IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
[2020] EWHC 3719 (Ch)

No. CH-2019-000338

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 2 July 2020

Before:

MR JUSTICE FANCOURT

B E T W E E N :

GKN AEROSPACE SERVICES LIMITED — Appellant

- and -

DUNCAN INVESTMENTS LIMITED — Respondent

MR A. ROSENTHAL QC appeared on behalf of the Appellant.

MR B. FAULKNER appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE FANCOURT:

1 This is yet another case about the exercise of a break option in a lease. By an order made on 5 December 2019, in the County Court at Central London, HHJ Saunders declared that the appellant tenant's attempt to exercise a break option to terminate the lease of Flat 2, 16 Queen's Gate Place, South Kensington ("the flat"), had failed because the break notice was served on the wrong date.

2 With permission granted by Marcus Smith J, the tenant appeals against that order and contends that the judge wrongly interpreted the relevant words of an Addendum document, as it was called, dated 5 October 2017.

3 I have had the benefit of excellent submissions from both Mr Rosenthal QC, on behalf of the tenant, and Mr Faulkner on behalf of the landlord.

4 The Addendum is a document by which the landlord, Duncan Investments Limited, and the tenant, GKN Aerospace Services Limited, agreed to renew a tenancy of the flat. The original tenancy was a lease dated 22 October 2015, by which the flat was let for a term of one year commencing on 24 October 2015. The lease contained an option for the tenant to renew the tenancy for a further year and also a break option.

5 The options were in the form of provisos to the habendum clause in the lease and the break option reads as follows:

> "Provided that at any time after 23 February 2016 the Tenant may give to the Landlord not less than 2 months' notice in writing, to be sent by first-class post or hand delivered as specified in Clause 6 of the Third Schedule of this Agreement, of his intention to end the Agreement and, upon the expiry of the Notice, the tenancy shall cease, except that either the Tenant or the Landlord can pursue their legal remedies against the other for any breach of any pre-existing rights under the Agreement. For the avoidance of doubt, in the event that this tenancy is continued for the second term, in accordance with the terms set out above, the 2 months' notice required to terminate this tenancy may be given by the Tenant to the Landlord at any time during the second term."

6 For both options in the lease, at least two months' notice in writing was required and, in the case of the break option, it could be exercised and the period of notice could expire at any time after the first six months of the term.

7 By clause 6 of the lease, the parties agreed various matters, set out in the Third Schedule, including the following at para.6:

> "Any notice to be given under this Agreement shall be deemed to be properly given if sent by first-class post and deemed delivered two working days later, which excludes Saturdays, Sundays and Bank Holidays, or delivered by hand and deemed delivered on the next working day, which excludes Saturdays, Sundays and Bank Holidays, and, if given to the Landlord, addressed to him at Duncan House, Clipston Road, Sibbertoft, Market Harborough, Leicester, LE16 9UB or, if given to the Tenant, addressed to him by name at the address of the property."

Thus, a break notice would be deemed to have been given if posted by first-class post or if hand delivered to the landlord at its Market Harborough address, and it would be deemed to have been delivered two working days after posting or one working day after hand delivery.

8 The option to renew the original one year tenancy was duly exercised as a result of which the tenancy was due to end on 23 October 2017. But before that date arrived, the parties signed the Addendum which further extended the tenancy for a term expiring on 23 October 2019.

9 The Addendum is a short two-page document. It was not negotiated or drafted by lawyers acting for the parties. Beyond that, there is no evidence about who drafted it. It refers to the tenancy agreement that commenced on 24 October 2015 and agrees a twenty-four month extended term commencing on 24 October 2017 and ending on 23 October 2019. It states:

> "All other terms and conditions remain the same save for the following …".

And there then follow five numbered clauses dealing with various matters, including the rent, a break option and an option to renew.

10 Clause 2 is in the following terms:

> "The Parties agree that the Tenant may, for this Addendum only, service notice at one point, being three months prior to the anniversary of the first year. This notice shall be given in writing, to be sent by first-class post or hand delivered to the address specified in clause 6 of the Third Schedule of the Agreement, of their intention to end the Agreement and upon the expiry of the Notice the tenancy shall cease, except that either the Tenant or the Landlord can pursue their legal remedies against the other for any breach of any pre-existing rights under the Agreement."

It is that clause that the Judge interpreted as meaning that a break notice had to be given on 24 July 2018 to terminate the term on 24 October 2018.

11 Before the hearing in the County Court, there had been a dispute about whether the notice had to be given to expire on 23 or 24 October 2018, but at the hearing it became common ground that the anniversary of the first year was 24 October 2018 and that the break notice was not ineffective because it specified a termination date of 23 October 2018. The notice had, in fact, been given in appropriate form by solicitors acting for the tenant on 1 June 2018. The landlord's argument was that the break option had not been validly exercised because the notice had not been given <u>on</u> 24 July 2018.

12 The Judge agreed with the landlord that the Addendum, on its true interpretation, compelled that conclusion, unusual though it was for a break option to be exercisable only by notice given within a twenty-four hour period. The Judge identified the question that he had to decide as whether the words "only serve notice at one point, being three months prior to the anniversary of the first year" meant that the break notice had to be received on 24 July 2018 only and not on any other date. It is notable that in that formulation he read the word "only" with the words "serve notice" rather than with the words "for this addendum", contrary to the agreed position of the parties before him.

13 The Judge then summarised the parties' arguments and referred to the important and well-known judgment of the President of the Supreme Court, Lord Neuberger of Abbotsbury, in the case of *Arnold v Britton* [2015] AC 1619. The Judge reminded himself of the warnings in that case about allowing an *ex post facto* appreciation of commercial good sense to override the ordinary language of a contract, if that language later appears imprudent for one of the parties to have agreed.

14 The Judge expressed his conclusions in paras.36 to 42 of the judgment as follows:

> "36. Upon the above authorities, I agree that the plain and only meaning of the words 'serve notice at one point, being three months prior to' 23 or 24 October 2018 is that the notice had to be served on a particular day. I am also of the view that the alternative wording suggested by Mr Faulkner in his submission would have been more appropriate and that there may well be other alternatives.
>
> 37. In my view, that conclusion is underpinned when one compares the break clause in the original lease with that contained in the Addendum. The original lease contained a 'rolling break clause' whereas the Addendum's break clause could only be exercised at one point.
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> 38. That some thought went into this change is perhaps best expressed by the fact that whilst the original lease provides that the notice be given for 'not less than two months', thereby indicating that it can be for more than two months, in the case of the Addendum this was tightened up considerably by providing it could only be exercised on one particular day.
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> 39. I do not accept that this clear interpretation of the meaning of the clause, as I have found, can be undermined by a finding on my part that it lacked commercial common sense. During the trial I expressed the view that the clause was unusual. That may be the case but, as with anything unusual, the position can be clarified by explanation. Here, in my view, there is potential explanation, although I did not have any evidence before me to make such a finding.
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> 40. Plausible explanations include (a) the residential property market is viable in South Kensington and more than three months' notice is not normally required; (b) the notice being served on a particular day gives the landlord certainty in their dealings with the property; (c) there may be a cynical commercial basis for it, the intention of the landlord to restrict the tenant's ability to serve a notice. I do not, therefore, find that the clause is commercially absurd. Unusual it may be but that does not amount to an absurdity.
>
> 41. I find that *Hexstone Holdings* was decided on its own particular set of facts. In that case the parties were criticised for not having expressed that was the case. Here it is an expressed term.
>
> 42. Both parties were represented by large commercial entities and, whilst there may have been some deficiencies in drafting leading to

> this litigation, it does support the contention made by the claimant that the clause was not commercially absurd."

15 Although it is not clear from the judgment, the alternative wording suggested by Mr Faulkner, as referred to in para.36 of the judgment, was a number of different formulations of clause 2 that Mr Faulkner had shown the Judge, which he said were what one would expect to see if the tenant's interpretation of clause 2 was what the parties had agreed. The case of *Hexstone Holdings* referred to is a decision of the late Mr Bartley Jones QC sitting as a Deputy Judge of the High Court, in which he expressed an *obiter* opinion to the effect that it would be absurd to require a break notice to be given only on one day.

16 The tenant's grounds of appeal against the Judge's decision are, principally, that the Judge got the interpretation of clause 2 wrong but, more specifically, that the Judge (a) wrongly considered that clause 2 was not capable of having a different meaning, namely that the break notice had to have been given to the landlord by the day three months before the anniversary of the first year; (b) failed to apply the unitary process of interpretation explained by Lord Hodge in *Wood v Capita Insurance Services* [2017] AC 1173; (c) failed to give any sufficient weight to the poor drafting of the clause; (d) failed to give weight to the way that clause 2 would operate in conjunction with the service provisions (para.6 of Schedule 3 to the lease), (e) failed to give sufficient weight to the purpose of the break clause or to the context, which was a change from a rolling break date to a fixed date, and (f) wrongly considered that his interpretation made commercial sense.

17 These grounds of appeal reflect the considerations identified by Lord Neuberger in his judgment in *Arnold v Britton* at para.15, where he said that the meaning of a commercial contract has to be assessed in the light of five factors but disregarding subjective evidence of any parties' intentions.

18 In the *Wood v Capita* case, Lord Hodge, in his judgment, said at para.10, that the court's task was to ascertain the objective meaning of the language which the parties have chosen to express their agreement. His Lordship said that 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. He then elaborated on that idea in paras.11-13 of his judgment and said:

> "11. Interpretation is, as Lord Clarke JSC stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause … and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold*, para 77, citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 10 per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance."

19 Of course, none of the relevant law as to interpretation of contracts is in dispute. It is the application of the principles, summarised by Lord Hodge, that is where the parties differ.

20 In oral argument, Mr Rosenthal submitted that the judge failed properly to apply the considerations that Lord Neuberger had listed in *Arnold v Britton* and only had in mind the commercial hindsight point, and that, in short, he failed to carry out an iterative process by reference to all the considerations to ascertain the meaning of the clause. Mr Rosenthal submitted that even on its terms, regarded in isolation, clause 2 was ambiguous because it was poorly drafted and it could have the meaning for which the tenant contended, but that when one takes into account the background and the context of the break option in the lease, and the changes that were agreed, that significantly colours the meaning of clause 2 of the Addendum and shows that it is concerned with "a single opportunity to break the lease" not a single day on which a break notice must be served. He submitted that not much could be read into the absence of words such as "not less than" in clause 2, given the different drafting style, and that the service provisions in para.6 of Schedule 3 mean that a single day for service would cause substantial uncertainty and risk for the tenant and that there was no countervailing commercial benefit to the parties in having a single day only for service of the option notice. He criticised the Judge's three reasons, or "plausible explanations", as the Judge put it, for why the parties might have agreed such a term as being without foundation or, in the case of the third explanation, the trap for the tenant, as being one that could only benefit the landlord and would be resisted by a tenant.

21 Mr Faulkner, for the landlord, said that the clearer the words in issue the harder it was to depart from the literal meaning and that in this case the drafting was crystal clear, and that any drafting infelicities in clause 2 were pedantic points rather than points of substance that

detracted from the plain meaning. He submitted that the tenant's interpretation required some violence to be done to the words of clause 2; for example, to replace the words "one point" with the words "any point", or replace the words "serve at one point" with the words "to take effect at one point". He submitted, on the strength of *Arnold v Britton*, that if the words were clear it did not matter that they had no commercial purpose. He also submitted that the changes from the break option in the lease were the one-off fixed break and the replacement of a 'not less than' period of notice with a fixed period.

22 Mr Faulkner argued that there was no practical difficulty with the Judge's interpretation because the deemed service provision of the lease and the common law and statutory rules applying to service of notices worked in parallel, such that if a first-class letter was posted on a Thursday and was, in fact, delivered on the Friday, it would be served on the Friday and also deemed served on the Monday, so that if the three month period began on a Monday the letter was validly served. It was straightforward, therefore, he said, to comply with the restrictive notice requirement and he said that such a requirement had the commercial purposes that the Judge had identified. That being so, there was no reason to depart from the plain meaning of the words of clause 2.

23 In my judgment, this is a case in which the drafting of the relevant clause of the Addendum is far from ideal. There are ambiguities in it, apart from the central dispute between the parties. These are, first, what exactly does the word "only" in "may for this addendum only serve notice", qualify? The parties at trial had agreed one answer and the judge came to another. Second, what date is "the anniversary of the first year": the expiry of the first year, which would be 23 October 2018, or the first anniversary of the commencement date of the term, which would be 24 October 2018? Apart from those ambiguities, the clause does not state what type of notice it is concerned with or on what date the term may be broken. These matters are left to be inferred from the content of the clause as a whole. These are significant flaws in the drafting of an option of this kind.

24 It is necessary and appropriate, in order to carry out the unitary and iterative exercise required, to have proper regard not only to the words of clause 2, and any drafting deficiencies, but to the context in which the Addendum was signed. The context is given by the terms of the lease, to which I have referred. Under the lease, as extended, the tenant had what is generally called a "rolling break option", with a requirement for at least two months' prior written notice to be given. Notice was to be given in accordance with the terms of para.6 of Schedule 3 but could be given at any time, to expire at any time as long as a minimum of two months' notice was given.

25 The Addendum is in short form and incorporates the terms of the lease, save for certain changes. The substantial change is that instead of a rolling break option, the tenant has what might be called a "one-off" break option; that is to say, a break option that can only be exercised at one point during the two year term of the tenancy. There is also a change in the mechanics of the operation of the option in that instead of at least two months' notice, a longer period of three months is required. Both those changes are for the benefit of the landlord. There might or might not have been a *quid pro quo* for that change in the amount of the rent agreed or in the inclusion of a further option to renew at a fixed rent.

26 The issue raised on this appeal is whether there was also a third change that the parties agreed, namely that a break notice could only be given on a single day exactly three months before the anniversary date rather than at any time before or on that day.

27 The answer to the central question that the Judge decided cannot be found outside the language of clause 2 of the addendum but that language must be construed with regard to the context and the commercial effect of the rival interpretations. If one extracts from clause 2 the words "the Tenant may … only serve notice at one point", assuming that the Judge was right and the parties were wrong about how the word "only" was to be read, the words appear to be unambiguous. But that is where the iterative process starts, not ends. Given the defects in the unskilled drafting of the clause, the literal meaning of a few words of clause 2 cannot be taken as the meaning of clause 2 without careful consideration of the context in which the Addendum was made, the effect of its other terms and the commercial effect of the rival interpretations. One can no longer say that there is no apparent ambiguity within the language of the clause itself, therefore such matters are irrelevant. Equally, however, one should not search for ambiguity if none exists.

28 I am satisfied that there is ambiguity about the true meaning of clause 2 when the factual background is considered. The objective purpose of clause 2 is to change the terms of the break option contained in the lease that would otherwise have been incorporated into the new tenancy. The significant commercial change is that the break option is no longer a rolling break option, exercisable at a time of the tenant's choosing, but becomes a one-off break that can only have effect at a single fixed point in time. The next significant change is that instead of the tenant being required to give two months' notice, at least, the tenant is required to give three months' notice. The language of clause 2 of the Addendum is striving to define those new terms and to identify the break date itself. The words that are said to describe the requirement for service of a break notice are the very same words that identify the single break date and a requirement for three months' notice. In that context, one can appreciate, as Mr Rosenthal submitted, that the draftsman's focus is on defining the single opportunity for the tenant to break the term of the new lease. Given his poor use of language and syntax, there is ambiguity about whether that is all that he is doing or whether he is also making the third change to the previous option.

29 In that regard, the commercial consequences of such a strict requirement are the following: The effect is not to make the option practically unworkable but to create uncertainty and risk for the tenant. According to the service provisions incorporated into the Addendum from para.6 of Schedule 3 to the lease, a first-class post letter has to be posted two working days before the notice date or a notice be personally served at the landlord's address one working day before the notice day. As it happens, 24 July, three months before 24 October 2018, was a Monday, so for deemed service on the Monday the tenant would have to have posted a letter on the previous Thursday, or hand delivered it on the Friday. If, on the other hand, the anniversary of the first year was 23 October 2018, three months before that date was a Sunday and the deemed service provisions do not cater for deemed service on that day.

30 Mr Faulkner argued that the common law and statutory service provisions apply in parallel to the lease provisions, so that if the posted letter was delivered on the Friday then it would be delivered on that day but also deemed delivered on the Monday. To avoid uncertainty, he said there were books written about the service provisions that the tenant could consult and the tenant could serve a multiplicity of notices to cover all possible dates, for the avoidance of doubt.

31 In my judgment, this argument about parallel service provisions and different dates of service only indicates the potential difficulty created by a strict requirement for service on a single day, even on the assumption that the tenant could be sure which day was specified by clause 2. The idea that the same letter can be delivered on two separate dates creates uncertainty

about whether the strict requirement in the option has been satisfied. Although the difficulties are not insuperable, the effect is to introduce both risk and uncertainty.

32 The commercial purpose of a tenant break option is, broadly speaking, to give the tenant the right to terminate the lease early, if it no longer needs the demised property, subject to a reasonable period of notice to the landlord so that it can plan and arrange its affairs accordingly, and with clarity for both parties as to whether the exercise of a break option is valid. The landlord's interpretation of clause 2 tends to conflict with these commercial needs by putting the tenant at risk of not validly exercising the option and creating uncertainty on both sides as to whether the lease will end early. The tenant's interpretation, on the other hand, is in accordance with the general commercial purpose of a break option.

33 I am unable to accept that there is any true commercial purpose served by requiring notice to be given on a single day only other than, from the landlord's point of view, the prospect of the tenant tripping itself up and failing to comply. I therefore disagree with the Judge's "plausible explanations" in para.40(a) and 40(b) of his judgment. The explanation in para.40(a) was, in any event, unsupported by any evidence and was speculation.

34 Although it may not be disadvantageous to a landlord to have only three months' notice, it can only be of advantage to a landlord to have more. Mr Faulkner's suggestion that more could cause difficulty for the landlord, in case of a change of personnel or poor record-keeping, was wholly implausible, particularly given (as he submitted in a different context) that this landlord is a substantial property investment company. Although a tenant tripwire might be of benefit to a landlord, it does not objectively make commercial sense to both parties to the lease.

35 The landlord's interpretation of clause 2 produces a result that serves no reasonable commercial purpose. A strict requirement for notice to be given on a single day is, if not unheard of, then at least exceptionally rare in practice. For that reason, if the parties really had agreed that the tenant must give notice on a single day, they would, in my judgment, have used much more specific language to spell out each of the three changes to the lease option that were being made. The language that they have used is clumsy but, in my judgment, is concerned to provide a one-off option, unlike the option in the lease, and to specify that three months' notice, expiring on the anniversary date, is required as compared with two months' notice expiring at any time under the lease.

36 It is true, as the Judge pointed out, that the lease contained the words "not less than" and the Addendum does not, but those words are not needed to avoid a requirement for precisely three months' notice. A requirement expressed in terms of three months' notice would be interpreted, in any event, as a requirement for not less than three months' notice. The Judge considered that by omitting the words "not less than", the Addendum had tightened up considerably the latitude for giving notice by requiring notice to be given on one day only. But that only assumes as being correct the conclusion about the meaning of the Addendum that the Judge had reached. If, as I consider, the first sentence of clause 2 of the Addendum is addressing, albeit maladroitly, the one-off break date and the requirement for three months' notice, it is not significant that there is no express reference to "not less than three months' notice".

37 I therefore respectfully consider that the Judge was wrong to conclude that the words of clause 2 were only capable of one interpretation. In isolation, the words "serve notice at one point" support his interpretation but the commercial purpose of the clause as a whole must be considered in its full context. Although the Judge did compare clause 2 with the terms of the

break option in the lease, the only point he emphasises in his reasoning is the absence of the words "not less than". The substantial contrast with the option in the lease is the change from a rolling break to a one-off break and the increase in the period of notice and this is what clause 2 is addressing.

38 The Judge was wrong to conclude that there were plausible commercial explanations for the introduction of a third change requiring the tenant to serve its break notice within a period of twenty-four hours. He did not address the tenant's argument that a twenty-four hour service window would create difficulty, risk and uncertainty for the parties.

39 Although nothing would prevent parties from agreeing such a term, if so minded, in my judgment, they did not do so by clause 2 of the Addendum. I therefore allow the tenant's appeal.

LATER

40 So far as the trial costs are concerned, an overall total of just over £21,000 seems to me to be a reasonable figure for the whole of the costs of a claim of this nature. I bear in mind that the claim only related to about £40,000 of rent and some consequential sums that might have followed for the tenant, if it was established that the lease was not validly broken, so it would be wrong to limit it strictly to £40,000. Although the costs are a significant proportion of what was at stake, I do not consider that, given the nature of the claim and the issues and the work that was done, it could reasonably have been done for substantially less. So I do not find that the costs incurred are disproportionate.

41 I do accept that some adjustment is appropriate for the hourly Grade A fee earner rate and for the absence of delegation, although it does not seem to me, at first glance, that there is very much in the delegation point given the way that the work done on documents is described. I will, nevertheless, make a modest reduction in the solicitors' costs. They are a total of £9,945 and I will reduce those costs to £9,000 to take account of the hourly charging rate and the possibility that some modest delegation could have done.

42 So far as counsels' fees are concerned, there is no challenge to the brief fee of Mr Rosenthal. It is said that the fee for advice from counsel should be struck out. I do not accept that. On the basis of what I have been told, that was a fee for (in part) initial advice on the issue, which came from Ms Tozer, and then subsequently advice on the preparation of the claim by Mr Rosenthal. His fees are only £1,000 of the £3,100. In those circumstances, given that he put in a charge for the work that was done, it does not seem to me that there is any substantial duplication, but I will reduce the overall counsels' fees by £500 to take account of the possibility of some additional fees as a result of the change of counsel.

43 So £945 come off the solicitor's costs and £500 off the counsels' fees.

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