Case No: A3/2011/3031

Neutral Citation Number: [2012] EWCA Civ 1037
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (CHANCERY DIVISION)
MANCHESTER DISTRICT REGISTRY
HHJ HODGE QC
1MA30422

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE DAVIS
and
MRS JUSTICE BARON

- -

Between :

LONDON TROCADERO LIMITED	**Appellant/ Defendant**
- and -	
FAMILY LEISURE HOLDINGS LIMITED	**Respondent /Claimant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

NICHOLAS TROMPETER (instructed by **Mishcon de Reya**) for the **Appellant.**
IAN FOSTER (instructed by **Turner Parkinson LLP**) for the **Respondent.**

Hearing date: 10th July 2012

- -

Judgment

Lord Justice Davis:

Introduction

1. This is an appeal, brought by leave of Mummery LJ, against an interlocutory order of His Honour Judge Hodge QC, sitting as a judge of the Chancery Division, of 10 November 2011. By that order, the judge declared and ordered that the claimant ("FLH") had the right to remove a quantity of amusement and gaming machines from premises at the Trocadero, Piccadilly Circus, London W1 on certain terms. He further ordered the defendant ("LTL") to pay FLH's costs of its application for relief save that there was to be no order as to the costs of a previous hearing on 23 September 2011. He allocated the case to the multitrack and gave certain directions for the future progress of the proceedings. He also granted a stay on terms, pending a possible application for permission to appeal.

2. The essential subject matter of the proceedings is in broad terms indicated by the nature of the interlocutory order made. As between two commercial enterprises, given the nature of the dispute, one would have thought some kind of agreed solution would have been reached, without the need for any court intervention. That did not happen. At all events, after the order was made and an appeal was set in motion, it seems that LTL, in consideration of certain covenants, granted a licence to FLH to remove the goods in question. Thus the only extant matter, in substance, was now costs. This was not drawn to the court's attention until receipt of FLH's skeleton argument for this hearing. It should have been notified much earlier. Further, since the only outstanding issue was now one of costs, again one would have thought a sensible solution might be agreed. Again, that did not happen. It is not obvious that any real regard has been had to the statement in the White Book (Vol 2 9A-77) that generally it is inappropriate for parties seeking to resolve a dispute between them as to costs to seek to do so by litigating to a conclusion a substantive issue that has become "academic".

3. Nevertheless, given where we are now, in order to resolve the outstanding issue as to costs it is necessary to look at the substantive legal claims being advanced.

Background

4. The premises in question were levels 1 and 2 of certain units at the Trocadero. These premises were the subject of a Lease between the predecessors of LTL and a company called West End Amusement Parks Limited ("WEAP"). The Lease was dated 30 September 2002. It is, with Schedules, 69 pages long and is clearly carefully drawn. It is necessary, in order to explain the issues arising in the litigation, to refer to a number of its terms.

5. WEAP is styled "the Tenant"; and "Tenant" is defined to mean the person named as the Tenant in the Lease "and includes the successors in title of the Tenant and those deriving title under the Tenant". Definitions of the words "Common Parts" and "Loading Area" are, among others, included.

6. By clause 3.2 of Section 2 of the Lease it is provided:

"There are granted the rights and easements set out in Schedule 1."

Clause 3.5 operates so as to negate the existence of any implied easement.

7. Schedule 1, in the relevant respects, provides as follows:

"1. Subject as provided in Schedule 3 and subject to compliance with the provisions contained in Schedule 3 a right of way (during the opening hours on a Centre Opening Day and in common with the Landlord and all others authorised by the Landlord from time to time or otherwise having the like right) for the Tenant and all others authorised by the Tenant to pass to and from the premises on foot only over and along the Common Parts provided always that:

1.1 the Landlord shall be at liberty at any time and from time to time during the Term:

1.1.1 to make such alterations to the Common Parts as the Landlord shall think fit and to close the Common Parts or parts of them for such period as is necessary to make such alterations;

1.1.2 to close the Common Parts or parts of them for a sufficient period in each year to prevent the acquisition by the public or others of any rights or easements in respect of them;

1.1.3 to erect, place and maintain in the Common Parts at its absolute discretion in all respects such signs, lighting, heating, ventilating, security or other equipment, kiosks, plants, reception desks and landscaping, children's recreational equipment, tables, chairs, benches and other seating and such other items as the Landlord may from time to time determine; and

1.1.4 to hold or authorise or promote in the Public Areas such activities as the Landlord shall consider desirable to promote the Centre or any trade or business in it.

1.2 The Landlord shall be at liberty to restrict:

1.2.1 the use of the Common Parts by the public outside the Maximum Trading Hours for a Centre Opening Day in such manner as the Landlord shall think fit; and

1.2.2 the use of the Common Parts in such manner as the Landlord shall think fit for the purpose of carrying out works to them or in connection with the provision of services but not so as to preclude access to the Premises.

2. Subject to compliance with the provisions of paragraph 1 of Schedule 3 the right (in common as above) to load and unload vehicles in the Loading Area at such times as provided for in Schedule 3."

Turning then to Schedule 3, that in the relevant respects provides as follows:

"1. Delivery and collection of goods

1.1 For the purpose of this paragraph "Goods" shall mean all goods, materials, articles or things whether for sale, display or use in the Premises which are to be delivered to or removed from them except:

1.1.1 refuse and rubbish; and

1.1.2 articles sold to customers which are removed by such customers upon purchase.

1.2 No goods are to be delivered or removed from the Premises except in accordance with the following procedure, that is to say:

1.2.1 The Tenant shall ensure that Goods to be delivered to the Premises are delivered to the Loading Area only during the Loading Hours on a Centre Opening Day.

1.2.2 Upon a delivery to the Loading Area of Goods for collection by the Tenant or the Tenant's authorised representative shall forthwith upon demand attend the Loading Area and take delivery of them.

1.2.3 The Tenant shall arrange for the vehicle making the delivery to be unloaded with all due speed and shall ensure that the Goods so unloaded are removed from the Loading Area and transported to the Premises by means of such lifts, hoists and service corridors as shall be designated from time to time by the Landlord for use by the Tenant.

1.2.4 Goods to be removed from the Premises shall not be delivered to the Loading Area for collection except during the Loading Hours on a Centre Opening Day and then not until the Tenant has been advised that there is a vehicle then available to collect the same.

1.2.5 A Tenant wishing to transfer Goods to the Premises shall transport such Goods by such service corridors and lifts as the Landlord shall from time to time designate for use by the Tenant.

1.2.6 If the Tenant wishes to deliver or to remove from the Premises any Goods of a size or weight that cannot be

transported by means of the service lifts in the Centre the Tenant shall give at least twenty-four hours prior written notice to the Landlord or the Landlord's managing agents of the proposed delivery or removal of such Goods and shall comply with such stipulations as the Landlord or the Landlord's managing agents shall make for the transportation of the same within the Centre.

1.3 The Tenant shall not in any circumstances (except with the prior written consent of the Landlord):

1.3.1 unless otherwise agreed in writing by the Landlord or the Landlord's managing agents transport Goods within the Centre at any time using any of the Public Areas;

1.3.2 transport Goods within the Centre by any conveyance or vehicle except a conveyance or vehicle of such size and type as shall be previously approved by the Landlord."

Clause 52 of the Lease provides that a person not a party to the Lease has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of the Lease but so as not to affect any right or remedy which exists or is available apart from that Act.

8. It was unsurprising that the Lease should contain detailed provisions with regard to deliveries and removals. As is well known, the Trocadero is very well-attended. It has many tenants and licensees running different kinds of businesses, primarily related to entertainment and leisure. The premises extend to over 600,000 square feet. It is centred in the heart of London and has an estimated "footfall" of over 9 million per year. Mr Trompeter, for LTL, understandably emphasised the need for and importance of restrictions as to delivery and removal, to ensure good estate management and to avoid unreasonable disruption to other businesses in the building.

9. WEAP was a company involved in amusement and family entertainment. It is a subsidiary of FLH. WEAP itself has a subsidiary called West End Amusements Limited ("WEA") which in practice seems to have traded from the premises, albeit they were formally leased to WEAP. To that end WEA hired certain equipment (being gaming and amusement machines) from FLH. It did so under the terms of a Hire Agreement dated 14 January 2003 and made between FLH and WEA. The terms were such that ownership of the hired machines remained with FLH; that FLH could regard the Hire Agreement as terminated if (among other things) WEA became insolvent; and that on termination FLH was entitled to take possession of the machines and for such purposes enter on premises occupied by WEA.

10. Some of the machines were very bulky. It is evident that they were in due course installed in the premises: the evidence indicates no problems in that regard.

11. On 22 June 2011 WEA and WEAP filed in the Manchester District Registry notice of intention to appoint administrators. In due course, by letter of 6 July 2011, FLH indicated that it was seeking to repossess the machines in the premises. The judge was to find that it was entitled to regard the Hire Agreement as terminated and to seek

to repossess the relevant machines; the machines in the premises at that time were the property of FLH and the subject of the terms of the Hire Agreement.

12. It was therefore necessary for the machines to be removed from the premises. This is where the problems began.

13. The joint administrators (the same for each of WEA and WEAP) wished to avoid potential third party liabilities arising, and also to avoid increased financial exposure to FLH; and were anxious that the machines be removed. Likewise, FLH was anxious that they be removed, so that it could redeploy them (in circumstances moreover where machines apparently can, by reasons of changes in fashion, become outmoded).

14. On 28 June 2011 the solicitors for LTL (Mishcon de Reya) wrote to the directors of WEAP inquiring as to their intentions. Solicitors in Manchester, Turner Parkinson, responded on behalf of WEAP and WEA. In due course, Turner Parkinson were also instructed to act for the administrators.

15. After initial correspondence, there was a meeting between the parties early in July 2011, described as "less than cordial", for reasons it is unnecessary to explore. The correspondence continued. It was made clear to LTL that the administrators, as well as FLH, actively desired removal of the machines. It was indicated that the "joint administrators propose to consent to third parties attending and removing their equipment from site…and do require confirmation from your clients that access will be provided for the removal of third party equipment." Mishcon de Reya responded enquiring, reasonably, as to what it was consent was actually sought for. They also asked for provision of method statements for removal.

16. It was in turn proposed that the removal be undertaken by a company called JEP Industrial Limited ("JEP"), which apparently had had previous experience of such matters at the Trocadero. A detailed 18 page method statement prepared by that company was provided. Amongst other provisions, it was at the outset there stated that "detailed operational arrangements at this location will be agreed with Trocadero Management Company before work commences".

17. On 26 July 2011 Mishcon de Reya on behalf of LTL served on the administrators a notice purportedly under the Torts (Interference with Goods) Act 1977 requiring removal of the machines within 10 days and indicating an intention to sell them if that were not done. That was on any view a very aggressive step and also not obviously legally justifiable, given that WEAP (the tenant) was in administration and that the Lease subsisted: indeed, so much was later acknowledged. But it would at least indicate a desire on the part of LTL itself at the time that the goods be removed.

18. Correspondence continued. It is possible to detect a note of exasperation in the letters of Turner Parkinson. By letter dated 5 August 2011 Mishcon de Reya indicated that it was not clear what the proposed complex removal operations would involve and expressed concern as to potential disruption (apparently some 450 machines, and hoists, tackles and other heavy removal equipment, stood to be involved). Attention was drawn to the terms of the Lease. The letter also stated "we expect to correspond with the tenant, not third parties". (By that time, on 3 August 2011, Turner Parkinson had indicated that they were acting for FLH.) Correspondence continued. Turner Parkinson took the stance that the proposed method of removal had been sufficiently

indicated and in any case under paragraph 1.2.6 of Schedule 3 LTL could put forward stipulations.

19. On 18 August 2011 Mishcon de Reya wrote saying that FLH had no right of access to the premises and was "an unconnected third party". It said that any application had to be made by WEAP. In response, Turner Parkinson responded that FLH sought to remove the equipment with the consent of the administrators. That was correct. That was confirmed by a letter of one of the administrators addressed to Turner Parkinson dated 19 August 2011 and was reaffirmed by letter dated 14 September 2011: that letter confirming agreement to the machines belonging to FLH being "uplifted" and confirming consent to FLH accessing the premises for that purpose.

20. Still agreement was not reached. Proceedings were issued by FLH on 31 August 2011 (amended on 9 September 2011), claiming delivery up of the machines and damages for wrongful interference with goods. Proposals as to the method of removal continued to be made. Further details were eventually given by Turner Parkinson in a letter dated 3 October 2011 (and in due course reflected in the third witness statement of Mr George Massri, a director of FLH, of 21 October 2011). Mr Trompeter drew our attention to Mishcon de Reya's letter of 28 October 2011 indicating that this was "the first time in four months" that Turner Parkinson had answered the question of how the machines were to be removed, bearing in mind the provisions of the Lease, and that "for the first time the proposals have been properly thought out and are now easy to understand". They suggested a licence be prepared. The letter also, however, indicated that if consent was to be granted to FLH to enter the property and use the common parts for the removal of goods, compensation was required to be paid. That demand indicates that LTL was not accepting that FLH was legally entitled to remove the goods.

<u>The course of the proceedings</u>

21. The matter first came before Judge Hodge in Manchester on 23 September 2011; FLH having issued an application notice on 6 September 2011 seeking delivery up. The application was adjourned for further hearing. Certain preliminary matters were discussed: the judge indicated in his ruling that the machines could only be removed in accordance with the terms of the Lease. He also noted the criticisms made on behalf of LTL as to the vagueness of the method statement then provided. (No doubt it was in consequence of that that a much more detailed method statement, and the 3rd witness statement of Mr Massri, were subsequently provided.) The judge reserved costs and reserved the matter to himself.

22. The matter in due course came back before the judge. The issues advanced before the judge tracked the issues advanced before us – although now in practice only relevant on costs – and I will summarise those below.

23. The judge reviewed at some length the events of the preceding hearing and subsequent developments. He accepted that FLH might have more clearly identified the nature of its case and relief sought, but concluded that its case had been made sufficiently clear to LTL. He addressed the argument as to whether FLH had an entitlement to enter the premises and remove the goods, in accordance with the provisions of the Lease. He rejected LTL's arguments that the right to load and unload and to remove under Schedule 3 were personal to WEAP and held that it

extended to those authorised by it; and considered that other machinery could be removed by FLH in accordance with paragraph 1.2.6 of Schedule 3 (it was common ground that a requirement of reasonableness was to be implied here). He briefly rejected an argument that FLH had no standing to enforce the Lease or to seek the relief claimed. The judge trenchantly rejected the argument on behalf of LTL that Schedule 3 was to be construed as being for the benefit of WEAP (as the Tenant) alone. He regarded that approach as being "overly literal and technical" which "flies in the face of common sense". Thus he made a declaration and order for delivery up and orders for costs and directions as indicated.

Submissions and discussion

24. Before us, Mr Trompeter sought to renew the arguments he advanced before the judge. He submitted first that the judge erred in his interpretation of the Lease; second, that he erred in his finding that FLH had standing; third, that he erred in his discretion in granting the relief which he granted; and fourth that he erred on the question of costs.

25. I will take these in turn.

(1) Interpretation of the Lease

26. Mr Trompeter submitted that "the Tenant" is so defined in the Lease that it does not extend to FLH. I agree with that. Moving on from that, he submitted that the terms of Schedule 1 and Schedule 3 confer no relevant right of access or loading or removal on FLH. In common with the judge, I emphatically disagree.

27. Paragraph 1 of Schedule 1 extends the right to pass on foot over the Common Parts on the Tenant "and all others authorised by the Tenant". So on any view, FLH having plainly been so authorised by WEAP, could so pass over the Common Parts. Although paragraph 2 of Schedule 1 does not repeat those exact words, it is clear as a matter of implication, in my view, that that also extends to those authorised by the Tenant – indeed, I understood Mr Trompeter (rightly, in my view) to accept as much in argument. Were it otherwise, the Tenant could not even engage companies like DHL or Pickfords for such a purpose, which would make the right effectively nugatory.

28. Mr Trompeter stressed, however, that much of paragraph 1 and paragraph 2 of Schedule 1 is expressed to be subject to the relevant provisions of Schedule 3. And in that Schedule, he says, there is no relevant reference to "all others authorised by the Tenant": indeed such a notion, he says, is only expressly addressed in paragraph 1.2.2 – thereby, he said, indicating that is intended to be excluded elsewhere in this Schedule. Further, confining the provisions of Schedule 3 to the Tenant (and the Tenant alone) makes sense, he said: just because of the importance of good estate management, in the context of premises such as these, and the perceived need for the Landlord to deal only with the contractually named Tenant (or its successors in title).

29. This, to my mind, and in agreement with the judge, makes no kind of commercial sense at all. Elsewhere in the Lease – for example in paragraph 2 of Schedule 1 and in paragraph 1.2.6 of Schedule 3, as noted above – words are to be implied; and the wording used here is at least apt to extend to those authorised by the Tenant. In my

view it should be so construed in order to give effect to sense: when the competing construction advanced by Mr Trompeter does not.

30. Moreover, the correspondence makes clear that the interests of WEAP, WEA, the administrators and FLH were the same. Their solicitors were the same. The administrators had good commercial reason for wanting the goods to be removed and had consented to FLH gaining access to remove them. I agree, of course, that the Lease contractually was with WEAP, not FLH. But there is no reason why WEAP (latterly by the administrators), should not authorise someone else – here FLH – to approach and give notice to LTL for such arrangements, approvals or consents as might be needed under Schedule 3: and the documents show that that is what they did.

31. I am, in fact, rather puzzled at the stance LTL throughout have taken. To remove the machines would be costly. The concerns as to the avoidance of undue disruption are understandable; but given there was also a self-evident desire on the part of LTL to have the machines removed, as well as to achieve a money payment in addition, FLH (which was solvent) was on the face of it the better candidate than WEAP (which was not).

32. I do not propose to say more. In my view it is clear that the Tenant, for the purposes of Schedule 3, was entitled to deliver and remove goods, in accordance with its terms, through those authorised by it – including FLH and JEP. Clearly, of course, those authorised by WEAP would be subject to the obligations there set out, just because they were agents of WEAP: and that, indeed, is duly reflected in the terms of the order made by the judge.

(2) Standing

33. The argument advanced on standing was no less technical and, in my view, no less unmeritorious.

34. The argument went like this. The grant of the relevant rights was to the Tenant (as defined); and even if the rights could be exercised by those authorised by the Tenant, the entitlement to enforce rested with the Tenant (as defined). Moreover, the general principle is that a licensee cannot sue for nuisance: see *Hunter v Canary Wharf Limited* [1997] AC 655; and, yet further, any potential rights under the Contract (Rights of Third Parties) Act 1999 had been expressly excluded by clause 52 of the Lease.

35. I would agree that the judge's very short reasoning on the issue of standing did not really address these points: indeed he seemed to assume that FLH could sue for interference with the rights conferred by the Lease as a person authorised by WEAP to exercise such rights. But it may be the point was not extensively argued before him.

36. The position of Mr Foster, on behalf of FLH, was to accept – indeed assert – that FLH could not itself, as licensee, sue for interference with the easement granted. His point was that FLH's pleaded case always was, and remains, that LTL, by its conduct, had wrongfully interfered with FLH's goods (viz the machines): and FLH could sue accordingly.

37. Notwithstanding Mr Trompeter's elaborate efforts, I can see no effective answer to that.

38. We were referred to the general statements in Clerk and Lindsell on Torts (20th ed) at paragraphs 17-31 and 17-32 and to the observations of Lord Nicholls in *Kuwait Airways Corporation v Iraqi Airways Co* [2002] 2 AC 883, at paragraphs 39 and 42, which I do not need to set out in extenso. As Lord Nicholls also there observed:

> "For the purposes of this tort an owner is equally deprived of possession when he is excluded from possession or possession is withheld from him by the wrong-doer."

In *Oakley v Lyster* [1931] 1 KB 148 at p.155, Greer LJ observed that:

> "If the defendant is proved to have prevented the true owner from exercising his rights it is quite clear that there is a cause of action."

That approach also underpins the approach adopted by Sir Robert Megarry VC in *Howard Perry & Co Limited v Bristol Railways Board* [1980] 1 WLR 1376.

39. Mr Trompeter sought to say that LTL has never sought to deny FLH's entitlement to the machines: it has only sought to prevent it from wrongfully going, without its permission, over LTL's land to gain access to them. But once one accepts (as I have done, on the true interpretation of the Lease) that FLH, with the authority of WEAP, was entitled, in compliance with Schedules 1 and 3, to gain access to recover its goods in accordance with their terms, that point falls away.

40. Mr Trompeter further sought to rely on the Victorian case of *England v Cowley* (1873) LR Exch. 126. The case has some superficial similarity with the present case. There a plaintiff seeking to enforce a bill of sale over goods in the possession of an individual (who was a tenant of the property where the goods were) was held not to have a claim in trover against the defendant, the landlords who refused him access to the goods overnight: because the landlord proposed to distrain over them the next day. But, on an examination of the facts, the distinctions are obvious. There, after – it may be noted – a trial, the jury had found as a fact that the defendant landlord had not deprived the plaintiff of his goods. Further, two of the judges held that what was determinative was that there was a mere threatened assertion of right on the landlord's part and the plaintiff did not thereafter insist (by use of force or otherwise) on removing the goods. Further, Kelly CB, while agreeing with the majority, indicated that a remedy by an action for trespass on the case might have lain. (Martin B dissented.) That, overall, is to be contrasted with the present case: where, amongst other things, the denial of access was not overnight but sustained (necessitating proceedings) in circumstances where FLH could not get any access to, or assert any effective rights over, its property. In my view the stance of LTL here calls to mind the comments of Sir Robert Megarry VC in the *Howard Perry* case at p.1380E:

> "A denial of possession to the plaintiffs does not cease to be a denial by being accompanied by a statement that the plaintiffs are entitled to the possession that is being denied to them."

41. The case of *Club Cruise Entertainment v The Department of Transport* [2008] EWHC 2794 (Comm), cited by Mr Trompeter, is also clearly distinguishable. The facts were most unusual: and, significantly, access to the temporarily detained ship (on health grounds) was not denied to the owners.

42. It must also be remembered that Judge Hodge was dealing with an interim application. This was not the trial. For Mr Trompeter to succeed on his point on standing, he would have to show that, on the evidence as it was, there was no realistic prospect of FLH establishing its claim for wrongful interference with goods. He cannot do that.

(3) The form of the order

43. The judge undoubtedly had jurisdiction, on this interim application for delivery up, to make the declaration and order that he did make: then setting directions for the trial. I cannot begin to see that the judge was not entitled, in his discretion, to make the order in the form that he did.

(4) Costs

44. Finally, Mr Trompeter challenged the judge's order as to costs. He submitted in particular that FLH's case had not been sufficiently identified by 23 September 2011; and that the provision of an appropriately detailed method of removal of the machines was only forthcoming in October 2011, as set out in Mr Massri's 3rd witness statement. Accordingly, LTL should at least have its costs up until then.

45. The difficulty for that argument is that the judge expressly considered it. He took it into account and chose to reflect it by making no order as to the costs of the hearing of 23 September 2011. The judge was entitled to note that, even when the appropriate methodology had finally been produced, the case still had to be "fought out to a bitter end" (as he put it) – LTL was still denying FLH any entitlement to access and thus (even if the methodology had been produced earlier) there still would have been this litigation. The judge also had appropriate regard to the state of the pleadings. Overall, this was an exercise of discretion on costs within the ambit reasonably open to the judge.

46. Mr Trompeter asserted that LTL had "throughout the matter…attempted to be as constructive and as reasonable as possible". One can deduce that the judge did not share that view; and the open correspondence, at all events, is at some stages suggestive of an aggressive and condescending attitude on the part of LTL, scarcely designed to facilitate compromise.

Conclusion

47. I would dismiss the appeal on all points raised. It is most regrettable that this matter has ended up in the Court of Appeal.

MRS JUSTICE BARON:

48. I agree.

LADY JUSTICE ARDEN DBE

49. I also agree.