Neutral Citation Number: [2016] EWCA Civ 377

Case No: A1/2014/4130

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION TECHNOLOGY AND CONSTRUCTION COURT
HH Judge Waksman QC
HT-13-213

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2016

Before :

LORD JUSTICE JACKSON
LORD JUSTICE KITCHIN
and
LORD JUSTICE BRIGGS

- -

Between :

SOUTH ESSEX PARTNERSHIP UNIVERSITY NHS FOUNDATION TRUST	**Appellant/ Defendant**
- and -	
LAINDON HOLDINGS LTD	**Respondent /Claimant**

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- -

Mark Wonnacott QC (instructed by **Bevan Brittan LLP**) for the **Appellant**
David Holland QC (instructed by **Browne Jacobson LLP**) for the **Respondent**

Hearing date : 12 April 2016

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Approved Judgment

Lord Justice Briggs :

1. This appeal from the order of HHJ Waksman QC on 31st October 2014 sitting as a deputy High Court Judge raises two discrete issues arising out of a four day dilapidations trial in the Technology and Construction Court. The claim by the respondent landlord Laindon Holdings Limited was for breach of repairing covenants in a lease of business premises at 1-4 Dunton Court, High Road, Laindon, Basildon, Essex ("the Lease" and "the Premises" respectively). The Lease terminated on 28th January 2011 as a result of the exercise of a break clause by the appellant tenant, now known as South Essex Partnership University NHS Foundation Trust.

2. The largely uncontentious factual background can be found set out in sufficient detail in the judge's lucid *extempore* judgment [2014] EWHC 3855(TC). Since this appeal raises no issues of importance to anyone other than its parties, I need not repeat or summarise that background in this judgment.

Issue One

3. Within the judge's aggregate order for damages in the sum of £130,492, he awarded a sum of £41,445 under heading 7 in the Scott Schedule, namely "Carpets". The Agreement for Lease, made on 28th March 2002 (on the same day as the Lease itself) had provided for a substantial programme of what were called "Tenant's Fitting Out Works", consisting mainly of the installation of a lift and internal partition works, by contractors engaged by the landlord, but at the tenant's expense. Those works included the lifting, cleaning and re-installation as far as possible, of an existing system of tiled carpeting throughout the building, it being contemplated that the upper floors would all be carpeted by re-use of the existing tiles, and the ground floor by a mixture of re-use and replacement to the extent necessary.

4. Shortly before the end of the term, the tenant informed the landlord by letter that it would be replacing the tiled carpeting system with broadloom carpet of the same colour and specification (i.e. carpet in strips rather than tiles). In the absence of any complaint by the landlord, the tenant then installed a broadloom carpeting system in place of the previous carpet tiles at a cost of £38,234.

5. Following the termination of the Lease, the landlord claimed that the re-carpeting had not been in compliance with the relevant repairing covenant in the Lease, namely clause 3.3.2, which provided that the tenant was:

> "to repair or replace from time to time the Landord's fixtures and fittings in the Premises as may be or become necessary at any time during or at the expiration of the Term."

6. By the time the matter came to trial, the tenant's case was, in the alternative, that :

   i) The tiled carpets were tenant's fixtures, because the tenant had paid for the re-installation of the tiled carpet system in the Premises as part of the Tenant's Fitting Out Works; or

ii) If the tiled carpets were landlord's fixtures, their replacement by a broadloom carpeting system was a permitted alteration under clause 3.4.3 of the Lease, which provided that:

> "The Tenant may make any internal non-structural alterations to the Building without the consent of the Landord."

7. The landlord's case at trial was that the tiled carpets were landlord's fixtures or fittings falling squarely within clause 3.3.2, and that they did not form part of the Building for the purposes of the tenant's right to make non-structural alterations within the meaning of clause 3.4.3. A pleaded case that, even if they did, there had been a failure by the tenant to remove the altered carpet and reinstate pursuant to clause 3.4.5 of the Lease was withdrawn at an early stage of the trial.

8. The judge accepted the landlord's submissions on this issue in an appropriately concise conclusion on one of a large number of items in the Scott Schedule. He said that the carpets were the landlord's fixtures and fittings, and that changing fixtures or fittings did not constitute an alteration within the meaning of clause 3.4.3.

9. On this appeal, Mr David Holland QC for the landlord submitted that the tiled carpets were, on any view, the landlord's property, but were chattels rather than fixtures, falling within "fittings" under clause 3.3.2, but not therefore forming part of the Building for the purposes of clause 3.4.3. For the tenant Mr Mark Wonnacott QC submitted that the payment for the reinstallation of the tiled carpets by the tenant as part of the Tenant's Fitting Out Works meant that they ought to be regarded as tenant's fixtures. Even if they were the landlord's property, he submitted that they were part of what had been demised and, on any sensible commercial construction, fell within the purview of the tenant's entitlement to make alterations under clause 3.4.3.

Analysis

10. In my judgment the judge was clearly correct in describing the tiled carpets as landlord's fixtures and fittings, regardless of the fact that they were re-laid at the tenant's cost at the start of the term, and that both the Lease itself and the Agreement for Lease provided that the Tenant's Fitting Out Works were to be disregarded on any rent review. Much the largest part of the Tenant's Fitting Out Works consisted of the installation of lifts which, on any view, were to become part of the fabric of the Building, rather than a fixture, so that the provision for payment by the tenant for the fitting out works is of no weight in deciding to whom the carpets belonged. They had in fact belonged to the landlord prior to their removal and reinstatement. Much the largest part of the carpeting system (following fitting out) consisted of the landlord's refurbished carpet tiles, rather than new ones paid for by the tenant, and no-one has suggested that the carpeting system should in some way be apportioned between the parties for the purposes of identifying whether they were landlord's or tenant's fixtures and fittings.

11. I do not consider that it really matters whether the carpet tiles were fixtures or fittings. Since they were probably glued to the floors I would, if necessary, have regarded them as fixtures.

12. The reason why it does not matter is that, on the true construction of the tenant's unqualified right to make alterations, conferred by clause 3.4.3 of the Lease, it extended to the tiled carpets whether they were landlord's fixtures, or landlord's chattels (i.e. fittings). Clause 3.4.2 of the lease contained a heavily qualified right for the tenant to make structural or external alterations to the Building but clause 3.4.3 contained an entirely unqualified right to make internal non-structural alterations to the Building. It would in my view be a commercial nonsense to construe clause 3.4.3 as permitting alteration by replacement of landlord's fixtures, but making no provision for alteration or replacement of landlord's chattels provided within the Building for the use of the tenant under the Lease. The original term was for 19 years (albeit that it was terminated early under the tenant's break clause). Bearing in mind the landlord's qualified right to require reasonable reinstatement of alterations under clause 3.4.5, the only sensible interpretation of clause 3.4.3 in the context of this commercial lease was that it provided a right to the tenant to make alterations affecting any of the landlord's property within, or forming part of the Building, save for the structure and exterior.

13. It follows therefore that, in respectful disagreement with the judge, I consider that the replacement of the tiled carpeting system with a strip carpet system by the tenant shortly before the determination of the Lease constituted a permitted alteration. The replacement carpet was not, of course, out of repair at the termination of the Lease, within the meaning of clause 3.3.2, and the landlord did not avail itself of its qualified right to request the removal of the altered carpeting system pursuant to clause 3.4.5, before the termination of the Lease. The tenant was not therefore in breach of covenant in relation to the carpets.

Issue Two

14. The judge concluded that, for the purposes of quantifying the landlord's loss, the trial date rather than the date of termination of the Lease should be chosen as the appropriate date, pursuant to the principles for choosing the quantification date laid down in *Dodd Properties v Canterbury City Council* [1980] 1WLR 433. He did so because he accepted evidence from the landlord's responsible director Mr Brook to the effect that, regardless what proportion of it was required to remedy breaches of covenant by the tenant, the £500,000 which the landlord intended to spend upon the premises before re-letting them would, for good cash flow reasons, only be spent once a new tenant had been found, and no such tenant had been found by the time of the trial. In the event, the result of the judge's rulings on the items of breach alleged in the Scott Schedule was that only a little more than 20% in value of the works which the landlord intended to carry out were in fact required to remedy breaches of covenant by the tenant.

15. The landlord's claim included, under the heading "on-costs", an item for a four months void period which the landlord expected to have to endure as the result of having to carry out those remedial works (that is works to remedy the tenant's breaches of covenant) before it could expect to obtain rent from an incoming tenant. The judge accepted that claim in principle, but reduced the void period to two months, quantified at £20,070.

16. Mr Wonnacott did not on this appeal challenge the judge's conclusion that the landlord's loss should be quantified at the trial date, rather than the date of

termination of the Lease. Rather, he submitted that since the landlord obtained payment in full by way of compensation for the tenant's breaches of covenant shortly after judgment, there could be no basis for visiting upon the tenant thereafter any void period arising from the landlord's choice to delay still further the carrying out of its proposed works, once put in funds pursuant to the judgment for that part of them necessary to make good the tenant's breach of covenant. He did not challenge at all the commercial good sense of the landlord doing all the works in one go, and doing them after finding a new tenant. But he said that a perfectly sensible commercial decision to postpone all the works, after being put in funds for that part necessary to remedy the tenant's breach of covenant following judgment, was a commercial decision of the landlord, rather than anything caused by the tenant's breach. In reply he put it this way. There were, prior to trial, two reasons why the landlord should delay carrying out the works. The first was because parts of them were attributable to the tenant's default, but the tenant had not paid compensation from which that default could be remedied. As to the rest, there was a separate commercial reason for delay for which the tenant could not be blamed. After trial, and payment of the judgment sum, only the second reason for delay persisted.

17. Notwithstanding Mr Holland's valiant submissions to the contrary, I have found Mr Wonnacott's argument to be compelling. Nothing in the judge's analysis seems to me to address it. Mr Holland submitted that this was simply a factual matter, based upon evidence which the judge was entitled to accept, with which this court should not interfere.

18. I disagree. A conclusion that, once put in funds by payment of damages, further delay by the landlord in carrying out the repairs, including those necessary to remedy the tenant's breach, ought not to be visited as a further recoverable loss upon the tenant, strikes me as a matter of legal analysis rather than fact finding.

Conclusion

19. For those reasons, I would allow the appeal on both grounds.

Lord Justice Kitchin :

20. I agree.

Lord Justice Jackson :

21. I also agree.