Case No: A3/2010/1723

Neutral Citation Number: [2011] EWCA Civ 416
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
MR N. STRAUSS QC
(sitting as a deputy judge of the High Court)
(HC09C01584)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 9th February 2011

Before:
THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE ARDEN
and
LADY JUSTICE BLACK

- -

Between:

Michael Gerson Limited	**Appellant**
- and -	
Greatsunny Limited	**Respondent**

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Dermot Woolger appeared on behalf of the **Appellant**.

Kirk Reynolds QC and Mr Richard Clegg appeared on behalf of the **Respondent**.

- -

Judgment

Lady Justice Arden:

1. The appellant, whom I will call Gerson, is a lessor of equipment and the respondent, which I shall call Greatsunny, is the freeholder owner of premises at 203/205 Watling Street, Radlett, Hertfordshire.

2. On 30 September 2004 Greatsunny let its premises and the tenant took a lease also of equipment from Gerson. It is agreed that the equipment became fixtures which would in law belong to the landlord.

3. On 1 April 2005 the landlord agreed to a waiver in favour of Gerson. The provisions of the waiver were set out by the judge in his judgment and they provide as follows. They provide for the protection of persons interested in the equipment as follows:

> "(a) that (whether or not incorporated into the premises or into other premises or otherwise attached thereto) the goods will remain your property unless and until title thereto passes to the customer following satisfaction of all the customer's obligations under the agreement;
>
> (b) that I/We will not seize distrain on or levy execution on, or otherwise seek to deprive you of the goods or claim any interest therein whilst any monies remain owing to you under the agreement or whilst title in the goods remain vested with you.
>
> (c) that whilst any monies remain owing to you under the agreement or title in the goods remains vested in you, you shall be entitled at any time to enter the premises or any other premises of which I/We am/are then landlord…and remove the goods therefrom PROVIDED THAT you remedy any damage thereby caused to such premises as soon as reasonably practicable.
>
> (d) that in the event we determine the lease we will give you notice of the termination and thereafter 28 days in which to remove the equipment.
>
> (e) that we agree that this agreement will bind our successors in title and assigns thereof."

4. The tenant became insolvent and the lease by Greatsunny was terminated. After that, on 21 June 2007, there was a telephone conversation between Mr Michael Gerson of Gerson and Mr Kohler of Greatsunny. The judge found that in the course of that conversation Mr Kohler told Mr Gerson that the lease had been terminated.

5. The findings of the judge are in paragraphs 15 to 18 of his judgment:

> "15. The only factual issue affecting liability in this case arises from a conversation between Mr Gerson and Mr Kohler which took place on 21st June 2007. By this stage, Mr Kohler had obtained details of the equipment leased to KPR/KPG from the directors. There were several other equipment leases. Mr Kohler had set out the details on a schedule. He needed the information in order to deal with the lessees. Mr Gerson had learned of a possible re-letting of the premises to another company in the same business. This was in fact a company called Perfect Party Ltd, but by the time of the conversation the defendant had decided that it would not proceed with the transaction without better information as to the company's substance. On the previous day, Mr Gerson had written to other equipment lessors, who had financed equipment at the premises, at the suggestion of Mr Simon, one of KPG's directors, to propose a standstill pending negotiations to sell the business.
>
> 16. Mr Gerson was concerned to get the best value for the claimant's equipment, whether from the defendant or from a new lessee. He therefore telephoned Mr Kohler, and pressed upon him at some length the proposition that it would be in the interests of both the claimant and the defendant to find a new tenant which would be interested in making use of the equipment, and that a tenant operating in the same field as KPR/KPG would be ideal. Mr Kohler was not very forthcoming, but did not disagree with what Mr Gerson said. Mr Kohler had no recollection of Mr Gerson's pressing this line of approach on him, but accepted that the conversation may have been to this effect. I accept Mr Gerson's evidence that there was a conversation along these lines.
>
> 17. For his part, Mr Kohler, while not actually recollecting what he had sad, was certain that he would have told Mr Gerson that the lease had been terminated. The whole point of collecting the information relating to the equipment leases was to be able to deal with the lessees, and he would have had no basis for doing that until the lease was terminated. Therefore, that is something which he would have made clear in all conversations which he

> had with the different lessees. Mr Gerson's evidence is that he was not told that the lease had been terminated, but on this point I prefer Mr Kohler's evidence, and I find that he did tell Mr Gerson that the lease had been terminated.
>
> 18. It is important to note that neither Mr Gerson nor Mr Kohler had the terms of the Landlord's Waiver at the forefront of his mind. Mr Gerson was not aware of the termination of the lease at the time he telephoned Mr Kohler, not having seen the notice at the premises, and in his mind (rightly or wrongly) written notice was required. Therefore, the fact that Mr Kohler said that the lease was terminated (as I find) would not have made any particular impression on him. He would not have recognised this as something which started the 28 day period for him to remove the equipment the equipment running. So far as Mr Kohler is concerned, I accept his evidence that he did not at the time have a copy of the Landlord's Waiver available to him. His purpose in mentioning termination of the lease was not to trigger the 28 day period in the Landlord's Waiver, but simply to make the defendant's position in relation to the premises clear."

6. It is now common ground that the notice could have been given orally and that there was no need for it to state that it was given under the terms of the landlord's waiver or that there was no need for it to state that the 28 day period was commenced. All it had to do was to say that the lease had been terminated.

7. On this appeal the appellant seeks as its first ground to argue that the notice given on 21 June was insufficient because, in a word, it was "casually" given. Nothing turns on the precise description to be attached, but the appellant says that it was too slight, informal and parenthetically given. The appellant relies on the principles established by the authorities, for example the principle established in the judgment of Lindley LJ in Re Friedlander ex parte Oastler [1884] 13 QB 471 at [475], where Lindley LJ, considering Section 4(1)(h) of the Bankruptcy Act 1883, held:

> "The first question is, what is the meaning of the debtors 'giving notice' that he has suspended, or is about to suspend, payment of his debts? I think it does not mean mere casual talk; it must be something formal and deliberate, something done by the debtor with a consciousness that he is 'giving notice,' and intended to be understood in that sense. An act of bankruptcy is a serious matter. I am of

> opinion that what was done in the present case did not amount to a 'giving notice' within the Act"

8. Jacob LJ gave permission on paper for this appeal to take place. However, as Mr Woolger fairly accepts, that order cannot be interpreted as giving permission for new grounds to be raised if there was an objection by the respondent. Any such objection would in fairness have to be heard and the convenient time to do it is on the hearing of the full appeal.

9. In this judgment I am giving a ruling on this first ground separately from the other grounds of appeal because Gerson accepts that unless it can succeed on this first ground the appeal must succeed on all the grounds it raised in order to obtain the order which it seeks on this appeal.

10. I proceed on the basis that in closing submissions counsel then appearing for Gerson, not Mr Woolger, submitted that the notice had to be clear and unambiguous. In fact, in fairness to the judge, that point was made in a forest of other submissions and the judge himself makes no specific reference to it. Mr Woolger, who, if I may say so, has ably presented submissions on this appeal, very fairly accepts that this is not a matter that was pursued with the two parties to the conversation in cross-examination. He points out that Mr Kohler for his part could not recall the conversation, but it is clear from what the judge held that he would have made the point to other equipment lessors in similar circumstances.

11. I have set out the four relevant numbered paragraphs already, and it will be noted that in paragraph 18 the judge considered why it was that Mr Gerson did not appreciate what he had been told, that the lease had been terminated, which is what he had been told on the judge's holding. In particular, he points out that Mr Gerson was not aware of the fact that written notice was required and he finds, specifically, that the fact that Mr Kohler said the lease was terminated would not have made any particular impression on him.

12. Arising out of these further findings Mr Woolger fastens on four important matters. First, he points out that Mr Kohler accepted that he could not recall the precise content of the conversation on 21 June. He accepts that in his evidence. Thus Mr Woolger submits that there would have been little point in cross-examining him further about what exactly he said as he did not recall what he said. Secondly, by contrast, Mr Gerson was adamant that he had not been told that the lease was terminated. Furthermore, Mr Woolger points out that the judge did not suggest that Mr Gerson was being untruthful, but rather made findings at paragraph 18 to which I have just referred.

13. As the judge holds later at paragraph 59 of his judgment, there was no agreement between the parties in the course of his conversation to suspend the 28-day period, and Mr Gerson was left with the impression, which the judge holds was partly due to his belief that a formal written notice was required, that there was no need for Gerson to exercise its rights under the Landlord's waiver.

14. Thirdly, Mr Woolger submits that Mr Kohler did not intend to give notice; rather he too hoped to relet the premises with the equipment in place. It was in the parties' mutual interest that that should happen. Fourthly, Mr Woolger submits that Mr Kohler did not have the terms of the Landlord's waiver at the forefront of his mind in the course of their conversation, and the judge so finds in paragraph 18 of his judgment.

15. With these full matters Mr Woolger submits that it must follow that the notice cannot have been clear and unambiguous. In my judgment, whilst that is certainly a possibility, the difficulty is that the judge accepted that notice had been given and so found. He so finds in the final sentence of paragraph 17 which, to recap, states that "Mr Gerson's evidence is that he was not told that the lease had been terminated, but on this point I prefer Mr Kohler's evidence and I find that he did tell Mr Gerson that the lease had been terminated". Furthermore, when we examine in the previous sentence the evidence which Mr Kohler had given, Mr Kohler had said that the fact that the lease was terminated was:

> "something which he would have made clear in all conversations which he had with the different lessees."

16. Accordingly, the judge accepted also by inference that the statement that the lease was terminated was one also that was clearly made.

17. Returning to the first ground of appeal, this is directed to establishing in this court the stated fact which is inconsistent with the judge's findings. It is proposed that we should do this without our being asked to hold that the judge's finding in paragraph 17 was one that was not open to him and one that was perverse and should be set aside. In my judgment this ground of appeal cannot succeed. The ground of appeal with which I am concerned at this point in time seeks to undermine the findings of the judge at the end of paragraph 17. It is accepted by Mr Woolger that the judge was entitled to make the findings in paragraph 17. The mere fact that Mr Kohler could not recall the precise content of the conversation of 21 June did not just prevent the judge from drawing influences from the background and from his impression of the oral evidence. Added to that, Mr Kohler was given no chance to explain in the course of his evidence whether he would have given his explanation with the clarity which, it is now said, he did not give it; and, while he could not have been asked about what he said on the particular occasion of 21 June, he could, as Black LJ pointed out in exchanges, have been asked about what he would normally have said.

18. The problem for the appellant is not resolved by Mr Woolger's offer to limit his argument to paragraph 17 of the judgment, since, as I have explained, that is inconsistent with his argument and it is quite clear that we would also need to look at transcripts if this were not the case. The question is not, as Mr Woolger submits, a pure question of law. As Mr Kirk Reynolds QC, appearing with Mr Richard Clegg, submits in his short submissions, paragraph 18 of the judge's judgment on which Mr Woolger relies is nothing more than a

judge trying to reason out why it was that Mr Gerson did not appreciate that he was being told that the lease had been terminated. The reasoning in that paragraph 18 would not water down or demonstrate inconsistency with what was said at the end of paragraph 17 because it was directed to Mr Gerson's subjective state of mind.

19. Moreover, even if there were no inconsistency it would not be possible for this court to draw inferences to the quality of what was said orally. There is simply no material which would found certain inferences by the court other than the judge's findings at paragraph 18, which do not show that the notice must have been unclear; they simply establish that Mr Gerson must have found it unclear. We cannot rehear the oral evidence which the judge heard and the judge had that advantage of hearing the witnesses in person.

20. As Mr Reynolds so neatly put it, either this new ground is not a new ground and it is a challenge to a factual finding or it would need new findings to be made by this court which this court could not make and which would be inconsistent with the judge's other findings. Accordingly, in my judgment ground 1 has to be dismissed *in limine,* and this means that it is unnecessary for the court to hear the other two grounds.

21. I bear in mind that the result for the appellants will be a disappointing one, and moreover one which they and the respondent would not have anticipated in June 2007, namely that the rights of the lessor were, by 19 July 2007, at an end, even though neither party had appreciated that, certainly on 21 June. But that would be the result of a landlord's waiver which enabled notice to be given in the manner in which the judge had held, namely by oral evidence. That holding of the judge is not challenged on this appeal.

Lady Justice Black:

22. I agree.

Sir Nicholas Wall:

23. I associate myself with my Lady's remark about Mr Woolger's submissions. I have nothing to add, and I also agree. The appeal will therefore be dismissed.

Order: Application refused; appeal dismissed