SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 56
CA74/20

Lord Justice Clerk
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

ROCKFORD TRILOGY LTD

Pursuers and Reclaimers

against

NCR LTD

Defenders and Respondents

Pursuers and Reclaimers: D M Thomson QC; BTO Solicitors LLP
Defenders and Respondents: Lake QC; Burness Paull LLP

19 October 2021

Introduction

[1] Rockford Trilogy Ltd were the landlords and NCR Ltd the tenants under a commercial lease of premises known as "Trilogy Two", part of the Trilogy Business Park located at Eurocentral. The lease, for the whole building, was entered into on 27 March 2003, and was due to expire on 26 March 2020. Neither party served a notice to quit, the last

date for intimating which was 14 February 2020. The central issue in dispute in this appeal was whether or not the lease had been extended by tacit relocation.

Background

[2] The facts were largely agreed. In the course of late 2019 and early 2020, the parties' agents engaged in discussions regarding the possibility of their entering into a licence of some part of the premises after the 2003 lease expired. At proof, no parole evidence was led, the focus being on the correspondence between the parties' respective property agents, Savills, for the reclaimers, and Jones Lang LaSalle ["JLL"], for the respondents.

[3] Detail of the correspondence and the affidavit evidence relative thereto may be found in paras [3] to [18] of the Commercial Judge's opinion. The key points to note are that:

(i) in June 2019 Savills wrote to JLL outlining Heads of Terms "for your client to remain in part of Trilogy Two"; on the same day Heads of Terms for leasing a different building, Trilogy Three, were also sent;

(ii) Savills again wrote on 11 November advising that a schedule of dilapidations would be served and indicating that, if smaller accommodation was required, Trilogy One might suit; a schedule of dilapidations was served on 5 December;

(iii) on 20 January 2020 Savills advised that the reclaimers were willing to "construct a 12 month agreement that lets your client remain in the building for Nil rent. Your client would still be responsible for all the other charges resulting from their occupation";

(iv) the reply of 21 January 2020 stated that the respondents were ready to commit to a relocation elsewhere, and "have advised that the only way they would consider remaining at the building is if the dilapidations are to be capped at £300k together with the nil rent

proposed for 12 months. Do you think this is something the landlord might agree to in order to retain NCR as an occupier at Trilogy?";

(v) following a further suggestion from Savills regarding Trilogy One, JLL wrote on 27 January repeating that the respondents were looking to proceed elsewhere, that option being preferred for the additional facilities it offered;

(vi) in an email of 31 January JLL stated that the respondents were now looking at a two year term rather than twelve months; that same day this was followed with an email stating: "I have just confirmed with NCR, it is the proposed split floor they would be interested in taking for the 2 years not the whole floor. I think they are just looking for best and final offer from the landlord";

(viii) Savills indicated on 3 February that the reclaimers were willing to grant a two year licence over the whole ground floor for nil rent;

(ix) JLL replied on 4 February that the respondents would like formal Heads of Terms "for the deal to stay", asking whether this would be a new lease or an amendment of the existing one; Savills replied enclosing Heads of Terms; and in a letter dated 6 February stated that the reclaimers proposed a new two year licence over the ground floor of Trilogy Two.

[4] There the matter remained until 26 February when the reclaimers' solicitors emailed the respondents stating that since notice to terminate had not been received, and the minimum period therefor had elapsed, they considered the lease to have continued by tacit relocation. The respondents' solicitor expressed surprise at this contention, considering the discussions which had taken place. There was subsequent correspondence about the Heads of Terms but these did not result in a new lease being entered into.

Legal principles

[5] The legal principles relating to tacit relocation were not in dispute, save that the written note of argument for the reclaimers submitted that, in the context of negotiations, only where the parties have actually reached an agreement on new terms could tacit relocation be excluded, mere attempts to agree new terms being insufficient for the purpose. This proposition was not emphasised in oral argument, and in any event, it is too narrowly stated. In our view the law was correctly stated by the Commercial Judge in the following summary taken from his opinion.

[6] The concept of tacit relocation is based upon presumed consent by silence. If neither party has given notice of his intention to terminate the lease at its expiry, the parties are by their silence presumed to have agreed that the lease is to be prolonged on the same terms. The law implies consent to relocation if parties are silent on the matter of consent. Negotiations between the parties about other potential arrangements are not *per se* inconsistent with a finding that there has been silence on whether the existing lease should be continued. However, where parties have reached an agreement inconsistent with consent to prolongation, tacit relocation will be excluded (Rennie, Leases, at 144; Stair Memorial Encyclopaedia of the Laws of Scotland, Volume 13, para 450; *Smith* v *Grayton Estates* 1960 SC 349 (per Lord President (Clyde) at 354); *McFarlane* v *Mitchell* (1900) 2 F 901 at 904.)

[7] Although service of a notice to quit is the classic means of showing that there has not been silence, informal notice that the lease is not to continue will suffice as long as it constitutes sufficient intimation of the party's intention not to prolong the lease on the existing terms. This will be sufficient to prevent the inference of consent being drawn. (*Signet Group plc* v *C & J Clark Retail Properties Ltd* 1996 SC 444 at 446B – 447D; *Gilchrist* v *Westren* (1890) 17 R 363 per the Lord Justice Clerk (Macdonald) at p 366 and per Lord Young

at 367). There must be "overt intimation by either party that he did not consent to the prolongation of the lease" (*McDonald* v *O'Donnell* 2008 SC 189 per Lord Justice Clerk (Gill) at para [32], under reference to *Signet Group plc*).

The Commercial Judge's decision

[8] The Commercial Judge decided that the key communication was that of 21 January. Prior to that stage, although there had been proposals for a new arrangement, and the reclaimers' agents had queried whether the respondents "are not renewing", or "are going", they had not been given a clear indication of an intention to leave. However, the email of 21 January conveyed the distinct and definite message that unless an alternative arrangement was agreed, the respondents would not remain as occupiers of the premises. The reclaimers knew that the respondents were going to leave unless that new arrangement could be reached. This statement that there would be no continuation of occupancy on the old terms, and that remaining could only be on new terms, was sufficient to exclude tacit relocation.

Position of the parties

[9] The reclaimers' case was that the Commercial Judge erred in failing to consider the email of 21 January 2020 as part of a lengthy chain of negotiation by correspondence beginning in June 2019. In the course of this parties were exploring other possibilities, but the respondents had not given a clear indication that they would not continue to be bound by the lease. In negotiations parties may take up positions for the purposes of leverage, without necessarily constituting a clear intention not to continue the lease. Only clear and effective communication of such an intention could prevent tacit relocation. The email of 21 January was not sufficient.

[10] The respondents highlighted that tacit relocation relies on "the actings of the parties to the lease show that they are consenting to this prolongation", in which context silence may be taken for consent. Although intimation is required, this need not be a formal step: informal communication to the landlord of a tenant's intention not to continue with the lease is sufficient. The terms of the email of 21 January clearly gave that intimation. The context was consistent with the Commercial Judge's interpretation of the email: the negotiations had been proceeding on the basis that a new agreement would be reached, were the respondents to remain in the premises at all. The email contained a clear statement that the new proposal, including nil rent, was the "only" way that the respondents would remain. This is inconsistent with intention to continue the lease. As such, tacit relocation was excluded.

Decision and analysis

[11] The principle of tacit relocation is based on presumed consent by silence. At the conclusion of the term, silence by parties as to the continuation of the lease will be taken as implied consent to remain bound by its terms. What occurs is a prolongation of the original lease, not the creation of a new lease. Apart from duration, the terms of the original lease are continued.

[12] The sole question arising in this case might be phrased thus: was the Commercial Judge correct to interpret the email of 21 January 2020 as being sufficient to displace any inference of consent to the continuation of the existing lease on its original terms? Senior counsel for the respondents was right to suggest that in this setting it is unhelpful to talk of giving "notice" which may too easily be confused with the issue of notice to quit, and may wrongly suggest a degree of formality which is not called for. In the submissions for the reclaimers there were hints of this: the focus on a footer to the email of 21 January (that the

correspondence was not intended to and did not form part of any legally binding contract and was expressly subject to completion of formal missives in accordance with Scots law); the submission that the communication of an intention not to be bound after the expiry was "an important act having consequences"; and the suggestion that what was needed was the communication of a change in the respondents' position, which had substantive legal effect.

[13] It is important to recognise that what one requires to ask is not whether the lease has formally been terminated, but whether the circumstances are such as to exclude tacit relocation. In this respect we agree with senior counsel for the respondents that it is important not to conflate what requires to be said by way of intimation with its effect. All that requires to be intimated is a lack of consent to the continuation of the lease; the effect of such an intimation is that the lease will not automatically be renewed. It is clear from the authorities that informal notification "whether communicated verbally or in writing" will suffice (*Signet Group Plc* v *C&J Clark Retail*, at p 447).

[14] Each case is of course determined on the basis of its own facts and circumstances. The background to the email was a correspondence in which the parties had been exploring the possibility of reaching a new arrangement. During this correspondence, although it was conducted on the clear basis that the respondents might not remain, and were considering other options, the Commercial Judge was entitled to conclude that until early 2020 there was no clear intimation that they would not consent to continuation of the lease, or that they would remain only on different terms. In other words, there was until this point nothing clearly inconsistent with implied consent. However, in the email of 20 January 2020 the reclaimers made proposals to the respondents to let the building for 12 months at a nil rent, with the respondents being liable for other charges. That was the immediate context in which the email of 21 January specified that "the only way [the respondents] would consider

remaining in the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months". It is of no matter that the parties continued to discuss terms, or that the email of 20 January had the footer referred to. The issue is not whether the parties had reached agreement as to the altered terms on which the respondents might be willing to stay; the issue was whether there was intimation that, whatever else, they would not remain on the existing terms. The Commercial Judge was correct to interpret this email as providing sufficient intimation that the respondents would not continue under the lease on its current terms. That was inconsistent with implied consent to the prolongation of the lease, and was enough to exclude the operation of tacit relocation. The reclaiming motion must therefore be refused.