Neutral Citation Number: [2018] EWCA Civ 1102

Case No: C3/2017/2385/LATRF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Lands Chamber)
Martin Rodger QC, Deputy Chamber President
LRX/147/2016, [2017] UKUT 228 (LC);

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2018

Before:

LADY JUSTICE RAFFERTY
LORD JUSTICE MCFARLANE
and
LORD JUSTICE LINDBLOM

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Between:

CORVAN (PROPERTIES) LTD	**Appellant**
- and -	
ABDEL-MAHMOUD	**Respondent**

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- -

Mr Jonathan Seitler QC and James Sandham (instructed by **Northover Limited**) for the **Appellant**
Philip Rainey QC and Nicola Muir (instructed by **Direct Access**) for the **Respondent**

Hearing dates: Wednesday 25 April 2018

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Judgment Approved

Lord Justice McFarlane:

1. The single issue raised in the present appeal is whether an agreement between freeholder and property management company constitutes an agreement for more than twelve months, and therefore falls within the meaning of 'qualifying long term agreement' in section 20ZA(2) of the Landlord and Tenant Act 1985 ["The 1985 Act"]. The appeal therefore turns on (i) the correct construction and meaning of the relevant clause (clause 5) of the agreement, and (ii) the scope of section 20ZA(2) of the Act.

2. The underlying proceedings in the First-tier Tribunal (Property Chamber) ["FTT"] concern a claim for £24,420.83 of unpaid service charges for the period 25 March 2010 to 24 June 2014. That total included, inter alia, a contribution towards the fees of managing agents. So far as is relevant for this appeal, the FTT on 29 June 2016 disallowed part of the charges on the grounds that the management agreement was a qualifying long term agreement to which the consultation requirements of Section 20 of the 1985 Act applied and had not been observed.

3. On 2 June 2017 The Upper Tribunal (Lands Chamber) ["UT"] (Deputy President Martin Rodger QC) dismissed the landlord's appeal on the question of whether the agreement was a qualifying long term agreement. Permission to appeal to this court was granted on 24 October 2017 by Hickinbottom LJ.

Background

4. The Appellant is the freehold proprietor and landlord of Clive Court ("the Building") in Maida Vale, a substantial residential block managed by its appointed agents Moreland Estate Management Limited (and previously by True Associates Ltd.). It contends the words of the contract do not result in the agreement being for a term of more than 12 months, and thus do not fall within the meaning of section 20ZA(2) of the 1985 Act.

5. The Respondent occupies flat 500 at Clive Court, under a long lease granted by the appellant's predecessor in 1988 and which the respondent acquired in 2000. As the Upper Tribunal put it, the lease includes "conventionally drafted service charge provisions which require the respondent to contribute towards expenses incurred by the appellant in the provision of services…". She contends the contract is for a term of more than 12 months, and is therefore a qualifying long term agreement for the purposes of section 20ZA(2) of the 1985 Act – with the result that there was a consultation requirement (with all 154 leaseholders). It is agreed there was no consultation. The failure to consult means the leaseholders' contributions to the costs of those appointments were subject to a statutory cap of £100 per annum (pursuant to section 20 of the 1985 Act, and regulation 4(1) of The Service Charges (Consultation Requirements) (England) Regulations 2003 (SI/2003/1987)), unless the consultation agreements have been dispensed with under section 20ZA(1) of the 1985 Act.

6. Clive Court was formerly managed on behalf of the appellant by True Associates Ltd under a management agreement entered into on 17 December 2008. Responsibility for management was later assumed by Moreland Estate Property Management Limited on the same terms.

7. The relevant clause (clause 5) in the 17 December 2008 agreement reads as follows:

> "The contract period will be for a period of one year from the date of signature hereof and will continue thereafter until terminated upon three months' notice by either party".

The Legal Context

8. Section 20ZA(2) of the 1985 Act defines a "qualifying long term agreement" as:

> "an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months".

Factual and Procedural Background

9. The conclusions of the UT were essentially these:

> "24. Although… the contract period is expressly stated to be for a period of one year, clause 5 does not stop there, but goes on to provide that the same contract period is "to continue thereafter". The period of 12 months therefore represents only the start of the contract period. The critical question is whether the contract period can be brought to an end on the expiry of that initial period of 12 months or whether it must be allowed to continue for some further period, even if only for a single day.
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> …
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> 26. … [T]he agreement is intended to continue until after the end of the initial period of one year: it "will continue thereafter." That continuation, for whatever further period, is not conditional upon the absence of notice: it is a continuation "until terminated" not "unless terminated". … [T]he notice may not bring the agreement to an end until a period of continuation after the end of the 12 months has first commenced. On that construction the agreement was for a period of at least a year and a day, and was therefore for a term of more than 12 months.
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> …
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> 28. Nor is there any room for implying a term that the agreement may be terminated at the end of the initial 12 months by notice of reasonable duration. … That would be inconsistent with the intention that the agreement was to continue after that date, and in any event would be a surprising term for the parties to have left unexpressed in a clause dealing explicitly with duration and termination by notice."

10. There are essentially two issues that fall to be determined:

a) The correct construction of the contractual provision (clause 5), and whether it results in a term exceeding 12 months; and

b) The correct interpretation of the statutory provision, in particular whether the "term" referred to in section 20ZA concerns a minimum, or a certain fixed maximum term.

The Appeal

11. For the appellants, Mr Jonathan Seitler Q.C. submitted that to insist, as the UT had done, that the clause resulted in the terms being a year plus one day, or a minimum of 15 months was to do violence to the terms of the agreement. He submitted that although the clause is a single unity, it has two distinct elements. The first concerns the length of the term, the second is about termination. The expression "contract period" could not be overlooked by placing excessive emphasis on the word "will". In respect of the word "will" in the clause, he submitted it is a soft, and not strong or directive, "will". In other words, it should not be construed so as to mean "shall". Furthermore, because this clause was clearly overly condensed drafting, it requires the implication of two words in order to give proper effect to the intention that the term be for 12 months and no longer. The modification which Mr Seitler suggested was the insertion of "unless terminated" after the "and" – such that the agreement would read:

> "The contract period will be for a period of one year from the date of signature hereof and *unless terminated* will continue thereafter until terminated upon three months' notice by either party". (proposed addition italicised)

12. In the alternative that those words are not implied, Mr Seitler submitted the court should avoid the rigidity adopted by the UT in respect of the word "until". Instead, the court should read "until" as being equivalent in meaning to "unless", with the result that the contract did not mandate continuation beyond 1 year. Nonetheless, he argued notice could be given within the first year, but effect could not be given to termination until midnight at the end of the first year, with the result that the term of the contract was exactly, and no more than, one year – subject, effectively, to an option to extend if a decision was made by the landlord not to give notice.

13. In respect of the policy underlying the 12 month stipulation in section 20ZA(2), Mr Seitler submitted the consultation requirement was an extra, and not the only protection for the tenant in respect of service charges. The heart of the provisions, and the protection of the tenant, is section 19(1), which limits relevant costs incurred by landlord to only those which are reasonable.

14. As to the second issue, Mr Seitler argued that although the point need not be decided, a five year agreement with a right to terminate at any time would still be a qualifying long term agreement. In ascertaining what constitutes the "term" referred to in section 20ZA(2), the pragmatic and correct answer must be the contract period as expressed – after all, this is the only certainty so far as duration is concerned. In the present case, the contract specified the period to be one year.

15. Mr Seitler relied on the reasoning in *Paddington Walk Management Ltd v Peabody Trust* [2010] L & TR 6, which was a decision of HHJ Hazel Marshall QC sitting in the Central London County Court. The relevant clause in the service agreement entered into on 1 June 2006 was in these terms:

> 'for an initial term of one year from 1 June 2006 and will continue on a year-to-year basis with the right to termination by either party on giving three month's written notice at any time.'

16. HHJ Marshall considered the terms of the clause in the context of section 20ZA and held:

> '48. In my judgment an agreement for a year certain and then from year-to-year to continue subject to not being terminated is not "an *agreement* for a term of *more* than 12 months" (emphasis added by HHJ Marshall) within the meaning of this part of the statute. I reach this conclusion with a little hesitation … In other words, the structure of the Act is that the definition of qualifying long term agreement is to apply to a contract in which the tenants would definitely have to contribute in respect of a period of more than 12 months.
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> 49. In my judgment the whole flavour of the provisions extending to these agreements is "long term". I cannot see how a periodic contract for, for example, a month and thereafter from month-to-month, could be regarded as long term as a matter of impression… A line has to be drawn somewhere, and it has been drawn at a commitment which exceeds 12 months. A commitment of 12 months only is on the non-qualifying side of the "long term" line.
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> 50. A contract initially for one year and thereafter on a year-to-year basis subject to a right to terminate on three months' notice is terminable at the end of the initial period or any subsequent year on three months' notice, and does not entail a commitment for more than 12 months. There is thus no such commitment in this case and I conclude that the Pemberton's contract is not a qualifying long term agreement.'

17. Mr Seitler submitted that, even if the court was of the view that the clause in the *Paddington Walk* case was materially different from clause 5 of the agreement in the present case, the simple question identified by HHJ Marshall still applies, namely whether the contract period will end within or without the 12 months.

18. Furthermore, Mr Seitler submitted the construction of the clause in the present case by the Tribunal cannot be reconciled with that in *Brown v Symons* (1860) 8 C.B.(N.S.) 208 where the relevant clause provided that the contract would be binding 'for twelve months certain' and 'continue from time to time until three months' notice in writing be given by either party to determine the same'. He argued that both clauses conveyed the same certainty of initial period, and used similar language of continuation, yet the Tribunal's conclusion is diametrically opposed to that in *Brown* where the court held that the contract could be determined at the expiration of the first year by giving three months' previous notice.

19. Mr Seitler also submitted that the Tribunal's finding is further inconsistent with *Langton v Carleton* (1873) L.R. 9 Ex. 57, where the court refused to emasculate the words "twelve months certain" by finding that the term was in fact for a longer period.

20. Finally, Mr Seitler sought to rely upon an interpretation of 'qualifying long term agreement' to be found in a consultation document issued by the Office of the Deputy Prime Minister in August 2002 with respect to draft regulations aimed at supporting the service charge provisions in the Act. By the close of oral submissions, it had been made clear that the Act containing s 20ZA had received Royal Assent on 1 May 2002. In those circumstances, it would, in my view, be inappropriate for the court to take note of a subsequent consultation paper relating to regulations.

21. For the Respondent, Mr Philip Rainey QC submitted the contract is not simply for a term of "one year", but is for "a period of one year … and will continue thereafter". Those latter additional words cannot simply be ignored, and the consequence is that the (indefinite) continuation of the contract following the first year is mandatory. It is an indefinite continuation "until terminated", not "unless terminated" (as contended by the appellant). As the agreement does not provide that the three months' notice can be given at any time (prior to the initial 12 months), it must be the case that the three months' notice can only be given after the expiration of "a period of one year".

22. Mr Rainey further submitted that any suggestion that the obvious intention of the contracting parties was to exclude the agreement from the consultation requirements by expressly limiting the term to "one year" is by no means obvious and furthermore would be to introduce evidence of subjective intention, which is inadmissible (see *Arnold v Britton* [2015] UKSC 36 (see paragraph 15 per Lord Neuberger PSC – see paragraph 27 below).

23. The appellant's contention that into clause 5 should be implied the words "unless terminated" – so as to read as set out above (at paragraph 11) and give effect to the words "one year" – was not part of the appellant's case before the Tribunal. In any event, they are neither necessary nor do they satisfy the test of business efficacy (as required by *Marks & Spencer Plc v BNP Paribas Securities Trust Co. (Jersey) Ltd* [2015] UKSC 72, see paragraphs 22-24 per Lord Neuberger PSC). The agreement between the parties works perfectly well without the implication of the words for which the appellant contends.

24. Furthermore, it is not logically coherent to construe the second "will" in the clause as a 'soft' will, as contended for by the appellant. The word "will" must have the same meaning in both of its occurrences in the clause. If the second "will" is construed as being 'soft', then so must be the first. The result of that would be that the length of the initial term (one year) would be uncertain. Mr Rainey submitted that that purported construction was clearly unsustainable.

25. So far as the second issue is concerned, Mr Rainey submitted that because the consultation requirements are for the protection of tenants, and because tenants have no power to serve notice to terminate rolling contracts, an agreement which purports to be for a term of 12 months but which continues thereafter unless either party takes a step to terminate it, is an agreement "for a term of more than 12 months". It is irrelevant whether or not the term could, by notice, be determined within a year of commencement. It is clearly undesirable for landlords to be able to circumvent the legislation by drafting clauses with apparent uncertainty of term, but which are intended to continue.

26. Mr Rainey submitted that *Paddington Walk* was therefore incorrectly decided, and that the determining factor is not the length of the commitment. In the alternative, he argued that, if *Paddington Walk* was correctly decided, the agreement in the present case is significantly materially different. The agreement in the present case is similar to that found in the case of *Poynders Court v GLS Property Management Ltd* [2012] UKUT 339 (LC), a decision of His Honour Judge Gerald sitting in the Upper Tribunal (Lands Chamber) which concerned an agreement which was silent as to the duration of the term and was indefinite, subject to a right of either party to terminate on three months' written notice. In *Poynders Court*, HHJ Gerald's approach focused on substance, rather than form, finding (at paragraph 10) "whether the provision of those services will be for more than 12 months depends upon the nature of the services to be

provided under the terms of the Management Agreement". HHJ Gerald found the services were intended to be provided for a period which extended beyond 12 months because they related to preparation and collection of an annual service charge, and further services "for an annual fee which is fixed for two years whereafter it will be reviewed annually with no provision for apportionment on early termination". As in *Poynders*, the remainder of the agreement in the present case makes it clear that the managing agent will or is intended to provide the services for a period which extends beyond 12 months. Mr Rainey therefore relied upon HHJ Gerald's conclusion in *Poynders Court* that the question of whether an agreement had been entered into for a term or duration of more than 12 months:

> "12. … is not answered by saying it can be terminated on three months' notice; it is not an agreement to provide the services for three months, but an agreement to provide them forever, or indefinitely, unless and until terminated by three months' notice".

Conclusion

The construction of the clause

27. In approaching the correct construction of the clause, it is of assistance to bear in mind the helpful recent guidance of the Supreme Court in *Arnold v Britton* [2015] UKSC 36 (per Lord Neuberger PSC at paragraph 15):

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

28. Adopting the approach to the assessment of meaning described by Lord Neuberger, I consider that the use of the word 'will' in clause 5 does indeed introduce a mandatory requirement that the contract will continue beyond the initial twelve months, without specifying for precisely how long.

29. Although the wording of the clause does not prevent the giving of notice of termination before the conclusion of the twelve months, any such notice would have no effect until after the twelve-month period has ended. To hold otherwise would be to do violence to the words "and will continue".

30. The fact that the appellant needs to imply the words 'unless terminated' or to change 'until' to 'unless', indicates that the natural meaning of the words without those changes does not support the appellant's case. This may be a case where the likely intention of the landlord at the time the agreement was made would seem to differ

from the effect of the actual words used in the relevant clause. Making the implied changes to the wording argued for by the appellant would involve taking into account subjective intention in the process of construction, something that is not permitted (see *Arnold v Britton* above). In addition, it is difficult to see what the commercial common sense would be for managing agents to have that alteration made.

31. Correctly construed, as found by the Tribunal, the term of the contract is for a period of one year plus an indefinite period which is subject to the three-month termination right. In that respect, because it mandates continuation beyond the first year, it is a qualifying long-term agreement.

32. The appellant is not correct in submitting that the UT implied the words "and a day" into clause 5. Rather, its construction of the clause had the effect that the term could not be shorter than a year and a day.

33. *Langton v Carleton* does not assist the appellant. It is substantially different to the present agreement. In that case, the full clause read:

> "for twelve months certain, after which time either party should be at liberty to terminate the agreement by giving to the other a three months' notice in writing of his desire so to do; and that if the plaintiff and Burrows should desire to terminate the agreement without notice, after twelve months and before any notice should have expired, they might do so upon paying the defendant 50l."

34. There is something to the argument that, on its face, *Brown v Symons* undercuts the construction of the Tribunal. However, because *Brown v Symons* was in the Court of Common Pleas (precursor to the High Court) and thus does not bind the Court of Appeal, it need not, strictly, be distinguished. Furthermore, in *Re Searle* [1912] 1 Ch. 610, Neville J. was not persuaded to apply the dicta in *Brown v Symons*, which concerned a master and apprentice, by analogy to a case of landlord and tenant.

The correct approach to the statute

35. The respondent's skeleton argument fittingly captures the purpose of the statutory intervention in sections 18-20ZA of the 1985 Act:

> "to ensure that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, or (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The longer the term of any agreement entered into by the landlord, the more significant becomes the risk of a conflict with these two purposes. This is why consultation is required for all QLTA's and why the basic definition catches simply "any agreement"."

36. The issue the court is invited to decide is whether it is determinative, for the purposes of assessing whether an agreement is for a term longer than a year, that an agreement involves a commitment to twelve months or more (as contended by the appellant), or that the maximum possible length of the period is greater than a year (as submitted by the respondent).

37. If it were necessary to do so, I would agree with the appellant's approach to this issue: the deciding factor is the minimum length of the commitment. Indeed, this is what Lewison J. (as he then was) assumed in *Paddington Basin Developments Ltd v West*

End Quarry Estate Management Ltd [2010] EWHC 833 (Ch) (although the point was uncontroversial), where he noted

> "30. Although the estate management deed has no fixed term, it is incapable of determination by West End Quay Estate Management Ltd until the expiry of twenty-five years. Accordingly it is an agreement for more than twelve months."
>
> (emphasis added)

38. I would disagree with the approach of the respondent that the deciding factor is the maximum length of the period. HHJ Marshall QC was correct in *Paddington Walk* at paragraph 49 that the deciding factor is the length of the commitment. That must be read as the 'minimum commitment'. Adopting the language of clause 5 itself, the issue is the duration of the "term" the parties have "entered into" in the "agreement".

39. If this interpretation is correct, it would follow that HHJ Gerald was wrong in *Poynders Court*. Whether the agreement is for a term exceeding 12 months is not about the substance of the management agreement and its various obligations. Rather, it is about whether it is an agreement for a term which must exceed 12 months. In *Poynders Court*, whilst the managing agent may have been "intended" to provide the services for a period extending beyond 12 months, the relevant clause as to the term of engagement did not secure that they were under contract to do so for the period of more than twelve months. The requirement that the contract be for a term of more than twelve months cannot be satisfied simply by the contract being indeterminate in length but terminable within the first year.

40. If, however, My Lady and My Lord agree with my conclusion on the first issue (that the minimum commitment extends beyond a year), it is not strictly necessary to decide this second issue.

41. For the reasons given, the appeal must therefore be dismissed.

Lord Justice Lindblom:

42. I agree

Lady Justice Rafferty:

43. I also agree