IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
[2023] EWHC 2137 (Ch)

No. PT-2022-001071

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 4 August 2023

Before:

MASTER PESTER

B E T W E E N :

NPS (40GP) LIMITED — Claimant

- and -

LIBERTY COMMODITIES LIMITED — Defendant

MISS I PETRIE (instructed by Bryan Cave Leighton Paisner LLP) appeared on behalf of the Claimant.

MISS C LAMONT (instructed by Eversheds Sutherland LLP) appeared on behalf of the Defendant.

J U D G M E N T
(Via Microsoft Teams)

THE MASTER:

A. Introduction

1 In these proceedings the claimant ("the Landlord") seeks declaratory relief against the defendant ("the Tenant") in relation to an underlease dated 21 October 2019 of commercial premises ("the Lease") at Second Floor, 40 Grosvenor Place, London SW1 ("the Premises"). The only relief sought in the particulars of claim, dated 9 December 2022, is a declaration that the Lease is continuing, together with costs.

2 The basic facts are not disputed and can be summarised as follows:

(i) The Lease was granted on 19 October 2019 for a term of ten years.
(ii) The basic rent due under the Lease is £3,115,134 annually plus VAT. The rent commencement date under the Lease was 19 February 2022.
(iii) Pursuant to cl. 2.2 of the Lease, the basic rent was "to be paid by equal quarterly payments in advance on the Quarter Days …". Quarter days are the usual quarter days, that is 25 March, 24 June, 29 September and 25 December.
(iv) Since the Lease was granted, the basic rent, and all other amounts due under the Lease, have not been paid.
(v) On 4 February 2022, the Tenant's agent wrote to the Landlord's agent to discuss the possibility of the parties agreeing a surrender of the lease.
(vi) The Tenant did not pay the basic rent due on 25 March 2022.
(vii) On 8 April 2022, the Landlord's managing agents carried out works to upgrade the entry barrier system in the building. This involved the deactivation of existing keycards and reissuing new keycards to Tenants of the building. While it is not entirely set out perhaps as clearly as it could be in the evidence, my understanding is the second floor, which was protected by a security system operated by the Tenant alone, continued to operate. So the keycards which were deactivated only affected access to the common parts of the building in the lobby.
(viii) On 11 April 2022, a Mr Fuzesi, acting on behalf of the Tenant, informed Ms Collins, acting on behalf of the Landlord, that the Tenant had in fact vacated the demised premises on 8 April 2022.
(ix) No surrender has ever been agreed. Equally, it appears that no new keycards were issued to the Tenant's employees, either on 8 April 2022 or thereafter.
(x) The allegation was made for the first time by the Tenant's solicitors, by letter dated 15 July 2022, that the Landlord's upgrade works to the building amounted to a forfeiture of the lease on 8 April 2022. It is worth quoting from the key paragraphs of that letter, which read as follows:

> "As you are aware, the contractual term of the Lease does not expire until 20 October 2029. However, we understand that you have peaceably re-entered the Premises and taken unequivocal steps to take back possession of the Premises including the deactivation of our client's access cards which was confirmed by the onsite security team on 8 April 2022.
>
> Our client has subsequently tried to take access to the Premises and has only been permitted access to the post room for the building. Access to the Premises has not been permitted since 8 April 2022. We therefore consider that the Lease has been forfeited by peaceable re-entry and our client's liabilities and obligations pursuant to the Lease have now terminated.

> Please confirm by return that you accept the Lease has terminated."

The Landlord does not accept that the lease has been terminated, hence these proceedings.

3 The Tenant is currently in financial difficulties. This does not appear to be in dispute. There is an outstanding winding up petition against the Tenant, which is due to be heard on 31 August 2023. The petition was originally presented by Citibank NA as a noteholder for Credit Suisse. However, on 28 June 2023, the Landlord was substituted as petitioning creditor by Chief ICC Judge Briggs.

4 The Landlord stressed these points about the apparent financial position of the Tenant but it seems to me that, strictly speaking, they are irrelevant to the points which I need to decide.

B. The parties' positions in outline

5 The Landlord's position is that the Landlord was not entitled to forfeit the lease on 8 April 2022. In any event, the Landlord says it did not forfeit the lease, either on 8 April 2022 or on any other date, and that the points made by the Tenant on forfeiture are "a thinly veiled attempt" to avoid the ever-growing liabilities under the lease.

6 By its defence, in summary, the Tenant's position is that the Landlord could and did forfeit the lease on 8 April 2022.

7 One oddity about the parties' respective submissions which it is perhaps worth noting is that the Landlord submits that it could not lawfully have forfeited the lease on 8 April 2022, whilst the Tenant submits that it can and did. This is a reversal of the usual position whereby the Tenant most commonly alleges that the lease is subsisting whilst the Landlord submits that the lease has been lawfully brought to an end. Therefore, at times it seems to me there was a certain air of unreality about the submissions being made before me.

C. The evidence

8 In terms of the evidence, I have particulars of claim and a defence. I also have a witness statement of Mr Edward Gardner in support of the application and a witness statement of Ms Samantha Miller in response. These two individuals are the solicitors for the Landlord and the Tenant respectively, so it is worth noting that the Tenant has had the opportunity to put in evidence in response setting out any factual points that it would wish to take.

D. Legal principles

9 This is, of course, an application for summary judgment. CPR 24.2 provides that the court may give summary judgment against the defendant on the whole of a claim or on a particular issue if:

> "(a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

10 Further guidance has been given about the approach the court is to apply on an application for summary judgment, set out in *Easyair Limited v Opal Telecom* [2009] EWHC 339 (Ch) at [15], in the well-known judgment of Lewison J (as he then was). The particular point which may be worth citing in full for this judgment is point (vii) of para.15, which provides as follows:

> "On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

11 I have also had regard to the decision of the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [10]-[15], repeating the basic point which has also been referred to in other leading cases on contractual constructions, that:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …".

E. Discussion and analysis

12 The Tenant's position is that it does, indeed, in the words of *Easyair v Opal Telecom*, have a real as opposed to a fanciful prospect of defending the claim, and that there are, in any event, good reasons why the matter should proceed to trial. It is said the nature of the claim and the defence raised are fact-sensitive.

13 In reaching my decision, it is convenient to breakdown the analysis by considering five separate issues in turn.

14 The first issue: Was the Landlord entitled to forfeit the lease on 8 April 2022? This involves a short point of construction. Clause 6.1(a) of the lease provides as follows:

> "Whenever:
>
> (a) the Basic Rent is in whole or part unpaid 14 days after becoming payable whether formally demanded or not;
>
> …
>
> then the Landlord may re-enter the Premises or any part of them …".

So the question is, when does the basic rent become payable? The relevant quarter day is 25 March 2022 and the Landlord's submission is that the fourteen day period only begins to run on 26 March 2022. The whole of the period must have elapsed before the right to forfeit can accrue. In contrast, the Tenant contends that, on a natural reading of the clause, the fourteen day period is to run from the point at which the rent becomes payable, namely on 25 March, and expires fourteen days later, namely on 8 April. The Tenant accepts that rent can only be said to be in arrears if the rent is not paid by midnight on the quarter day on which the rent becomes due. However, it is said that there is a distinction between when the rent is payable, on the one hand, and when it is in arrears on the other.

15 Counsel for the Tenant referred me to *Dibble v Bowater and Morgan* (1853) 2 EL. & BL. 564; 118 ER 879, and to a passage in **Woodfall** at para.7.065, as authority for the proposition that rent is due on the morning of the day appointed for payment but it is not in arrears until after midnight. I accept that as a starting point.

16 However, I have no hesitation in preferring the construction for which the Landlord contends for the following reasons:

(i) In *Zoan v Rouamba* [2001] WLR 1509 (CA) it was said that, per Chadwick LJ:

> "Where the period within which the act is to be done is expressed to be a number of days, months or years from or after a specified day, the courts have held, consistently since Young v Higgon (1840) 6 M&W 49, that the specified day is excluded from the period; that is to say, that the period commences on the day after the specified day."

Chadwick LJ was there considering a specific legislative provision but I do not think that matters: the analysis is equally applicable as a starting point when undertaking a contractual analysis.

(ii) In this case, rent can never be treated as being unpaid until 26 March.

(iii) Thereafter, the "general rule" is that in approaching the computation of periods of time, the day on which the initial event occurs is excluded: see per Megarry V-C in *Re Lympne Investments* [1972] 1 WLR 523. This rule is obviously not absolute but there is nothing in the wording of cl.6.1(a) which would have the effect, in my view, of displacing that general rule.

(iv) There are also sound commercial reasons why, in approaching the question of construction, an inclusive rather than exclusive, in the words of Chadwick LJ, approach should be adopted to the calculation of periods of time. Forfeiture is a

> serious remedy and, again, as a general rule a longer rather than shorter period should be afforded to the tenant before the landlord is entitled to terminate. It seems to me I can take that into account, applying the general approach indicated by the Supreme Court in *Wood v Capita Insurances*, that one has a look at the contract as a whole and have regard to the nature of the contract and elements of the wider context when reaching an objective conclusion as to its meaning.

17 Accordingly, I take the view that the Tenant's defence proceeds on an erroneous calculation of when the Landlord became, in theory, entitled to forfeit the Lease. However, it seems to me that I should go on to consider the other questions because it could be said that the view that I take on construction does not necessarily provide a complete answer to the application for summary judgment, and because I heard full arguments on these other issues.

18 The second question: "On or around" or "on or after"? The Tenant says that the resolution of the first issue – that is the issue of construction – does not mean that its defence has no real prospect of success. The defence pleads that the Lease was terminated "on or around 8 April 2022 pursuant to the steps the Claimant took to take back possession of the Demised Premises and forfeit the Lease by peaceable re-entry". That is para.3 of the defence.

19 I accept, as the Landlord submitted, that it is "not entirely satisfactory" to plead "on or around" when dealing with a defence based on the alleged forfeiture of a lease. The initial letter from the Tenant's solicitors, Eversheds Sutherlands, from which I have already quoted, made it plain that the date relied on was 8 April 2022. For the reasons I have set out above, I do not accept that the Landlord could lawfully have determined the lease on 8 April 2022. I should note here that in its skeleton argument the Tenant said that in any event the Landlord had, as at 8 April 2022, an entitlement to forfeit the lease for non-payment of the rent that became payable on 19 February 2022. I note that that point was not taken in the defence and, in any event, it seems to be plainly wrong and was not pursued, or certainly not pursued very vigorously, before me. This is because the Landlord's solicitors, in fact, sent a letter, dated 9 March 2022, in which it threatened to issue proceedings and exhibited the Lease and a statement of account. That would appear, on any view, to be a waiver of any right to forfeit the Lease for non-payment of the rent that fell due on 19 February 2022.

20 However, as this is an application for summary judgment, rather than treating this as a separate point which justifies granting the application for summary judgment, it seems to me more important to focus on whether the Tenant has a real, as opposed to fanciful, prospect of establishing that there was a peaceable re-entry, which is the next issue I go on to consider. The Tenant, as I have already said, says that the point of construction is not determinative of the application and, in any event, in case it might be said that I am wrong on the approach I take to construction, it seems to me important that I consider separately the points about whether there was peaceable re-entry in any event.

21 The third point: Was there a peaceable re-entry? I turn to the definition that I was taken to, set out in **Hill and Redman's Law of Landlord and Tenant** at para.A:4866, as follows:

> "Peaceable re-entry requires some form of actual physical re-entry onto the whole of the demised land. Entry onto part only is sufficient if the lease so provides. Changing the locks is the best evidence of re-entry. Where this is not practical, say because there are no locks to change, there must be some other obvious manifestation of re-entry."

I take that general statement as a starting point but it is always important to look at the individual facts involved in the case.

22 The Landlord also submits to me that the Landlord must (i) have an intention to forfeit and (ii) manifest or demonstrate some final and positive act. Here I think it is important again to look back at how the matter is put in the particulars of claim. The particulars of claim, at para.17.10, plead as follows:

> "On 8 April 2022 the Claimant carried out the planned maintenance work and upgrades to the ground-floor entry barrier system of the Building whereupon key cards for the previous barrier system were deactivated. From 8 April 2022 onwards, immediate access to the Building and replacement key cards were (and remain) available to any of the Defendant's staff on the Staff List (and indeed any other Tenants of the Building) who presented themselves to the security staff manning the ground-floor barrier system of the Building."

23 In response to this plea, the defence, at para.18.1 – so far as material – responds as follows:

> "… At paragraph 17.10 of the Particulars of Claim, the Claimant has confirmed that the key cards for the ground floor barrier system were deactivated and the Defendant's [sic] avers that the action taken by the Claimant in upgrading the access barrier and failing to provide the Defendant or its employees with revised key cards are unequivocal steps by the Claimant to take back possession of the Demised Premises."

24 The Landlord referred me here to the decision of the Court of Appeal in *Revlok Properties v Dixon* [1973] 25 P&CR 1, where a tenant had absconded. The Court of Appeal held that in those particular circumstances the landlord was entitled to secure the premises by changing the locks without it amounting to a peaceable re-entry. What I take from that decision is that it is always a matter of looking at the individual circumstances of a case rather than taking any one individual act, such as changing keys, as being a definite open and shut answer one way or the other.

25 In this case, the consistent position taken by the Tenant since the solicitor's letter of 15 July 2022, in the defence and in Ms Miller's witness statement, is that the Landlord forfeited the lease by deactivating the keycards, failing to provide new keycards and preventing the Tenant's employees from accessing the demised premises: see, for example, the witness statement of Ms Miller at para.18.

26 It seems to me that the pleaded actions of the Landlord do not amount to an unequivocal retaking of possession of the premises. I say this for the following reasons:

(i) If the Tenant's contentions were correct, then the deactivation of the keycards would presumably unlawfully have forfeited the leases of the other tenants in the buildings on 8 April 2022. There is no suggestion that this is what occurred.

(ii) In fact, the Tenant continued to control access to the second floor entry points through its own keycard system. The Landlord does not control that system. It is only in relation to the ground floor barriers, which were upgraded. The Tenant points to the fact that one of its employees, a Ms Diep, attended the building on

several occasions post-8 April 2022 but was not issued with a new keycard or given access to the demised premises. However, when one looks at the defence, in particular what is said at para.18, what is pleaded is that Ms Diep attended the building to collect post and was provided with access to the post room of the building but was not issued with a new keycard to the access barrier for the building. However, what is missing, it seems to me, is any plea that Ms Diep, or indeed any other employee, asked for a new keycard and was refused the same. No application was made to me for permission to amend the defence to allege the same. The same, it seems, also applies in relation to the plea at para.17.11 of the defence, where it is pleaded that a Mr Howard, the Tenant's legal counsel, was given access to the building in order to assist with a Serious Fraud Office investigation. It is said there that he was not provided with a replacement keycard but, equally, there is no suggestion that he asked for and was refused one.

(iii) One needs here to look at the undisputed factual context. The Landlord had warned the Tenant of the relevant works and the Tenant had already indicated to the Landlord that it was going to vacate the demised premises. The Tenant then, in fact, told the Landlord that it had, in fact, vacated the demised premises.

(iv) Moreover, it appears that there were ongoing discussions about a possible surrender, even after 8 April 2022. The evidence here is that I have been shown an extract from a WhatsApp conversation whereby Mr Fuzesi, on I believe 25 March 2022, wrote as follows:

> "Hi Tracy, Robert here from Dubai. Do you have any feedback from the Landlord?"

The response is:

> "Hi Robert, I have reported your proposal to my client and they are considering it I am still waiting for their instructions."

Then it is said:

> "As we discussed we are going to vacate the office by 6 April so obviously keen to know how the settlement going on."

Then it says:

> "yes I have made them aware of this."

And then it says:

> "Ok thanks. Please let me know if you hear from them. Thanks again."

Then it says:

> "I have chased them."

Then on 11 April there is a further WhatsApp message from Mr Fuzesi saying this:

> "Hi Tracy, we have now fully vacated the office as of Friday 8 April as already advised [I interpose here just to say that that

> makes it plain that the Tenant, or the agent of the Tenant, did inform the Landlord that the office was being vacated and had been vacated on 8 April]. I would be grateful if you can let me know asap where we are with legals as our Lawyers are advising that the Landlords Lawyers are still awaiting instructions, which is surprising as the point of moving out so fast was to have this matter brought to an end at the earliest. I would be grateful if you can advise the current status."

Then the response is:

> "I am still awaiting instructions. My client is not convinced allowing a surrender is the best course of action."

So that was on 11 April. It seems plain to me that neither party at that point took the view that deactivating the keycards had effected a peaceable re-entry.

(v) Nor is this all. The Landlord is also able to point to the transcript of a voicemail message of 4 May 2022 left by a Mr Samsher Bhachu of Eversheds Sutherlands, the solicitors for the Tenant, with the solicitors of the Landlords. The transcript records Mr Bhachu saying the following:

> "I think that we were hoping to get this surrendered but I think that your client or client's agent has turned around and said that there is no present deal at the numbers that are being offered. I think that my client has offered 2 million quid to settle the arrears and for a clean break on this and then your client or client's agent first said yes then said no and wants 10 million.
>
> If you could give me a call back please, my clients have asked me to give you a call. I think that they are having the same conversation with the agent or trying to get hold of the landlord as well but there are commercial factors that play here relating to this particular company …". (emphasis added)

Again, that shows, at least as far as the Tenant's lawyer was concerned, who had been asked by his clients to make the call, that as at 4 May 2022 the Lease had not been terminated. I note that there is an absence of any evidence from any employee of the Tenant to say that the Tenant's lawyers were here acting without instructions.

(vi) There is a further point. The Landlord says that insofar as it undoubtedly failed to provide the Tenant with new access cards, such conduct is necessarily passive and did nothing more than preserve the status quo. The Tenant says that argument is fallacious. The Tenant's evidence, to which I have already referred, concerning Ms Vanessa Diep, is that notwithstanding her attendance at the building on a number of occasions after 8 April 2022, she was not issued with a new keycard or given access to the demised premises. However, there is no evidence, and there is no plea to the effect, that any employee of the Tenant requested and was refused keycards. That is consistent with the fact that the Tenant had, and indeed did, vacate the premises on 8 April 2022. Again, I note that no application was made by the Tenant to amend its defence to plead a positive refusal on the part of the Landlord to provide keycards to access the demised premises.

27 Therefore, my conclusion on the admittedly somewhat unusual agreed facts of this case is that I do not find that there was any form of actual physical re-entry of the demised premises so as to bring the Lease to an end.

28 The fourth point: Unlawful forfeiture of the lease? There is a suggestion in the defence that whether the Landlord was entitled to forfeit the Lease or not, the Tenant avers that the Landlord, in fact, did so by deactivating the keycards and failing to provide new keycards and preventing the Tenant's employees from accessing the demised premises. The first point here is that it seems to me that re-entry would only avail the Landlord if the re-entry was lawful. But equally, I do not think, on the conclusions I have reached, that it can be said that there was any unlawful forfeiture of the lease.

29 The fifth point: Alternative defences? Finally, the Tenant says it has two alternative bases for its defence that ought to be allowed to go to trial. I think I can deal with these two points fairly shortly given the findings I have already made.

30 The first is a suggestion that even if the Tenant's arguments on the right to forfeit are wrong, the Landlord did, in fact, make a final election to terminate the Lease which the Landlord has accepted. I do not see any basis to suggest that the Tenant is correct to say the Landlord did make such a final election to terminate.

31 In the final alternative, the Tenant wishes to run an alternative case that the Landlord committed a repudiatory breach of contract. The difficulty with that line of argument is that, as the defence makes clear, the Tenant relies on precisely the same matters pleaded in relation to its case on forfeiture in averring that the Landlord committed a repudiatory breach. As those matters did not amount to a forfeiture so, in my view, they do not amount to any repudiatory breach.

32 Finally, I turn to consider whether there is some other reason, a reason which must be compelling, to allow this matter to go to trial. Given that I am satisfied that the Tenant, on the pleaded facts and the facts as set out in the two witness statements from the solicitor, do not, in fact, have a real as opposed to a merely fanciful prospect of succeeding on its case at trial, I do not consider that there is any other reason for a trial, still less that there is a compelling reason.

F. Conclusion

33 It follows that, for the reasons set out, I am satisfied that in perhaps this somewhat unusual case the Landlord is entitled to the summary judgment that it seeks. I will now hear from the parties regarding any consequential matters.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge