OUTER HOUSE, COURT OF SESSION

[2019] CSOH 20

CA66/18

OPINION OF LORD ERICHT

In the cause

K/S MEADOW WAY

Pursuer

against

DGM LONDON ROAD LIMITED

Defender

Pursuer: Connal QC (sol adv); Pinsent Masons LLP
Defender: Garrity; DWF LLP

5 March 2019

Introduction

[1] The pursuer is the tenant and the defender is the landlord under a lease of a nursing home. The pursuer seeks declarator that the Lease is assignable by the tenant without consent of the landlord, which failing seeks rectification of the Lease to that effect.

[2] This case is a commercial action. At the procedural hearing I took the view that it would be appropriate for the court to deal with the declarator first, as the declarator turned on the correct construction of the lease and would resolve the case if it were granted. This meant that the parties would not be put to the expense of fully developing their cases on rectification until the prior question of declarator had been dealt with. The case called

before me for a debate primarily on the proper construction of the lease, and this also provided an opportunity for discussion of the defender's plea as to relevancy on rectification and its plea of all parties not called.

The Lease

[3] The lease in question ("the Lease") was entered into by Cox Ltd as Landlord and the pursuer as tenant on 12 June 2006 and registered in the Books of Council and Session on 26 April 2007.

[4] The debate proceeded on the basis that the defender is the successor in title of Cox Limited as Landlord. Rockingham Estates Limited was a previous successor in title as landlord and has been dissolved. The title is a complicated one involving various areas of land. It may be that some of these areas of land were not transferred to the defender by Rockingham Estates Limited along with the rest of the title. I was informed that steps were being taken to restore Rockingham Estates Limited to the register of companies and for title to any such areas to now be transferred to the defender. Both parties were content for the debate to proceed on the basis that the defender is the landlord.

Background to the Lease

[5] The lease is over a nursing home. The nursing home is let to an occupational tenant under an occupational lease which had been entered into in 1998.

[6] In 2005 the heritable proprietor of the nursing home was Cox Limited. Cox Limited entered into missives to sell the nursing home to the pursuer. The sale was to have been subject to the occupational lease. The missives provided that the price was £11,590,000 with a non-returnable deposit of £286,109 to be paid shortly after conclusion of missives. The

missives were entered into between solicitors firms on behalf of Cox Limited and the pursuer.

[7] In the event the missives were not implemented. Instead Cox Limited and the pursuer entered into the Lease.

Terms of the Lease

[8] The duration of the Lease was 175 years. There was a premium of £286,109. The rent was £1 Sterling if asked only. The landlord had no liability for repair, maintenance or renewal.

[9] The grant of lease in clause 2 provided:

> "2. **GRANT OF LEASE AND DESCRIPTION OF PROPERTY**
>
> IN CONSIDERATION of the payment of the Premium by the Tenant to the Landlord and the performance by the Tenant of its obligations in this Lease the Landlord LETS to the Tenant **but excluding assignees** and sub-tenants **except as expressly permitted in terms of this Lease,** the Property, …". (Emphasis added).

[10] Elsewhere in the lease there were various references to assignation, which I set out here with emphasis added.

[11] The definition of the pursuer as tenant stated:

> "(in this Lease called the "the Tenant", **which expression shall**, wherever the context so requires or admits, **include their permitted** successors and **assignees** and sub-tenants)".

[12] The definitions clause (clause 1.1) included the following definition:

> "**"Parties"** means the Landlord and Tenant **or, in substitution therefor, their** respective successors or **permitted assignees** in respect of their interests in this Lease;".

[13] Although the pursuer was a single legal person, Clause 1.3 stated:

> "Where from time to time there are **two or more persons included in the expression the "Tenant"**, obligations contained in this Lease which are expressed to be made by

the Tenant shall be binding jointly and severally on them and their executors and representatives whomsoever without the necessity of discussing them in their order;".

[14] Clause 4 provided:

"4. **RENT**

The Tenant binds and obliges itself and (in substitution therefor) its successors and **permitted assignees** to pay to the Landlord rent of ONE POUND (£1) STERLING per annum, if asked only and any other sums payable by the Tenant pursuant to the terms of this Lease."

[15] Clause 6 provided:

"6. **TENANT'S OBLIGATIONS**

The Tenant binds and obliges itself and (in substitution therefor) **its permitted** successors and **assignees** to observe and perform throughout the period of this Lease the whole conditions, obligations and others specified or referred to in this Lease, including without prejudice to that generality, the Tenant's Obligations set out in Part 3 of the Schedule."

Variation of the Lease

[16] The Lease was varied by a minute of variation between Rockingham Estates Ltd as the then landlord and the pursuer as tenant dated 30 October and 19 December 2007 (the "2007 Variation").

[17] The recitals to the 2007 Variation narrated that Rockingham Estates Ltd was or was about to be entitled to the Landlord's interest in the Lease. The recitals further narrated that Rockingham Estates Ltd and the pursuer " Have agreed that certain changes be made to the Lease". The 2007 Variation took the form of a short document making only one variation to the Lease and confirming that the terms and conditions of the Lease should otherwise continue in full force and effect. The variation was as follows:

"2. **VARIATION**

2.1 Notwithstanding the terms of the Lease with effect from and including the Completion Date [ie the date on which Rockingham Estates Limited becomes Landlord], the lease shall be varied as follows:

The words "except as expressly permitted in terms of this Lease" where they appear in Clause 2 of the Lease shall be delete and treated as *pro non scripto*."

Clause as Varied

[18] Parties were agreed that the clause which they were asking the court to construe was clause 2 of the Lease as varied by the 2007 Variation. For ease of reference the clause as so varied reads as follows:

"2. GRANT OF LEASE AND DESCRIPTION OF PROPERTY

IN CONSIDERATION of the payment of the Premium by the Tenant to the Landlord and the performance by the Tenant of its obligations in this Lease the Landlord LETS to the Tenant but excluding assignees and sub-tenants, the Property, ...".

Construction of the Lease as varied

Pursuer's Submissions

[19] Counsel for the pursuer submitted that a lease entered into with an initial term of 175 years did not require the consent of the landlord to an assignation by the tenant.

[20] Under reference to *Rainy Sky SA* v *Kookmin Bank Co Ltd* [2011] 1 WLR 2900, *Arnold* v *Britton* [2015] AC 1619 and *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, counsel submitted that this would be the view taken by a reasonable commercial reader of the Lease.

[21] Counsel explained that the pursuer is a property investment company. The pursuer intended to purchase a heritable property with an occupational lease that would provide an income stream. A purchase of heritable title would have given the pursuer the option to dispose of the asset in the open market. The pursuer was prepared to purchase the asset.

Missives were entered into for purchase. The pursuer granted a Power of Attorney to their agent to purchase the property. However what was subsequently entered into was not a purchase but a lease of 175 years duration. If the grant of a lease of 175 years was intended to be akin to ownership of the property, the pursuer would have to have the ability to dispose of the assets at some point in the future.

[22] Counsel submitted that the Lease as varied should be read as allowing the tenant to assign the tenant's interest to a third party without the consent of the landlord. Without such an interpretation the tenant was severely restricted as to whether it could ever dispose of the asset it had paid for. There was no requirement in the Lease for the landlord to act reasonably in giving consent. The landlords could, therefore insist on being provided with something in return for consent that was impossible for the pursuer to provide. A ransom payment could be demanded. An interpretation of the Lease that could allow the defender to insist on such demands as a basis for assignation would not equate to business common sense.

[23] Counsel stressed that a lease of 175 years is exceptionally long. In his submission, it should be viewed as akin to ownership. A Lease of 99 years had been held to be assignable (*The Scottish Ministers* v *Trustees of the Drummond Trust* 2001 SLT 665 per Lord Carloway at p668) and this was even truer in a lease of 175 years duration. A commercial entity would not set out to purchase an asset for a sum in excess of £11,500,000 if the asset would not in any way be transferrable at any time without the consent of the third party. The construction which made best commercial sense would require the Lease to be interpreted as allowing the tenant to assign the tenant's interest in the Lease to a third party without the consent of the landlord. Counsel further submitted that the interpretation contended for by the defender had the potential to result in the pursuer being unable to dispose of or re-

finance the asset without the defender's consent. Counsel accepted that security was in place and was registered in the Land Register, but submitted that the security was granted by the lender without a full appreciation of the terms of the Lease, which could result in a financial institution deciding not to advance funds in support of any purchase of the tenant's interest. It was reasonable to infer that the purchase of a property asset valued in excess of £11,500,000 may require external funding. A security holder would not be able to dispose of the asset without the consent of a landlord.

Defender's submission

[24] Counsel for the defender submitted that there were no legal or factual foundations for granting the declarator as concluded for. Clause 2 of the Lease as varied was clear and unambiguous and its terms should be given effect to (*Rainy Sky SA* v *Kookmin Bank Co*, *Arnold* v *Britton*, *Wood* v *Capita Insurance Services Ltd*).

Discussion and decision

[25] In my opinion, the meaning of clause 2, as varied by the 2007 Variation, is clear and unambiguous. Assignation is expressly excluded.

[26] While there are references to permitted assignees in other clauses, in my view these are subordinate to clause 2 and do not overrule its clear terms. They will be operative if at some time in the future the Landlord, despite not being obliged to permit assignation, agrees to do so and the Lease is varied accordingly.

[27] In the *Scottish Ministers* v *Trustees of the Drummond Trust* (2001 SLT 665) Lord Carloway, then sitting in the Outer House, considered a 99 year lease of an area of woodland. Lord Carloway held that there was a presumption that an ordinary lease

involved *delectus personae* and was not assignable (p667L). He found on the facts that the presumption did not apply. In particular he stated "Given that substantial term [ie 99 years], I do not consider that the parties envisaged that the tenants would remain thirled to the land for such a lengthy period with no option to terminate or alienate" (p668F).

[28] However in my opinion there is an important difference between the *Drummond Trust* case and the present one. In *Drummond Trust* the Lease was silent on assignation. In certain circumstances a lease of extraordinary endurance which is silent on assignation may contain an implied right to assign (Rankine, *Leases* p173; *Duke of Portland* v *Baird and Co* (1865) 4M 10). In the current Lease, however, it has been expressly agreed by the landlord and tenant that assignees are excluded.

[29] There is nothing inherently repugnant to Scots law in the situation where a landlord and tenant agree that assignation is not possible. Provided that the statutory requirements for a lease are met and there is no illegality, the law gives parties to a lease freedom to come to whatever terms they agree. An express exclusion of assignation is enforceable (*Marquis of Breadalbane* v *Whitehead and Sons* 1893 21R 138; Rennie *Leases* para 18-07).

[30] In this case the landlord and the tenant were commercial operators involved in a complex property investment transaction. They expressly agreed to exclude assignees. The pursuer went to the effort of entering into the 2007 Variation with the Landlord to clarify the original wording of clause 2. Accordingly it seems to me that, unlike in the *Drummond Trust* case, the parties envisaged that the lease would be unassignable.

[31] Of course, that does not mean that in practice the tenant would be obliged to remain as tenant for the entire 175 years. If the landlord and tenant came to an agreement that the tenant be substituted by a third party, then appropriate documentation could be entered

into to achieve this. In practical terms, the tenant is in no worse position than a tenant under a lease which states that it is assignable with the consent of the landlord.

[32] The pursuer is concerned that the landlord would not agree to such a substitution without something in return. The pursuer is concerned about the possibility of a "ransom" demand. It seeks declarator that the lease is assignable without the consent of the landlord.

[33] It is common in practice for leases to make specific provision in relation to landlord's consent. For example, parties might agree to a lease not being assignable without written consent of the landlord, which consent is not to be unreasonably withheld. Such provisions reduce the scope for there being a ransom demand. However, the parties to the Lease have chosen not to include such a provision. The pursuer must take the consequences of that choice.

[34] Given the clear and unambiguous terms of the Lease I did not find counsel for the pursuer's submissions on the difficulties of externally funding an investment of £11,500,000 to be of assistance. The Lease was acceptable as security to Bank of Ireland, in whose favour a standard security was registered on 26 April 2007.

[35] I shall refuse the declarator sought.

Rectification

The rectification sought by the pursuer

[36] Given that I have not granted declarator the next issue which arises is whether the Lease should be rectified to permit assignation without the Landlord's consent in terms of the second conclusion. The effect of the rectification sought would be that clause 2 would read as follows (the rectified words being in bold type):

> "2. GRANT OF LEASE AND DESCRIPTION OF PROPERTY
>
> IN CONSIDERATION of the payment of the Premium by the Tenant to the Landlord and the performance by the Tenant of its obligations in this Lease the Landlord LETS to the Tenant **and their** assignees and sub-tenants, the Property, ...".

Defender's submissions

[37] Counsel for the defender submitted that the pursuer failed to specify any prior agreement for lease and accordingly had failed to satisfy the requirement under section 8(1) of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.* The court required to be satisfied that the lease failed to express accurately the intention of the granter.

Pursuer's submissions

[38] Counsel for the pursuer submitted that it would be premature to dismiss a claim for rectification at this early stage in a commercial action. The common intention of the parties could be inferred from the circumstances including the conduct of parties after they signed the documentation (*Patersons of Greenoakhill Ltd* v *Biffa Waste Services Ltd* [2013] CSOH 18 at paragraph 45). The pursuer had secured its interests with the bank and had produced a written document evidencing a common intention to procure acquisition of a heritable interest or something equivalent. Subject to any necessary expansion of the pleadings, the pursuer was entitled to a proof before answer.

Discussion and decision

[39] Section 8 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985* provides as follows:

"8. - Rectification of defectively expressed documents.

(1) Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—

(a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made;…

(3) Subject to section 9 of this Act, in ordering the rectification of a document under subsection (1) above (in this subsection referred to as "the original document"), the court may, at its own instance or on an application made to it and in either case after calling all parties who appear to it to have an interest, order the rectification of any other document intended for any of the purposes mentioned in paragraph (a)… of subsection (1) above which is defectively expressed by reason of the defect in the original document."

[40] The pursuer's position on record is as follows:

"missives were entered into with Cox Limited, a British Virgin Islands registered company, for a price of £11,590,000, under terms requiring a deposit of £286,109. Thereafter the transaction did not proceed by way of disposition. There was granted the Lease, for a duration of 175 years from 12 June 2006. In that Lease, per incuriam, the "premium" is narrated as being £286,109 (being the deposit under the missives) rather than the passing price of £11,590, 000. The Lease was registered on 26 April 2007, on which date a Standard Security in favour of the Bank of Ireland was also registered. The plain intention of the parties as demonstrated by the documentation was to enter into a relationship in which the Pursuer's rights were either those of ownership or equivalent to ownership."

[41] It is striking that the pursuer does not offer to prove a common intention to enter into a lease, never mind a lease which is assignable. The averments about the missives could, if proved, establish a common intention to sell and purchase the property. However that is not what the pursuer is contending for in this action. His conclusion is for rectification of the Lease to make it assignable without the landlord's consent. There are no averments as to the process by which the common intention to sell the property changed to a common intention to lease the property on terms which permitted assignation without the landlord's consent. There is an averment that "£11,590,000" was a "passing price" but no averment as

to whether the sum of money which actually changed hands was that "passing price" of £11,590,000 or the premium of £286,109 set out in the Lease. On the pleadings as they stand, there is some force in the defender's position that the pursuer has not pled a relevant case on rectification.

[42] However, it is not appropriate for me to decide the matter of rectification on the pleadings as they stand. This being a commercial court action, a debate was allowed primarily on the issue of the proper construction of the Lease. Had I found in favour of the pursuer on the construction point, parties would not have had to incur the time and expense of developing the rectification argument. The pursuer avers that the common intention was to enter into a relationship equivalent to ownership. It is appropriate as part of commercial court procedure to now allow parties to develop their pleadings on rectification.

All parties not called

Defender's submissions

[43] Counsel for the defender submitted that as the following parties had not been called the actions should be dismissed:

(1) Cox Ltd, as the granter of the Lease and party to any prior common intention;

(2) the Keeper of the Land Register of Scotland, in respect of the tenant's registered interests in the Lease, the standard security registered against that Lease, and also the registered interests of the heritable proprietors of the property;

(3) the Bank of Ireland, as holder of a registered standard security over Lease;

(4) Rockingham Estates Ltd, the third party purchaser of the heritable title in Cox Ltd and the current title holder of part of the property.

Pursuer's submissions

[44] Counsel for the pursuer submitted that there was no requirement to call these parties. If the defender wished he could bring them in as third parties, or call them as witnesses. The bank had provided a letter confirming that it was aware of the action and did not wish to take part in it.

Discussion and decision

[45] In my opinion the presence of the parties listed by the defender is not necessary in order to have the questions at issue in this case effectively disposed of. There is no prejudice to the defender as the defender can call representatives of these parties as witnesses if it wishes to do so. The Bank of Ireland is aware of the litigation and has chosen not to take part in it.

Order

[46] I shall uphold the defender's second plea-in-law in so far as it relates to the declarator sought in the first conclusion and repel the pursuer's first plea-in-law and refuse to grant that declarator. I shall repel the defender's first plea in law (all parties not called). I shall put the case out by order for discussion of further procedure in relation to rectification and any other outstanding matters such as the pursuer's plea in law as to reduction of the 2007 Variation. I reserve all questions of expenses in the meantime.