Landlord the Lease on the terms set out in this Agreement. No purchase price, premium, or deposit is payable.
 - 15.2 The Tenant cannot require the Landlord to grant the Lease to any person other than the Tenant (here meaning Bella Italia Restaurants Limited, incorporated and registered in England and Wales with company number 00964194, only).
 - 15.3 The Tenant cannot assign, sublet, charge, or otherwise share or part with the benefit of this Agreement whether in relation to the whole or any part of the Property.
 - 15.4 Conditions 1.5 and 2.2 do not apply to this Agreement.”
12. Clause 15.4 is a reference to the Law Society’s Standard Commercial Property Conditions (Second Edition). Condition 1.5 of those Standard Conditions prevents the buyer transferring the benefit of the contract, and provides that the seller may not be required to transfer the property in parts to any person other than the buyer. The effect of clauses 15.2–15.4 is therefore to replace Condition 1.5 with similar provisions relating to the landlord and tenant. Condition 2.2 of the Standard Conditions provides for the payment of a deposit. That is removed in this agreement, in light of the last sentence of clause 15.1.
13. In the present case, under the contract of sale between the Trustees and Ropemaker, the property was sold with the benefit of the agreement for lease, and in the transfer of the property Ropemaker covenanted with the Trustees to comply with the Trustees’ obligations under (*inter alia*) clause 15.1. It is also undisputed that Ropemaker is willing and able to grant the lease to Bella. The question is whether Bella can nevertheless refuse to accept a grant from Ropemaker on the basis that the agreement rendered that obligation personal to the Trustees?
14. Mr Weekes said that clause 15.1 was indeed personal to the Trustees. His central argument was that clause 15.1 imposed an obligation on the landlord to grant the lease, and on the tenant to accept the lease from the landlord. “Landlord” is defined in the agreement specifically to refer to the Trustees. His submission was, therefore, that on the face of clause 15.1 the lease had to be granted by the Trustees and could not be granted by any other party.
15. He said that this construction of clause 15.1 was supported by the fact that the clause did not refer to the obligation being applicable to the landlord’s

successors in title, but did refer to the lease being granted “at the direction of the Developer” which Mr Weekes’ said reflected the joint venture agreement in place between the Trustees and Churchmanor. He said that both of these points reinforced the personal nature of the Trustees’ obligation under the clause. In addition, he said that the draft lease attached to the agreement was drafted up as a lease to be granted by the Trustees rather than anyone else.

16. Mr Weekes relied on *City Inn (Jersey) v Ten Trinity Square* [2008] EWCA Civ 156 and *Margerison v Bates* [2008] EWHC 1211 (Ch) as examples of cases where covenants referring to the obligations of particular parties were interpreted as being personal to those parties. He rightly acknowledged, however, that ultimately the question is one of construction of the agreement in question. In that regard, as Edward Bartley Jones QC observed at §23 of *Margerison*, “the court’s role is to ascertain the true meaning of the language used (in the sense of ascertaining what the language used would signify to a properly informed observer in the context of the document and its obvious purpose read against the relevant background factual matrix)”, and this question must of course be approached “with a perception of business common sense”.
17. Approaching the construction of the agreement in that way, I do not accept Mr Weekes’ submissions as to the interpretation of clause 15.1. While it is true that the draft lease provides explicitly that references to the landlord and tenant “include their respective successors in title”, whereas the agreement for lease itself contains no such general provision, that is no doubt because a large number of the provisions in the agreement for lease are expressed to be personal to one of the parties to the agreement. In particular:
 - i) Clauses 15.2 and 15.3 make clear that the benefit of the agreement is non-assignable by the tenant, and that the landlord cannot be required to grant the lease to any person other than the tenant.
 - ii) Clause 28.1 provides that the landlord’s obligations in clauses 3–9 are personal and binding only on the Trustees.
 - iii) Clause 28.2 provides that the developer’s obligations in clauses 16–24 are personal and binding only on Churchmanor.
18. Mr Weekes rightly pointed out that clause 28.1 as it stands is difficult to understand, since most of the obligations set out in clauses 3–9 are in fact expressed to be obligations on the part of the developer (i.e. Churchmanor) and not the landlord (i.e. the Trustees). That may well, as he suggests, be a drafting error such that the clause should, properly interpreted, be a reference to the developer’s obligations under clauses 3–9. An alternative possibility might be that it should be interpreted as referring to the obligations of both the developer and the landlord, as relevant.
19. I do not, however, have to decide that matter. The important point is not the identity of the party bound under clause 28.1, but the fact that the drafter of the agreement has carefully set out in clauses 28.1 and 28.2 a series of provisions that are expressed to be personal to specific parties, but has not included 15.1 in that list.

20. Mr Weekes cautioned against placing too much weight on this, referring to the discussion in Lewison, *The Interpretation of Contracts* (6th edition), pp 381–386. The maxim *expressio unius est exclusio alterius* – the expression of one thing is the exclusion of another – is undoubtedly, as Lewison notes, merely a principle of interpretation and not a rule of law. Like any such principle it should not be rigidly applied. The contract must be construed as a whole, and if a particular exclusion were to appear to be, in fact, an accident of drafting then it would be inappropriate for the interpretation of the contract to rest on that point. In this case, however, while there do appear to have been errors of drafting in the agreement as regards the references to the landlord vis-à-vis the developer (and the handwritten annotations on the agreement indicate that there were various other instances where the agreement referred to the landlord when in fact the developer was intended), no-one has suggested that the omission of clause 15.1 from the list of personal obligations in clauses 28.1 and 28.2 was an inadvertent error. Nor is there any good reason why clause 15.1 should have been excluded from that list, if the landlord’s obligation under that clause was indeed intended to be personal to the Trustees. The only sensible interpretation of the agreement is therefore that clause 15.1 was *not* intended to create an obligation that was personal to the Trustees.
21. That conclusion is reinforced by the terms of clauses 15.2 and 15.3. The effect of those is to render the benefit of the agreement personal to the tenant, i.e. Bella. It is striking, however, that no similar provision is made in respect of the landlord’s obligations under clause 15.1. It is not an answer to say (as Mr Weekes’ suggested) that those clauses are simply there to replace equivalent clauses in the Standard Conditions. Since a deliberate drafting decision was taken to replace the relevant provisions in the Standard Conditions with alternatives suited to this agreement, it would have been easy to provide for the position of the landlord under clause 15.1 if this was intended to be a personal obligation. The difference in treatment of the landlord and tenant on the face of clause 15 therefore indicates clearly that clause 15.1 should not be construed as creating an obligation personal to the landlord.
22. Indeed, if Mr Weekes were correct to say that the definitions in the agreement had the effect of rendering every obligation in the agreement personal to the relevant named party, then clauses 15.2, 15.3, 28.1 and 28.2 would all have been entirely redundant. The fact that they are there must, therefore, be taken as a strong indication that it was not envisaged that the definitions of the various parties to the agreement would imply that the obligations in the agreement were personal to the named parties.
23. As to the fact that clause 15.1 refers to the lease being granted “at the direction of the Developer”, I do not think that anything turns on this. As Mr Calland said, this simply emphasises the central role of the developer in the agreement. Nor does the fact that the draft lease refers to the Trustees as being the landlord alter the conclusion that I have reached, particularly given that – as already mentioned – the draft lease states explicitly that references to the landlord includes its successors in title.
24. My conclusion on the contractual interpretation issue is therefore that the obligation of the landlord under clause 15.1 of the agreement for lease, properly

construed, is not personal to the Trustees and may therefore be performed by Ropemaker as the transferee of the property.

Statutory interpretation issue

25. In light of my conclusions on the contractual interpretation issue, it is not necessary for me to express a view on the question of whether, in the alternative, the Trustees can rely on the provisions of the 1995 Act. It is, however, appropriate to record the main arguments of the parties, since the issue was fully argued before me.
26. The effect of s. 3 of the 1995 Act is that both the benefit and burden of landlord covenants of a tenancy will pass on the assignment of the whole or any part of the premises or the reversion in them. Section 28(1) of the Act defines a tenancy as “any lease or other tenancy”, including a sub-tenancy and “an agreement for a tenancy”. A landlord covenant is defined in the same section as “a covenant falling to be complied with by the landlord of premises demised by the tenancy”.
27. The central questions are whether the present agreement for lease is an “agreement for a tenancy” and whether clause 15(1) is a “landlord covenant”, within the meaning of the section 28(1) definitions.
28. Mr Weekes said that neither is the case, on the basis of the judgment of Proudman J in *Ridgewood Properties v Valero* [2013] Ch 525, [2013] EWHC 98 (Ch), finding at §§52–55 that conditional agreements for a lease fell outside the scope of the 1995 Act. The judge’s reasoning (at §55) was that conditions precedent to the grant of a lease were neither covenants forming part of an agreement for a tenancy nor landlord or tenant covenants within the meaning of section 28(1) of the 1995 Act. The consequence of this, Mr Weekes argued, was that an agreement for a tenancy will only fall within the 1995 Act if it is specifically enforceable by the time of the transfer of the property, such that an equitable tenancy arises. In the present case at the time of transfer of the property to Ropemaker the agreement for lease was still conditional and not specifically enforceable. On that basis Mr Weekes submitted that the 1995 Act did not apply.
29. Mr Calland emphasised Proudman J’s observation that she had not heard detailed argument on this point, and submitted that her reasoning on this issue was wrong and should not be followed. Shortly summarised, his argument was that an agreement for lease that is subject to conditions falls within the natural meaning of an “agreement for a tenancy”. By contrast, Mr Weekes’ construction would render the specific inclusion of an “agreement for a tenancy” in the s. 28(1) definition redundant, since a tenancy that took effect in equity (on the basis that the agreement for tenancy was specifically enforceable) would already be comprised within the words “any lease or other tenancy”.
30. Mr Calland also argued that difficulties would arise if an agreement for a tenancy could *only* fall within the 1995 Act if it was capable of specific performance. As he noted, not only is this not what the Act says, but since specific performance depends (among other things) on the conduct of the party

claiming it, this construction of the 1995 Act would mean that its application to a particular agreement would lead to a complex and uncertain inquiry.

31. The arguments on both sides raise interesting and difficult points which, it seems to me, may well have to be decided in a future case. In the present case however, as I have said, I do not need to grapple with this thorny issue, given my construction of the contract as set out above.

Conclusion

32. It follows from my conclusion on the contractual interpretation issue that the Trustees were entitled to perform their obligations under clause 15.1 by procuring the grant of the lease by Ropemaker. Accordingly, Bella was not entitled to refuse to accept the lease offered by Ropemaker on the day set for completion, and was not entitled to terminate the agreement. The claim therefore fails and the Defendants are entitled to the declaration they seek, namely that the agreement has not validly been terminated and that Bella is liable to complete the lease offered by Ropemaker.