



Neutral Citation Number: [2018] EWHC 3776 (Admin)

Case No: CO/811/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPEAL BY CASE STATED
FROM GREATER MANCHESTER MAGISTRATES' COURT

Civil Justice Centre,
1 Bridge Street West
Manchester M60 9DJ

Date: 30/10/2018

Before :

MR JUSTICE KERR

Between :

STOCKPORT METROPOLITAN BOROUGH COUNCIL **Appellant**

- and -

PUNJ LLOYD LIMITED **Respondent**

Mr Mark Cawson QC (instructed by **Stockport Metropolitan Borough Council**) for the **Appellant**

Ms Andy Creer (instructed by **Charles Mia Solicitors**) for the **Respondent**

Hearing date: 30th October 2018

Approved Judgment

Mr Justice Kerr:

Introduction:

1. In this appeal by case stated from the Greater Manchester Magistrates' Court, I have to decide whether a district judge was right to turn down a claim for non-domestic rates (NDR) by the appellant (the council).
2. The council sought to levy NDR from the respondent company (PLL) from 14 August 2013 to 31 March 2017 in respect of two "hereditaments" at Sim-Chem House in Cheadle Hulme, which together can be referred to as "the property". The amount in dispute is approximately £792,000.

Facts:

3. In April 2000, an underlease in respect of the property (the 2000 underlease) was entered into between Simon Group plc and Simon-Carves Limited (SCL) whereby the two hereditaments at the property were demised to SCL for 21 years from 12 April 2000. In 2005, Padwick Properties Limited (Padwick) acquired the reversion immediately expectant upon the 2000 underlease.
4. On 19 July 2006, a deed of guarantee (the guarantee) was entered into between Padwick, SCL and the respondent, PLL. Clause 3 of the guarantee set out the "Guarantor's covenants". The guarantor was PLL. SCL was the tenant and Padwick was the landlord.
5. By clause 3, PLL as guarantor covenanted to observe the terms contained in schedule 1 to the guarantee. Those included paragraph 1.2 in the following terms:

"That in case of default in such payment of rents or other monies or observance or performance of any of those covenants and conditions during the Term the Guarantor shall pay and make good to the Landlord on demand such default and shall indemnify the Landlord on demand against all losses, damages, costs and expenses thereby arising or incurred by the Landlord".
6. Paragraph 2 of schedule 1 contained a further covenant, as follows:

"That if the Lease is disclaimed or the tenant otherwise ceases to be liable on its covenants in the Lease or to exist ('Event'), the Landlord may within six months after the Event by notice require the Guarantor to accept from the Landlord a new lease of the Premises

 - 2.1 for a term equivalent to the residue which would have remained of the Term if there had been no Event,
 - ...
 - 2.3 subject to the like covenants and conditions as are contained in the Lease, the new lease and rights and liabilities under it to take effect commencing on the date of the Event; and

2.4 the Guarantor shall pay the Landlord's reasonable costs incurred by the Landlord in connection with the new lease and the Guarantor shall accept the new lease accordingly and shall execute and deliver to the Landlord a counterpart thereof".

7. The tenant, SCL, went into administration in July 2011. Its business and assets were sold to a company called Simon Carves Engineering Limited, which was granted a licence to occupy the property by the administrators of SCL. SCL itself vacated the property in September 2011.
8. In the same month, solicitors for the administrators of SCL wrote to Padwick's solicitors saying that SCL had vacated and had no further responsibility for the rent and other obligations under the 2000 underlease.
9. In November 2011, the administrators returned the keys of the property to Padwick and purported to surrender the 2000 underlease. Padwick took steps to secure the property and market it but did not accept any surrender. The property then remained vacant and unoccupied save for Padwick's limited steps to secure and attempt to market it. Padwick did not enter into possession of the property.
10. On 27 February 2013, SCL went into liquidation. On 14 August 2013, the liquidators of SCL disclaimed the 2000 underlease pursuant to section 178 of the Insolvency Act 1986.
11. The effect of that disclaimer is provided for by section 178(4) which provides:

"A disclaimer under this section—

 - (a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed; but
 - (b) does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."
12. On 19 December 2013, Padwick's solicitors gave notice to PLL in accordance with paragraph 2 of schedule 1 to the guarantee, requiring PLL to enter into a new underlease of the property. It is common ground that the 2000 underlease had ceased to have effect on its disclaimer by the liquidators of SCL. Padwick's solicitors also demanded payment of monies due under the 2000 underlease that had fallen due prior to the disclaimer.
13. On 15 April 2014, Padwick commenced proceedings against PLL seeking an order for specific performance of the latter's obligation to enter into a new underlease in the performance of its covenant as guarantor under the guarantee and seeking to recover arrears of rent from PLL. Those proceedings were contested by PLL which asserted that it had surrendered the 2000 underlease as long ago as November 2011. That action came before His Honour Judge Keyser QC, sitting as a judge of the High Court.
14. He gave judgment in March 2016, in favour of Padwick and against PLL. He decided that Padwick had not done any acts consistent with acceptance of surrender of the 2000 underlease; and that the 2000 underlease had not been validly

surrendered by PLL which, therefore, was obliged to take a new underlease of the property and to discharge the then outstanding arrears of rent.

15. The judge also made an order granting specific performance of PLL's obligation to take a new underlease of the property and required PLL to execute that document not later than 23 March 2016, failing which it would be executed instead by the court. Finally, he gave judgment in favour of Padwick in respect of its monetary claim for arrears.
16. PLL did not comply with Judge Keyser's order and accordingly Master Bowles on 21 April 2016 executed a new underlease of the property between Padwick and PLL, in accordance with the judge's order. Clause 2 of that new underlease provided that the property was demised to the tenant, PLL:

 "... from and including 14th August 2013 for a term expiring on (but including) 11th April 2021... ."
17. Thus, the demise contained in the new underlease included backdating of its effect to 14 August 2013. That, as I have said, was the date on which the liquidators of SCL had disclaimed the 2000 underlease. In argument before the learned district judge below, particular reliance was placed by the council on that backdating provision.
18. The council, in its capacity as rating authority for the purposes of NDR, issued demand notices in respect of the two hereditaments at the property. At first, the target of its demands was Padwick. In August 2016, however, the council obtained a copy of His Honour Judge Keyser QC's judgment. After considering that judgment, it ceased pursuing Padwick for NDR and turned its attention to pursuit of PLL.
19. The council proceeded in February 2017 to issue demand notices in respect of the two hereditaments at the property for the financial year 2013-14 starting on 14 August 2013, the date of disclaimer of the 2000 underlease; and for the whole of the financial years 2014-15 and 2015-16. The sums demanded are those that were in issue before the district judge and, subject to one qualification, remain in issue before me in this appeal.
20. The demand notices were not complied with and the council sought liability orders. That matter came before the Greater Manchester Magistrates' Court and eventually the relevant summonses were heard and determined by District Judge Goozée in the Greater Manchester Magistrates' Court on 14 September 2017. He heard submissions from Mr Whitfield of counsel, then appearing for the council, and from Ms Creer, appearing then and now for PLL.
21. The district judge gave a reserved judgment on 20 November 2017. He held that PLL's liability for NDR arose only as from 21 April 2016, the date on which the new underlease was executed by Master Bowles. He also decided a second issue which was, broadly, whether the council had exercised due diligence in its pursuit of PLL. It is common ground that absent such due diligence, a local authority

acting in a rating capacity can disentitle itself from collecting NDR. The district judge decided that issue in favour of the council and that ruling has not been challenged in this appeal.

22. The district judge stated as follows in the course of his judgment:

“39. Upon the disclaimer of the underlease, I find the leasehold estate ceased to exist .. and reversion accelerated. After disclaimer, the landlord, Padwick...had the right to immediate possession.

40. [PLL]...as guarantor had no such right to immediate possession. However, they had contractual liabilities under the deed of guarantee. Padwick...called for release under the Deed of Guarantee. ... They were also obliged under the terms of the Guarantee to pay rents or other monies on demand and indemni[f]y [the landlord] on demand...I find the lease when executed gave [PLL] an immediate right to possession from that date”.

23. He rejected the notion of any “retrospective rights to immediate possession of the hereditaments” (paragraph 41) and decided, as I have said, that PLL’s immediate right to possession arose only from 21 April 2016. He therefore dismissed the applications for liability orders in respect of previous financial years and was prepared to make a liability order only in respect of the period from 21 April 2016 onwards.

24. The district judge was asked by the council to state a case, however. After some correspondence and suggestions in the usual way, he did so. In the case stated he asked the opinion of this court on the following three questions:

“Q1. Was I correct to find as I did that [PLL] was not the owner of the hereditaments, being a person entitled to immediate possession, until the replacement lease was executed by the High Court on 21st April 2016?

Q2. Was I correct to find as I did that [PLL] was the owner of the hereditaments in accordance with s.65 LGFA 1988 and therefore liable for Non-Domestic Rates only from 21st April 2016?

Q3. Was the [council’s] submission correct and wrongly rejected by me, namely that [PLL] was the owner of the hereditaments and entitled to possession by reason of the back-dating of the replacement lease to 14th August 2013, and that [PLL] should not benefit from its own wrongdoing by the delay in complying with its obligations under the Deed of Guarantee?”

25. The council then appealed to this court.

Law:

26. By section 45 of the Local Government Finance Act 1988:

“(1) A person (the ratepayer) shall as regards a hereditament be subject to a non-domestic rate in respect of a chargeable financial year if the following conditions are fulfilled in respect of any day in the year—

- (a) on the day none of the hereditament is occupied,
 - (b) on the day the ratepayer is the owner of the whole of the hereditament,
 - (c) the hereditament is shown for the day in a local non-domestic rating list in force for the year, and
 - (d) on the day the hereditament falls within a class prescribed by the Secretary of State by regulations.
- (2) In such a case the ratepayer shall be liable to pay an amount calculated by—
- (a) finding the chargeable amount for each chargeable day, and
 - (b) aggregating the amounts found under paragraph (a) above.
- (3) A chargeable day is one which falls within the financial year and in respect of which the conditions mentioned in subsection (1) above are fulfilled.
-”

27. By section 65(1) of the 1988 Act:

“The owner of a hereditament or land is the person entitled to possession of it”.

28. It is agreed in this appeal that the words “entitled to possession” in section 65(1) bear the meaning that the person concerned must be immediately entitled to possession. In *Brown v City of London Corporation* [1996] 1 WLR 1070, Arden J, as she then was, so held. She had to decide among other things whether receivers of certain property were entitled to possession of it for the purposes of section 65(1). She held that they were not.

29. Simplifying the facts, debenture charges were held by a chargee over certain properties owned and occupied by the chargors. The chargors were indebted to the chargee and defaulted, whereupon the chargee appointed receivers who became, in accordance with the debentures, agents of the chargors. The first issue was whether the receivers were entitled to possession. The judge accepted a submission that the person entitled to possession:

“requires one to identify the person who has the immediate legal right to actual physical possession, albeit that such person ex hypothesi will not be in actual physical occupation of the property” (1080F).

30. She accepted a further submission that the appointment of the receivers and performance of their functions as agents of the chargors did not displace the chargors’ entitlement to possession and that (see at 1081H):

“[o]ne has to identify who, at the relevant time, had the immediate entitlement to possession; i.e. the immediate legal right to possession. It is not relevant to enquire who, if they exercised a particular right or power, would have such entitlement, in circumstances where they have not yet done so... .”

31. Accepting those submissions, she concluded at 1082H:

“As there cannot in general at least be two persons in different capacities in possession at the same time ... it must follow ... that a person is entitled to possession for the purposes of section 65(1) of the Act of 1988 only if he is immediately entitled to possession. It is not enough that a person has a right which if exercised would result in his having possession... .”

Issues, Reasoning and Conclusions:

32. Through the able submissions of Mr Mark Cawson QC, the council advanced the following main arguments.

- (1) The effect of disclaimer of the underlease was to terminate the same entirely (see *Schroder Exempt Property Unit Trust v Birmingham City Council* [2014] EWHC 2207 (Admin) per Hickinbottom J, as he then was, at [17] and following).
- (2) On that occurrence, a lessee or sub-lessee will cease to be the owner for rating purposes and will no longer be entitled to possession. Generally, the owner of the reversion immediately expectant on determination of the lease or underlease will become the “owner” for the purposes of section 45 and 65 of the 1988 Act.
- (3) By section 178(4)(b) of the 1986 Act, any guarantor or surety is not thereby released from contractual obligations to make good defaults of the former tenant” (see *ibid* per Hickinbottom J at [21]).
- (4) By serving notice on PLL on 19 December 2013, requiring the latter to take a new underlease, Padwick created on the part of PLL a specifically enforceable obligation to do so; cf. *Re a Company No. 00792 of 1992, ex p. Tredegar Enterprises Limited* [1992] 2 EGLR 39; Emmet & Farrand on Title at 26.236.
- (5) The creation of such a specifically enforceable obligation to take a new underlease, as occurred in this case, gives rise to a lease in equity at the time when the specifically enforceable obligation is created.
- (6) In accordance with the principle in *Walsh v Lonsdale* (1882) 21 Ch D 9, this can be regarded as a straightforward application of the maxim that equity looks on as done that which ought to be done. He referred me to the commentary on that maxim in Snell’s Equity 33rd edition at 5-015, citing among other cases in the footnotes, *Walsh v Lonsdale*.
- (7) The district judge had been wrong to decide that PLL became entitled to possession of the property only on execution of the new underlease. He contended that the judge had placed unwarranted reliance on a passage in Woodfall on Landlord and Tenant in volume 1 at paragraph 5.069, to which I was referred.

- (8) Reference was made in that passage to four cases dealing with the issue of duration of a lease, in all of which the duration had been held (for certain different purposes at issue in those cases) to be measured as prospectively only and not retrospectively. The four cases are *Shaw v Kay* (1847) 1 Ex 412; *Jervis v Tomkinson* (1856) 1 H&N 195; *Cadogan (Earl) v Guinness* [1936] Ch 515; and *Roberts v Church Commissioners for England* [1972] 1 QB 278, CA. Mr Cawson argued that those cases were not in point and did not deal with the creation of an equitable lease arising from the learning derived from *Walsh v Lonsdale*.
- (9) In oral argument, he submitted further that *Brown* and *Schroder* were both cases in which inchoate or contingent rights to possession had existed but had never crystallised; whereas in the present case, by contrast, PLL's right to possession had crystallised because Padwick had served notice on it, thereby triggering the creation of an equitable lease with PLL as tenant. He said that it made no difference that PLL subsequently ran an unsuccessful defence of surrender in the proceedings that came before Judge Keyser. That defence was shown to be bad in 2016 but, said Mr Cawson, PLL had become immediately "entitled to possession" from 19 December 2013.
- (10) He accepted in oral argument that a court in a rating case such as this does not sit as a court of morals and that it is not apt to speak, as the district judge did in his third question, of a party not being permitted to take advantage of its own wrong. He submitted rather that the policy underlying the "entitlement to possession" provision in section 65(1) is that the party who is able to exploit the land in question commercially should be the party liable under section 65(1).
33. For PLL, Ms Andy Creer made the following main submissions. As a preliminary point, she submitted that in the proceedings before the district judge below, the council had not contended for an equitable lease as it now does and thus had not argued below the point of law now relied upon, namely that an equitable lease was created on service by Padwick of the notice on 19 December 2013. This was, she said, a new point taken for the first time in this appeal.
34. She submitted that had that argument been run below, the district judge might have decided differently the point he decided in the council's favour which is not before me in this appeal, namely whether the council had, broadly, exercised due diligence in its pursuit of PLL rather than Padwick (the due diligence issue). On that issue, Ms Creer pointed out that the council's witness in the magistrates' court, Mr Long, gave evidence in a witness statement that the council had received a copy of the disclaimer of the 2000 underlease at some point as far back as 2014.
35. This raises the possibility that in the exercise of my powers under section 28A of the Senior Courts Act 1981 and Part 52 of the Civil Procedure Rules, I could if necessary remit the due diligence issue to the magistrates' court. I shall return to that point shortly.
36. On turning to the substantive issue in the appeal, Ms Creer's main submissions were to the following effect.

- (1) The doctrine embodied in *Walsh v Lonsdale* was not in point. That case, she argued, decided only that a tenant holding under a contract for the lease enforceable by specific performance, holds under the same terms in equity as if the lease had been executed. It was unlikely that the decision embodied more than a principle of estoppel precluding the tenant from denying the agreed terms of occupation. She pointed out that in *Walsh v Lonsdale* the tenant had entered into possession, unlike in the present case. The case decided nothing about the effect of any equitable leases against third parties.
 - (2) The *Tredegart Enterprises Limited* case is distinguishable; there, the surety seeking by injunction to defeat a winding up petition had exercised rights of possession by allowing a third party into occupation of the premises and had paid rent initially, before defaulting. The case decided nothing about whether the surety would have had an immediate right to possession as a matter of property law or for the purposes of liability under the 1988 Act.
 - (3) Thus, submitted Ms Creer, in the cases relied on by the council the tenant had already entered into possession, unlike the present case. She defended the reasoning and conclusion of the district judge and pointed out, as he did, that if (as is likely) Padwick is the party liable for NDR in respect of the property for the financial years in question until 21 April 2016, Padwick probably had a remedy over against PLL under the original 2000 underlease and the guarantee; so no injustice arose from accepting PLL's case.
37. I come to my reasoning and conclusions. First, it seems to me that I should entertain and decide the issue that arise from the first two questions in the case stated, namely, whether PLL had an immediate right to possession of the property from 19 December 2013 onwards and not just from 21 April 2016 onwards, as the judge decided.
38. There was no cross-appeal by PLL in respect of the finding in favour of the council by the District Judge on the due diligence issue. The skeleton argument of Ms. Creer, served 10 days after that of the council, did not state what this court was asked to do about the due diligence issue, given the potential impact on that issue below of the change to the way the argument for the council is being run. She did not in her skeleton argument in terms contend that the "entitled to possession" issue under section 65(1) was not open to the council.
39. It seems to me in those circumstances, and without any criticism of Ms Creer, whose stance appears to me to be sensible, that the right course is to decide the "entitled to possession" issue and then to consider, if necessary, whether to exercise my powers to remit the due diligence issue back to the magistrates' court should fairness so require.
40. I, therefore, turn to the "entitled to possession" issue. The first point is that the liability orders that were sought included liability in respect of the period from 14 August 2013 down to 18 December 2013, that is to say, the period before Padwick served notice on PLL requiring the latter to take a new underlease. It is clear to me that it cannot be said in respect of each day during that period that "on the day" (in

the words of section 45(1)(b)) PLL was the “owner” of the hereditaments. Mr Cawson did not contend that PLL had an immediate entitlement to possession until 19 December 2013.

41. Secondly, I consider the period from 19 December 2013, the date the notice was served, onwards. The issue was whether PLL was the “owner”, i.e. “the person entitled to possession” of the property within section 65(1) from 19 December 2013 onwards, or only, as the district judge found, from 21 April 2016 onwards when Master Bowles executed the new lease.
42. The essence of the case for the council, as I have said, is founded on the equitable principle derived from *Walsh v Lonsdale*. However, I have come to the conclusion after careful reflection that the learning derived from that case and applied since in various other contexts and cases, cannot be applied here. I reach that conclusion for the following brief reasons.
43. The first reason is this. It is clear from the judgment of Arden J (as she then was) in *Brown* that there cannot, at any rate in any normal case of which this is one (and leaving aside joint ownership by e.g. a couple living together) be more than one “owner” entitled to possession. It must follow that in the present case it would have to be shown that from 19 December 2013 onwards, Padwick ceased to have itself any immediate right to possession of the property. If Padwick retained an entitlement to immediate possession after service of the notice, it is most unlikely that PLL could be so entitled at the same time.
44. In this case, Padwick was careful not to enter into possession of the property. As the judgment of HHJ Keyser QC shows, Padwick avoided doing anything that would amount to accepting a surrender of the 2000 underlease. Padwick limited its forays into the property to those consistent with its rights as a landlord out of possession and not as an owner in possession. As Judge Keyser said in his judgment at [58]: “Padwick was in a position to take possession whenever it chose to do so”, but had “chosen not to do so”.
45. The judge was there dealing with the situation before and not after service of the notice on 19 December 2013. But in my judgment, Padwick’s entitlement to possession persisted after 19 December 2013 also. It seems to me that the reality of the situation was as follows. PLL had an obligation from December 2013 to take a new underlease and that obligation remained unperformed. Not having performed that obligation, PLL would have been unable to oust Padwick from the property if Padwick had gone into possession after December 2013, unless and until PLL were to perform its obligation to take a new underlease, which it did not do.
46. I hold that after service of the notice on 19 December 2013, Padwick remained entitled to immediate possession pending the obtaining of an order for specific performance by PLL of its obligation to take a new underlease. I reject the proposition that had Padwick gone into possession after 19 December 2013 and absent any order for specific performance, it would have done so as a trespasser because of the existence of an equitable lease from that date in favour of PLL. The latter would not have been able to assert an equitable lease to stop Padwick from

going into possession, because it, PLL, would receive no assistance from equity, being itself in breach of its obligation to execute a new lease.

47. I think the council's argument seeks to stretch the principle in *Walsh v Lonsdale* too far. It is not apt to be invoked by a landlord seeking to deny its own right to possession in favour of a tenant's for the purposes of statutory rating provisions. The notion that PLL should not profit in rating law from its own wrongdoing, the proposition mentioned in the district judge's third question, is misplaced in the rating jurisdiction where, as has been said a number of times, the court is not a court of morals; see, e.g. *R (Principled Offside Logistics Limited) v Trafford Council* [2018] EWHC 1687 (Admin) at [118] and the citations, earlier in the judgment, of HHJ Hodge QC's decision in *Rosendale Borough Council v Hurstwood Properties Limited* [2017] EWHC 3461 (Ch) and of Norris J's decision in *Re PAG Management Services Limited* [2015] EWHC 2404 (Ch), [2015] BCC 720.
48. As for Mr Cawson's point that the policy underlying section 65(1) of the 1988 Act is that the party able to exploit the land should be the party liable to pay NDR in respect of it, the answer is that it prompts but does not answer the question which is the party able to exploit the land. If, as I hold, PLL was not in a position to rely on an equitable lease, being unwilling to execute a legal one, that party here was Padwick and not PLL.
49. The closest analogy here, I therefore consider, is a case such as *Brown* where the receivers were not entitled to immediate possession because their right to possession was inchoate and never crystallised. Steps remained to be taken before the entitlement to immediate possession arose. Similarly, in the present case, the obtaining of an order for specific performance was a necessary step that needed to be taken by Padwick in order to transfer forcibly its immediate entitlement to possession of the property and thereby offload on to PLL its liability to pay NDR in respect of the property.
50. I bear in mind that specific performance is a discretionary remedy. Padwick could not, until Judge Keyser's judgment and order, be sure that it would be able to persuade the court to grant that remedy on the particular facts, even though it was clearly in principle available once it was understood that the defence of surrender was bad.
51. Other factors might have dissuaded the court from granting the remedy; for example, a late payment of arrears or evidence of a willing third party tenant could at least in principle have induced the judge to withhold the remedy of specific performance and award damages under Lord Cairns' Act instead. You can never be sure you are going to get specific performance until you have got it.
52. For those reasons, I consider that the district judge was correct to decide the "entitlement to possession issue" in the way he did. It is, therefore, unnecessary to consider further the due diligence issue and any question of remitting the matter back to the magistrates' court.
53. In accordance with my reasoning and conclusions, I answer the three questions asked by the district judge respectively yes, yes and no, and I dismiss the appeal.

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