IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND
CONSTRUCTION COURT

No. HT-2018-000048

[2018] EWHC 1851 (TCC)

Rolls House
7 Rolls Buildings
London
EC4A 1NL

Thursday, 26 April 2018

Before:

MR. A. WILLIAMSON QC,

sitting as a Deputy High Court Judge

B E T W E E N :

PREZZO LIMITED — Applicant

- and -

HIGH POINT ESTATES LTD — Respondent

MR. D. SHAPIRO (instructed by Kennedy's Law LLP) appeared on behalf of the Applicant.

MR. J. FIELD (instructed by DAC Beachcroft) appeared on behalf of the Respondent.

J U D G M E N T

MR. WILLIAMSON QC:

1 The defendant, High Point Estates Limited, whom I will refer to as “HPE”, was at all material times the freehold owner of a property known as Salisbury Buildings in Harrogate (which I will refer to as "the Building").

2 The claimant, whom I will refer to as "Prezzo", was at all material times the leasehold tenant of parts of the Building, namely the ground floor and the basement. I will refer to those as "the Premises". The Premises were held pursuant to a lease, made in 1996, which I will refer to as "the Lease".

3 On 18 March 2014, a fire occurred at the Premises, which caused damage both to the Premises and to the Building.

4 Prezzo seek a declaration in the form set out at paragraph 23 of the Particulars of Claim.

5 The context in which this issue arises is the well-known decision of the Court of Appeal in *Mark Rowlands v Berni Inns Ltd* [1986] 1 QB 211. That case established two important matters, on its own facts. First of all, at page 228E of the judgment of Kerr LJ, the court concluded that the insurance which had been affected in that case enured for the benefit of both the landlord and the tenant. Secondly, at page 232E ,the court held that, in those circumstances, the intention of the parties sensibly construed must therefore have been that in the event of damage by fire whether due to accident or negligence, the landlords' loss must be recouped from the insurance moneys and that, in that event, they were to have no further claim against the tenant for damages in negligence.

6 That decision and subsequent relevant authorities have been helpfully distilled in the judgment of Holgate J in the more recent decision of *Fresca-Judd v Golovina* [2016] 4 WLR 107 (QB). At paragraph 48 he said as follows:

> "In my judgment, the following principles may be derived from the authorities:-
> (1) The court should construe the terms of the tenancy agreement in order to determine how the parties have agreed to allocate risk between themselves;
>
> (2) A covenant by a landlord with his tenant to insure the demised premises in return for mutual obligations by the tenant is an important indicator that the parties intended that the tenant,
>
> (a) need not take out insurance for the risk covered by the landlord and,
> (b) would not be liable for any loss or damage suffered by the landlord falling within the scope of that which the landlord has agreed to cover;
>
> (3) The strength of that indicator will depend upon the other terms of the tenancy, including whether they provide some alternative explanation for the covenant to insure;
>
> (4) The strength of that indicator is greater where the tenant is contractually obliged to pay for, or to contribute towards, the cost incurred by the landlord of insuring the premises;
>
> (5) Other relevant indicators include terms of the tenancy which relieve the tenant

from repairing or other contractual obligation in the event of damage by an insured risk, or which require the landlord to lay out insurance monies on remedying damage caused by an insured risk, or which suspend the obligation to pay rent whilst damage from an insured risk prevents use of the demised premises. But the application of the principle in *Rowlands* does not depend upon the inclusion of all or any of these terms in the tenancy agreement;

(6) Where applicable the principle in *Rowlands* will defeat a claim brought against the tenant in negligence even in the absence of a clause expressly exonerating the tenant from liability for negligence.
I would add that *Woodfall's Law of Landlord and Tenant* also treats the covenants discussed in *Rowlands* as *factors* or *indicators* in deciding whether the court should infer that the parties' common intention was that the landlord would look to an insurance policy rather than the tenant for indemnification, rather than as prerequisites for drawing that conclusion (see paragraph 11-104)."

7 In the present case, the issues between the parties are whether:

1. HPE were obliged under the Lease to insure not only the Premises but also the Building and,

2. If so, whether this had the effect that it was impliedly agreed that Prezzo was not to be liable for any loss or damage suffered by HPE which fell within the scope of such insurance.

8 The background is that in 1964, a superior lease was entered into between Prudential Assurance Co Ltd and Dawson & Co Ltd for a lease of the "demised premises" as therein defined. Those premises have been referred to as "the Site" and I shall so refer to them. The Site included not only the Premises and the Building, but also a bridge and another building. I will refer to that lease as "the Superior Lease".

9 On 31 January 1996, Dawson & Co Ltd entered into the Lease with the Mansfield Brewery. That Lease was, in due course, assigned to HPE and Prezzo, the present parties.

10 Clause 4.2 of the Lease is, in my judgment, central to the issue which I have to decide. It provided that there was a covenant by HPE in favour of Prezzo:

"to insure the Premises in accordance with its obligations as lessee contained in clause 3(14) of the Superior Lease".

11 Clause 3.14 of the Superior Lease provided a covenant:

> "To insure and keep insured in the joint names of the Landlords and the Lessee the demised premises…against loss or damage by fire, flood, tempest, explosion, lightning and earthquake in The Prudential Assurance Company Limited…to the full reinstatement value thereof and pay all premiums necessary for that purpose…and to cause all moneys received by virtue of any such insurance to be forthwith laid out in rebuilding and reinstating the demised premises and to make up any deficiencies out of the Lessee's own moneys".

12 The key question, it seems to me, is what clause 4.2 required HPE to do.

13 On its face, the obligation was to insure the Premises as defined in the Lease. In accordance with paragraph 15 of the recent decision of the Supreme Court in *Arnold v Britton & Ors*

[2015] AC 1619, my principal concern is to construe those words. They are plain; the term, "the Premises" is a defined term in the Lease. It is not the same as the Building, also a defined term in the Lease. If the parties had intended to include the whole of the Building, they could and would have said so.

14 What then is the effect of the words, "in accordance with its obligations as lessee contained in clause 3(14) of the Superior Lease"?

15 On analysis, in my judgment, this is not a case of incorporation wholesale of terms from another contract as is envisaged by, for example, paragraph 3.10 of *Lewison on the Interpretation of Contracts*, or the decision of the Court of Appeal in *Tradigrain SA v King Diamond Shipping SA* [2000] 2 Lloyd's Rep. 319. I agree with the submission made on behalf of HPE that this is intended rather to indicate the standard and nature of the obligation which is contained in the first four words of clause 4.2.

16 Therefore, in my judgment, HPE were agreeing to insure the Premises only and to do so in accordance with their obligations in clause 3.14 of the Superior Lease. If one looks at clause 3.14, one can see that it contains a number of helpful indications as to the scope of the obligation. It defines:

1. What loss and damage is to be covered.
2. How that (or rather with whom) that insurance is to be effected.
3. That the insurance is to be for full reinstatement value and,
4. The question of premiums.

17 The words beginning, "in accordance with", do not, in my judgment, have the effect of converting the obligation upon HPE to insure the Premises into an obligation to insure the Building or even the Site.

18 Prezzo submit that it is to be so construed and they point to various other provisions of the Lease.

19 Clause 2.2 requires that Prezzo were to pay the Insurance Rent, which is a defined term. That definition sets out how the amount which is to be comprised in the Insurance Rent is to be calculated.

20 It seems to me that that is simply a formula for the calculation of insurance rent. It has no impact upon the primary obligation or the scope of the primary obligation of HPE to insure.

21 Clause 3.3.1 contains a repairing covenant upon Prezzo in relatively standard form. It is subject to an exception for "damage caused by such of the Insured Risks as the landlord is obliged to insure against in accordance with its covenants in the Superior Lease." The term, "Insured Risks" is also defined. In my judgment, that also has no impact on the scope of the obligation to insure under clause 4.2 for two reasons:

1. Clause 3.3.1 is concerned with damage to the Premises not to the Building.
2. The definition of "Insured Risks" is also concerned solely with the Premises and not with the Building.

22 The fact that the clause 4.2 obligation is limited to the Premises is reinforced, in my judgment, by the provisions of clause 3.19 which set out various covenants of Prezzo as the tenant, for example, clause 3.19.6 which prohibits the tenant from itself effecting insurance

in respect of the Premises. It seems to me that this provision is the logical corollary of HPE's obligation to insure the Premises and is intended to prevent double recovery.

23 As an alternative to what is very much its primary case under clause 4.2, Prezzo also relies on clause 4.4 of the Lease. Clause 4.4 contains a covenant on behalf of the landlord to pay the rent (effectively under the Superior Lease) and also, "to perform the covenants on the part of the lessee in the Superior Lease".

24 As to that obligation, I agree with HPE's submissions that this clause is not directed at their insuring obligation under the Lease, but to securing that this Superior Lease is not forfeited for whatever reason. It seems to me that HPE's insurance obligation is intended to be dealt with by clause 4.2 not by clause 4.4.

25 In any event, clause 4.4 is not a clause directed at the allocation of risk between HPE and Prezzo, which is the crucial issue for the purposes of the *Berni Inns* line of cases. It can scarcely have been the intention of the parties that Prezzo would not be liable for any loss or damage to any part of the Site, but that would be the logical consequence of Prezzo's submission in relation to clause 4.4.

26 I should say, for the sake of completeness, that the Superior Lease was surrendered in, I think, 1998. There was argument before me as to the effect of that surrender on the clause 4.4 obligation but it is not necessary for me to decide that point and so I do not do so.

27 I therefore conclude that HPE's obligations under clauses 4.2 and 4.4 do not extend to insuring against risk of damage to the Building.

28 It follows that HPE is not precluded from making claims against Prezzo with regard to loss and damage flowing from the fire.

29 I therefore decline to grant the declarations which have been requested.

CERTIFICATE

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