



OUTER HOUSE, COURT OF SESSION

[2021] CSOH 125

CA139/19

OPINION OF LORD CLARK

In the cause

PACCOR UK LIMITED

Pursuer

against

UNITED UK PROPCO 8 SARL

Defender

**Pursuer: Jones QC sol-adv; Brodies LLP
Defender: Garrity; DWF LLP**

14 December 2021

Introduction

[1] The pursuer is the tenant of premises, leased from the defender. The premises are located in an industrial estate known as Brucefield Industry Park, Livingston. This action concerns units 5, 6, 7 and 8 Young Square, in the industrial estate. Another action (case number CA138/19) has been raised by the pursuer in relation to units 3 and 4 Young Square, also let by the defender to the pursuer and covered by different leases.

[2] The pursuer occupied the premises referred to in each case until around December 2015. Thereafter, the leases remained in force and the pursuer continued to pay the rent for a period of time. In the present case, the pursuer avers that the premises let

under the lease for units 5-8 were subject to malicious damage, caused by travellers, on or about 26 July 2017 (in contrast to the other action, CA138/19, in which damage to units 3 and 4 is said to have occurred on a different occasion, in April 2019). The pursuer seeks a declarator that the lease came to an end on 26 July 2019 as a consequence of the averred events in July 2017. The pursuer also seeks repayment of rent it had paid for a period of time, alleging that there was a full abatement of rent and service charge from the date of the premises being damaged. The defender denies the pursuer's contentions and in its counterclaim seeks recovery of unpaid rent.

[3] A debate took place, dealing with both cases, with each party challenging the relevancy and specification of the other party's averments. I have issued an Opinion in the case CA138/19, dealing with a number of issues raised in relation to units 3 and 4 which were also raised in the present case. While the lease terms were not identical to those here, parties rightly proceeded upon the basis that the terms were very similar and on certain issues the same questions arose. Given parties' agreed position, there is no need to quote the terms of the present lease. Accordingly, the decisions I reached and the reasons given on those same issues, which can be found in that Opinion, apply *mutatis mutandis* to this case. I need not set these out in any detail, but in summary the outcome on the same issues is as follows. I rejected the contentions for the defender and accepted the pursuer's submissions as to: (i) the pursuer's averments on damage to the premises; (ii) the pursuer's averments on intimation of damage; and (iii) the defender's averments on an implied term. I also rejected the contentions for the pursuer and accepted the defender's submissions on: (i) the implied term averred by the pursuer; (ii) the defender's averments about the pursuer's additions/fixtures and fittings; and (iii) the pursuer's averments in answer to the counterclaim that the defender had waived its right to payment of rent and service charge

during the period of abatement. While some averments fell to be excluded from probation, I concluded that on the remaining matters a proof before answer is required. Thus, on those same issues, that is also the position in the present case. However, this case also involves certain additional points.

Additional points

Damage to the premises

[4] In relation to the nature and extent of the damage, the pursuer has lodged two expert reports. The supplementary reports issued in September 2020 concerned only units 3 and 4, dealt with in CA138/19. The pursuer's summons in the present case does not make any reference to the expert reports. On behalf of the defender, it was argued that this was an additional reason for rendering the pursuer's averments on damage as irrelevant or lacking in specification.

Decision

[5] The pursuer makes averments about the actions of the travellers and the damage caused. It is also averred that an employee of the pursuer, acting as caretaker of the premises, "recorded the events of on or around 26 July 2017 in a contemporaneous written account" and reference is then made to the terms of that account. In that context, with expert reports produced in support of the claims concerning damage to the premises, which are plainly intended to be relied upon, I do not regard it as essential for the pursuer to have referred to those reports or sought to incorporate any part of them in its pleadings. In a commercial action, fair notice is required but when there are sufficient averments of the actual damage alleged, supported by expert reports which the court is advised are to be

relied upon, that test is met. This additional point does not therefore alter the decision I reached in CA138/19 that the issue is one to be determined at proof.

The pursuer's "enjoyment" of the premises

[6] In answer 3, the defender avers: "The pursuer's enjoyment of the Premises was not restricted or denied as a result of any averred events in July 2017". This averment is made after averments that the pursuer had ceased to occupy or use the premises.

[7] Paragraph FOUR of Part IV to the schedule to the lease states:

"The said annual rent and Service Charge shall be payable and the tenancy under the foregoing Lease shall continue notwithstanding damage to or the destruction of the lease subjects or any part thereof by fire or otherwise. Notwithstanding the foregoing in the event that the leased subjects are damaged or destroyed in whole or in part by fire or otherwise the rent and Service Charge payable hereunder shall cease to be payable to the extent that the Tenants' enjoyment of the premises is restricted or denied thereby and in the event that the leased subjects are not reinstated, rebuilt or repaired in terms of Part VI of this Schedule within two years from the date of damage or destruction requiring such reinstatement, rebuilding or repair this Lease shall be at an end,"

[8] For the pursuer, it was submitted that it was wrong for the defender to assert that ceasing to occupy or use meant that the tenants were not entitled to the enjoyment of the Premises. "Enjoy" meant having the use or benefit or satisfactory possession of the premises. Even if the premises were not used for day-to-day business, anything that interrupted the ability to use them for the purposes of the lease "restricted or denied" the tenant's enjoyment. The defender as landlord was obliged to put in place loss of rent and service charge insurance for 2 years, payable if the premises are damaged or destroyed by any of the listed insurance risks. The pursuer as tenant paid the premium. Payment by the insurer under the policy was not agreed to be contingent upon the tenant being in actual

occupation. Of course, if enjoyment was not restricted or denied the landlord was entitled to receive rent and service charges even if the tenant was not in actual occupation.

[9] Counsel for the defender argued that the terms of the lease were clear and unambiguous: abatement of rent and service charge was linked to the extent that the tenant's enjoyment of the premises is restricted or denied. That was a matter for the pursuer to prove. It was accepted that the pursuer was free at any time to use the property. The fact that the pursuer had ceased to be in occupation of the premises over a year before the averred damage was a matter of agreement.

Decision

[10] Viewed in simple terms, this was a lease which required the pursuer to pay rent and service charges and required the defender to take out insurance cover, with the pursuer paying the premium. The fact that the pursuer was not actually using the premises at the time of the damage is in my view of no relevance to the question of whether its enjoyment of the premises was restricted or denied. If the pursuer is correct about the damage, which is a matter for proof, then its enjoyment would have been restricted or denied. Paying the rent and service charge necessarily meant that the pursuer was entitled to use, and in that sense enjoy, the premises, even if in fact it had not done so for a period prior to the damage. If the averment complained of is to be read as meaning that the pursuer's enjoyment was not restricted or denied because it had ceased to occupy or use the premises, I would therefore have rejected the defender's contentions on this point and excluded from probation the averment noted above.

[11] However, there is of course the wider question before the court as to whether, as a matter of fact, the pursuer's enjoyment of the premises was restricted or denied by the

averred events or damage, and if so to what extent. If the averment is merely asserting that the events and damage did not cause restriction or denial of enjoyment, that remains a relevant point. Construed in that way, the averment should not be excluded.

The defender's averments about non-receipt of funds and not being in breach of contract

[12] On behalf of the pursuer, it was argued that the defender's averments that no insurance payments had been received and that the defender was not in breach of any obligation (in answer 5) and that the defender was under no obligation to reinstate (in answer 6) were irrelevant and ought to be excluded from probation. The relevant lease provisions meant that rebuilding and reinstatement was required within the 2 year period, and if that did not happen then the lease would automatically terminate.

[13] Counsel for the defender argued that the landlord's obligations under the lease, as regards insurance and reinstatement of insured risk damage, were clear and unambiguous.

The landlord's obligations are conditional upon obtaining all statutory consents, and the landlord's obligation is to lay out "monies received by virtue of such insurance".

Accordingly, it was submitted that the defender's averments that no monies have been received by reference to any insurance claim and that the defender was not obliged to reinstate were relevant and fit for proof.

Decision

[14] As noted above, the orders sought by the pursuer in this case are for declarator that the lease came to an end on 26 July 2019 as a consequence of the events averred to have occurred in July 2017, and for repayment of rent it had paid for a period of time (from February 2019) when the premises were said to be damaged. I accept the submissions for

the pursuer that the averments in answers 5 and 6 to which reference has been made have no bearing on those conclusions or the grounds for them averred by the pursuer. Put simply, that basis of the claim is that there was damage to the premises and they were not repaired, with the result that the clause resulting in termination after two years came into play. Having regard to the basis on which the claim is averred, it is not a relevant defence that the defender has not received any insurance payments or that the defender was not in breach of its obligations. The provisions in paragraph FOUR of Part IV (quoted above), which deal with termination, do not require the pursuer to establish receipt of insurance payments or breach of contract by the defender. Of course, if the pursuer fails to establish that there was within the terms of the lease damage that caused enjoyment of the premises to be restricted or denied, the claim for repayment of rent will fail as will the contention that the lease has terminated. Accordingly, the averments identified by the pursuer are irrelevant and I shall exclude them from probation.

Waiver

[15] In the Opinion in the case concerning units 3 and 4, CA138/19, I have already dealt with the relevancy of the pursuer's averments on waiver, in its answers to the counterclaim. For the same reasons, in this case those averments fall to be excluded from probation. In addition, the wording of the letter relied upon for the purposes of waiver relates only to units 3 and 4 and a separate part of the letter deals with the lease in the present case. That separate part of the letter does not contain any language which could support or even relate to waiver and for that reason alone the averments on waiver are irrelevant.

Conclusion

[16] For the reasons given, certain averments will be excluded from probation, but on other matters the case must proceed to proof.

Disposal

[17] I shall fix a by-order hearing to deal with further procedure and to determine the specific averments which require to be excluded from probation as a consequence of my findings above. In the meantime, I reserve all questions of expenses.