Nicholas John O'Hare v Stuart Burgher

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Thomas, Hughes
Judgment Date:	04 March 2021
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Text

[2021] JRC 65

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Commissioner, and Jurats Thomas and Hughes

Between
Nicholas John O'Hare
Plaintiff
and
Stuart Burgher
Defendant

Advocate H. Sharp **Q.C. for the Plaintiff**.

Advocate C. J. Swart **for the Defendant**.

Authorities

Trico Limited v Buckingham [2020] JCA 067

Energy Investments Global Limited and Heritage Oil Limited v Albion Energy Limited [2020] JCA 258

Pothier — Oeuvres Complètes (Tome Premier — Traité des Obligations)

Selby v Romeril [1996] JLR 210.

Wood v Capita Insurance Services Limited [2017] AC 1173

Business dispute — application for summary judgment

THE COMMISSIONER:

Introduction

1 . The Plaintiff applies for summary judgment on his Order of Justice issued on 19 th October, 2020 and placed on the pending list on 30 th October, 2020. The Defendant filed an answer to the proceedings on 24 th November, 2020 and has amended that answer by a further document on 4 th December, 2020. It is unclear at present whether the amendment yet has the leave of the Royal Court, but we are encouraged by Advocate Sharp to proceed on the basis that the Defendant's case is to be taken at its highest and we should therefore have regard to the amended answer. In agreeing to proceed in that way, Advocate Sharp has not as we understand it conceded that the whole of the answer is in proper form and he would not be precluded from making other interlocutory applications in the event that for whatever reason these proceedings continued.

2 . The parties had worked together in partnership at 24 The Parade, St. Helier ("the Property") which is owned by a company registered as Parade Dental Group Holdings Limited ("PDGHL"), which is beneficially owned by the parties in equal shares. The company has leased the whole of the Property to the parties who, in so far as the company is concerned, remain jointly and severally liable for the obligations under the lease. What happened in practice in the course of the partnership was that the Plaintiff occupied one part of the premises, and the Defendant operated within another part of the premises with some shared space. In October 2017, the business relationship came to an end and the Plaintiff moved out of the Property. Subsequently there were proceedings in the Royal Court — the Plaintiff sought a just and equitable winding up order in respect of the practice company Parade Dental Practice (2014) Limited (the "company"), and the Defendant sought payment from the Plaintiff of a cash sum of £46,760.86, a just and equitable winding up of the company, a dissolution of the partnership and an accounting in respect thereof with related relief. Those proceedings were compromised by a Settlement Agreement ("the

Agreement") made on 27 April 2020 following mediation.

3 . By his application for summary judgment, the Plaintiff seeks a construction of the Agreement with an order for specific performance of what is alleged by the Plaintiff to be a Defendant's obligation thereunder, namely, to vacate the Property.

The Agreement

4 . The Agreement was expressed to settle all the various claims between the parties. It can conveniently be summarised as having three main purposes:

(i) to set out the terms on which the Property was to be dealt with;

(ii) to set out the terms on which the company was to be dealt with;

(iii) to cover miscellaneous points which are not relevant to the present litigation, which concerns only those provisions relevant to the Property.

5 . Advocate Sharp contended for the Plaintiff that the Agreement was intended to provide a clean break between the parties as a result of the breakdown of their partnership. For the Defendant, Advocate Swart contended that there could not be a clean break until the Property was sold, and therefore the Agreement should not be seen in that light. In our view, it is clear that the Agreement was intended to provide a clean break between the parties albeit the clean break would not be ultimately achieved until the Property was sold.

The relevant provisions

6 . Although PGDHL is not a party to the Agreement, the Plaintiff and the Defendant agreed that they would, as directors, procure that the Property was marketed for sale on the open market. Their Agreement that the Property should be sold encompassed a number of points of which the material ones are set out in these provisions:

"2. This Agreement shall be binding on the Parties as follows:

(1) The parties as directors of PDGHL shall procure that the Property shall be marketed for sale on the open market in accordance with the following provisions:

(a) [Appointment of D2 Real Estate as agents to act as valuer and selling agent, with marketing instructions including a provision as an application for a change of use application if so advised in the event that no sale of the Property had been achieved within three months. The Parties agreed to act on the advice of D2 and agreed also an obligation that generally they would act in good faith in order to expedite the process of selling the Property — Clause 2(1)(A) to (D)]

(b) The costs of the valuation and the sale shall be paid by PDGHL

(c) The Parties shall take all reasonable steps required to maximise the sale price of the Property ……..

(d) Subject to payment of the amount under Clause 2(2) and release of the funds under Clause 2(8)(c), SB [the Defendant] shall give NOH [the Plaintiff] access to the Property upon NOH providing 48 hours' notice whilst SB remains in occupation thereof and any such access shall be in the company of SB or his duly authorised representative. Both Parties shall have access to the Property thereafter and SB shall furnish NOH with a key.

(e) [Provision for conveyancing]

(2) No later than 30 days after this Agreement is signed, NOH shall reimburse SB for and in respect of his share of (1) the mortgage payments made by SB to the Bank (2) the occupier and foncier rates; and (3) the building insurance, in the total sum of £15,400 (fifteen thousand four hundred pounds)

(3) The Parties shall continue to share the mortgage payments due to the Bank and ongoing expenses (occupier rates, foncier rates and insurance) payable under the lease between them and PDGHL on a 60/40 basis (SB/NOH) until SB vacates the Property whereafter it [sic] shall be shared on a 50/50 basis until the Property is sold. SB shall enter into a tenancy with PDGHL on a month to month basis (running from 19th of each month to correspond with the mortgage payments to the Bank) to give effect to this clause.

(4) SB shall be entitled to vacate the Property, removing all Property not belonging to NOH, as soon as he has found alternative premises but in any event within 3 months or the end of any restrictions in the present Covid-19 lockdown which would prevent his vacation whichever is the latest or as otherwise agreed, with a view to providing vacant possession to any buyer. NOH shall take all steps that are necessary to remove his equipment and practice items from the Property within that same period.

(5) The Parties shall, once SB has vacated the Property, approach the Bank to request a mortgage holiday and shall provide to the Bank such financial information as it may reasonably require in order to consider such a request.

(6) Once the sale of the Property has completed, the Parties shall take all reasonable steps for the summary winding up of PDGHL and distribution of the sale proceeds (after settlement of all associated costs) equally between them.

(7) Following the distribution under (6) the Parties shall write to the Court to advise that the proceedings between them may be discontinued on the basis of no order as to costs.

(8) ….

7 . There is no doubt that the Agreement thus envisaged that the Property would be sold either with vacant possession or with a new tenant in place who had entered a 9-year lease at an acceptable rental.

8 . The Agreement was made on 27 th April 2020, following a mediation. The Order of Justice was issued on 19 th October 2020, some six months after the date of the Agreement. D2, the real estate agent appointed to find a tenant and/or purchaser for the Property, has not had any success. Part of the difficulty is that the Property is in need of repair and the parties have not been able to agree on a repair programme. The Plaintiff asserts that the Agreement was to enable a sale within three months; he therefore seeks an order that the Defendant give up vacant possession. The Defendant contends that although the parties hoped to obtain a purchaser within three months, there was never any requirement for possession to be given up until such time as a purchaser had been found, although he reserved the right to move out whenever that became appropriate because he had found other accommodation.

The Lease

9 . During the course of argument, it became apparent that PDGHL had granted a lease to the Defendant and Plaintiff, although that lease was not amongst our papers. We asked that a copy be made available to us, and it has been duly delivered. We have taken the opportunity of considering it. The lease was dated 10 th January 2014 and the Plaintiff and Defendant are joint and several tenants. The term of the lease is for a period of 9 years, deemed to have commenced on 15 th January 2014 and terminating on 14 th January 2023. On the evidence which has been provided to us the rental payment was fixed having regard the need to discharge the mortgage and other outgoings in relation to the Property rather than for the purposes of fixing upon a commercial rent. Among all the other covenants contained in the lease, there is this covenant:

> *"6. The Landlord HEREBY COVENANTS with the Tenants as follows:*
>
> *…….*
>
> *(c) That whilst the Tenants pay the rent and additional sums and observe the covenants herein contained they shall during the term quietly enjoy the premises without any interruption by the Landlord or any person claiming under or in trust for them."*

10 . This provision, given the apparent continuation of the lease, would appear to stand in the way of any order in favour of the Plaintiff for possession. However, neither party addressed us to any great extent on the significance of the lease, Advocate Sharp on the basis that the Agreement was intended to act as a clean break between the Plaintiff and the Defendant. The difficulty with that submission is that PDGHL is the owner of the Property and landlord under the lease, but is not a party to the Agreement. As we shall see, much of the argument

turns on the proper construction to be made of Clause 2(4) of the Agreement. Advocate Swart submitted that there is a provision in that clause for the entitlement to vacate the Property because if it were not there, the lease would have the outcome that the Defendant would continue to have liability for payment of the outgoings under the lease. That of course is true, but it is equally true of the Plaintiff as well.

11 . As we understand it, the parties have in fact continued since the date of the Agreement in accordance with the interim provisions set out at Clause 2(3). In other words, the parties have shared mortgage payments and other expenses on a 60/40 basis, the Defendant still being in possession of the Property. A question which arises is whether the closing words of Clause 2(3) have the effect of subordinating the terms of the lease to the Agreement. They are:

> *"SB shall enter into a tenancy with PDGHL on a month to month basis …… to give effect to this Clause."*

12 . In other words, did this provision effectively novate the lease?

13 . There are a number of difficulties with this construction. On the face of it, a tenancy in the name of the Defendant alone would not make adequate provision for the Plaintiff to pay 40% of the outgoings in relation to the Property, and accordingly, it could not be said that granting the Defendant a tenancy on a month to month basis would actually give effect to the Clause, which it is expressed to do. On the other hand, what is the purpose of a provision committing the Defendant to a monthly tenancy (in circumstances where he is expected to give vacant possession because the Property will be sold within three months) when he has a joint and several lease which does not expire in any event until January 2023? That might suggest that the provision under discussion was intended to bring an end to the lease — and yet PDGHL is not a party to the Agreement, albeit it is the landlord under the lease, and it is trite law that a contract should not be set aside or novated except by Agreement of the contracting parties. Creditors of PDGHL, for example, might have a legitimate interest in ensuring that the lease was not vacated such that the Plaintiff would then be discharged from his obligations under the lease save for rights against him in personam capable of being brought by the Defendant pursuant to the Agreement. Regrettably, the Agreement does not in this respect appear to have been thought through as fully as it might.

14 . The Plaintiff and the Defendant are the joint owners of PDGHL. It appears they are the sole directors. While we think it is difficult to make sense of the provision in question, in our judgment the proper construction of this provision is to treat it as one which also binds PDGHL and amounts to an Agreement to replace the lease with a monthly tenancy in the name of the Defendant with the payments in respect of the mortgage and other outgoings for the Property being shared between the parties as provided in the remaining parts of that clause.

15 . If we are wrong in that construction, the position remains that until January 2023, both the Plaintiff and the Defendant are entitled to occupy the Property as joint and several tenants from PDGHL. That company is clearly unable to take commercial decisions at present, the two directors being apparently unable to agree on very much. In those circumstances a court would wish to give effect to the terms of the Agreement by ensuring that each of the Plaintiff and the Defendant as director of PGDHL performs his obligations under the Agreement which, as they include the obligation to provide vacant possession to any buyer of the Property in due course, must extend, so it seems to us, to a provisional Agreement at least that the lease be cancelled in the event of a sale. On either basis, in our view, we are entitled to proceed from this point as though the lease did not exist and we propose to approach it in this way. Since the Agreement was made, the parties appear to have ignored the existence of the lease and for the purposes of adjudicating between the two of them, we feel it is justified in doing the same.

16 . The Order of Justice seeks an order for specific performance of the Agreement in favour of the Plaintiff and an order that the Defendant be required to vacate the Property forthwith. In his application for summary judgment, Advocate Sharp's principal submission was that the proper construction of Clause 2(4) was that it contained an obligation on the part of the Defendant to vacate the Property within three months of the date of the Agreement. He recognised that the opening language was that the defendant was *"entitled to vacate the Property"*, which might suggest that he had the right to vacate but not an obligation to do so. That, however, was in Advocate Sharp's submission subordinated to the phrase *"but in any event within three months or the end of any restrictions in the present Covid-19 lockdown ...."*, which appeared later in the sentence. Accordingly, he submitted that the obligation to vacate within three months was consistent with the instructions to be given to the agent to market the Property for sale and/or to find a tenant, and, as the Defendant had not given up possession, he should do so forthwith.

17 . By contrast, Advocate Swart said that his client occupied that part of the premises which he had always occupied and there was no business or commercial sense in the Plaintiff's application. If the Defendant moved out of the Property, the Plaintiff's costs by way of contribution to outgoings for the Property would go up. He submitted that the proper construction was that the Defendant was entitled to remain in the Property until he had found alternative accommodation, and hopefully that would be within the three month period which the parties had agreed for the purposes of looking for a sale during that period.

Principles of Construction

18 . Advocate Sharp relied on the dictum of the Court of Appeal in *Trico Limited v Buckingham* [2020] JCA 067, and in particular, at the passages in that judgment appearing between paragraphs 55 and 57. It is noteworthy that in the court's introduction to principles of construction in that case, McNeil JA said this:

"Counsel for both parties have urged us to adopt English principles

> ***governing the interpretation of contracts as laid down by the English courts.*** We are not aware of any decision in which a Jersey court has held that Jersey Law is different. The Master's judgment in De la Haye, in which he drew upon the Court of Appeal's decision in Trilogy, is authority establishing that, save where otherwise specified, the English principles will be followed in this Island even though the decisions of the English courts are not binding. There is no reason for us to disagree."

19 . Pausing there, we note that Courts rely upon counsel to put forward all relevant authorities before them. This is a particularly important obligation in circumstances where submissions are made to the Court of Appeal or the Privy Council, neither of which might be expected to be aware of all Jersey authorities. This might be thought to be particularly relevant in contract cases, where the underlying law of contract is not the same as it is in the different countries of the United Kingdom. *Trilogy*, as a trust case, would naturally give rise to consideration of English principles of construction in trust cases; and while it may be that there is little distinction to be drawn in the English case law between principles of construction in trusts and in contract cases, practitioners in Jersey must be cautious in disregarding local authorities which would more naturally be submitted to the court for consideration in contract cases. Thus, in *Energy Investments Global Limited and Heritage Oil Limited v Albion Energy Limited* [2020] JCA 258, the Court of Appeal noted at paragraph 46 that in contract cases the courts of this Island regularly refer to the works of Pothier, who the Royal Court on numbers of occasions has described as providing a surer guide to the Law of Jersey than that of cases decided in England and Wales. The Court went on to say:

> ***"It is right to reflect that the English legal authorities on the interpretation of contracts have sometimes drawn from the rules which he described — unsurprisingly, in that Pothier, the most influential of commentators, was at one stage regarded as authoritative in England ….***. a similar respect for Pothier is held in Scots Law ……."

20 . In construing the Agreement, we have had regard to the commentaries of Pothier — Oeuvres Complètes (Tome Premier — Traité des Obligations) Part 1, Chapter 1, at Article VII where twelve rules of construction are to be found.

21 . This is not to say that the views set out by the English and Scottish judges in relation to the construction of contracts are not also helpful. They undoubtedly are, but one must be careful with any extrapolation of those rules in cases where the objective/subjective question comes to be considered in the identification of the contract which the parties made. In this case, however, that does not arise because neither side contends that the Agreement was not made, nor is it contended that there is any fundamental problem in meeting the requirements of a valid contract as set down in *Selby v Romeril* [1996] JLR 210. In this context, therefore, the comments of Lord Hodge in *Wood v Capita Insurance Services Limited* [2017] AC 1173 between paragraphs 10 and 13, cited at paragraph 56 of the Court of Appeal judgment in *Trico Limited v Buckingham*, are of

assistance. In particular, at paragraph 13 of his judgment in *Wood*, Lord Hodge said this:

> ***"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. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corporation* [2010] 1 All ER 571, ***para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."***

22 . Here, although the Agreement offers some signs of professional drafting, there is a lack of clarity in a number of material provisions. We have referred already to that difficulty in relation to clause 2(3) of the Agreement and the same is true of clause 2(4).

23 . The following features step out from the latter clause as demanding attention:

(i) The Defendant is entitled to vacate the Property, removing all property not belonging to the Plaintiff. This provision suggests that he is entitled but not obliged to vacate it.

(ii) The entitlement to vacate the Property is described as arising as soon as the Defendant has found alternative premises. Subject to (3) below, this suggests that not only is he entitled to vacate the Property once he has found alternative premises, but that he can be required to remain in the Property if he does not do so.

(iii) The entitlement to vacate does not only arise once the Defendant has found alternative premises. It also arises in any event within three months or the end of any restrictions from the Covid-19 lockdown which would prevent his vacation of the premises, whichever is the latest. Given that none of the restrictions in the Covid-19 lockdown rules in force at the time of the Agreement would actually have prevented the Defendant from giving vacant possession of the Property, this clause is difficult to

construe. What the clause does grammatically seem to make clear is that the entitlement to vacate the Property is not restricted to when the Defendant has found alternative premises but extends to any time within three months of the Agreement. On a normal reading of that language, the entitlement to vacate the Property ceases after three months have expired from the date of the Agreement. Yet, such a construction is negated by the language which then follows — "with a view to providing vacant possession to any buyer". The idea that the entitlement to vacate the Property is lost at any time makes little business or commercial sense in any event, and indeed would be contrary both to the lease if it still existed because on that analysis it would expire in 2023, to the concept of a periodic tenancy in the name of the Defendant, and also to what the Plaintiff actually did, namely to move out of the premises in or about 2017. Furthermore, it makes no sense to have an entitlement to vacate the Property for a limited period with a view to providing vacant possession to any buyer, when the possibility of finding a buyer after the expiry of the limited period would and does remain very much a live possibility.

(iv) Finally, it is to be noted that the Plaintiff did not have an entitlement to remove his equipment and practice items from the Property within the three-the month period, but an obligation to do so. This again would negate any suggestion that he had a continuing right to occupy any part of the Property pursuant to the lease, at least as between him and the Defendant.

24 . On any analysis this is a very unhappily drafted clause. Advocate Swart suggested that the reference to the Covid-19 lockdown was a reference to the concern which dentists had at that time that at the end of the lockdown arrangements, they might have lost their practices altogether. That seems to us to be very unlikely. While we are not sure what this provision was intended to mean, and while we understand that dentists could undoubtedly have been concerned at the possibility of losing patients to other practices when the Covid lockdown restrictions were removed, we do not think that the Covid reference in Clause 2(4) means any more than a reference to such restrictions, if any, which would prevent the Defendant from inspecting alternative premises to which he could move thus providing vacant possession to a buyer. We do not therefore find that part of the Clause helpful in construing what the Clause means. One is left however, with the expression *"in any event within three-months"* which it seems to us should be read in conjunction with the objective of providing vacant possession to a buyer.

25 . While the expression *"entitled to vacate"* does not look like an obligation to vacate, and would not normally be construed as meaning *"must vacate"* we have reached the conclusion that this is the only sensible construction of the clause as a whole. The obligation placed on the Defendant was to vacate the Property no later than three months from the date of the Agreement in order that vacant possession might be provided to a buyer. This chimes with the provisions of Clause 2(1)(d) which required the Defendant to give the Plaintiff access to the Property upon 48 hours' notice while the Defendant remained in occupation, but thereafter both parties would have access and the Plaintiff would be furnished with a key. That is not a provision which has a knock-out effect in favour of the Plaintiff, but it points in the direction of the construction of Clause 2(4) which we have

made. Similarly, although the Defendant claimed he was entitled to remain in the Property until it was sold, the provisions of Clause 2(3), which provide for a 60/40 split of expenses until the Defendant vacated the Property, and thereafter on a 50/50 basis until the Property was sold, militate in favour of an obligation on the part of the Defendant to vacate the Property even though a purchaser had not been found.

26 . In the circumstances, we construe Clause 2(4) of the Agreement as meaning that the Defendant had to vacate the Property within three months of the date of the Agreement. As it is an agreed fact that he has not done so, he is in breach of his obligation under the Agreement, and there is no need for this claim to go to trial. It is an appropriate case for summary judgment, and the Defendant can be ordered to comply with Clause 2.4 of the Agreement and vacate the Property.

27 . Unless otherwise persuaded by the Plaintiff, we consider that the Court has a discretion as to the time which it will allow to the Defendant to vacate the Property in accordance with the Court's Order. It is clear that Defendant runs his dental practice from the Property, and although he must have been making contingency arrangements, as any cautious Defendant would do in these circumstances, we do not have information before us to the time which he needs to comply with the Order. We will therefore accord the parties the opportunity of making further submissions when this Judgment is handed down as to the time within which the Order must be performed, and indeed to address us on any other matters which might be relevant as a result of this judgment.