Neutral Citation Number: [2019] EWCA Civ 128

Case No: A2/2017/3419

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
Mr Justice Dingemans
CL/17/047/TR

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 February 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE HOLROYDE
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

ANDREW TOMS	**Appellant**
- and -	
MARILYN RUBERRY	**Respondent**

- -
- -

Leslie Blohm QC and Charles Auld (instructed by **Michelmores LLP**) for the **Appellant**
Nicholas Grundy QC and Simon Lane (instructed by **Nalders LLP**) for the **Respondent**

Hearing dates: 25 October 2018

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Approved Judgment

Lord Justice David Richards:

1. The point of principle raised by this second appeal is whether a notice may be served under section 146(1) of the Law of Property Act 1925 before the right to re-entry has arisen under the provisions of the lease. The trial judge, and Dingemans J on appeal, held that the right of re-entry must first have arisen and on this ground the landlord's claim for possession of the demised premises was dismissed. This appeal is brought with permission granted by Lewison LJ.

2. A second issue, raised by the tenant in her respondent's notice, is whether the section 146 notice in this case was invalid by reason of a failure to specify the correct breaches of covenant or condition complained of, as required by section 146(1).

3. Section 146(1) provides:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice-
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach;
>
> and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

4. The appellant Mr Toms (the landlord) and the respondent Mrs Ruberry (the tenant) are respectively the landlord and tenant by assignment of The Queens Arms Public House, Fore Street, Constantine, Falmouth, Cornwall. The lease dated 22 April 2005 was for an initial term of three years but has since been extended on a number of occasions, most recently in May 2015 for a further three years.

5. The lease, described as a "Business Development Agreement", was granted by a company in the Punch Taverns group, which was engaged in the development and letting of pubs on a large scale. The lease is a substantial document and contains many provisions dealing with the management of the pub business on the premises. Only a small number of provisions are relevant to the present proceedings and they are all of a type that could be found in any commercial lease. In the lease, the landlord and tenant are referred to respectively as "the Company" and "the Business Partner".

6. Part 1 of the lease, headed "Property Provisions Demise", contains in clause 3 covenants by the tenant. The covenants relevant to this appeal are sub-clauses 3.6 and 3.7:

"3.6 Repairs

3.6.1 To keep and so deliver up at the end of the Term all the interior and exterior of the Premises including the Company's Fixtures Fittings and Effects car parks outbuildings garden grounds and bowling greens (if any) clean and well tended

3.6.2 To repair renew and replace in a manner equal to that existing at the date hereof and otherwise sufficiently maintain and so deliver up at the end of the Term the several items set out in the Third Appendix to this Part I and comply with the obligations therein referred to

If the Business Partner shall make default in the performance of these obligations then without prejudice to any other remedy available to the Company the Company may enter upon the Premises and carry out all necessary work at the expense of the Business Partner and the cost of such work shall be a debt due by the Business Partner to the Company payable on demand and recoverable as rent in arrears.

3.7 Decorations and Declaration Scheme

3.7.1 To keep and so deliver up at the end of the Term the interior of the Premises including all Company's Fixtures and Fittings and Effects painted polished papered or otherwise decorated to the satisfaction of the Company (damage by fire and such other risks against which the Company shall have insured excepted save where the insurance moneys shall be irrecoverable in consequence of some act or default of the Business Partner his servants agents licensees and invitees) such works to be carried out at such reasonable intervals as the Company may determine but not less than once every three years and in the last three months of the Term however determined.

3.7.2 To observe and perform and be bound by the provisions of the Decorations Scheme set out in the Third Schedule hereto so far as such provisions relate to the Business Partner (being a scheme to facilitate payment by the Business Partner of the cost of the decorations required by clause 3.7.1 hereof as and when they fall to be carried out and to mitigate a claim by the Company for dilapidations in respect thereof on the expiration or sooner determination of the Term and to protect the

> Company from the Business Partner's breach of the provisions of clause 3.7.1)"

7. Part II of the lease, headed "Operational Conditions and Other Provisions", contains further provisions relevant to this appeal.

8. Clause 4.1 of Part II confers a right of re-entry and forfeiture on the landlord on the occurrence of any of the events set out in sub-clauses 4.1.1 to 4.1.8. The relevant provision in this case is sub-clause 4.1.7:

> "If the Business Partner commits any other breach of his obligations under this Agreement and (where such breach is capable of remedy) the Business Partner fails to remedy any such breach within fourteen 14 days following the receipt of written notice from the Company to remedy the same ("a Default Notice")"

9. In broad terms the other events giving the landlord the right of re-entry are: a failure by the tenant to keep the premises open for business; a failure by the tenant to comply with undertakings relating to the Licences in force in respect of the premises or the commission by the tenant of an offence relating to licensed premises; if the tenant is made bankrupt or other insolvency-related steps or enforcement measures are taken against the tenant; the tenant defaults in the payment of any money due under the lease or fails to supply financial statements and sales reports in accordance with the terms of the lease; the failure by the tenant to maintain standards set out in the lease or in the "Manual"; the conviction of the tenant for drugs and other offences or carrying out any activity on the premises which would bring the business into bad repute; and the termination, revocation or suspension of the licences for more than seven days without the landlord's consent or the imposition of terms that the landlord reasonably considers to be damaging to the business or to its interest in the premises.

10. On 25 February 2016, the landlord served on the tenant a Default Notice under clause 4.1.7 of Part II of the lease (the Default Notice) and a notice under section 146 (the section 146 notice).

11. The Default Notice set out clause 4.1.7 and the text of clause 4.1 conferring the right of re-entry. It continued:

> "In accordance with clause 4.1.7 of the Agreement Mr A Toms hereby gives you 14 days' notice to remedy the breaches set out in the enclosed report prepared by Mr Jon Stone FRICS Chartered Surveyor dated 18 February 2016."

12. The surveyor's report was enclosed with the Default Notice. It is accepted by the tenant that the default notice complied with clause 4.1.7.

13. The section 146 notice set out clauses 3.5, 3.6 and 3.7 of Part I of the lease. Paragraph 1, which immediately follows the quoted clauses, stated "You are in breach of the above covenants. The breaches complained of are set out below and as per the

attached report of Mr Jon Ston [sic] FRICS Chartered Surveyor dated 18 February 2016". There followed a table with three columns, containing respectively the number of the relevant sub-clause, the area or room to which the breach was said to relate and a short narrative description of the alleged breach. Three breaches of clause 3.6, and one breach of each of clause 3.5 and 3.7, were alleged. Paragraph 2 required the tenant to remedy the breaches within a reasonable time so far as they were capable of remedy. Paragraph 3 stated that if the tenant failed to comply with the notice within 7 weeks the landlord intended to re-enter the premises pursuant to clause 4.1.7 of the lease and claim damages for the above breaches of covenant. It was dated and signed on behalf of the landlord.

14. At trial, Recorder Mawhinney found the specified breaches of clauses 3.6 and 3.7 to be established. This finding is not challenged.

15. In dismissing the landlord's appeal, Dingemans J accepted the tenant's case that the landlord was not entitled to serve a section 146 notice until a default notice under clause 4.1.7 had been given and the period of 14 days specified in that clause had passed without the breaches being remedied. Only then would the landlord's right of re-entry be exercisable.

16. The judge held that on the proper construction of section 146(1), a notice under that provision could not be given until the landlord's right of re-entry had accrued under the provisions of the lease. After referring to a number of reported cases, the judge gave his reasons at [42]:

> "In my judgment the authorities establish that section 146 must be given a common sense interpretation, and that the purpose of the section is that the tenant should have full notice of what the tenant is required to do. However there is no authority to support the proposition that a section 146 notice may be served before the relevant right to re-entry [sic] has occurred. The wording of section 146(1) requires "a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease". The ordinary meaning of this provision suggests that the right of re-entry must exist because there is reference to "a right" not to "a future right". This interpretation is supported by the requirement set out in section 146(1)(a) that the notice shall specify "the particular breach complained of". This requires the "particular breach" to have occurred, because otherwise the service of the section 146 notice becomes a matter of guesswork about whether a particular breach will occur, and because it is not possible to specify a particular breach unless it has occurred. If the right of re-entry in this case arises because of a failure to take action within 14 days of the clause 4.1.7 notice, then the 14 days is required to elapse before the notice can be served because this is the particular breach relied on."

17. Mr Blohm QC, on behalf of the landlord, challenges the judge's conclusion and reasoning on the ground that it misreads section 146(1) which, correctly construed, requires only that the underlying breach of covenant which could give rise to a right of re-entry should have occurred before service of the notice and does not require that the contractual right of re-entry itself should have become exercisable by then. He submits that this is supported by a consideration of the purpose of the provision and by authorities which, though not directly deciding the point, are consistent with his interpretation.

18. Mr Grundy QC, on behalf of the tenant, supports the judge's reasoning as to the ordinary meaning of section 146(1), submitting also that this gives effect to its purpose and that the authorities on which Mr Blohm relies deal with a different issue and provide no guidance on the issue in this case.

19. It is common ground that the Judge was right in the first sentence of [42] to say that the authorities establish that section 146 must be given a common-sense interpretation and that its purposes is to give the tenant notice of the breaches, so that he knows what needs to be remedied. It is also common ground that a second purpose of a section 146 notice is to enable the tenant to make an application for relief against forfeiture under section 146(2). In *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296; [2006] 1 WLR 201, Neuberger LJ said at [57] that the proper approach to section 146 notices, and to notices generally, was encapsulated by Lord Parmoor in *Fox v Jolley* [1916] 1 AC 1 at 23:

> "I think that the notice should be construed as a whole in a common-sense way, and that no lessee could have any reasonable doubt as to the particular breaches which are specified."

20. In his skeleton argument on behalf of the appellant landlord, Mr Blohm QC identified the relevant issue as being whether a notice under section 146(1) can be served "after the relevant breach, even if that is a date prior to the contractual right of re-entry". He correctly submitted that section 146(1) does not explicitly provide for the date of service. He went on to submit that the only, implicit, restriction is that the breach complained of, not the right of re-entry, must be subsisting at the time of service. The relevant breaches for this purpose were the breaches of clauses 3.6 and 3.7 of Part I of the lease, established by the recorder's findings and not challenged on appeal.

21. Mr Blohm pointed to the way in which a forfeiture clause would operate in the absence of section 146. A breach of any particular covenant by the tenant will not entitle the landlord to forfeit the lease unless the lease so provides in the proviso for re-entry. The proviso for re-entry is a grant of a right of re-entry on the occurrence of specified events, or conditions. If a condition is satisfied, the landlord is entitled, but not bound, to re-enter and forfeit the lease. He may do this either by physical re-entry or by the service of proceedings. The right of re-entry must have arisen as at the date the landlord purports to exercise it.

22. Mr Blohm criticised the Judge's view in paragraph [42] of his judgment that the ordinary meaning of the opening words of section 146(1) ("A right of re-entry or forfeiture under any proviso or stipulation in a lease of any covenant or condition in the lease shall not be enforceable") suggests that the right of re-entry must exist

because the reference is to a "right", not to a "future right". He submitted that those words could equally well be applicable to a right enforceable in the future as to a presently enforceable right.

23. Mr Blohm's principal submission was that the words "for a breach of any covenant or condition in the lease" in section 146(1) refer, in the case of the lease in this case, not to the tenant's failure to comply with a Default Notice served under clause 4.1.7, but to the breach or breaches of covenant specified in the Notice. Accordingly, once the tenant in this case had committed the breaches of clauses 3.6 and 3.7, the landlord was entitled to serve a section 146 notice. Mr Blohm submitted that this interpretation gave effect to the purpose of section 146 of giving the tenant the opportunity of remedying the breach and giving the tenant an opportunity to apply for relief against forfeiture at an early stage. The giving of a default notice before service of the section 146 notice would serve no purpose but would unnecessarily add to the reasonable period for remedying the breach which had to be stated in the section 146 notice.

24. Finally, Mr Blohm relied on what he submitted were analogous cases where the courts had considered the relationship between section 146 and the landlord's waiver of breaches giving rise to a right of re-entry.

25. I do not accept these submissions on behalf of the landlord.

26. Section 146(1) is concerned with the exercise by a landlord of rights of re-entry or forfeiture conferred by the terms of the lease. The opening words of the sub-section make clear that it is directed to those covenants and conditions, breach of which entitles the landlord to exercise the right of re-entry or forfeiture conferred by the lease. In the present case, it is therefore the terms of clause 4.1 of Part II that are in point. For these purposes, it does not matter that there is or may not be a "breach", in the ordinary sense of a voluntary act on the part of the tenant: see *Halliard Property Co Ltd v Jack Segal Ltd* [1978] 1 WLR 377.

27. A section 146 notice must specify "the particular breach complained of" and, if it is capable of remedy, require the tenant "to remedy the breach". The particular breach in this case contemplated by section 146(1) is the breach of the covenant or condition contained in clause 4.1.7, because under the terms of clause 4.1, it is that breach (and not the antecedent breaches of clauses 3.6 and 3.7) which entitles the landlord to exercise the right of re-entry. If (as in this case) the antecedent breaches are capable of remedy, clause 4.1.7 requires the service of a Default Notice and the expiry of 14 days from receipt of the Notice before the right of re-entry arises. It is the failure to remedy the antecedent breaches of clauses 3.6 and 3.7 within the period of 14 days from receipt of the Default Notice which is the relevant "breach of any covenant or condition in the lease" referred to in the opening part of section 146(1). If the antecedent breaches had been incapable of remedy, there would have been no requirement under clause 4.1.7 to serve a Default Notice and the right of re-entry would have arisen immediately upon the occurrence of the breaches of clauses 3.6 and 3.7. Mr Blohm's submissions would be correct in this case if clause 4.1.7 had simply provided for the right of re-entry to arise on a breach of the repairing covenants (see, for example, *Fox v Jolley* [1916] 2 AC 1 at pp. 2-3).

28. It is true, as Mr Blohm said, that section 146(1) does not in terms spell out the time at which a section 146 notice should be given. However, it is in my judgment clear from

the sub-section as a whole that it can only be after the breach of the covenant or condition triggering the right of re-entry (clause 4.1.7, in this case) has occurred. The notice under section 146 must state "the particular breach complained of" and, if it is capable of remedy, require the tenant "to remedy the breach". Similarly, the section 146 notice can be given only if the tenant has failed to remedy the breach within a reasonable time. These requirements make sense only if the relevant breach has already occurred.

29. Nor do I think that there is substance in Mr Blohm's submission that the opening words of section 146(1), "right of re-entry or forfeiture", are apt to include a future right. While that might be true if those words were divorced from their context, it is inconsistent with the points made in the previous paragraph above. It is also inconsistent with section 146(2) which provides that a tenant may apply for relief against forfeiture "[w]here a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture". In *Pakwood Transport Ltd v 15 Beauchamp Place Ltd* (1977) 36 P&CR 112, this court held that a landlord was "proceeding…to enforce such a right" when it served a section 146 notice. It can only have been doing so if the right had become enforceable under the terms of the lease. The court rejected the landlord's argument that the service of a notice was not part of proceeding to enforce the right but merely a step preliminary to a proceeding. Section 146 thus proceeds on the basis that the right is otherwise enforceable when the notice is given.

30. I therefore conclude that the courts below were right in holding that a section 146 notice can be served only after the contractual right of re-entry has become enforceable. This conclusion is not altered by a consideration of the "waiver" authorities to which Mr Blohm referred: *Penton v Barnett* [1898] 1 QB 276, *Farimani v Gates* [1984] EGLR 66 and *Greenwich LBC v Discreet Selling Estates Ltd* (1990) 61 P&CR 405. Mr Blohm accepted that they did not address the issue arising in this case. These were cases where the statutory notice had been given and the issue was whether, if the relevant breach had been waived, a further notice had to be given before the right of re-entry could be enforced. This court held in *Penton v Barnett* that, as the relevant breach was a continuing breach, no further notice was required. The decision has subsequently attracted criticism but in *Greenwich LBC v Discreet Selling Estates Ltd* this court, while seeing force in the opposing view, held that it was bound by *Penton*. In my judgment, these decisions do not have a bearing on the issue in this case, where a section 146 notice is given before the right of re-entry has arisen at all.

31. By a respondent's notice, the tenant seeks to uphold the judge's decision on the grounds that the section 146 notice failed to specify the relevant breaches of covenant. Mr Grundy submits that "the particular breach complained of" was the failure to comply with a default notice served under clause 4.1.7. Given that I reject the landlord's case on his appeal, it is not necessary for me to deal with the respondent's notice, but in my view it follows from what I have said on the landlord's case that I consider that this point is also well-founded.

32. For the reasons given in this judgment, I would dismiss the appeal.

Lord Justice Holroyde:

33. I agree.

Lady Justice Nicola Davies:

34. I also agree.