ROYAL COURT

156.

23rd October, 1990

Before: F.C. Hamon, Esq., Commissioner, and
Jurats Vint and Herbert

Between: Fort Regent Development Committee — Plaintiff

And: The Regency Suite Discothèque and Restaurant Limited — Defendant

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Preliminary judgment arising out of question of waiver by Plaintiff of its right to end lease raised in amendment to Defendant's Answer.

Advocate S.C.K. Pallot for the Plaintiff,
Advocate R.G.S. Fielding for the Defendant.

JUDGMENT

COMMISSIONER HAMON: This is a preliminary judgment arising out of a summons to amend its Answer by the defendant to this action. It arose in somewhat unusual circumstances.

On the 10th October, 1980, a contrat de bail à termage (or lease) was passed before the Royal Court in due form. By that lease the Plaintiff leased to the Defendant certain rooms within the Fort Regent Leisure Centre. The lease was for twenty one years. There were certain covenants in the lease. The Plaintiff took the view that the

Defendant had committed major breaches of these covenants. It applied by Order of Justice dated the 9th February, 1990, to have the lease cancelled. It further asked that it be given vacant possession of the premises, claimed damages and requested an order that a copy of the Court Act be registered in the Public Registry.

A defence was entered and a reply filed. The case was set down for hearing by Act dated the 23rd April, 1990. Some ancillary applications for further and better particulars (and following the Act of the 23rd April) for discovery were made between the 20th August, 1990, and the 18th September, 1990.

The case opened today and fourteen witnesses were called. It was therefore somewhat surprising for the Court to be met with a summons dated the 18th October, 1990, for an abridgement of time under Rule 1/5 (which was granted by the Judicial Greffier) and for an amendment of the Answer under Rule 6/12. We heard counsel and allowed the amendment but giving the Plaintiff its costs of and incidental to the summons on a full indemnity basis.

The amended Answer raises for the first time a point of law upon which if the Defendant were to succeed the Plaintiff's case would undoubtedly collapse.

The question raised is one of waiver. The new paragraph in the Answer reads as follows:

> "That further or in the alternative the plaintiff has irrevocably waived its right (which subject as herein pleaded is denied) to cancel the lease under the provisions of clause 13 for alleged breaches thereof which were at any material time prior to the 28th September, 1989, within the knowledge of itself, its servants or agents by virtue of its issue on or about the 28th September, 1989, of an unequivocal demand for rental for the period 29th September, 1989, 25th December, 1989, under invoice No. 13199. It is averred that by issuing such demand the plaintiff has elected to continue the tenancy and thereby waive any previous breach of

the terms of the lease which subject as herein pleaded is denied within its knowledge".

The doctrine of waiver - or "la renonciation" - is not unknown to Jersey law, counsel however were of the opinion that the question raised had not been previously decided in Jersey case law. Before we examine this apparently novel argument we must say at once that the method of proceeding "sur le champ" without the Plaintiff's pleading in reply to the amended Answer was agreed by both counsel and, despite our misgivings, we have acceded to their request to hear the matter in this way. A full day's argument on this preliminary point has raised a clear choice for us to follow.

In the absence of local authority we either look for assistance to French or English law. We must say at once that we appear to have discovered a veritable minefield and nothing appears as clear to us as counsel entrenched in their respective salients would have us believe.

Mr. Fielding began appropriately with a citation from Dalloz' "Nouveau Répertoire de Droit" (2nd Edition) at paragraph 430 which reads: "Les parties peuvent renoncer au droit de demander la résiliation; cette renonciation doit être expresse et non équivoque". That led him on to what Mr. Pallot described as the 'jewel in his crown'. That was the case of David Blackstone Ltd & Anor -v- Burnetts (West End) Ltd & Anor (1973) 1 WLR 1487. In that case it was held that an unambiguous demand for future rent was an election to treat a tenancy as continuing and constituted a waiver if the landlord or his agent had had sufficient knowledge of the breach before the despatch of the document, by which the election was made, though the election did not become effective until communicated to the tenant. The body of the judgment is informative on this point. Swanwick J said at p.1496:

"I turn now to the two main questions in the order in which I have set them out. The first is whether a demand for future rent viewed objectively as it must be is in law sufficient in itself to constitute a waiver. Strangely enough the researches of counsel have failed to find any direct authority on this question either binding on me or at first instance. The basic principle is that

the court leans against forfeiture; therefore if a landlord after he knows of a breach of covenant entitling him to forfeit a lease either communicates to the tenant his election to treat the tenancy as continuing or does any act which recognises the existence of the tenancy or is inconsistent with its determination, he is deemed to have waived the forfeiture. It is for the lessee to establish the facts which in law constitute the waiver. Viewing the matter a priori and of course assuming for this purpose sufficient knowledge of the breach I find it difficult to see how a demand for future rent in advance looked at objectively can be other than an election to treat the tenancy as continuing and to recognise its continued existence. I believe that a preponderating balance of persuasive authority and dicta supports this proposition".

And then he goes on to deal with further matters concerning the matter of waiver.

Mr. Fielding went on then to cite Expert Clothing Service and Sales Ltd -v- Hillgate House Ltd & Anor (1986) 1 Ch. 340 at p.359 where Slade LJ said this:

"One typical act of waiver illustrated by a number of reported cases is the acceptance of rent. It is well settled that this will constitute a waiver of a landlord's right to forfeit on account of any breaches of a tenant's covenant of which he is aware at the date of the acceptance. Furthermore a landlord cannot prevent the acceptance of rent from operating as a waiver merely by stating that he accepts it without prejudice to his right to forfeit (see Central Estates Belgravia Ltd -v- Woolgar (No. 2) (1972) 1 WLR 1048-1054 per Buckley LJ). Now we have been referred to no authority binding on this court to this effect. I am also content for present purposes to assume, without finally deciding that, as was held by Sachs LJ in Segal Securities -v- Thoseby (1963) 1 QB 887, Mr. Neuberger is right in submitting that the demand for rent will by itself have the right effect. He submitted that just as a demand for rent will give rise to a waiver even though it is expressed to be made without prejudice to

the landlord's right to forfeit, correspondingly the sending of the letter of the 22nd October 1982 and the proferring of the enclosed drafts though technically acts by way of negotiation were capable of giving rise to waiver and did have this effect. He relied heavily on the following passage from the judgment of Buckley LJ in Central Estates (Belgravia) Ltd -v- Woolgar (No. 2) (1972) 1 WLR 1048-1054: "If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, with the continuance of the lease or tenancy in operation, he cannot thereafter be heard to say that the state of affairs did not then exist"."

We have cited passages from these two English cases in deference to the careful argument of Mr. Fielding and to show that in English law it appears that the Courts lean against forfeiture but in England the legal parameters do not appear to be the same as we have them here. It appears from what we were told that in England the parties themselves can set a lease aside. Not so here. The Court alone can set aside a contract lease and only when there has been shown sufficient evidence of breaches of covenant can the Court decide whether or not to exercise its discretion to terminate. Mr. Fielding drew our attention to Faulkner -v- The Public Works Committee (1983) JJ71 where the Court found an enforceable agreement for the creation of a lease because the Committee, despite what appeared to it to be clear breaches of the intended lease, waived those breaches by sending a draft lease for signature. The waiver there arose because the Committee had seen the Plaintiff enter into possession, failed to evict him and inserted a commencement date into the draft lease. As the Court said at p.75:

"We have considered very carefully, however, whether it would be right for us to order the Committee to perform the agreement in view of the breaches of the conditions of the plaintiff, that is to say the excessive sale by retail of fish and other items and the advertising to which our attention was drawn by Mr. Skinner the Chief Administrative Officer at the time of the Island

Development Committee and the building of the ramp and the placing of tanks on top of the bunker which we were told again by Mr. Skinner were really quite out of place in an historical bunker of that sort. However we have come to the conclusion that the Committee, by being prepared as it was to enter into the lease, as was evidenced by sending a draft to Mr. Clyde-Smith, waived those breaches (if breaches they were), of the agreement. Therefore we think the Committee cannot rely on these breaches in order to say to us that we ought not to enforce the agreement".

We have to say that we feel that the facts of that case vary greatly from the facts of the present case.

Mr. Pallot in the course of his argument also referred us in depth to Dalloz and particularly to the Codes Dalloz - Codes des Loyers et de la Co-propriété 8th Edition, 1989. Both counsel began with Dalloz and both used the same extract to move into different jurisdictions. That extract on page 678 quoted to us by Mr. Pallot reads as follows:

"3. Renonciation - Le Bailleur a la possibilité de renoncer à la clause résolutiore et d'exercer l'action en résiliation du bail ....

4. La renonciation exige la preuve de faits précis et non équivoques .... Elle ne se présume pas et doit résulter d'actes qui l'impliquent nécessairement, et qui, accomplis volontairement, et en connaissance de cause, manifestent de façon non équivoque l'intention de renoncer de leur auteur ....

5. N'impliquent pas renonciation: une attitude passive et la perception de loyers sans réserve .... Le fait d'avoir encaissé des loyers sans réserves ni la demande du bénéfice de la majoration triennale du loyer, formulée sans réserves relatives à la résiliation éventuelle du bail .... La réclamation par le bailleur des loyers impayés, avec menace de faire jouer une clause résolutoire du bail dans une lettre postérieure à la premiére sommation".

Mr. Fielding, in the absence of Norman customary law looked to English law. Mr. Pallot was able to argue that he felt there was

sufficient in Dalloz to retain us within the French sphere of influence.

In fact, referring to Dalloz, although we initially found the commentary somewhat surprising we cannot now see why, if in an action to terminate a contract lease for breach of covenant has been instituted by the Plaintiff, the Plaintiff cannot accept payment of rental pending a decision. The position would of course be quite different in the Petty Debts Court because the parties are only in that jurisdiction because set notice of termination has been given by one to the other. Payment of rental during the time prescribed by the laws could well alter the position between the parties.

We do not think, with deference to Mr. Fielding's arguments, that in the circumstance it is necessary to examine English case law in any depth. We are quite satisfied that we can draw sufficient from the French authorities which have been stated time and time again in this Court to be preferred, (see for example Warner (née Rimeur) -v- Hendrick (1985-86) JLR 366 at p.371.

We are also satisfied that there is a dissimilarity between French and English law, as is shown by Barry Nicholas in his work "The French Law of Contract" published by Butterworth in 1982 where the learned author says at p.236:

> "There is obviously a broad similarity of function between the remedy of "résolution" and the common law remedy of recission or avoidance for breach but there are two marked differences:
> 1. Save in certain exceptional cases the creditor must normally apply to the court for an order resolving the contract, he may not as in the English common law simply treat the debtor's breach as discharging the contract.
> 2. There is no legal criterion for distinguishing those breaches which are sufficiently serious to justify the termination of the contract and those which are not. The matter lies in the pouvoir souverain of the trial judge".

We have considered the few Jersey cases that mention waiver. One of these, and upon its authority both counsel relied, is The New Guarantee Trust Finance Ltd -v- Terence Victor Birbeck (1977) JJ 71. In that case letters of termination were served on the defendant but later a new working agreement was prepared. The Court gave some indication that had that new working agreement been acted upon by the defendant then waiver might have applied. As the learned Deputy Bailiff (as he then was) said at p.84:

> "The most that could be said of the agreements is that they could be interpreted as a promise not to insist on the plaintiff company's strict legal rights, but for them to act as a legal waiver to prevent the plaintiff company from denying their effect would require that the defendant company should have acted upon them; it did not (see Charles Rickards Ltd -v- Oppenheim (1950) 1KB 616)".

Mr. Fielding took that passage by way of analogy arguing that in the present case the unequivocal making of demands for rental when the breaches had already occurred and were known to the Plaintiff amounted to waiver. That passage is in accordance with the basic rules of contractual obligation as expressed by the learned author of Cheshire and Fifoot's Law of Contract (9th Ed'n) at p.539 where the authors say:

> "In short a voluntary concession granted by one party upon the faith of which the other may have shaped his conduct remains effective until it is made clear by notice or otherwise that it is to be withdrawn and the strict position under the contract restored. The concession raises an equity against the party who consented to it. If for instance in the case of a written contract for the sale of goods, the buyer at the request of the seller orally consents to the postponement of delivery he cannot correctly hold the seller to the original contract. No repudiation of his waiver will be effective except a clear intimation to them that he proposes to resume his strict rights. Normally he will do this by giving express notice of his intention but this method is not essential and anything will suffice which makes it abundantly clear that the concession is withdrawn.

Within a reasonable time thereafter the original position will be restored".

We do not yet know from the evidence what the effect of the rental demand of the 28th September had on the tenant. We have not yet heard any evidence.

Mr. Fielding asked us to follow the apparently strict objective tests of English common law where the question of waiver appears to be a matter of law and not of actual intention and (as is stated in Woodfall "Landlord & Tenant" 1990 para. 1-1907) "it is irrelevant quo animo such an act is done".

We are not yet prepared to say on this preliminary hearing that the doctrine of waiver (or "la renonciation") does not apply. We are however prepared to rule that we do not accept the rigidity of the English common law test and say that by sending out the invoice of the 28th September the Plaintiff had automatically shut itself off from relief even though it instigated the Order of Justice after the sending out of the invoice.

Our judicial discretion allows us, in our view, to examine all the circumstances surrounding the sending out of the invoice of the 24th September, just as we will, as this matter comes on to trial, examine the possible motivation of both parties and, for example, carefully examine whether the Plaintiff, on the facts, is seeking to take advantage of a temporary difficulty in order to avoid what it may now consider to have been a bad bargain.

Therefore, on this preliminary point of law we find for the Plaintiff. Costs, we feel, should be in the cause.

Authorities

New Guarantee Trust Finance Ltd -v- Birbeck (1977) JJ 7.

Codes Dalloz Codes des Loyers et de la Co-propriété (8th Ed'n, 1989) p.678.

Dalloz: Lexique de Termes Juridiques - Dalloz (cinquième éd) (1981).

Nicholas: French Law of Contract (p.p. 236-238) "Résolution".

Cheshire and Fifoot: Law of Contract Part VII Section I (p.p. 534-540).

Warner (née Rimeur) -v- Hendrick 1985-86 JLR 366.

Faulkner -v- Public Works Committee (1983) JJ 71.

The New Guarantee Trust Finance Limited -v- Birbeck (1977) JJ 71.

Pirouet -v- Pirouet & Others (1985-86) JLR 151.

Woodfall "Landlord & Tenant" (1990) paras 1-1108, 1-1906 to 1-1919.

Expert Clothing Service & Sales Limited -v- Hillgate House Limited & An'or (1986) Ch. D. 340.

David Blackstone Limited & An'or -v- Burnetts (West End) Limited & An'or (1973) 1 WLR 1487.

Dalloz: Nouveau Repentoire de Droit (2nd Ed'n) paras 422 and 423.