Case No: A3/2016/4704

Neutral Citation Number: [2018] EWCA Civ 1556
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mr David Halpern QC, (sitting as a Deputy High Court Judge)
HC/2016/000335

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th July 2018

Before :

LORD JUSTICE LEWISON

and
LORD JUSTICE LEGGATT

- -

Between :

	TRILLIUM (PRIME) PROPERTY GP LIMITED	**Appellant**
	- and -	
	ELMFIELD ROAD LIMITED	**Respondent**

- -
- -

Mr Timothy Dutton QC (instructed by **DLA Piper LLP**) for the **Appellant**
Mr Guy Fetherstonhaugh QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Respondent**

Hearing date : 26 June 2018

- -

Judgment **Lord Justice Lewison:**

1. The issue on this appeal is the interpretation of an index-linked rent review clause contained in a reversionary lease of offices in Bromley. The dispute between the parties concerns the figure to which indexation is to apply. If the indexation is applied to the Initial Rent payable under the lease, the resulting rent for the rent review period beginning on 25 March 2015 is £1,595,235.63. That is the figure for which the landlord contends. If, on the other hand, the indexation is applied to the rent which was payable immediately before the reversionary lease took effect, the resulting rent for that review period is £1,282,835.31. That is the figure for which the tenant contends. Mr David Halpern QC,

sitting as a judge of the Chancery Division, found in favour of the landlord. His judgment is at [2016] EWHC 3122 (Ch). The tenant now appeals.

2. The story begins with the grant of an underlease of the property on 23 June 1986. This is referred to in the lease with which we are concerned as "the Initial Lease". It was granted for a term of 25 years from 25 March 1985, and was thus limited to expire on 24 March 2010. The Initial Lease contained an upwards only rent review clause to market rent at five yearly intervals, with a final review a few days before the term was due to expire. The first rent review resulted in an increase in the rent to £1,160,000. That rent remained constant for the second and third reviews. On 28 December 2005 the parties entered into a number of memoranda and a deed of variation. The memoranda recorded that the rent was to remain at its current level of £1.16 million until 28 September 2005. By the deed of variation, it was agreed that:

i) The rent for the period from 29 September 2005 to 24 March 2010 would be reduced to £965,000;

ii) The final rent review was deleted;

iii) A number of tenant's covenants were relaxed or widened.

3. At the same time the parties entered into the reversionary lease with which we are concerned. The reddendum provided:

> "YIELDING AND PAYING therefor FIRSTLY from the Term Commencement Date … the Initial Rent … and such rent to be subject thereafter to such increase calculated in accordance with the provisions of paragraph 3 of the First Schedule…"

4. Clause 1 defined "the Initial Rent" as follows:

> "The initial rent payable under this Lease from and including the Term Commencement Date to and including 25 March 2015 being rent equivalent to the [greatest] of (a) the rent first reserved under the Initial Lease immediately prior to the expiry thereof subject to such increase calculated in accordance with the provisions of paragraph 3 of the First Schedule hereto) (b) £1,200,000 per annum exclusive of VAT and (c) the open market rent as determined in accordance with the provisions for review contained in the Third Schedule hereto."

5. Paragraph 3 of the First Schedule to the lease provides:

> "3.1 "Base Figure" 193.1;

> "Index" the index figure of the Index of Retail Prices …
>
> "Review Date" 25 March 2015 and 25 March 2020
>
> "Review Period" a period beginning on any Review Date and ending on the day before the next Review Date or if none until the end of the Term;
>
> 3.2 Until the first Review Date the annual Rent will be the Initial Rent and thereafter during each successive Review Period the annual Rent will be a sum equal to the greater of:
>
> 3.2.1 the annual rent reserved under this Lease immediately before the relevant Review Date; and
>
> 3.2.2 the revised rent ascertained in accordance with this clause.
>
> 3.3 the annual Rent for any Review Period is to be determined at the relevant Review Date by multiplying the Initial Rent by the Index for the month preceding the relevant Review Date and dividing the result by the Base Figure."

6. It is common ground that the Base Figure of 193.1 was the index figure of the RPI at as September 2005; that is to say the date from which the reduced rent of £965,000 became payable. On 21 July 2010 the parties agreed that the Initial Rent was to be the figure of £1.2 million a year as specified in paragraph (b) of the definition of that expression. There was therefore no need to attempt to produce the calculation envisaged by paragraph (a) or the valuation envisaged by paragraph (c).

7. We are now concerned with the rent review as from 25 March 2015. On the face of it the calculation is straightforward. The Initial Rent is the agreed figure of £1.2 million. That figure is the multiplicand. It is a constant for both rent reviews under the lease. The multiplier is the figure for the RPI for the month preceding the Review Date. It is agreed that the relevant figure for the 2015 review is 256.7. The divisor is the figure specified in the lease as the Base Figure. That, too, is a constant for both reviews under the lease. It follows that the calculation for the March 2015 review is: £1.2 million x (256.7 ÷ 193.1) = £1,595,235.63.

8. The argument for the tenant, ably presented by Mr Tim Dutton QC, is that there is an ambiguity in the language of the lease which precludes the court from applying the literal meaning of paragraph 3.3. He argues that since the Base Figure of 193.1 is agreed to have been the base figure as at September 2005, what should be index-linked is the amount of rent that was payable at that date. That amount is £965,000 rather than £1.2 million. In order to avoid what he calls "chronological inconsistency" it is necessary to read paragraph 3.3 as if it required the indexation of £965,000 rather than the "Initial Rent" as defined.

9. We have been referred to the familiar decisions of the Supreme Court dealing with the principles of contractual interpretation, culminating (at least for the time being) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. I will not attempt to distil or paraphrase that learning. As Lord Hodge said at [9], the legal profession has sufficient judicial statements of that nature.

10. The first difficulty with Mr Dutton's argument is that the ambiguity on which he relies is not an ambiguity in the *language* of paragraph 3.3 as applied to the rent review. The meaning of the defined term "Initial Rent" is clear. Nor is it an ambiguity in the application of paragraph 3.3 for that purpose. That is the product of a simple arithmetical calculation. It is (at best) an ambiguity in the application of paragraph 3 to one of the alternative ways for the ascertainment of the Initial Rent, which in the event was not carried out. As Lord Neuberger put it in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [18]:

> "If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."

11. Second, if there is a relevant ambiguity, how is it to be resolved? It could be resolved by adapting paragraph 3 so as to make it applicable to the ascertainment of the Initial Rent, rather than by changing the multiplicand for the purposes of the rent review. Mr Dutton accepted that either was a possible approach.

12. At the heart of Mr Dutton's argument is the assertion that paragraph 3.3 overcompensates the landlord for changes in the value of money. Instead of taking the rent payable at the expiry of the Initial Lease as the multiplicand, paragraph 3.3 takes the Initial Rent under the new lease as the multiplicand, but then index-links it by reference to inflation since 2005 rather than by reference to inflation since 2010. He pointed out in his skeleton argument, by reference to the well-known decision of Browne-Wilkinson VC in *British Gas Corporation v Universities Superannuation Scheme Ltd* [1986] 1 WLR 398, 401, that the broad purpose of a rent review clause is to reflect changes in the value of money and real increases in the value of the property over a long term. That, however, is only of limited assistance to him, as he accepted orally. In the first place, the parties have excluded any increase in rent attributable to changes in the value of the property over the long term. Instead they have chosen index-linking alone. Second, that case was concerned with a conventional review to market rent; and it was in that context that the purpose of a rent review clause was described. Third, what was at issue in that case was the details of the assumptions to be made in connection with the hypothetical lease to be assumed for the purposes of the rent review.

13. Mr Dutton's interpretation entails the proposition that once the Initial Rent has been determined (by whatever means) it plays no part in the rent review process, except in so far as it acts as the "floor" below which the reviewed rent cannot drop. That seems to me to be a very improbable interpretation of the rent review clause. First, it would be highly

unusual for a rent review clause to operate by reference to a figure which does not feature in the lease in question and which bears no relation to the rent actually payable for the time being under the lease. Second, it sits unhappily with the instruction in the reddendum that what is to be reviewed is the Initial Rent (as defined), rather than a wholly extraneous figure. Third, and more fundamentally, it is in direct contradiction of the express instruction that the multiplicand is the Initial Rent. Where parties have gone to the trouble to define terms, it is all the more difficult to avoid giving effect to their chosen definition.

14. In short, I can see no relevant ambiguity in the application of paragraph 3 to the rent review process. Where the language of a contract is unambiguous, the court must apply it: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [23].

15. Mr Dutton also argued that even if the language of the clause was apparently unambiguous, the commercial background and the commercial consequences of the literal interpretation showed that something had gone wrong with the language of the clause. The decision of the House of Lords in *Chartbrook Ltd v Persimmons Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 showed that in those circumstances the court could correct the mistake as a matter of interpretation. What is necessary to bring this principle into play is (a) that it should be clear that something has gone with the language and (b) that it is clear what a reasonable person would have understood the parties to have meant: *Chartbrook* at [22] and [25]. The first problem with this argument is that if anything has gone wrong with the rent review provisions, as Mr Dutton suggests, it is a failure to think through the consequences of what the parties agreed, rather than any deficiencies in drafting. A failure of that kind cannot be solved by the process of interpretation: *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 at [24] (Carnwath LJ), [80] (Rix LJ); *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607, 142 Con LR 27 at [21] (Arden LJ); *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437, [2014] Pens LR 255 at [37] (Lewison LJ). The second is that the alleged error may not lie in the rent review provisions at all; but in the parties' expectation that paragraph 3 could be operated in fixing the Initial Rent under option (a).

16. Third, there is more than one possible solution to the alleged drafting error. One is the interpretation that Mr Dutton propounds. But another possible solution would have been to alter the Base Figure, so that it corresponded with the Index Figure at the start of the new lease. But that is not a solution for which Mr Dutton contends, and it would produce an outcome far less favourable to the tenant than his preferred interpretation. Yet another, which is a response to a different possible error, is the adaptation of paragraph 3 so as to make it applicable to the ascertainment of the Initial Rent. In those circumstances I do not think that it can be said that it is *clear* what a reasonable person would have understood the parties to have meant.

17. In addition to these points there is no way of knowing whether the sum of £965,000 was or was not the market rental value of the property in September 2005. What we do know is that the rent was reduced from its former level, and moreover was reduced in

circumstances in which changes to the lease in the tenant's favour were also agreed, and the tenant agreed to take the reversionary lease. It could well be that the reduction in rent was an inducement to persuade the tenant, in effect, to extend the term. If so, then index-linking that figure might well under-compensate the landlord.

18. One thing is clear: the parties entered into the reversionary lease knowing that the Initial Rent would be *at least* £1.2 million. The other alternatives would only be relevant if they produced higher figures. If those other alternatives had not been included in the lease, there could be no conceivable argument for not applying the contractual method of indexation to the figure of £1.2 million. I do not accept that the existence of the alternative possibilities for the Initial Rent alters the clarity of the contractual provision as applied to the rent review. The fact that a contract term was an imprudent one for a party to have agreed or that it has worked out badly or even disastrously is no warrant for departing from the clear language of the contract, especially when that contract has been professionally drafted: *Arnold v Britton* at [19] and [20]; *Wood v Capita* at [10] and [13].

19. Whether a claim in rectification would succeed is a different matter. But that is not a claim which is before the court.

20. In my judgment the judge was correct in his interpretation. I would dismiss the appeal.

Lord Justice Leggatt:

21. I agree.