

JERSEY / JUDGMENT

Boots Properties Limited -v- Jones

[2017] JRC 063 (20 April 2017)

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judgment

Introduction

1. This judgment represents my decision in respect of two applications for summary judgment brought by the plaintiff firstly against Mr Jones, the defendant in action number 2016/242, and secondly against Mr and Mrs Jones the defendants in action number 2016/243. 2. Both proceedings relate to a 9 year lease of the ground floor of 10 Bath Street, St Helier ("the Property") which was entered into on 22 nd June, 2006, ("the Lease"). The Lease was between the plaintiff and Mr Jones. 3. Prior to 2006, it was common ground that the plaintiff had leased the Property to Mr Jones under a 9 year lease commencing in 1994. Mr Jones remained in occupation of the Property following the expiry of the lease granted in 1994 until he entered into the Lease in 2006. 4. The action against Mr and Mrs Jones arises out of a bond and promissory note they entered into in favour of the plaintiff in June 2011. In this judgment I will refer to the plaintiff's application in respect of this bond as "the Bond Application". The second application for summary judgment is against Mr Jones only and relates to arrears of rent plus interest said to be due for the period from August 2011 i.e. post the bond until expiry of the Lease on 21 st June, 2015. The amount claimed in terms of rental arrears by the time the application came before me had been reduced by the plaintiff's amended particulars of claim to the sum of £53,641.77 plus contractual interest. In this judgment I will refer to this application as the "Arrears Application". Chronology 5. In this part of my judgment I set out the relevant events and extracts from material documents. I do so only as far as it is necessary to decide the present application and bearing in mind that the applications are summary judgment applications. I have therefore indicated to the extent to which any parts of this chronology are disputed. 6. I start by reference to the terms of the Lease. (i) Clause 1(a)(i) provided for an annual rent of £15,500; (ii) Clause 1(b) provided for any arrears of rent to bear interest at the rate of 4% over HSBC Bank Plc's base rate from time to time; (iii) Clause 2 of the Lease contained a number of covenants given by Mr Jones. The relevant covenants are as follows:- "(f) Not at any time without the prior consent in writing of the Lessor first obtained to make or suffer to be made any alteration of addition whatsoever to the Demised Premises either externally or internally and not to make

any alteration in the plan, external construction, height, roof, walls, timbers, elevations, external appearance or decorations of the Demised Premises or the Property and not to cut or injure or remove or suffer to be cut or injured or removed any of the walls, partitions, floors, timbers or structure of the Demised Premises and not to erect in the Demised Premises any partitions and should the Lessor grant consent to the Lessee to a partition or partitions in the Demised Premises then after the erection and completion thereof not to alter the same without the prior consent in writing of the Lessor and not to do or suffer in or upon the Demised Premises any wilful or voluntary waste, spoil or destruction PROVIDED ALWAYS that it may be a condition of any consent required under the provisions of this sub-clause (f) of Clause 2 hereof that unless the Lessor shall otherwise direct:- (i) The Lessee shall pay the costs and expenses incurred by the Lessor in relation to the granting of any such consent. (ii) The works shall not be carried out except in accordance with plans and specifications previously submitted in duplicate to and approved by the Lessor. (iii) The works shall be carried out in accordance with the approved plans to the satisfaction of the Lessor. (iv) The Lessee shall at his expense reinstate the Demised Premises to their original condition upon the termination of this Lease howsoever caused. The Lessee shall carry out before the expiration or sooner determination of the Term any works stipulated to be carried out to the Demised Premises by a date subsequent to such expiration or sooner determination. (g) Not at any time during the Term without the consent in writing of the Lessor first had and obtained to carry out or permit or suffer to be carried out in or over or under the Demised Premises or any part thereof any improvement or addition or any building, engineering, mining or other operations or works or make or permit or suffer to be made any change in the use of the Demised Premises or any part thereof and not to commence such operations or institute any such change of use if such involves development within the meaning of the Island Planning (Jersey) Law, 1964, or any modification thereof save as provided under the terms of this Lease and to pay to the Lessor all costs (including charges payable to a surveyor) which may be incurred by the Lessor in or in contemplation of any application to the States of Jersey Island Development Committee or any other planning authority or any application to the Lessor for any consent pursuant to the covenants herein contained and to keep the Lessor fully and effectually indemnified against all costs, expenses, claims and demands whatsoever in respect of the said applications and consents. (x) Not to use or permit or suffer the use of the Demised Premises other than as a retail shop and not to permit or suffer anyone to sleep upon the Demised Premises and not to use or suffer the use of the Demised Premises or any part thereof for residential purposes whatsoever and not to carry on or permit or suffer the Demised Premises to be used for any illegal or immoral purpose. (y) (i) Not to assign, transfer, sub-let or part with the possession of the whole or any part of the Demised Premises without the prior written consent of the Lessor, such consent:- (2) In the case of an assignment of the unexpired term of this Lease not to be unreasonably withheld in respect of assignee introduced by the Lessee for such purpose and producing proper and substantial references and being solvent and respectable and of such financial standing proven to the reasonable satisfaction of the Lessor so as to be capable of undertaking the Lessee's obligations under this Lease. (ii) PROVIDED FURTHER

that on the grant of consent to an assignment of the unexpired term of this Lease:- (1) The assignee shall be required to enter into a direct covenant with the Lessor to perform and observe all the covenants and conditions herein contained and on the Lessee's part to be performed and observed including the covenants contained in this sub-clause (y) of Clause 2 hereof. (2) The assignee being a limited liability company two of its Directors or a third party or parties at the election of the Lessor shall be required unconditionally and irrevocably and, if more than one, jointly and severally personally to guarantee to the Lessor. (A) The punctual payment of all the sums due by the Lessee as herein contained and the performance and observance by the Lessee of all covenants, undertakings and obligations herein contained and on the Lessee's part to be performed and observed including the covenants contained in this sub-clause (y) of Clause 2 hereof. (B) To agree and declare that their liability under the guarantee 'shall not in any way be discharged or diminished or affected by the granting of time or indulgence to the Lessee. (C) To abandon and waive any right which at any time they may have under the existing or future law of the Island of Jersey whether by virtue of the 'Droit de Discussion' or otherwise to require that recourse be had to the assets of the Lessee before any claim is enforced under the guarantee. (D) To undertake that if sued under the guarantee by the Lessor and the Lessee is not sued also they shall not claim that the Lessee be made a party to the proceedings. (E) To agree to be bound under the guarantee whether or not made a party to legal proceedings for the recovery of any monies due under the Lease by the Lessee and whether the formalities required by any law or statute of the Island of Jersey whether existing or future in regard to the rights of obligations of sureties shall or shall not have been observed. (F) To abandon and waive any right which at any time they may have under the existing or future law of the Island of Jersey whether by virtue of "Droit de Division" or otherwise to require that any liability under the guarantee be divided or apportioned between them and any other or others reduced in any manner. (G) Should the Lessee go into liquidation and the liquidator disclaim this Lease or if the Lessee should be wound up or cease to exist should the Lessor so require to execute within fourteen days of receipt of a written request from the Lessor so to do a new lease of the Demised Premises such new lease to commence as the case may be as from the date of such disclaimer or winding up or ceasing to exist and to be for the residue then unexpired of the Term and to be at the rent then payable (such rent to commence as from the date of such disclaimer or winding-up or cesser of existence and to be subject to the same covenants and to the same provisos and conditions as those in ,force immediately before such disclaimer or winding-up or cesser of existence) and to be granted at their cost in all respects. (iv) In all cases of assignment or sub-letter or propositions to assign or sub-let all the Lessor's reasonable legal costs shall be paid by the Lessee on demand." 7. In 2008, Mr Jones started to run into difficulties with payment of rent due under the Lease. It is not necessary for the purpose of this application to determine why these difficulties came about beyond recording Mr Jones' submissions that the business he operated at the Property was no longer performing successfully. Accordingly, he fell into arrears. 8. At some point in 2010 Mr Jones had conversations with a Charmaine Parker of the plaintiff about assigning the Lease. In his affidavit, he suggested that this was to a Mr Aaron. 9. On 12 th November, 2010, Boots UK

Limited wrote to Mr Jones claiming £38,249.02 in respect of unpaid invoices and threatening court proceedings unless the arrears were paid within 14 days. 10. On 13 th January, 2011, the plaintiff commenced proceedings against Mr Jones. 11. The matter first came before the Court on 28 th January, 2011, when it was adjourned for two weeks. By reference to an email dated 2 nd February, 2011, from Ogier, advocates for the plaintiff, to Mr Jones it appears that the adjournment was to allow for a bond to be registered in favour of the plaintiff against property owned by Mr and Mrs Jones. 12. In an email dated 3 rd February, 2011, from Ogier to Mr Jones, following a conversation earlier that day, Mr Jones was informed as follows:- "Further to our conversation this morning I have spoken with Boots and informed them that "Bean Around the World" is interested in taken over the lease. Boots have confirmed that they were advised of this point last year and stated at the time that they would not consider an assignment unless all the outstanding arrears are cleared. Their position remains the same". 13. The business Bean Around the World is owned by a Mr Stokes; the mail of 3 rd February therefore suggests that it was Mr Stokes rather than Mr Aaron who may have been in contact with Ms Parker. 14. On 11 th February, 2011, judgment was entered against Mr Jones for £40,781.34, interest at 4% above HSBC Bank Plc's base rate, costs and interest and costs. Mr Jones did not appear when judgment was taken. 15. On 24 th February, 2011, Ogier on behalf of the plaintiff wrote to Mr Jones repeating its proposal that it should take a charge over Mr and Mrs Jones' family home. The letter contained a series of conditions. Condition 5 is relevant and states as follows:- "Should the property not be sold after a period of six months then Boots may, if it so wished, obtain a further judgment against you and your wife which would then be enforced against the Property (which would be through the Jersey process that is known as "dégrèvement)". Alternatively, Boots may commence bankruptcy proceedings you should the Property not be sold within the time scale provided." 16. If the charge was not agreed bankruptcy proceedings were threatened. 17. By a letter dated 8 th March, 2011, Advocate Livingstone, acting for Mr Jones, indicated that in principle the proposals in Ogier's letter of 24 th February, 2011, were acceptable. In his letter he also stated:- "I have spoken to Mrs Jones and explained the ramification for her providing the security which is sought. In anticipation that you would require her to have separate advice, I have made arrangements for her to see my partner Angela Roscouet once the necessary promissory note has been produced." 18. The relevant paperwork required by the plaintiff was sent by Ogier undercover of a letter dated 5 th April, 2011. The letter included the following statement:- "Please ensure that Mrs Jones receives separate legal advice, and we will need to return the enclosed Certificates of Execution to confirm as such." 19. On 10 th May, 2011, Advocate Livingstone wrote to Ogier informing Ogier that Mrs Jones had decided that she would not sign the bond and other documentation. 20. By 19 th May, 2011 the position appeared to have changed because Advocate Livingstone wrote to Ogier seeking a revised bond. 21. On 27 th May, 2011, Advocate Livingstone wrote to Advocate Anna Johnson of Ogier and stated as follows:- "You hoped when last we spoke to be able to register the necessary Bond this week, but we haven't received any documents. I know Mrs Jones has seen my colleague Angela Roscouet for independent advice. Following that meeting I am advised that both Mr and Mrs Jones remain prepared to give Boots the desired security, so I

look forward to receiving the necessary documentation at your earliest convenience." 22. The required documentation was sent to Advocate Livingstone on 1 st June, 2011, and contained the following statement:- "I further note that Mr and Mrs Jones have both received independent legal advice and they both still wish to proceed with the registration of a charge. In connection with the receipt of independent legal advice the enclosed certificates of execution will need to be completed and returned." 23. The bond was executed on 2 nd June, 2011, and named Mr and Mrs Jones as Borrower on page 1. It also contained the following material terms:- " Borrower " "includes all or any of the persons named as the Borrower and their respective heirs, executors and administrators"; 2.1 "the Borrower hereby acknowledges being well and truly indebted unto the Lender in the capital sum set out in the Second Schedule in accordance with the terms of this Bond (the "Loan"). 2.1.1 "The Loan is all money and liabilities whatever and however incurred whether now or in the future due or becoming due from the Borrower to the Lender including Interest in accordance with any agreement between the Borrower and the Lender and if there is no agreement interest on any money and liabilities due from you at an annual rate of 3% above the base rate charged by HSBC Bank Plc from time to time computed and compounded monthly." 2.2 "the Borrower covenants with the Lender to repay the Loan to the Lender on demand and in any case no later than four days after a deed of sale of the Property is passed before the Royal Court." 24.1 "the Borrower has been warned by the Lender of the risks in giving this Bond and advised by the Lender to take legal advice on this Bond before signing and either has taken legal advice or has been given the opportunity but has declined to do so." 24.2 "the Borrower enters into a Bond of the Borrower's own free will and not in consequence of or in reliance on anything said by or on behalf of the Lender or any other person." 24. The address of the "Property" was set out in the first schedule and was the family home of Mr and Mrs Jones. 25. The total amount due under the bond recorded in the second schedule was £70,184.13. For the Arrears Application, a more detailed schedule was provided covering the sums covered by the judgment dated 11 th February, 2011, arrears of interest, monthly rent for the months of January to June 2011, plus interest on rental arrears, and the legal fees payable by Mr and Mrs Jones. 26. Certificates of execution were signed on behalf of both Mr and Mrs Jones by Advocate Roscouet for Mrs Jones and Advocate Livingstone for Mr Jones. Both certificates contained the following statement:- "(a) That I attended the person named at 3 above, explained the terms of and gave independent advice on the Security Documents mentioned at 1 above enclosed with your instructions." 27. Also on 2 nd June, 2011, Mr and Mrs Jones again in the presence of Advocates Livingstone and Roscouet both signed a further promissory note in the sum of £1,361.66 which was registered with the Judicial Greffe on 8 th July, 2011, which appears to cover rent for July 2011. The note reads as follows: ""Boots Properties Limited c/o Ogier House 44 Esplande St Helier JE4 9WG Dear Sirs, Owner: TREVOR JONES and LYNN JONES, née Le Huquet Registration and Re-registration of the Promissory Note over 'Bernadine', 2 Le Grand Pre Estate, St Clement, (the "Property") Boots Properties Limited ("Boots") We unconditionally and irrevocably authorise any Advocate/Solicitor appointed by Boots to sign any billet or acknowledgement document on our behalf to register or re-register the

Promissory Note in the original capital sum of £1,361.66 bearing interest, signed by us on the 2nd day of June, 2011 in favour of Boots in the Public Registry creating a general charge secured against the Property. With this authority, we understand and agree that Boots can re-register this and any other previous Promissory Note at or around each 10th anniversary of the date of the original Promissory Note until all borrowing has been repaid, or until Boots is satisfied the Promissory Note no longer need to be registered in the Public Registry. We also acknowledge and confirm that the Boot's costs in connection with all subsequent re-registrations will be either paid by us on receipt of a demand from Boots or added to the capital sum of the loan outstanding." 28. The family home was marketed for some six months by Mr and Mrs Jones but no purchaser was ever found and no sale ever took place. Mr and Mrs Jones still live in the family home. 29. Both before and after Mr and Mrs Jones entered into the bond, there appeared to have been communications in respect of a possible assignment of the Lease in 2011. Following on from the email of 3rd February referred to in paragraph 12 above, on 22nd February, 2011, Ms Parker of Boots emailed Mr Stokes of Bean Around the World and stated as follows:- "With regards to our conversation regarding the above property, initial investigations would suggest that this property will become available shortly and Boots are looking to add toilet facilities to the premises. In order to start the ball rolling, please can you confirm that you are still interested in this property and if so kindly provide your full contact details to allow us to complete an initial credit check." 30. Mr Stokes replied on 24th February, 2011, indicating that he was looking at a possible tenancy of the Property, including taking on the entire building (which was owned by Boots and was empty) and suggesting that toilets and storage facilities might have to be placed upstairs. The email referred the plaintiff to Bean Around the World's website. 31. On 3rd April, 2011, Mr Jones also wrote to Ms Parker. In the final paragraph his letter stated as follows:- "As you are aware I have found a reputable businessman, Mr David Stokes, who is most interested in taking over the lease and I would really be most grateful if you would give this due consideration in view of my situation." 32. On 6th April, 2011, Mr Stokes chased Ms Parker who replied on 13th April, 2011, as follows:- ".....we are still investigating the possibility of expanding the premises and I will advise as soon as possible." 33. On 7th April, 2011, after the bond was executed, Advocate Livingstone wrote to Ms Parker at Boots and stated:- "I understand you have been in discussion with Mr Alvin Aaron regarding an assignment of the above lease which runs from 22nd June, 2006, to 21st June, 2015. I am instructed that Mr Aaron has agreed to take an assignment of the unexpired portion of the lease from my client." 34. It is not clear why Advocate Livingstone was referring to Mr Aaron at this point given that for the previous two months the proposed assignee had been Mr Stokes. Nevertheless Advocate Livingstone referred to Clause (y)(i)(2) of the Lease set out above and enquired whether the plaintiff had any objection in principle to the assignment and asked what details and references were required for Mr Aaron. 35. Advocate Livingstone wrote further to Ms Parker on 23rd June, 2011, stating "I have been contacted by the proposed assignee Mr Aaron who was enquiring about the installation of toilets at the Property ." The final paragraph stated:- "You will be well aware of my client Mr Jones' difficulties in meeting his ongoing monthly rental obligations, so it is important that a decision is made as soon as

possible regarding the proposed assignment to Mr Aaron. I would therefore ask you please to reply urgently to my letter of 7 th June, and to reply to this letter at the earliest reasonable opportunity." 36. Advocate Livingstone wrote to Mr Sanders at Ogier at on 22 nd July, 2011, stating:- "I am experiencing considerable frustrations in getting any response beyond mere acknowledgements from Boots regarding the proposed assignment by Mr. Jones to Mr. Aaron. Whilst the assignment and the arrears are not directly linked, and whilst I understand you are not currently instructed by Boots in relation to the former, you will understand my client's view that he has found an assignee willing to take over the lease but is hearing nothing from your clients as to whether there are any difficulties with the proposed assignment, and if so, what those difficulties are." 37. Mr Jones in his oral submissions also indicated there were two other possible assignees; one was a Mr Nightingale whom Advocate Livingstone according to his invoice spoke to in October 2011. The other was J. D. Williams Book Makers. No documentation has been produced from either showing any communications with the plaintiff or Boots in relation to taking an assignment of the Lease. 38. By reference to the affidavit of Mr Michael Fullerton filed in support of the plaintiff's application Ms Parker no longer works for Boots and so Mr Fullerton deposed he had been unable to discuss matters with her. He also deposed that he was unable to access email accounts of previous employees and so could not review the email correspondence sent or received by Ms Parker around the relevant time. 39. The following are pertinent paragraphs of Mr Fullerton's affidavit as follows:- "49 I cannot find any correspondence to confirm why Boots refused to proceed with the assignment to either Mr Stokes or Mr Aaron. I can see that the initial position adopted by Boots was that before it would consider an assignment all arrears had to be repaid. Mr Jones had been notified of Boots' position in this regard both by telephone and letter. I can confirm that this is consistent with the position of Boots would adopt now if approached with a request for an assignment where there is outstanding arrears of rent. The rationale being to ensure that Boots would not weaken its position by releasing the tenant from their obligations whilst still being indebted to Boots potentially leading to costly legal proceedings. 50. Boots later confirmed to Mr Jones that an alternative to repayment of the arrears would be to find an appropriate assignee (satisfactory to Boots). I believe the reason that Ms Parker was willing to consider an assignment at this stage was on the basis that the arrears had been dealt with as a result of Mr and Mrs Jones entering into a charge in respect of Mr Jones' outstanding indebtedness. Boots' position was now protected in this respect. The understanding, as set out as conditions in the contemporaneous documentation was that Bernadine would be sold within a six month period enabling the arrears to be paid in full. 51. I would note that both Mr Stokes and Mr Aaron required structural work to be carried out if they were to take on an assignment of the Lease. Mr Stokes confirmed that he would be looking to take on the building as a whole which would enable them to place toilets and storage upstairs and Mr Aaron wished to install toilets at the Property. 52. I have reviewed the clauses of the Lease and I note that pursuant to clause 2(x), the tenant covenants with the landlord "Not to use or permit or suffer the use of the Demised Premises other than as a retail shop". I do not consider that either a coffee shop or a pizza take-away can be considered to be a retail shop.

Leaving to one side the clause in the Lease which prevents the assignment of the Lease to businesses such as a coffee shop or a pizza take-away, an assignment to either of the proposed assignees appears to have required structural changes to be made to the Property. Ms Parker noted in her email to Mr Stokes of April 2011 that Boots was "still investigating the possibility of expanding the Property" so it seems that enquires were made to determine whether Boots would be willing to agree to such structural changes to the Property. I can confirm that if Boots was presented with the proposed assignees in respect of this Property now, Boots would not consider them to be suitable tenants." 40. By reference to the papers before me, there were no further communications between the plaintiff and Mr and Mrs Jones or either of them after the summer of 2011 until July 2016 when Ogier sent two letters, one to Mr Jones seeking to recover arrears of rent and one to Mr and Mrs Jones demanding repayment under the bond. Subsequent to these letters proceedings were issued which have resulted in the present applications. The relevant legal principles 41. In relation to the applicable legal principles on a summary judgment application there was no dispute between the parties. The plaintiff had referred me to Corefocus Consultancy Limited v Cronk

[2013] (2) JLR Note 31, and the unreported judgment

[2013] JRC 194 in particular paragraphs 9, 10, 13 and 14. 42. Given the arguments advanced by Mr and Mrs Jones referred to below, it is also appropriate to refer to Hard Rock Limited and Hard Rock Café International (STP) Inc v HRCKY Ltd

[2013] JRC 244B in particular paragraphs 14 to 16 which were applied at paragraphs 86 to 88 of the Hard Rock decision. 43. I have applied the principles in Corefocus and Hard Rock decisions in reaching my decision in respect of the Bond Application and the Arrears Application. The parties' contentions 44. In relation to the Bond Application, Mr Jones firstly relied on the fact that the plaintiff should have agreed to an assignment of the Lease in 2010. Had an assignment been granted, it would not have been necessary for Mr and Mrs Jones to have provided a bond. The plaintiff had failed to agree to such an assignment despite the number of attempts which he made in 2010 to find a new tenant; and that Mr Jones stated that he had given the contact details of Ms Parker of Boots to a number of interested persons. 45. In relation to the interest of Bean around the World and Mr Aaron, these were still retail businesses and so again assignments should have been agreed with one of these two businesses. 46. The lack of any toilets at the Property was something the plaintiff had to address in any event to comply with Health and Safety requirements. The plaintiff was not therefore justified in refusing to consent to an assignment because alterations were required to construct toilets. 47. Ultimately what Mr Jones faced from Boots was silence with the plaintiff simply refusing to release Mr Jones and not addressing requests to assign the remainder of the Lease. 48. In relation to Mrs Jones, she disputed she had received independent advice. While she accepted that she had met and had discussions with Advocate Roscouet on the day she signed the bond and other related documentation, she denied having seen Advocate Roscouet prior to the date of execution

despite Advocate Livingstone's email of 27 th May, 2011, suggesting otherwise (see paragraph 17 above). She also recalled that her focus was whether bankruptcy could be avoided by a remise de biens taking place. 49. Mrs Jones also stated she did not understand she was a borrower under the terms of the bond. 50. Mrs Jones further argued that Advocate Roscouet was not independent because she was a partner of Advocate Livingstone and not from another firm. 51. In relation to the Arrears Application, Mr Jones' complaint was the total failure by the plaintiff to respond to requests to assign the remainder of the Lease to prospective tenants. 52. The family home was not sold because in 2011, Mrs Jones' mother who had provided funds for part of the purchase of the family home was seriously unwell and resided with Mr and Mrs Jones. Accordingly, the family home had to be adapted to enable care to be provided to Mrs Jones' mother. The focus of Mr and Mrs Jones was on providing this care. While therefore the family home was marketed as being for sale in 2011, this did not lead to any offer. Attempts to market a sale of the family home stopped towards the end of 2011. 53. Although Mr Jones accepted that he paid certain relatively small sums sporadically to the plaintiff from the end of 2011 onwards until the Lease came to an end in 2015, he heard absolutely nothing from the plaintiff over this period in relation to any assignment, payment of money due under the bond, the sale of the family home or in respect of moneys due under the Lease. The business operating at the Property had also ceased trading requiring Mr Jones to look for other work. 54. Advocate Pallot contended, having taken me carefully through the terms of the Lease and the bond that any issue concerning whether or not the plaintiff had wrongly refused to agree to an assignment was not relevant to the Bond Application. This was because, apart from one reference in 2010, all the discussions in terms of assignability only really took place in 2011. Any assignment would not have been completed until after the time the bond was entered into. 55. It was clear from the correspondence in particular the certificate of execution that Mrs Jones had independent legal advice. There was therefore no basis to assert that independent advice had not been received. 56. It did not matter that Advocate Roscouet was a partner with Advocate Livingstone. She had certified that independent advice had been given to Mrs Jones. 57. The certificate of execution also meant that any issue of undue influence between the first and second defendant was no concern to the plaintiff. 58. The plaintiff in any event was justified insisting that it would not consent to an assignment until the question of arrears was dealt with. 59. In relation to claims for arrears of rent, the plaintiff was not under a duty to litigate to cancel the Lease; it was entitled to hold Mr Jones to the covenant he had given in respect of payment of rent (see *Jervis v Harris*

[1996] Ch 195 and *Reichman v Beveridge*

[2006] EWCA Civ 1659). 60. By reference to the current policy of the plaintiff, the proposed assignees would not be suitable tenants. The plaintiff did not have to agree to a change of use or to alterations. Accordingly, the lack of a response from Ms Parker did not matter. 61. The plaintiff was further justified in waiting until the end of the Lease to decide what to do about arrears. It did not have to seek to cancel the Lease although it had the option

to elect to do so; rather it was entitled to enforce its covenant. 62. Even if her previous submissions were incorrect, by making some payments towards the outstanding rent from 2011 onwards, Mr Jones had affirmed the Lease and could not deny the claim for arrears on the basis that the plaintiff was in breach of its obligation to consent to an assignment. 63. However, the plaintiff accepted that nothing had happened between 2012 and 2016. It was for this reason it was only seeking interest on the Bond Application from the date of its letter before action sent in June 2016, seeking repayment of all sums due whether under the bond or the Lease. Any delay by the plaintiff in not pursuing its claims under the bond was not therefore a defence to the Bond Application. At best it entitled the Court to refuse to award interest for a period of time, but interest was only being sought from 2016 onwards for the Bond Application. It was also not a defence to the Arrears Application. Decision on the Bond Application 64. I start by reference to the argument of Mrs Jones that she did not receive independent advice. 65. Firstly it is clear that the plaintiff required Mrs Jones to have independent advice as can be seen from Ogier's letter of 24 th February, 2011, Advocate Livingstone's letter of 8 th March, 2011, Ogier's letter of 5 th April, 2011, Advocate Livingstone's email of 27 th May, 2011, and Ogier's letter of 1 st June, 2011. 66. Secondly it is clear that the certificates of execution signed by Advocate Roscouet identified Mrs Jones as having received independent advice. Furthermore during the course of the hearing Mrs Jones, whilst she disputed that she had not received advice prior to the date of executing the document, accepted that she spoke to Advocate Roscouet on her own on the day she executed the bond. What Mrs Jones disputed was that Advocate Roscouet was not independent because she was a partner with Advocate Livingstone and that her focus was avoiding bankruptcy and exploring the possibility of a remise de biens and not that she was accepting liability for moneys due under the Lease by Mr Jones. 67. Firstly, as far as independence is concerned, in my judgment the plaintiff is entitled to rely on the express representation in the certificate of execution set out above that Advocate Roscouet was independent following on from the various requests for Mrs Jones to receive independent legal advice referred to above. While the background to the bond was the threat of bankruptcy against Mr Jones, the transaction entered into was the granting of security. The Law Society Code of Conduct permits Advocates from the same firm to give advice in non-contentious matters. Ultimately, the transaction was whether or not Mrs Jones was prepared to agree to grant security over the family home which was owned jointly in respect of Mr Jones' indebtedness to the plaintiff. Accordingly it is not a defence to the Bond Application that Advocate Roscouet was a partner of Advocate Livingstone. 68. In addition, any breach of The Law Society Code of Conduct does not give rise to a cause of action in any event (see *Optical Services v Carey Olsen*

[2014] (2) JLR 567 at paragraphs 42 - 44). 69. Secondly to the extent Mrs Jones might not be happy with that advice or cannot recall it is not a basis to permit her to defend the Bond Application. Rather it is a matter between Mrs Jones and Advocate Roscouet. Nor is it a defence that Advocate Roscouet was aware of and heard the advice given by Advocate Livingstone to Mr Jones. 70. In any event Mrs Jones' focus on bankruptcy in respect of her

husband's indebtedness indicates that she understood that only Mr Jones owed money to the plaintiff because she was not a party to the Lease or under any liability in respect of it. Any discussion of a remise de biens can also only have been on the basis of selling the family home to meet Mr Jones' indebtedness. There was no evidence produced that Mr or Mrs Jones or both of them had any other property to sell. The terms of the bond are also clear on their face as they identified both Mr and Mrs Jones as borrower and the amount due. Likewise the terms of the Promissory Note are self-explanatory and not capable of being misunderstood. The only choice Mrs Jones faced was either to agree to the bond and the promissory note or to allow her husband to be made bankrupt which in due course would have led to proceedings to sell the family home to realise Mr Jones' interest in it. 71. In relation to the question of assignability, there is clearly a factual dispute as to whether prospective assignees were introduced to the plaintiff prior to the bond being entered into and what steps the plaintiff took in response to these requests. I explore this issue in more detail in relation to the next part of my judgment when I deal with the Arrears Application. 72. However, in my view, and assuming that Mr Jones introduced prospective assignees to the plaintiff in 2010 and also assuming that it is arguable that Boots acted in breach of the Lease in not agreeing to an assignee taking over, this is not a defence to the Bond Application. This is because by the time Mr and Mrs Jones entered into the bond, firstly the plaintiff had taken judgment against Mr Jones for arrears of rent due up to the end of 2010. Secondly, Mr Jones had independent advice (as did Mrs Jones). While content of that advice has not been referred to me, an option open to Mr Jones at the time would have been to apply to set aside the judgment obtained in January 2011 (either in whole or in part) and to defend the claim on the basis of the plaintiff having unreasonably refused to assign the remainder of the Lease. Yet Mr Jones did not do so. Instead, having received independent advice as I have stated, he confirmed his liability under the judgment and other matters by executing the bond and the related promissory note. This does not surprise me because any defence based on an unreasonable refusal to assign could only have applied to some of the arrears of rent incurred in 2010; it could not apply to any earlier arrears which Mr Jones accepted had accrued in 2008 and 2009. On any view therefore a significant sum was due to the plaintiff by the end of 2010. Other than the issue of whether Mrs Jones received independent advice, no other grounds were advanced that the agreement of Mr and Mrs Jones to enter into the bond and the promissory note (which is a contract having full legal effect until set aside) should be set aside on any other basis. Mrs Jones received such advice as I have set out above. 73. The actions of Mr and Mrs Jones subsequent to entering into the bond were also consistent with an agreement to do so and with condition 5 referred to in Ogier's letter 24 th February, 2011, (and indeed repeated in paragraph 6 on page 2 of Ogier's letter of 1 st June, 2011). Mr and Mrs Jones therefore acted consistently with this condition. This further indicates that they understood what they were agreeing to by entering into the bond and the related promissory note. 74. Finally, the fact that the plaintiff was putting pressure on Mr and Mrs Jones to agree to enter into the bond is also not a defence to the Bond Application because both had independent advice when they entered into the bond and related documents. 75.

Accordingly, I am satisfied that generally there is no defence to the Bond Application. 76. The only issue which is of concern in relation to the Bond Application is the question of interest. Included in the schedule describing what was owed to the plaintiff are sums representing interest on rental arrears and costs. The right to this interest arises from clause 1(b) of the Lease which provides for annual interest at a rate of 4% over HSBC Bank plc's base rate. In the proceedings against Mr and Mrs Jones, the plaintiff claims interest at a rate of 3% on a compound basis on the amount due under the bond by reference to clause 2.1. 77. However, 2.1.1 of the bond only applies if there is no other agreement including giving rise to a right to interest. Yet the Lease is such an agreement and gives rise to an agreement to simple interest. 78. Accordingly, the plaintiff is only entitled to judgment on the capital sums due under the bond and to simple interest at the rate of 4% per annum over HSBC Bank Plc's base rate from time to time or its successor or equivalent. The Arrears Application 79. In relation to the Arrears Application, the main defence advanced by Mr Jones is that, had the plaintiff agreed to an assignment in 2011, clause (y)(i)(2) has the effect that any obligation on the part of Mr Jones would have ceased on the date that an assignment should have been agreed by the plaintiff. 80. In the present case clearly assignees were introduced by Mr Jones. 81. What is not clear on the evidence produced to me is why an assignment was not concluded. By reference in the chronology set out above, at least two prospective assignees namely Mr Stokes of Bean Around the World and Mr Aaron were introduced. Yet Mr Fullerton in his affidavit on behalf of the plaintiff was not able to produce any evidence as to the position of the plaintiff in 2011 in relation to these requests. Rather he simply explains the position now by reference to the plaintiff's current policy. However Mr Fullerton's affidavit is only opinion evidence and not evidence of the plaintiff's policy at the time assignees were suggested or what steps it took at the time assignees were identified by Mr Jones in 2001. It is not even clear if Mr Fullerton worked for the Boots group in 2011. 82. Mr Fullerton's affidavit is also unsatisfactory because he simply states that he cannot access Ms Parker's email account. He does not state what attempts have been made by Boots to access Ms Parker's email account and what other records whether manual or electronic may have been kept by or for the plaintiff in relation to this Property or how any such records were stored. He does not explain whether anyone else for the plaintiff had any responsibility for the Property, whether decisions were made by Ms Parker alone or whether she reported to other individuals. He also does not explain if he knows Ms Parker's current whereabouts, whether attempts have been made to contact her or when and why (if relevant) she left the Boots Group. I refer to these omissions because I would have expected an organisation the size of Boots to have sophisticated record keeping requirements which would allow it to have responded to Mr Jones' criticisms notwithstanding the departure of one employee. 83. The lack of any records or evidence as to why the plaintiff did not respond to Mr Jones' request to assign the Lease in 2011 means that I simply do not know what the plaintiff, through Ms Parker, did in response to the requests to assign the balance of the Lease in 2011. This is not a basis upon which I can conclude that there is no defence to the Arrears Application. 84. In relation to the argument that the plaintiff would not have agreed to a

change of use from retail, while I accept that for Planning Law purposes, sale of food or drink involves a change of use and therefore might not be retail, the relevant clause in the Lease is silent as to the basis upon which the lessor may withhold consent. Accordingly in my judgment, it is arguable that the withholding of consent where it is not clear the basis upon which a landlord can withhold consent is subject to an implied obligation of good faith (see *Sutton v Insurance Corp C. I. Ltd*)

[2011] JLR 80 at paragraphs 16 and *Haden-Taylor v Canopus Underwriting Ltd*

[2015] (1) JLR 224 at paragraphs 136 to 139. The same analysis applies to alterations and any requests from tenants to construct toilets which would require the plaintiff's consent under clause 2(f) and 2(g) as well as 2(x). There is also no evidence from the plaintiff as to whether its current policy reflects what it was considering at the time through Ms Parker or indeed anyone else on behalf of the plaintiff or what steps it took in relation to the requests received. Again this is not a basis upon which summary judgment can be given. 85. I am also of the view that there is an arguable construction as to whether the plaintiff (as occurred in 2010) was entitled to refuse to agree to any assignment until the question of arrears had been dealt with. This turns on a construction of clause (y)(i)(2). One possible interpretation of the clause is that any assignment would contemplate the assignee taking on liability for any arrears because the assignee stepped into the shoes of the tenant. The other possible construction is that there would be a fresh start for the assignee who would only take on responsibility for the unexpired term of the Lease, leaving the original tenant responsible for any arrears up to the date of the assignment. Yet the position of the plaintiff was that they would not consent to any assignment until the question of arrears had been dealt with. If the agreement is construed to mean that a proposed assignee was required to take over responsibility for all arrears and was sufficiently solvent to do so then the question arises on what basis could the plaintiff insist on the tenant repaying arrears incurred prior to the date of the assignment? The risk would pass to the assignee assuming it was willing to take it on. If on the other hand the agreement of the parties was that any assignee effectively started with a clean slate from the date of the assignment, the question of arrears would not be a basis to refuse to agree to an assignment. The only basis to refuse to agree would relate to the ability of the assignee to pay rent after the date of the assignment not arrears. Such arrears would only be a question between the plaintiff and Mr Jones as the original tenant. Accordingly, this would not be a basis to justify withholding of consent on the basis of clause (y)(i)(2) as drafted. Clause (y)(i)(2) also does not provide for a tenant having to provide security as the price for an assignment being agreed. However the plaintiff's approach was that no assignment would be agreed until Mr Jones had either cleared the arrears or provided security to do so. It is at least arguable that this position falls outside clause (y)(i)(2). 86. However, matters do not end there because the Lease then continued for 4 years with small sums being paid sporadically against the rent due in the total sum of around £6,000. 87. This led to Advocate Pallot's argument that by making a series of payments between 2011 and August 2014, the plaintiff affirmed the Lease. 88. There is force in this argument. *Bailhache née Herbert v Williams*

[1968] JJ 997 suggests that payment of rent under a lease where there is an allegation of a tenant being in breach prior to the payment operates as a bar to a landlord's later claim for possession. Applying the same logic a tenant who has paid rent where a landlord has previously breached another term of a lease could be said to have lost the right to assert that the landlord's breach entitles the tenant to repudiate that lease i.e. to treat it as having come to an end. 89. However, as a matter of English law, affirmation only arises where a party has knowledge of the facts giving rise to the breach and has knowledge of a legal right to choose between either electing to terminate the contract for breach or deciding to continue the contractual relationship (see Chitty on Contracts 29th Edition paragraph 24-003). It is not clear to me whether the issue of a party said to have affirmed a lease by conduct (in this case Mr Jones by making payment of sums falling due after the plaintiff's failure to deal with requests to assign the Lease) only applies if that party knows of its legal rights to treat the contract as at an end. It is also not clear if this question was explored in *Bailhache*. Accordingly this is a matter that I regard as appropriate for the Royal Court to determine. 90. In reaching this conclusion, I accepted the plaintiff might argue that the actions of Mr Jones in making some payments after 2011 were unequivocal. However, I regard this argument as a factual one which can only be properly be determined at trial after the Royal Court has heard from both parties as to what their view was of the Lease and why there was using Mr Jones's words "deathly silence" on both sides from the end of 2011 until the plaintiff's letter for action in 2016. 91. I have therefore reached the view that I do not consider the question of affirmation (or any similar argument such as estoppel or waiver) can be determined without hearing the full material matrix and full argument on the scope of the doctrine of affirmation in the context of a lease of Jersey immovable property. 92. I further consider that unconditional leave should be given to defend the Arrears Application. Applying the principles in *Hard Rock*, referred to above, the argument that Mr Jones' obligations would have come to an end had an assignment been consented to clearly arise out of the terms of the Lease itself i.e. the same agreement that the plaintiff alleges Mr Jones has breached. Secondly, I do not regard such a defence either as shadowy or improbable. This conclusion does not mean that the defence will not have its challenges and it may not prevail. However, I am satisfied that there is a genuine defence raised in good faith to the claim for arrears. 93. This conclusion also means that any question of a claim for interest on arrears is also a matter for trial. Even if the main defence that the plaintiff should have agreed to an assignment does not prevail, the Court also possesses a discretion to decide what interest should be awarded and from what date. This discretion therefore allows Mr and Mrs Jones to argue for a later date than when arrears fell due for payment.

Conclusion

94. For the reasons given in this judgment, I grant summary judgment in respect of the Bond Application, save that the interest awarded is simple interest at a rate of 4% over HSBC's base rate on capital sums outstanding under the Bond and not on interest but I refuse the

application for summary judgment in respect of the Arrears Application where unconditional leave to defend is given. 95. I will hear from the parties on costs and whether any other consequential directions are required to progress the Arrears Application to a trial when this judgment is handed down. Authorities Corefocus Consultancy Limited v Cronk

[2013] (2) JLR Note 31. Corefocus Consultancy Ltd v Cronk

[2013] JRC 194 . Hard Rock Limited and Hard Rock Café International (STP) Inc v HRCKY Ltd

[2013] JRC 244B . Jervis v Harris

[1996] Ch 195 . Reichman v Beveridge

[2006] EWCA Civ 1659 . Optical Services v Carey Olsen

[2014] (2) JLR 567. Sutton v Insurance Corp. C. I. Ltd

[2011] JLR 80 . Haden-Taylor v Canopus Underwriting Ltd

[2015] (1) JLR 224. Bailhache née Herbert v Williams

[1968] JJ 997 . Chitty on Contracts (29th Edition). Page Last Updated: 28 Apr 2017 BAILII:
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Prepared on 29 October 2026 · Esheria