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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION APPEALS
ON APPEAL FROM THE
COUNTY COURT AT LIVERPOOL
ORDERS OF HHJ WOOD QC DATED
13 AUGUST AND 9 OCTOBER 2020



No. CH-2020-000270

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 12 October 2021

Before:

MRS JUSTICE FALK

B E T W E E N :

BMR BAGSHOT LTD

Appellant/Defendant

- and -

DORCHESTER MANSIONS (1997) LIMITED

Respondent/Claimant

MR E. LEVEY QC and MR D. WARNER (instructed by SBP LAW) appeared on behalf of the Appellant/Defendant.

MR J. POTTS QC, and MR P. BYRNE (instructed by Cullimore Dutton Solicitors) appeared on behalf of the Respondent/Claimant.

J U D G M E N T

MRS JUSTICE FALK:

- 1 This is an appeal against two orders made by His Honour Judge Wood QC, sitting at the Liverpool County Court, on 13 August and 9 October 2020. The dispute relates to a relatively small block of 11 flats, built in Art Deco style, in Bournemouth. They were constructed in the 1930s.
- 2 The respondent to the appeal, and the claimant below, Dorchester Mansions (1997) Limited ("DML"), is the freeholder owner of the building. Its directors are certain leasehold flat owners, and its shareholders are the owners of the flats. The appellant, BMR Bagshot Ltd ("BMR"), owns one of the flats, Flat 4, under a 999 year lease entered into in 2008, but the term of which commenced on 1 January 2000. BMR acquired the lease in April 2020. The sole director of BMR, Charles Margulies, has an interest in another flat in the building, and is himself a director and shareholder of DML.
- 3 The dispute arose when BMR commenced a refurbishment of Flat 4 in circumstances which DML claimed breached two covenants in the lease, paragraphs 9 and 13 of Schedule 6, because DML's consent had not been obtained to the works. In summary, BMR's position is that it did not require the landlord's consent to the refurbishment work it was doing because it was not structural in nature. DML disagreed that consent was not required. The dispute escalated, probably not assisted by an issue with contractors which involved the police being called, and DML applied for an interim injunction.
- 4 Following a short telephone hearing at which the case was adjourned on the basis of undertakings, HHJ Wood QC heard full argument on 15 July 2020. His reserved judgment was dated 27 July 2020 and, following further submissions, the judge made the first order

appealed against on 13 August 2020. That is also the date on which I understand that the judgment was formally handed down, although that is not entirely clear. The order granted an injunction until 21 September 2020 prohibiting BMR from carrying out alteration works to Flat 4 until it had obtained DML's licence to carry out the alterations in accordance with paragraphs 9 and 13. The order also provided that unless by 4 p.m. on 21 August 2020 DML filed and served a written resolution approved by what was described as the "necessary majority of shareholders" authorising the commencement of the proceedings and the giving of a cross-undertaking in damages, the injunction would immediately cease to have effect.

5 Following another hearing on 5 October when the judge again reserved judgment, the judge made the further order the subject of this appeal on 9 October, when he gave his further decision. That order slightly varied the wording of the condition in the first order to refer to "directors" rather than "shareholders". However, by that stage it was clear that the condition had not been complied with on either basis, or at least in a way that was compliant with company law and the company's constitution, with the result that the injunction had fallen away on 21 August. I will return to that. More significantly, in his second order the judge made no order as to costs.

6 There was an issue as to whether the appellant's notice was filed late. DML filed a respondent's notice raising that point. I cover it for completeness because it was not addressed today. I note that time was extended, if required, by Marcus Smith J in his decision refusing permission to appeal on the papers. That order has not been challenged. Permission was granted by Michael Green J on an oral renewal.

The Disputed Works.

7 The judge described the nature of the works in his first reserved judgment. I have also been shown some pictures of the flat part way through the works, and a list of the works. At paragraph 14 of his judgment the judge adopted a summary of the works by Mr Byrne, counsel for DML and junior counsel before me, as involving the demolition of internal walls, new partitioning to the hall, living room, dining room, kitchen, bathroom, Master bedroom and three other bedrooms, the creation of new suspended ceilings to all of these areas, new electrical installation, replacement radiators to most rooms, a new en suite bathroom to one of the bedrooms, installation of a new kitchen window, ceiling mounted sliding doors to the living room, and new plumbing, doors and air conditioning to some rooms. The judge commented that he could not see how this could fit with BMR's description of the works as "light refurbishment" and concluded that it was an extensive re-ordering of the flat.

8 It was common ground before the judge that, despite the extensive nature of the works, there was what the judge described at paragraph 13 as "no structural implication". He also commented at paragraph 15 that the demolition of internal partitions and removal of fixtures that had by then been undertaken did not affect the "structural integrity" of the building. The structure of the building was made from steel sections encased in concrete, and these were not being modified.

The Grounds of Appeal.

9 There are three grounds of appeal. Ground 1 relates to an alleged error of law by the judge in holding that the works that BMR was carrying out to Flat 4 required permission. BMR

says that the judge wrongly disregarded the Court of Appeal decision in *Bickmore v Dimmer* [1903] 1 Ch 158 and had wrongly applied the principles of construction set out in *Arnold v Britton* [2015] AC 1619. *Bickmore v Dimmer* provided a long established meaning of the word "alterations" as used in the lease, and made it clear that it was confined to alterations that are structural in nature. BMR says that the judge did not allow for the possibility that the drafting was otiose if no part of the structure was demised. In any event the flat had a balcony which was part of the structure, and was demised, to which it was added this morning that it also had a garage.

- 10 The second ground of appeal is that the judge erred in granting an injunction in circumstances where the commencement of proceedings had not been authorised by DML and so was a nullity.
- 11 Ground 3 was that, having found that the issue of the application had not been validly authorised, the judge wrongly refused to award BMR its costs, instead making no order as to costs, wrongly finding that BMR had only raised the issue of want of authority at a late stage, and wrongly placing the burden on BMR to raise the issue.
- 12 I received submissions from Edward Levey QC on behalf of BMR on all issues save one point which was addressed by Mr Warner, and from Philip Byrne on behalf of DML on Ground 1 (the licence issue) and from James Potts QC on Grounds 2 and 3. I am grateful for their submissions.
- 13 I should clarify that in essence the appeal is over costs. This was reflected in the order of submissions, with counsel addressing Grounds 2 and 3 before Ground 1. However, I will deal with the grounds in the order they are set out in the grounds of appeal.

Ground 1.

- 14 Ground 1 raises a preliminary issue as to whether it is properly the subject of an appeal at all. The judge's order simply granted a temporary injunction that has, in any event, expired. The judge correctly referred to the *American Cyanamid* principles at paragraph 26 of his first judgment, and at paragraph 27 to the approach that the court should take where the grant of the injunction is likely to dispose of the action. It was not necessary for the purposes of the grant of an interim injunction to make a final determination as to whether BMR was, in fact, in breach of the covenants. Appeals are, of course, against orders of the court and not reasoning, and in particular there is no appeal against the judge's application of the *American Cyanamid* test, modified, as he noted, to take account of the slightly different approach where an injunction is likely to dispose of the action.
- 15 However, the judge did, in fact, make a determination about the construction of the lease. That is clearest at paragraph 51 of the first judgment, where he concluded that the works were caught by both paragraphs 9 and 13. I do note that it is slightly differently expressed in paragraph 59, which is framed as the conclusion, where the judge said that there was a “high likelihood” of breaches being established. But, however he framed it, he did reach a view on a point of interpretation of the lease. That is a question of law.
- 16 Having reached a view on a question of law, and clearly as part of the reasoning that led him to make the order that he did, it seems to me that BMR ought to be able to challenge that view on appeal: see *Hadmor Productions v Hamilton* [1983] 1 AC 191 at 220C, where Lord Diplock made it clear that an appellate court may set aside an exercise of discretion to grant an injunction which was based on a misunderstanding of the law. Further, the judge should

not be criticised for having expressed a view. There was no real dispute about the facts. The point was a short one of construction of the lease. No proceedings were actually issued, so it was in practice at least a final determination of the dispute between the parties. If the judge got the law wrong then there is a very good argument that he exercised his discretion on a false basis. I will therefore proceed to consider the substance of Ground 1.

17 It is worth reading out paragraphs 9 and 13 in full:

"9. The Lessee shall not make any alterations in the Premises without the prior approval in writing of the Lessor or the Lessor's Surveyor to the plans and specifications thereof (such approval not to be unreasonably withheld or delayed) and shall make alterations only in accordance with such plans and specifications when approved and the Lessee shall at his own expense obtain all licences, planning permissions and other things necessary for the lawful carrying out of such alterations and shall comply with all byelaws regulations and conditions applicable generally or to the specific works undertaken.

13. The Lessee shall not without the previous consent in writing of the Lessor which shall not unreasonably be withheld install in or about the Premises any apparatus additional to existing apparatus which is intended to consume water from any of the supply pipes whether hot or cold except a washing machine and/or a dishwasher and/or other appliances of a like domestic nature drawing off water and the Lessee shall not alter any existing apparatus drawing off water PROVIDED THAT the washing machine the dishwasher and other appliances of a like domestic nature which the Lessee may install shall be of a type which does not vibrate so as to cause disturbance to the Lessor or Owner of another Flat in the Property and does not require to be affixed to the structure of the Premises."

Submissions on Ground 1

18 BMR's submissions can be summarised as follows. *Bickmore v Dimmer* was binding on the judge and had the effect that the expression "alterations" applies only to alterations that affect the form or structure of the building. That interpretation has been adopted in other cases and leading practitioner texts. It is well-established that contracts are not made in a legal vacuum, and the state of the law when the parties agreed it is admissible background:

see, for example *Winter Garden Theatre (London) Limited v Millennium Productions* [1948] AC 173 at 193.

- 19 In this case BMR say that the works did not affect the structure of the building and the judge was wrong to decide that *Bickmore v Dimmer* was not determinative. He should have taken account of the possibility that the draftsman made an error or included a prohibition that was otiose if no structural elements had been demised – although, in fact, the balcony and the garage were included. He wrongly gave weight to decisions of the First Tier Tribunal ("FTT") which were of no precedent value and did not contain proper analysis. BMR also submitted that there was no proper evidence to support the conclusion that paragraph 13 was engaged, and the judge failed to give proper reasons on that point.

Discussion of Ground 1

- 20 This question is a question of construction of the relevant paragraphs of the lease. As an initial point, I do not think that the judge could be criticised for referring to *Arnold v Britton*, a recent Supreme Court decision that considered the proper approach to interpretation of a lease. But I also agree with the principle referred to by Lord Porter in the *Winter Garden* case that case law should not be ignored. Parties obviously contract against a background which may include previous decisions on the interpretation of similar contracts. In my view, that point is consistent with the principles summarised in *Arnold v Britton*.
- 21 However, I do not consider that *Bickmore v Dimmer* in fact supports the conclusion that the judge's decision that paragraph 9 was engaged, or at least that there was a high likelihood of it being engaged, was incorrect. In fact, I would reach the same conclusion, although my reasoning would differ.

- 22 I first remind myself of the principles to apply. I am not going to read out paragraph 15 of Lord Neuberger's judgment in *Arnold v Britton*, but the essence of it is the need to assess the meaning of the words to a reasonable person with the background knowledge available to parties, in light of a number of factors which include the natural and ordinary meaning of the clause, other relevant provisions of the lease, the overall purpose of the clause in the lease, the facts and circumstances known at the time (which I note would include relevant case law on interpretation of particular terms in leases) and commercial common sense. He added at paragraph 20 that the court should be slow to reject the natural meaning of words.
- 23 Paragraph 9 of Schedule 6 of this lease applies to “alterations in the Premises”. In order to interpret this it is necessary to identify what the Premises are, and then determine whether the works amount to alterations to those Premises (or alterations in them). The Premises are defined in Schedule 3 of the lease. The definition makes it clear that the Premises are essentially confined to the internal walls and plasterwork, the plasterboard on the ceilings on the underside of what are described as “structural concrete slabs”, the screed covering the floor slab, the windows, the door to the balcony and the surfacing of the balcony. It expressly excludes any part of what is defined as the “Reserved Property”. Reserved Property is defined in Schedule 2 as including “the main structural parts of the Property” (the “Property” being the land and buildings as a whole) and, incidentally, contrary to BMR's written submissions, extends to the balconies. The definition of the Reserved Property also includes floors and ceilings not included in the demise of a flat. That must include the structural concrete slabs referred to in the definition of the Premises, which are clearly excluded from the demise.

- 24 I mention in passing that the definition of the Premises has strong similarities to that considered by Morritt J in *Taylor v Vectapike* [1990] 2 EGLR 12, where he adopted the parties' description of the demise as being effectively the “inner skin of the flat”.
- 25 *Bickmore v Dimmer* is authority for the proposition that the concept of “alteration” to premises applies only to alterations which would affect their “form or structure” (Vaughan Williams LJ at page 167). Cozens-Hardy LJ referred, at page 169, to “something which alters the form or structure of the building”. In that case the Court of Appeal held that a covenant in the lease of a shop (a lease which included the structure of the shop) which required the landlord's consent to alterations to the premises, did not prevent a large clock being fixed to the exterior wall with iron bolts which were drilled in to the structure.
- 26 In my view, the works proposed to Flat 4 fell within paragraph 9 on a straightforward application of the test in *Blackmore v Dimmer*. The “form or structure” test has to be applied to the premises demised, which in this case was the inner skin. It was not necessary for the judge to decide exactly where the line should be drawn for the purposes of the decision he was making, namely whether to grant an interim injunction, but I do consider that the extensive nature of the works, particularly in relation to demolition of walls and ceilings, affected the form or structure “of the Premises”. That is the expression that is being interpreted. I do think it is wrong in the context of this lease at least to regard the concept of form or structure as necessarily limited to something that a structural engineer would regard as structural in terms of the overall building. Apart from disregarding the reference to “form” in *Bickmore v Dimmer*, and effectively (and wrongly) treating the words as if they were a statutory test rather than seeking to understand what the case is really authority for, it does not pay sufficient attention to the fact that test had to be applied to the

“Premises”, not to the building as such. The form or structure of the “Premises” must, it seems to me, comprise the inner skin: walls, floors and ceilings.

27 My conclusion is also strongly reinforced by interpreting the provisions in context. The extensive nature of the other covenants in Schedule 6 supports the conclusion I have reached and does not support the argument that paragraph 9 is largely otiose, which I consider would be the likely result of BMR's interpretation. For example, paragraph 3 of Schedule 6 requires the Lessee to keep the Premises and all parts of it in good repair throughout the term of the lease – it specifically refers to "throughout the continuance of this demise". Paragraph 6 requires internal redecoration every seven years, as well as shortly before the end of the demise. Paragraph 8 requires access to be given to the Lessor to check the state of repair and condition of the Premises, and allows service of a notice requiring work to be done. Paragraph 7, I note, includes such detail as keeping the windows clean. It seems to me that it would be very strange if the landlord could insist on internal walls and ceilings being kept in good repair but had no power at all to raise reasonable objections to their proposed removal. It seems to me that that would be contrary to common sense. I also note that the repair and redecoration requirements in paragraphs 3 and 6 are absolute, whereas paragraph 9 is qualified: consent cannot be unreasonably withheld.

28 Other parts of Schedule 6 include extensive provisions aimed at preventing nuisance, whether in terms of noise or otherwise, and aimed at maintaining the overall appearance of the block. These provisions clearly demonstrate that the purpose of the covenants in Schedule 6 is control of the appearance of the block and the way that individual flats are dealt with during the term of the lease. This is not about what might happen at the end of 999 years, when I am sure it is somewhat unlikely that the parties would have anticipated that this particular block would still be standing in the way it is now. The focus is on the

position throughout the term of the lease, as made clear by the specific provisions of paragraphs 3 and 6.

29 BMR relied on *Total Transport Corporation v Arcadia Petroleum* [1998] 1 Lloyd's Rep. 351 at 357-358 and *Antigua Power Company Limited v The Attorney General of Antigua and Barbuda* [2013] UKPC 23 at 38 as supporting the proposition that any presumption against surplusage is of little value. On the facts of this case I do not find that submission persuasive in the light of the detailed provisions of Schedule 6, and the obvious aim of allowing the landlord to exercise close control.

30 I also note, although I do not rely on it, that it seems unlikely that the work would not involve at least some cutting into the structure, for example in the course of hanging suspended ceilings.

31 It is convenient to address paragraph 13 at this point. The challenge now being made was not included in the grounds of appeal, but I should clarify that I reject the submission that the judge had no evidence to support the conclusion that he reached. It was clear that there was at least one new en suite bathroom and new toilets. The covenant had a clear purpose because all flats other than the caretaker's flat are required to contribute on a one-tenth basis to hot water and heating bills. So if there was a significant increase in water usage it would make a difference to other owners of the flats.

32 I would also add that part of paragraph 13 requires consent to the alteration of "any existing apparatus drawing off water", as well as referring to additional apparatus as mentioned by the judge. The restriction on alterations must have been engaged by the removal of existing bathrooms and their replacements.

33 Returning to paragraph 9, in my view the case law supports my conclusion. The facts of *Bickmore v Dimmer* were very different. Whilst they did express a view that “alteration” was limited to a change to form or structure, the Court of Appeal’s view was that, wherever the line should be drawn, it should not prevent the tenant doing what was usual in the ordinary course of business, in that case putting up a sign advertising his jewellery and watchmaking business. That is very different to the extensive nature of the work in this case, including the removal of walls and ceilings.

34 Although BMR criticises the fact that the judge also referred to decisions of the FTT, they are not necessarily entirely irrelevant. They are clearly not binding, but they are possibly relevant in terms of the legal context, bearing in mind that the FTT considers questions of breach of covenant in the context of its jurisdiction relating to section 146 Law of Property Act 1925.

Ground 2.

35 Turning to Ground 2, in my view there was no error in the judge's approach. He was right to recognise that the issues with authorisation of the proceedings and of the cross-undertaking were technical and could be resolved. In fact they were not resolved, but this was because the wrong procedure was adopted, initially in wrongly excluding Mr Margulies from the decision-making process on conflict grounds, and subsequently in not recognising that the written resolution procedure could not be used unless all the directors signed the resolution, which Mr Margulies had not, although the relevant written resolution had been sent to him (a point that was accepted in a witness statement he made on 9 July 2020). Instead, a board meeting should have been convened.

36 It is clear that technical irregularities with the authorisation did not nullify the injunction. There was no real challenge to DML's reliance on *Browne v La Trinidad* (1887) 37 Ch D 1, 17 and *Bentley-Stevens v Jones* [1974] 1 WLR 638 at 641A. The point about nullity was not really pursued in oral argument. The judge recognised this point in his second judgment at paragraph 46. He appropriately gave DML an opportunity to correct the position and provided for the injunction to fall away if it was not corrected. He found, at paragraph 53, that the company law error was one of form and not substance. He was entitled to reach that conclusion. The will of the majority was clear. There was no evidence to suggest that the outcome would actually have been different if a formal meeting of directors had been convened and the matter put to a vote at that meeting. Mr Margulies, of course, could have convened a meeting under the terms of the Articles. It was suggested in submissions to me that he might have been able to persuade the other directors at such a meeting not to initiate and pursue proceedings. But there is no evidence from him that that is something that he believes that he would have been able to do. So there is no evidence that the position would have been any different if a meeting had been held.

37 The directors could have ratified the action taken to initiate proceedings at a Board meeting. It cannot be said that it was not open to the judge to exercise his discretion in the way that he did. He recognised in his first order that there was an issue with authorisation, and he made provision for it, including in particular for the injunction to fall away if appropriate authorisation was not provided.

Ground 3

- 38 The judge's decision to make no order as to costs reflected the fact that DML did not have or obtain the correct authorisation and had not, therefore, complied with the unless provision in the first order. It is clear from the second decision, particularly paragraphs 38 and 39, that if authorisation had been obtained, he would have regarded DML as the successful party for cost purposes.
- 39 BMR maintains that the failure to obtain authority should entitle it to costs, and that the judge wrongly made his decision not to award costs to BMR on the basis that BMR had raised the issue of lack of authority at a late stage, and as a tactical point. BMR's position is that it is wrong to view DML as in any way successful when, in the end, all it got was an injunction that lasted eight days. DML did not, in fact, have authority in place to commence proceedings or give the cross-undertaking, and the judge recognised that at paragraph 52 of his second judgment. BMR therefore maintains that in essence it was the successful party rather than DML.
- 40 I do not think that this is a fair characterisation of the judge's reasoning at paragraphs 48 to 52 of the second judgment, read in the context of the judgment as a whole. The judge recognised at earlier paragraphs that the general point about lack of authority had been raised earlier. Indeed it had, but what the judge was focusing on was that it was not apparent that an issue was being taken with the written resolution procedure contemplated by the earlier order. He thought that the form of the resolution proposed was not controversial. (See not only paragraph 49, but also paragraphs 9, 16, 19, 20 and 22 of the second judgment.) The reference to tactical manoeuvring that BMR complains about needs to be read in that context.

41 BMR argues that it raised, as early as 9 September, the specific point that was ultimately fatal, namely that all directors have to sign any written resolution, and that it raised the general question of lack of authority on a number of occasions earlier. I have looked at all the passages I was taken to in earlier skeletons and Mr Margulies' witness statement to that effect. But BMR's argument in my view misses the point. The judge recognised that the general question of lack of authority was raised earlier, but the particular point about all directors having to sign the resolution was only raised on 9 September. That was the context of the tactical manoeuvring point. The point arose in the context of the terms of the order of 13 August actually having been agreed between the circulation of the judge's judgment at the end of July, and 13 August. The specific complaint was raised on 9 September after the deadline of 21 August for the order falling away. The judge expressly accepted that there was no obligation on BMR to point out the issue (see paragraph 51) but said that he noted that the written resolution procedure was expressly contemplated by the first order which the judge had believed was agreed. He referred to the need to conduct litigation in a fair, open and proportionate manner.

42 In my view, the decision not to award costs to BMR was well within the judge's very broad discretion. There was no dispute before me as to the principles to apply, I was referred to the summary in *Global Energy Horizons Corporation v Gray* [2021] EWCA Civ 123 at paragraph 5:

"The court should only interfere if the judge below erred in principle, took matters into account which should have been left out of account, left matters out of account that should have been taken into account, or reached a conclusion which was so plainly wrong that it could be described as perverse."

43 The factors taken into account in this case clearly included the point just discussed about BMR's conduct, but also the judge's decision that the nature of the work did justify

injunctive relief, a decision that I have concluded was correct, and his conclusion that authority to conduct the proceedings could have been obtained retrospectively (see paragraph 52). To the extent that DML's failure properly to authorise the proceedings can be described as one of conduct, the judge obviously took that into account by deciding not to award DML its costs.

44 On that basis, in my view, the basis of the decision was sound. The judge recognised that the proceedings had not been correctly authorised and the injunction fell away, but nonetheless concluded that he should not award BMR its costs. He was best placed to take an overall view in relation to BMR's conduct, and I think that his reasoning does not unfairly ignore the way in which points were raised earlier in the process by BMR. The key point was that the argument advanced at the later hearing about the need for all directors to sign the resolution had not been raised at an earlier stage.

45 In conclusion I dismiss the appeal.

L A T E R:

46 I am going to take a broad brush approach in relation to costs. There is no dispute that costs should be awarded on a summary assessment basis, and on the standard basis, to the respondent. Taking account of proportionality I think that the costs shown in the N260 totalling £40,875 do look to me to be on the high side. There were some detailed comments on the solicitors' costs which have been addressed. There is an infelicitous presentation of the schedule. In fact, there is only one grade 1 fee earner, and the total listed is £8,850. I take account, although the point was not specifically made on behalf of the appellant, that

possibly some of that work might have been delegated to a more junior person , but I do not think that overall the solicitors' fees are materially in excess of what might be expected.

47 However, I have to say that I found counsel's fees, totalling £16,000 for Mr Potts and £9,255 for Mr Byrne, overall somewhat on the high side. The appellant only raises an issue specifically in relation to the amount labelled as 'advice in conference' or 'additional advice'. Mr Potts fairly made the point that, to the extent he has advised in conference, which might reasonably be expected to occur in advance of deciding whether to dispute an appeal, that would result in a reduced fee for the hearing because preparation time would be less. I take account of that, but, nonetheless, I feel that overall the fees are somewhat high for the nature of the appeal, which is essentially a costs appeal. I am going to reduce the overall amount of costs awarded, and make an award, inclusive of VAT, of £35,000 in favour of DML.

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