TFS Stores Limited v BMG (Ashford) Limited et al [2019] EWHC 1363 (Ch)

Judgment has been handed down in this important case concerning the contracting out procedures under s.38A of the Landlord and Tenant Act 1954 and Schedule 2 of Regulatory Reform (Business Tenancies) Order 2003.

The Fragrance Shop is a large retail operator with over 200 stores nationwide. In these proceedings it sought to establish that six of its leases at a number of McArthur Glen outlet centres were protected by the 1954 Act, despite the fact that the parties had, in every case, served warning notices and executed statutory declarations before either entering into agreements for lease or taking a lease so as to exclude the security of tenure provided by ss.24 – 28 of the 1954 Act.

The issues raised by the tenant ranged from an alleged absence of authority on the part of any person other than its chief executive officer – whether its solicitors, directors or employees - to receive warning notices or execute statutory declarations, to defective wording in the statutory declaration with regard to specifying the commencement date in completing the phrase "*I….propose to enter in a tenancy of premises…for a term commencing on [ ]*".

The first set of arguments required the court to consider the law of express and implied actual authority, ostensible authority, and the imputation of knowledge or otherwise via an agent acting for different principals. The court held that the tenant was bound by the acts of its professional and employee agents as having actual authority, on the facts, to act as they did, and who in any event had ostensible authority to the same extent.

The issue with regard to the form of the statutory declaration required the court to consider whether, in order to be valid, the commencement date specified by a tenant in a statutory declaration confirming that a lease it will enter into will be outside the Act must be the actual date of the grant of the lease – i.e. the date upon which its legal interest comes into existence – as opposed to the date on which the lease is expressed to commence (which can pre or post-date the actual date of execution).

This is a practical question of significant importance to practitioners because it is very difficult to know with certainty, in advance, the exact date on which a lease will be executed, and it is common practice to use wording that refers to the commencement date of the term contained in the lease, or some other formula. Indeed, in this case the wording in some of the statutory declarations were even less specific – some said "*…for a term commencing on the date on which the tenancy is granted"*, and one even said "*for a term commencing on a date to be agreed by the parties*".

The court upheld all of the various formulae as valid because the purpose of inserting such details into the statutory declaration is merely identificatory – i.e. it is to make it as clear as possible that the tenant confirms that it understands that this lease, which it intends to accept, will be outside the protection of the Act. Although decided under the previous court-ordered regime, the decision in *Receiver for the Metropolitan Police District v Palacegate Properties Limited* [2001] Ch 131 remained relevant – the court being concerned with *"whether the tenant understands that he is giving up protection*". This is important news for practitioners – there has been some debate when s.38A and the 2003 order came into force regarding the difficulty of specifying a future date, and this decision confirms the validity of current market practice. The alternative would render serving statutory declarations in advance very difficult, if not impossible.

In addition, the court confirmed the important function of the requirement that the statutory declaration must be made "in the form, <u>or substantially in the form</u>" set out in 2003 Order. Even if

there was a question mark over the exact wording used, it could be rescued by the fact that it was in any event "substantially" in the form set out in the 2003 Order.

In light of these conclusions, the court did not have to decide the landlord's additional arguments relying (a) on estoppel by deed and (b) ratification to uphold the contracting out process. These arguments were based on the fact that the details of the warning notices and the statutory declarations were recorded in the leases, which were signed on behalf of the tenant by its chief executive officer.

The court considered, had it been necessary to decide it, that such matters could not save a defective contracting out procedure. To allow an estoppel argument would risk subverting the process that Parliament has required to ensure that tenants are given a fair opportunity to properly understand the rights they are giving up. As for ratification, that requires the person ratifying to fully understand what it he is said to be approving – and on the facts of this case the court accepted that the chief executive officer had no real understanding of the concept of contracting out, and did not read or understand that the leases were recording an agreement to contract out.

One final aspect of the case concerned the landlords' counterclaim for double value pursuant to s.1 of the Landlord and Tenant Act 1730, based on an argument that the tenant had held over after expiry "wilfully". The court adopted the approach set out by Paull J in *French v Elliott* [1960] 1 WLR 40 with regard to the meaning of "wilfully" in the context of this provision, and considered that it requires more than a merely deliberate act – so long as the tenant's position is considered to be one where he has said "*I shall stay on. I think I have a right to do so*", as opposed to *"I will stay on, although I have no right to do so*", he is not "wilful". In this case the tenant had sought and received legal advice as to it position shortly before the leases expired, and in the absence of evidence that the tenant's claim was not advanced *bona fide*, it could not be said to have acted wilfully.

Wayne Clark and Joseph Ollech, instructed by Shoosmiths LLP, acted for the landlords.

Guy Fetherstonhaugh QC and Mark Galtrey, instructed by Gordons LLP, acted for the tenant.