Neutral Citation Number: [2025] EWHC 99 (KB)

Case No: KA-2024-000097

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
HIGH COURT APPEALS CENTRE
SITTING IN LONDON
COURT 37

Wednesday 22nd January 2025

Before:
FORDHAM J

- -

Between:
(1) AMMAR AL SALEH
(2) SWALIH LTD **Appellants**
- and -
CROYDON ESTATES LIMITED **Respondent**
(a BVI COMPANY)

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Leon Hines (BA International Solicitors) for the **Appellants**
Michael Collard (instructed by Bishop & Sewell Solicitors) for the **Respondent**

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Hearing date: 22.1.25

Judgment as delivered in open court at the hearing

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Approved Judgment

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FORDHAM J

Note: This judgment was produced and approved by the Judge, after authorising the use by the Court of voice-recognition software during an ex tempore judgment.

FORDHAM J :

Introduction

1. On 29 and 30 January 2024 at Central London County Court, HHJ Roberts heard the trial of the claim by the Respondent ("CEL") for possession of commercial property at 190 Edgware Road W2 2DS, together with claims for monetary orders. There were five defendants: D1 to D5. The Appellants on this appeal were defendants D3 (Ammar Al Saleh) and D5 (Swalih Ltd). The other defendants were Mohamed Hussain Saleh Al-Anazi (D1), Persons Unknown (D2) and Hoffman Estates Ltd (D4). I record, as did the Judge, that D3 was a director of D4 from 10.6.18 to 1.12.19. D3 was a director of D5 from 1.8.18 to 9.10.18 and again from 1.7.19. D3 appeared in person at the trial, in his own defence and that of D5. Mr Hinds has emphasised that, by way of context and background. He accepts that he is unable to identify any viable ground of appeal based on any failure on the part of the Judge to adjourn the trial to allow further time to get legal representation, a point mentioned in the written grounds of appeal but unsupported by any materials. I am quite satisfied that there is no viable platform for an appeal on that point and that it is rightly not pursued. But I have borne in mind the context and circumstances. The Judge handed down a 63-paragraph judgment (30.1.24) reference K00CL426. He ordered: (1) possession of the property; (2) judgment against D4 for £180,342.40; and (3) judgment against D3 for £45,515.40. Provision was also made for interest. Permission to appeal was refused on the papers by Sir Stephen Stewart (28.11.24). Mr Hinds used the word "trenchant", but I am sure that what he meant was to recognise – as do I – that this was a clear and comprehensive reasoned ruling.

Conclusion

2. I have come to the conclusion that Sir Stephen Stewart was right. Considering afresh the points which have been advanced, in writing and orally, for today I am satisfied that there is no viable basis for an appeal in this case. I will therefore be refusing permission to appeal. I will explain in outline the context and deal with the two points that have been helpfully and fully advanced by Mr Hinds. The request for reconsideration at this oral hearing (CPR 52.4(2)) had explained by a solicitor's witness statement that there was a single point of focus. Mr Hinds has addressed me today on that and a second point. By advancing these through the medium of this oral hearing, I have had the opportunity to test with him the details as well as the implications of what he has put forward and the consequences in terms of what it all means, when put alongside the various findings and conclusions of the Judge.

Context

3. There were three relevant time periods in this case, as follows: phase 1 (as I will call it) being from the date of a lease (23.12.13) to its expiry (24.3.21); phase 2 being from the date of that expiry (24.3.21) to the date of forfeiture (9.1.23); and phase 3 being the date of that forfeiture (9.1.23) to the date of judgment (30.1.24). During phase 2 there was, found the Judge, an "informal agreement" (June 2021) about ongoing payments for ongoing rent and towards accumulated arrears, pending negotiations about a new lease. When I say "rent" and "arrears" I make clear that these included certain related charges. Mr Hinds, building on that June 2021 informal agreement, submits that the Judge was wrong not to recognise its additional features with its additional legal implications.

4. The Judge found an entitlement to possession by reason of arrears. He found that the phase 2 tenant was D4 and not D5 (issue 1); that D3 and D5 had made payments during phase 2, which partially met the informal agreement (issue 2); CEL was entitled to forfeit on 9.1.23 (issue 3); D4's liability was £180,342.40 (issue 4); and D3's liability was £45,515.40 (issue 5).

5. D4's liability of £180,342.40 had two components. The first was £118,665.60 as the arrears referable to phase 1 when D4 was tenant under the lease. The second was £61,676.80 as use and occupation during phase 2, when D4 was found to be the tenant (issue 1). The phase 1 amount was reduced by a payment (9.6.21) of £29,666.40 which the Judge found was for the March 2020 rent. That is a finding of fact which is unimpeachable. Also unimpeachable are the Judge's finding of fact that no other phase 2 payment was referable to phase 1; and the Judge's finding of fact that when all the payments during phase 2 were taken into account (including the list which Mr Hinds has shown me and emphasised today), these were not sufficient to meet the terms of the June 2021 informal agreement. The phase 2 amount outstanding under the informal agreement was calculated by the Judge after making reductions in relation to the other payments made during phase 2. Points have been made today about misallocation, and about the Judge having been wrong as to the figures. But I have been unable to find any viable criticism; still less one capable of supporting a viable appeal.

6. D3's liability of £45,515.40 was based on the Judge's finding that D3 was in occupation after forfeiture (9.1.23), during phase 3, running a restaurant. This was damages for use and occupation at a daily rate of £325.11. That was the daily rate which had been payable under the original lease. Nothing that had been said today begins, in my judgment, to address that position so far as phase 3 and D3's liability is concerned.

7. The Judge found that during the term of D4's lease (phase 1), rent was paid on behalf of D4 by two companies of which D3 was or is a director: Star Lounge Ltd (dissolved on 14.1.20) and D5. That was in circumstances where D4 did not have a bank account and where CEL was content to accept payments from others on D4's behalf. Mr Hinds began his submissions by focusing on phase 1 and those payments, emphasising that D3 was not a director of D4 after 1.12.19. However, Mr Hinds rightly accepted that he could not impugn the Judge's finding that it was, nevertheless, D4 who was the tenant during phase 1. In my judgment, there is nothing arising out of the payments made during phase 1 that can support any sustainable attack on any of the findings by the Judge, on any of the issues. The Judge's finding about payments in respect of D4's liabilities in phase 1 coming from D5 and Star Lounge is a point of real significance, because the Judge found that the same practice continued during phase 2, when partial payments were made by D3 and D5 (issue 2); but when the tenant at will was D4 not D5 (issue 1).

8. Also significant is this. The Judge heard oral evidence from D3 and found him to be a evasive and unreliable witness, whose evidence was internally contradictory and contradicted contemporaneous documentation. The Judge set out several clear illustrations as to those contradictions.

The First Point

9. The point which was identified by Mr Hines in writing, which is maintained orally today, is that the Judge mischaracterised payments made by D3 and D5 and so

misdirected himself. The focus began with phase 1 but I have dealt with that and explained that it goes nowhere. Mr Hinds recognised that the true focus of his point related to what he called the "middle phase", which I am calling phase 2. The point is made that payments included arrears. So, these were larger sums than the ongoing rent. They included elements of accumulated past arrears. As with phase 1 payments, they came at a time when D3 no longer had any legal connection with D4, having been a director to 1.12.19.

10. In substance, as I see it, these are all arguments which go to the question of whether the Judge was arguably wrong in finding that the tenant in phase 2 was D4 rather than the 5 (issue 1). I have already explained that the Judge had found that the fact that the source of phase 1 payments was D5 (and Star Lounge) was not inconsistent with D4 being tenant during phase 1. That, as I have explained, was an unimpeachable analysis plainly open to the Judge. The Judge went on to address, in considerable detail by reference to the evidence and in particular the contemporaneous documents, why he concluded that the tenant during phase 2 continued to be D4 and was not D5. That was issue 1. It occupied a considerable portion of the Judge's judgment. He pointed to contemporaneous documents including emails in April 2021 from D3 which referred to "Hoffman". He pointed out that those materials were using the language of "renewal" which was repeated in an email in June 2021. He explained that a draft lease in the name D4 been sent by CEL's solicitors and considered and responded to in August 2021 by D3's solicitors, involving a draft and a redraft which named "Hoffman Estates Ltd". These are just some features. But they are illustrative sorts of points that the Judge heard about read about alongside the oral evidence that was called both by CEL and the Appellants. In my judgment it is quite impossible to identify a viable appeal on that issue. Added to which, for reasons that I have already explained, it is also impossible to identify a viable basis for impugning the Judge's analysis of the payments that were made, the one payment which was referable to phase 1, and the informal agreement about the arrears, all of which culminated in the judges unimpeachable finding that £61,676 a was outstanding in respect of phase 2, referable to the informal June 2021 arrangement. That was the context for the Judge's finding (issue 3) that he was plainly entitled to make. The submission is made that it makes no sense for D3 or D5 to be making payments referable to a situation where it is D4 and is the tenant; and that it makes no sense to be making payments to our referable to arrears. But that was the logic of the position during phase 1. The Judge found that it continued during phase 2.

Another Concern

11. I put to Mr Hinds – leaving aside everything else – what appears to me to be a logical difficulty. Suppose for a moment that it should have been D5 who was treated as being the "tenant at will" during phase 2, instead of D4. In circumstances where it is impossible to challenge the analysis of the figures and the allocation of figures, I have found it impossible to see how the Appellants could escape this as the picture being put forward. It would be D5 who was the tenant at will. D5 would then be on the line for the liability referable to phase 2. The amount of £61,676.84 in phase 2 would not therefore be referable to D4. It would be the subject of a judgment instead against D5. Indeed, even if it were found that the £29,666.40 paid (9.6.21) in phase 2 but in respect of phase 1 rent (March 2020) should have been allocated under the June 2021 informal agreement, that would still leave a liability of over £30,000 in respect of phase 2. But it would now be at the door of D5 (one of the Appellants) rather than D4. And since the

arrears would remain, the justification for the forfeiture would also remain. That means the position at phase 3 would be exactly the same involving the same liability of D3. I emphasise that my decision today does not turn on that concern. But I record that I was unable, despite Mr Hinds's assistance, to see an answer to it.

The Second Point

12. The additional points added in the oral submissions today related to what was called an "estoppel". Mr Hinds creditably accepted the difficulty identified by Sir Stephen Stewart, in seeking to mount an appeal on an estoppel argument which was never advanced at the trial before the judge. As for its substance, the way in which the so-called estoppel argument was supported was as follows. It is said that there was an informal agreement in June 2021 that there was to be a new lease provided in the name of D5, so long as there was payment meanwhile of the ongoing rent and the £3,000 per month towards accumulated arrears. Pausing there, that matches the June 2021 informal agreement that the Judge found was in place, but it builds something onto that agreement. It adds that there was an understanding by way of informal agreement that there would be a new lease in the name of D5. A first problem is that that is inconsistent with the Judge's finding on the evidence, which I have already explained is not open to challenge, about who the tenant was during phase 2. A second difficulty is that there is, in my judgment, no evidential foundation on which even arguably it can be said that the Judge should have found that the informal agreement had the additional content that has today been constructed. A third problem is that the payments were not, in any event, made and there was the deficit arising during phase 2. That, as I have explained, is impossible to challenge successfully so far as concerns the Judge's maths, identification of relevant dates and allocation of payments. As I have already explained, all of the payments in the list that was emphasised this morning by Mr Hines were included by the Judge as offsetting payments at phase 2. The extended informal agreement which is constructed in the oral argument today itself accepts that the "arrears" needed to be paid as well as the ongoing rent. Mr Hinds's answer was that what went wrong in underpaying was D3's frustration that the new lease was not executed. He says that led D3 to stop, in protest, making payments from December 2022. The obvious problem with that is it cannot explain the failures to keep up in the period before December 2022. No protest in December 2022, withholding payments after that, can possibly be the basis of the justified forfeiture on 9 January 2023 (issue 3). The entitlement to forfeit was in the context of what the Judge found were arrears (as well as the repossession notices that were deployed). For all those reasons, even if the estoppel point could now be introduced, it could not in my judgment be a basis for overturning the Judge's assessment of the June 2021 informal arrangement, of the limits of that arrangement, and of the findings of fact as to what happened next. In the end the argument of so-called "estoppel" – which seems to me to be an allegation that there was an agreement – has no evidential support. It is inconsistent with the Judge's analysis and findings of fact, on the evidence, there having been a full and fair ventilation of the facts and documents during the two day trial.

D3's Phase 3 Liability

13. Finally, I repeat that none of the points that are raised in my judgment touch phase 3 and D3's liability. That includes the Judge's findings that it was D3 who was the tenant during phase 3, that no payments were made during the periods identified by the Judge, and identifying a lawful and legitimate daily rate to calculate the liability. In all the

circumstances and for all those reasons I will refuse the renewed application for permission to appeal.