[2017] UKUT 377 (TCC)

Appeal number: UT/2016/0143

Landlord and tenant - forfeiture - long lease - ground rent - sections 166 and 167 Commonhold and Leasehold Reform Act 2002

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHEERUPMATE2 LIMITED **Appellant**

- and -

FRANCO DE LUCA CALCE **Respondent**

TRIBUNAL: JUDGE ELIZABETH COOKE

1. The Appellant, Cheerupmate2 Ltd, is the landlord of the Respondent, Mr Calce. It claims to have brought the Respondent's under lease to an end by forfeiture for arrears of ground rent. On 25 July 2016 Judge Michell in the Land Registration Division of the First-tier Tribunal ("the FTT") decided that no forfeiture had taken place, and the Appellant appeals that decision.
2. Permission to appeal was refused by Judge Michell, and by HHJ Behrens in the Upper Tribunal on the papers, but was granted by HHJ Purle QC on 20 March 2017 after an oral hearing. I heard the appeal in Manchester on 4 September 2017. Mr Ahmed Hosny represented the Appellant; he is one of its employees. Mrs Simeone spoke for the Respondent. Neither party objected to the other's representation. Although neither party had legal representation both submitted helpful skeleton arguments; I am grateful to both for their assistance, and particularly to Mr Hosny for exploring the legal points with me. On 8 September 2017 the Applicant sent a brief further submission by email, the contents of which I note but which added nothing to the arguments raised by Mr Hosny at the hearing.
3. In the paragraphs that follow I set out the factual and legal background to the appeal, and then explain the three issues in the appeal, and finally the arguments on each issue and the reasons why the appeal fails.

The factual and legal background to the appeal

The Landlord and the Tenant

4. The land to which this appeal relates is to the north of 2 Railway Bank, Hyde. The Appellant holds a long lease of the land, registered at HM Land Registry under title number GM221765. The Respondent holds an underlease, granted out of that lease in 1948 for a term of 900 years, registered at HM Land Registry under title number GM10548. The Appellant is therefore the Respondent's landlord and I refer to the parties as the Landord and Tenant respectively, and to the Tenant's underlease as "the Underlease".
5. The Landlord acquired its lease on 4 March 2015. It applied for registration as proprietor of that lease and was registered at the end of March, but the registration was back-dated to 9 March 2015 – no doubt by back-dating to the date of the application as is usual. So it has been the registered proprietor of its lease since 9 March 2015 although that registration was not visible on the register at that date.
6. The Tenant acquired the Underlease in 1997.

Payment of rent under the Underlease

7. The Underlease reserves a ground rent of £2 per year, payable half-yearly on 15 March and 29 September in each year.
8. Section 48 of the Landlord and Tenant Act 1987 provides:

> (1) A landlord of premises to which this Part applies shall by notice furnish the tenant with an address in England and Wales at which notices (including notices in proceedings) may be served on him by the tenant.
>
> (2) Where a landlord of any such premises fails to comply with subsection (1), any rent or service charge otherwise due from the tenant to the landlord shall … be treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does comply with that subsection.

9. It is not in dispute that that section applies to the premises let by the Underlease.

10. Section 166 of the Commonhold and Leasehold Reform Act 2002 restricts the obligation of a tenant under a long lease of a dwelling to pay rent by providing that a notice complying with the terms of the section ("a section 166 notice") must be served before the tenant has to pay:

> (1) A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice.
>
> (2) The notice must specify—
>
> (a) the amount of the payment,
>
> (b) the date on which the tenant is liable to make it, and
>
> (c) if different from that date, the date on which he would have been liable to make it in accordance with the lease,
>
> and shall contain any such further information as may be prescribed.
>
> (3) The date on which the tenant is liable to make the payment must not be—
>
> (a) either less than 30 days or more than 60 days after the day on which the notice is given, or
>
> (b) before that on which he would have been liable to make it in accordance with the lease.
>
> (4) If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment of rent have effect accordingly.
>
> (5) The notice—
>
> (a) must be in the prescribed form, and
>
> (b) may be sent by post.
>
> …
>
> (9) In this section—
>
> "dwelling" has the same meaning as in the 1985 Act,
>
> "landlord" and "tenant" have the same meanings as in Chapter 1 of this Part,
>
> "long lease" has the meaning given by sections 76 and 77 of this Act, and
>
> "prescribed" means prescribed by regulations made by the appropriate national authority.

11. In the words of Arnold J in *Chasewood Park Residents Association v Kim,* [2010] EWHC 579(Ch) at paragraph 41, compliance with section 166 is "a condition precedent to the tenant's liability for ground rent under a long lease".
12. There is no dwelling on the land let by the Underlease. But it describes the demised premises as a dwellinghouse and the parties both accept that section 166 applies to the Underlease.

13. A section 166 notice must be in the prescribed form (section 166(5)), and the form is prescribed by regulations (section 166(9)). Those regulations are the Landlord and Tenant (Notice of Rent) (England) Regulations 2004, which provide (at regulation 100) that a section 166 notice must be in the form set out in the Schedule to those regulations. The Schedule sets out the form of the notice including some notes to leaseholders, one of which was amended on 26 April 2011. Before the 2011 amendment the notice had to include the words:

> "Section 167 of the Commonhold and Leasehold Reform Act 2002 and regulations made under it prevent your landlord from forfeiting your lease for non-payment of rent, service charges or administration charges (or a combination of them) if the amount owed is £350 or less, or none of the unpaid amount has been outstanding for more than three years."

14. Since 2011 the prescribed words are, instead:

> "Section 167 of the Commonhold and Leasehold Reform Act 2002 and regulations made under it prevent your landlord from forfeiting your lease for non-payment of rent, service charges or administration charges (or a combination of them) unless the amount owed is more than £350, or consists of, or includes, an amount that has been outstanding for more than three years

15. On 12 March 2015 the Landlord sent a letter to the Tenant informing him that it was his new landlord, complying with section 48 of the Landlord and Tenant Act 1987; enclosed with the letter was a notice, intended to be a section 166 notice, in respect of unpaid ground rent from 25 March 2010 up to and including the £1 due on 25 March 2015, amounting in total to £11, to be paid on 20 April 2015. The Tenant did not make that payment.

Forfeiture for non-payment of rent

16. On 21 April the Landlord entered the land let by the Underlease and secured it; the Landlord says that it has forfeited the Underlease by peaceable re-entry for non-payment of ground rent.
17. Clause 3 of the Underlease authorises the landlord to forfeit the lease for non-payment of rent:

> "in case the said rent hereby reserved or any part thereof shall at any time or times …. be in arrear for the space of two years after the same shall have become due (whether any formal or legal demand thereof shall have been made or not…"

18. Section 167 of the Commonhold and Leasehold Reform Act 2002 restricts the power of a landlord to forfeit a lease for non-payment of rent by providing that there can be forfeiture only if either the arrears exceed a particular amount (currently £350) or the rent has been in arrears for more than three years:

> (1) A landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) ("the unpaid amount") unless the unpaid amount—
>
> (a) exceeds the prescribed sum, or
>
> (b) consists of or includes an amount which has been payable for more than a prescribed period.

19. Again, there is no dispute that the Underlease is a long lease of a dwelling for the purposes of this section.
20. Accordingly for the Tenant to be liable to pay rent to the Landlord the rent must have been demanded in a section 166 notice. And for the Landlord to be able to forfeit the lease for non-payment of ground rent in this case the Tenant must have incurred arrears of £350 or have been in arrears for more than three years.
21. That simple statement hides some complexity which I shall have to explore.
22. After taking possession of the land the Landlord applied on the same day, 21 April 2015, to HM Land Registry to close the Tenant's leasehold title on the grounds that the Underlease had been forfeited. The Tenant objected, and the dispute was referred to the FTT. Judge Michell's decision was that the purported forfeiture was not valid, and that is the decision the Landlord appeals.

The issues on this appeal

23. Judge Michell found that there had been no effective forfeiture – and therefore that the Underlease continues to be in existence – for three reasons.
24. First, he held that the section 166 notice was not valid.
25. Second, he held that the re-entry on 21 April 2015 fell foul of the forfeiture clause in the Underlease; he held that the two years referred to in clause 3 runs from the date specified by the section 166 notice when the rent became payable and not from the date on which it was due according to the lease.
26. Third, he held that the period of three years referred to by section 167(1)(b) of the Commonhold and Leasehold Reform Act 2002 runs from the date specified in the section 166 notice and not from the date on which it was due according to the Underlease.
27. Each of those reasons was sufficient in itself to invalidate the forfeiture; therefore in order for its appeal to be successful the Landlord must succeed on all three grounds. In giving permission to appeal HHJ Purle pointed this out, and observed that the Landlord would have a difficult task particularly on the second and third issues above. I now consider the three issues in turn.

The wording of the section 166 notice

28. The section 166 notice consisted of a printed form with handwritten additions. The defect in the notice, which Judge Michell found to invalidate it, was that one of the notes to the leaseholder was in an out-of-date format because it followed the pre-amendment wording. I have set out above (paragraphs 13 and 14) the old prescribed wording and the current wording. It will be seen that the meaning of the two notes is identical but that the modern form of words avoids the double negative and is therefore much clearer.
29. In refusing permission to appeal on the papers HHJ Behrens QC said that he would have granted leave on the first ground; he refused permission because he regarded the Landlord's case as unarguable on the second and third points. In giving permission to appeal after the oral hearing HHJ Purle granted permission to appeal because:

> "the departures from the prescribed form may not have invalidated the notice. That conclusion seems to be supported by the observations of the Court of Appeal (in the context of a different prescribed form but also in the field of landlord and tenant) deprecating disfiguring technicalities in this area: *Lindsey*

Trading Properties Inc v Dallhold Estates (UK) Pty Ltd (1995) 70 P & CR 332, especially per Peter Gibson LJ."

30. I have to decide whether the defect in the section 166 notice was sufficient to invalidate it, as Judge Michell found it was.
31. Technical defects in notices should not invalidate them where their meaning remains clear; that is the reasoning behind decisions about notices under section 48 of the Landlord and Tenant Act 1987, in particular *Lindsey Trading Properties Inc v Dallhold Estates (UK) Pty Ltd*, mentioned above, and *Rogan v Woodfield Building Services Ltd* [1994] EGCS 145. Where the tenant was not misled and had all the information it needed, the Landlord was found to have complied with the section.
32. However, in this case the defect was the use of wording which Parliament has specifically decided should not be used. The wording was part of the explanatory notes for the leaseholder rather than the notice itself, but that does not assist the Landlord – the notes for the Tenant are an important element in the notice and are the subject of the regulations that prescribe the form of the notice. The pre-2011 wording with its double negative is difficult to understand – in particular, it is difficult to understand whether the two limbs of the prohibition are complementary or alternative (does the amount have to be over £350 *and* in arrears for three years, or is it an either/or?). The amended wording is much clearer. For that reason I find that in this case the section 166 notice was invalid. It was not sufficiently clear for the Tenant to understand the position.
33. That disposes of the appeal; there is no need for a decision on the other two points because even if the Landlord were right about them the forfeiture was invalid, because the Tenant was under no obligation to pay the arrears for which the Landlord claimed to be forfeiting. But it is obviously appropriate for me to address all three issues and I do so.

The effect of section 166(4) of the Commonhold and Leasehold Reform Act 2002

34. I noted above that the forfeiture clause in the Underlease allows the landlord to forfeit for rent that has been in arrears for two years or more. Section 166(4) of the Commonhold and Leasehold Reform Act 2002 states:

> "If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment of rent have effect accordingly."

35. Judge Michell found, at paragraph 20 of his decision, that the effect of this provision was that clause 3 of the Underlease took effect accordingly; in other words that the Underlease could not be forfeited for arrears of ground rent until two years after the date for payment set by the section 166 notice (in this case, therefore, for until 20 April 2017).
36. Mr Hosny argued that sub-section (4) simply means that arrears cannot be recovered until a section 166 notice has been served. But sub-section 4 with its clear reference to non-payment and late payment goes further than that. Its effect is to modify not only the provisions of a lease about payment, but also its provisions about non-payment – of which forfeiture is a clear example.
37. Mr Hosny argued that the sub-section contained a contradiction, but I disagree. The sub-section contrasts the date when rent would have been payable, but for section

166, with the date on which it is payable, and ensures that provisions for late payment in the Underlease take effect on the basis that rent is not unpaid while a section 166 notice has not been served.

38. HHJ Purle in giving leave to appeal said that it was arguable that the effect of section 166 was to put off the date of payment without changing the status of the arrears; he used the Latin phrase *debitum in praesenti solvendum in futuro*, which means "due now but payable later", to describe the status of the rent before the section 166 notice is given. He said that the meaning of section 166(4) was unclear to him, and that

> "At the very least, it must require service of a notice but it does not in terms rewrite the lease but merely moderate its effect. It may be said not to turn arrears into something different so that, once notice is served, one is then left with the terms of the lease unshackled by the requirement of a notice which has by now been complied with."

39. HHJ Purle added that it was difficult to see why the section 166 notice must state the date on which the payment was due under the lease unless that date were to retain some relevance.
40. On that basis the rent for, say, 2010, would not be payable until a section 166 notice was served but as soon as it was served in 2015 would have been in arrears for five years – and that is the construction for which Mr Hosny contends. However, I take the view that the subsection goes further than that. The subsection modifies the provisions about non-payment and late-payment and changes the way that the Underlease is to be read. If that were not the case the reference in the sub-section to non-payment and to late payment would be unnecessary.
41. As to the reference in the section 166 notice to the date when payment was due under the lease, that is clearly required in order to let the tenant know exactly which instalments of rent are being claimed. Without such a date the tenant would not know whether or not the rent was statute-barred, and would not have any clear picture of what the landlord was claiming, nor any means to check the total claimed nor to know whether section 166(3)(b) had been complied with.
42. My Hosny argued that Judge Michell's construction would drive a coach and horses through the Limitation Acts, because it would mean that no cause of action could accrue in relation to rent from, say, twenty years ago until the s166 notice was served; thus the section would revive liability for rent that would otherwise be statute-barred. I very much doubt that the section has that effect; a section 166 notice in relation to rent that was already statute-barred would be invalid. I do not have to decide that point; the point is simply that the construction for which Mr Hosny argues does not necessarily follow.
43. Finally Mr Hosny argued that the sub-section would mean that a landlord purchasing a reversion would never be able to forfeit for historic arrears. That is not the case. A landlord purchasing a reversion where rent is outstanding can serve a section 166 notice if its predecessor has not done so; it must then wait two years before forfeiting for those arrears, but in the meantime there are of course other ways of recovering unpaid rent. So the subsection is by no means as dramatic in its effect as Mr Hosny says it is.
44. I take the view that Judge Michell's construction of section 166(4) was correct; its effect upon clause 3 of the Underlease is that the Landlord cannot forfeit for arrears

until two years after the due date set by the section 166 notice served in respect of those arrears.

45. This point too is sufficient to ensure that the appeal fails, even if I am wrong on the first and third issues.

Section 167 of the Commonhold and Leasehold Reform Act 2002

46. Section 167 of the Commonhold and Leasehold Reform Act 2002 is a further restriction on the right of a landlord of a long lease of a dwelling to forfeit it. Section 167(1) has the effect that forfeiture for an amount less than £350 can only be for "an amount which has been payable for more than a prescribed period," that period being three years. The Landlord claims to have forfeited the Underlease for that part of the £11 arrears that had been payable for more than three years according to the due dates provided for by the Underlease, amounting believe to £5
47. Judge Michell at his paragraph 23 found that section 167 meant that the Landlord cannot forfeit for arrears until three years after the due date set by the section 166 notice served in respect of those arrears and that the forfeiture was therefore invalid.
48. The same dilemma therefore arises as that which arose in the consideration of the effect of section 166(4). In that context I had to decide: does the statute delay the tenant's liability for rent until the notice is served and then further delay the consequences of non-payment? Or does it simply delay the point at which rent is payable, but without affecting anything else so that the moment the notice is served the rent is payable and is in arrears as it would be in the absence of section 166 (with the terms of the Underlease "unshackled" as HHJ Pule put it)? I have found that the former construction of section 166 is correct. Likewise as regards section 167, does "payable for three years" mean that three years must have elapsed since the due date in the section 166 notice before forfeiture can take place, or does it mean that three years must have elapsed since the rent became due under the Underlease, provided that a section 16 notice has been served before forfeiture is attempted?
49. I note that where a new landlord has not given notice under section 48 of the Landlord and Tenant Act 1987 rent is not payable until it does so, but once the notice has been given the rent is due in accordance with the dates provided for in the lease and is in arrears for a period calculated by reference to the lease and not to the date of the service of the notice. (*Rogan v Woodfield Building Services Ltd* (1994) 27 HLR 78, [1995] 1 EGLR 72, CA)). But section 167 of the Commonhold and Leasehold Reform Act 2002 is drafted in very different terms from section 48; moreover it was enacted in order to protect tenants from forfeiture, or at least to ensure that forfeiture was used only as a last resort and after extensive warning had been given, particularly where only a trivial amount was outstanding. The construction for which the Tenant argues and which Judge Michell found to be correct is consistent with that policy.
50. Mr Hosny argued that the use of the word "payable", rather than the "liable" used in section 166(4), meant that I should approach this section differently and that the reference was to rent payable in accordance with the provisions of the Underlease. There is no substance in that argument; it is simply that the draftsman chose to refer in section 166(4) to the tenant being liable and in section 167(1) to the rent being payable.

51. The effect of the construction for which Mr Hosny argues would be that a tenant could suffer forfeiture for historic arrears of rent the moment the due date in a section 166 notice came to an end, whereas for recent rent the landlord would have to wait..
52. Section 167(1)(b) does not say whether "payable" means "payable under the lease" or "payable because a section 166 notice has been served". On balance I prefer the latter construction, agreeing with Judge Michell, because if the former had been intended the section as drafted would have been unnecessary; it would have been necessary only to say that there could be no forfeiture unless a section 166 notice had been served – and that in itself would arguably be unnecessary because section 166 would have that effect in any event.
53. Accordingly I find that on this point too the appeal fails. The effect of section 167 is that a landlord cannot forfeit for arrears of ground rent of a dwelling house until three years have elapsed from the date for payment specified by the section 166 notice served in respect of those arrears.

Conclusion

54. At the hearing of this appeal Mr Hosny asked me about the costs order made in the FTT. Because the appeal has failed the FTT's costs order will stand, and the Tenant is entitled to its costs of the appeal. Moreover, the Landlord is – and has been all along – trespassing on the land demised by the Underlease and will no doubt deliver up possession to the Tenant without delay.

Judge Elizabeth Cooke

Release date: 15 September 2017

Amended under Rule 42: 20 September 2017