Tacit relocation of leases

Brucefield Estate Trustee Company Limited (in liquidation) v Computacentre (UK) Limited [2017] SC LIV 38.

The question of notices under commercial leases is once again raised by this case. In this instance, the issue is what form of notice is required in order to prevent the common law operation of tacit relocation.

First, we might ask, what is tacit relocation and why do we have it? In answer, it could be viewed as an anomaly in the law of contract. In general terms, when parties set out their agreement in the form of a written contract (which a lease is), the words used set out the full extent of their intentions. All leases must state an end date or duration, when the contractual relationship between the parties is due to come to an end. But for the speciality of the law of leases, that would ordinarily be conclusive. However, in every lease there is an implied agreement in addition to what is stated in writing to the effect that whatever the stipulated period of the lease might be, that period might be extended by the tacit (i.e. unspoken) consent of the parties.

If neither party has given notice of its intention to terminate the lease, the parties are by their silence presumed to have agreed that the lease is to be prolonged. Tacit relocation then operates to extend the period of the lease by one year on the same terms and conditions (with the exception of the expiry date). This common law concept has been recognised at least since the time of Baron Hume. It was expounded in *Hume's Lectures, Vol. 4*, (1786-1822) and is also explained in the authoritative text, Rankine, *The Law of Leases*, first published in 1887, apart from many other recent ones. In domestic leases particularly, it is a very helpful stop-gap to cover the relationship between the landlord and tenant where they have not thought to extend matters more formally. Indeed, in the majority of repairing cases I come across in my capacity as part-time Chairman of the Housing and Property Chamber, the relevant lease is an old one and has carried on only by means of tacit relocation, sometimes for many years.

The dispute arose in *Brucefield Estate* because the liquidators of that company sought decree for payment of one year's rent from its former tenant, Computacentre after the expiry of the initial lease period on 29 May 2015. This was resisted by the tenant on the grounds that the landlord's actions had amounted to notice to them that the lease was about to come to an end as from its expiry date.

The Landlord's position might have been thought to have been a simple one because Clause 9 of the lease contained the following provision: "Any notice, request or consent under this lease shall be in writing." It would follow that in the absence of

written notice of termination, the lease would continue for a year by operation of tactic relocation. However, it was found that at common law, it is open to the parties to stipulate that tacit relocation will not apply and that more importantly, such a stipulation can be done informally such as verbally (i.e. spoken word only) or by actions making that intention clear by inference. Clause 9 would therefore have had the effect of abrogating the common law rights of the parties in that regard. Whilst this is possible, it requires to be set out expressly and in the clearest possible terms to be effective. Clause 9 did not do that, with the consequence that it was possible for the tenants to exclude the operation of tacit relocation by means other than in writing as long as that intention was made clear.

The only trouble was, they did not - at least as far as their formal pleadings were concerned. The tenant had made no averments of any informal communication to exclude tacit relocation and therefore could not lead any evidence that such a thing had taken place. The actings on the part of the landlord otherwise relied upon by the tenants were found to be inadequate to constitute an indication by the landlord that the lease was to be at an end on the expiry of the lease period. As a consequence, the Sheriff took the unusual step of issuing a formal declaration that the lease had continued for a period of one year until 28 May 2016 and granted decree for one year's rent of £72,647 without the need for any evidence being heard.

This is a slightly odd case given the discussion about the way in which the operation of tacit relocation could be avoided, but which in the end turned out to be something of a red herring. However, we are better now informed about that common law concept. Apart from that, had the tenant merely complied with Clause 9 and provided written notice of termination of the lease sufficiently in advance of 29 May 2015, there would have been no means of action open to the liquidators and it would have saved a fairly substantial sum of money.

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