

Dr Sonny Lie v Dr Rajan Mohile

Case No: B2/2014/0697

Court of Appeal (Civil Division)

9 May 2014

[2014] EWCA Civ 728

2014 WL 2194608

Before: Lord Justice Patten Lord Justice Underhill Lord Justice Vos

Friday, 9 May 2014

On Appeal from Central London Civil Justice Centre

(Her Honour Judge Walden-Smith)

Representation

Mr Oluwaseyi Ojo (Solicitor Advocate) (instructed by Taylor Wood Solicitors) appeared on behalf of the Claimant.

Mr Martin Palmer (instructed by Attwood & Co Solicitors) appeared on behalf of the Defendant.

Judgment

Lord Justice Patten:

1 This is an appeal from an order of Her Honour Judge Walden-Smith which was made on the hearing of a preliminary issue in proceedings under Part 2 of the Landlord and Tenant Act 1954 . It raises a short point on the construction of section 41A of the Act and in particular as to whether one of two existing partners who were both the tenants of the relevant holding under the existing lease is entitled to make an application for a new tenancy under section 24 of the 1954 Act.

2 This court held in *Jacobs v Chaudhuri* [1968] 2 QB 470 that the word "tenant" for the purposes of section 24(1) meant all the joint tenants in whom the legal estate was vested. On this basis the request and claim for a new tenancy would have to be made by both partners and cannot be validly made by one alone. But the 1954 Act was amended so as to reverse the effect of the decision in *Jacobs v Chaudhuri* and section 41A now permits an exception to the rule in the case of partnerships where not all of the joint tenants continue to use the demised premises for the purpose of the partnership business.

3 Section 41A was introduced by section 9 of the Law of Property Act 1969 and is in the following terms:

"(1) The following provisions of this section shall apply where—

(a) a tenancy is held jointly by two or more persons (in this section referred to as the joint tenants); and

(b) the property comprised in the tenancy is or includes premises occupied for the purposes of a business; and

(c) the business (or some other business) was at some time during the existence of the tenancy carried on in partnership by all the persons who were then the joint tenants or by those and other persons and the joint tenants' interest in the premises was then partnership property; and

(d) the business is carried on (whether alone or in partnership with other persons) by one or some only of the joint tenants and no part of the property comprised in the tenancy is occupied, in right of the tenancy, for the purposes of a business carried on (whether alone or in partnership with other persons) by the other or others.

(2) In the following provisions of this section those of the joint tenants who for the time being carry on the business are referred to as the business tenants and the others as the other joint tenants.

(3) Any notice given by the business tenants which, had it been given by all the joint tenants, would have been—

(a) a tenant's request for a new tenancy made in accordance with section 26 of this Act; or

(b) a notice under subsection (1) or subsection (2) of section 27 of this Act;

Shall be treated as such if it states that it is given by virtue of this section and sets out the facts by virtue of which the persons giving it are the business tenants; and references in those sections and in section 24A of this Act to the tenant shall be construed accordingly.

(4) A notice given by the landlord to the business tenants which, had it been given to all the joint tenants, would have been a notice under section 25 of this Act shall be treated as such a notice, and references in that section to the tenant shall be construed accordingly.

(5) An application under section 24(1) of this Act for a new tenancy may, instead of being made by all the joint tenants, be made by the business tenants alone; and where it is so made—

(a) this Part of this Act shall have effect, in relation to it, as if the references therein to the tenant included references to the business tenants alone; and

(b) the business tenants shall be liable, to the exclusion of the other joint tenants, for the payment of rent and the discharge of any other obligation under the current tenancy for any rental period beginning after the date specified in the landlord's notice under section 25 of this Act or, as the case may be, beginning on or after the date specified in their request for a new tenancy.

(6) Where the court makes an order under section 29(1) of this Act for the grant of a new tenancy on an application made by the business tenants it may order the grant to be made to them or to them jointly with the persons carrying on the business in partnership with them, and may order the grant to be made subject to the satisfaction, within a time specified by the order, of such conditions as to guarantors, sureties or otherwise as appear to the court equitable, having regard to the omission of the other joint tenants from the persons who will be the tenants under the new tenancy.

...”

4 Under section 41A(1) , there are therefore four conditions which require to be fulfilled in order for a section 24 application for a new tenancy by the business tenants as defined to be a valid application: first, the lease must be vested in at least two joint tenants; secondly, the demised premises must include premises occupied for the purposes of the business; thirdly, the business must at some time

during the tenancy have been carried on in partnership by all the joint tenants; and fourthly, the business must now be carried on by at least one of the joint tenants, either alone or in partnership with other persons, with no part of the property being occupied under the tenancy for the purposes of a business carried on by the other joint tenant or tenants.

5 The claimant and the defendant in this case are both general practitioners who provide medical services pursuant to a contract with the South West Essex Primary Care Trust at premises known as the Chadwell Medical Centre, 1 Brentwood Road, Chadwell St Mary in Essex ("the premises"). They do so as partners under a partnership agreement for joint lives dated 15 July 2002. Although the defendant, Dr Mohile, attempted to dissolve the partnership by the service of a notice of dissolution on 3 June 2011, it is common ground that the notice was ineffective to do so and that the partnership has continued thereafter.

6 The premises are owned by the defendant, who granted a periodic tenancy of them to himself and the claimant, Dr Lie, as joint tenants in order to carry on the partnership business. On 3 June 2011 the defendant also served on himself and the claimant a notice under section 25 of the 1954 Act terminating the tenancy on 1 January 2012. Dr Lie appears to have served some form of counter notice indicating that he was not willing to give up possession (although, as appears from the judgment in the court below, the notice cannot be found). Then on 8 July 2011 he issued a section 24 application in the County Court seeking the grant of a new tenancy to himself alone for a term of 15 years. This application is opposed by the defendant as landlord, who has relied on a section 30(1)(g) ground of opposition in answer to the claim. He wishes to continue to practise at the premises without Dr Lie.

7 The application for a new tenancy came on for hearing before Her Honour Judge Taylor in the Central London County Court in February 2013 when she dismissed the claim on the basis that the notice of dissolution served by the defendant had been effective to dissolve the partnership and that the dissolution automatically brought the tenancy to an end and with it Dr Lie's right to a new tenancy. Her decision was reversed by this court on 24 October 2013 on the basis that the notice was ineffective to dissolve the partnership. The court therefore remitted Dr Lie's application for a new tenancy back to the County Court for rehearing. But in paragraph 13 of his judgment, Rimer LJ said:

"Before leaving this case, I add that the court raised with the advocates whether any consideration below had been given to Dr Lie's entitlement to apply alone for the grant of a new tenancy or whether, formally, the provisions of section 41A of the 1954 Act required any such application to be made by both business tenants. We were told that no consideration had been given to that point, and so I shall say no more about that. It is not an issue that is before this court for decision."

8 That point was, however, raised as a preliminary issue when the matter returned to the Central London County Court and was answered in favour of the defendant. Judge Walden-Smith noted that the first three of the four conditions set out in section 41A(1) were satisfied, but held that the fourth was not. It was accepted by the claimant that the premises continued to be occupied by both partners for the purposes of the partnership business. It could not therefore be said (to use the words of section 41A(1)(d)) that the business is carried on "by one or some only of the joint tenants". Since the partnership continues to subsist and to operate from the premises, she therefore dismissed the claim.

9 In order to overcome these difficulties, the claimant raises a number of points, some of which are not contained in the grounds of appeal for which permission has been granted and one of which (an argument about actual or ostensible authority that was raised during the course of Mr Ojo's submissions this morning) was in fact ruled out by the judge herself who refused permission to amend the particulars of claim in order to raise this point.

10 It is said that the defendant is somehow estopped from seeking to raise the validity of the section 24 application so late in the proceedings when it could and should have been raised much earlier. Secondly, the court is asked to consider the effect of what is alleged to have been the repudiation

by the defendant of the partnership agreement and/or his failure to observe the duty of utmost good faith by not supporting the application for a new tenancy.

11 The answer to the first of those points is that the preliminary issue goes to the jurisdiction of the court to grant a new tenancy and cannot be the subject of an estoppel on the grounds relied upon. The second of those points that I have mentioned raises factual issues which were not before the judge and are not suitable for determination on appeal. Moreover, they were not raised on the application for permission and this court should not be prepared, in my view, to allow permission to amend the grounds of appeal to include them now.

12 So far as Mr Ojo's further argument that I have mentioned is concerned, he *submitted to us, based on the decision of this court in Featherstone v Staples [1986] 1 WLR 861* and section 5 of the Partnership Act 1890, that Dr Lie had authority to make the section 24 application for a new tenancy on behalf of himself and the defendant. This argument, interesting as it is, was, as I have said, excluded by the judge's refusal of permission to amend, and in any case faces the insuperable difficulty that Dr Lie is in fact not applying for a new tenancy for both existing partners but for a new tenancy to be granted to himself alone.

13 That, I think, leaves the two grounds for which permission has been granted by Tomlinson LJ. The first line of argument is that the claimant satisfies the conditions in section 41A(1)(d) because as a matter of law he was and remains the only tenant of the premises under the existing tenancy. The defendant, Mr Ojo argues, was not capable of granting a tenancy to himself, even as a joint tenant with the claimant, and the tenancy therefore took effect as a tenancy granted to the claimant alone. He can therefore, it is said, satisfy the requirements of section 41A(1)(d) because his continuing partnership with the defendant is a business carried on, to use the words of that subsection, "in partnership with other persons".

14 It seems to me that the obvious difficulty with this submission is that if the claimant is the sole tenant then section 41A simply has no application at all because neither the first nor the fourth of the section 41A(1) conditions are satisfied: the existing tenancy is not held jointly by two or more persons (the section 41A(1)(a) condition); nor is the business carried on by "one or some only of the joint tenants" (the section 41A(1)(d) condition). As a sole tenant, Dr Lie would not in fact need section 41A at all; he could rely upon section 24(1) itself.

15 The submission that this was the legal effect of the grant of the periodic tenancy is based on section 82 of the Law of Property Act 1925 and the decision of the *House of Lords in Rye v Rye [1962] AC 496*. Section 82(1) provides that:

"Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone."

16 In my view, this section has no application to the grant of the tenancy in this case. What it does is to render enforceable an agreement or covenant between A and A plus B as if (which are the words of the section) it had been entered into between A and B alone. The purpose of the section, as explained in the commentary to Wolstenholme and Cherry, was to overrule the pre-1925 decisions such as *Napier v Williams [1911] 1 Ch 361*, which held that a covenant between A and A and B jointly was unenforceable at common law. But section 72(1) and (2) of the 1925 Act expressly validate conveyances of land by A to A plus B, thereby replacing the common law rule that a deed by A in favour of A plus B had the effect of vesting the legal estate in B alone. There is moreover nothing in *Rye v Rye* which casts any doubts about the validity of a lease such as the one under consideration.

17 Mr Ojo also relies on the decision of this court in *Lloyd v Sadler [1978] 1 QB 774*, which established that one of two joint tenants could become a statutory tenant under the Rent Act 1968. But so far as authority is concerned, we are bound by the decision and reasoning in *Jacobs v Chaudhuri* to hold that both joint tenants must join in any application for a new tenancy under the 1954 Act unless they

can take advantage of one of the statutory exceptions under that Act to that rule. The potential unfairness which the decision in *Jacobs v Chaudhuri* may cause in the case of partners, one of whom is unwilling to apply for a new tenancy, has been expressly addressed and dealt with by the amendments to the 1954 Act which are now contained in section 41A . In my view there is, therefore, no room for any judicial expansion of that exception on grounds of fairness beyond the bounds which Parliament has set.

18 For those reasons, I reject the submissions on behalf of the appellant and would dismiss the appeal.

Lord Justice Underhill:

19 I agree that the appellant's grounds of appeal on the points on which he was granted permission fail for the reasons given by my Lord. The other points which he sought to raise, whether in his skeleton argument or in his oral submissions, are not before the court and I would say nothing about them.

Lord Justice Vos:

20 I agree with both judgments.

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