Neutral Citation Number: [2017] EWCA Civ 1070

Case No: B2/2016/2435

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WINCHESTER COUNTY COURT
MR RECORDER LEVENE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2017

Before :

LORD JUSTICE McCOMBE
and
LORD JUSTICE HAMBLEN

- -

Between :

Christiana Properties Limited	**Appellant**
- and -	
Mr. Kreeshan Vickram Annauth	**Respondent**

- -
- -

Mr Gary Lewis (instructed by **Coupe Bradbury**) for the **Appellant**
The Respondent was not represented and did not attend

Hearing date : 12 July 2017

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. The appellant ("CPL") appeals the decision given on 25 May 2016 by Mr Recorder Levene sitting in Winchester County Court whereby he dismissed CPL's claim for payment of outstanding sums allegedly due from the respondent ("Mr Annauth") under the terms of a lease on the grounds that the claim had been compromised.

2. At the trial both parties were represented by counsel. At the hearing of the appeal CPL was represented by different counsel, Mr Gary Lewis, whilst Mr Annauth was unrepresented and did not appear. He had indicated that he wished to rely on the skeleton argument of his trial counsel for the purposes of the appeal.

Factual background

3. CPL is the proprietor of a shop at 380 Ashley Road, Parkstone, Poole, Dorset ("the shop"). By a lease dated 24 June 2009 ("the lease"), CPL let the shop to Mr Annauth. Under the terms of the lease:

    (1) The shop was to be let to Mr Annauth for a period of 15 years from 24 June 2009;
    (2) A peppercorn rent was payable up to 29 September 2009; and
    (3) The rent after 29 September 2009 was to be £55,000 per year, payable quarterly, with the first instalment for the period between 29 September 2009 and 25 December 2009 to be paid on the date of the lease.

4. By clause 14 of the lease Mr Annauth's sister, Miss Anoushka Annauth ("the guarantor"), guaranteed his rental obligations under the lease and agreed to indemnify CPL for any losses caused to it by his failure to comply with such obligations.

5. Mr Annauth fell into arrears in the payment of rent under the lease. By a deed dated 8 August 2011 CPL accepted the surrender of the lease. It was an express term of the surrender at clause 5 that it did not operate to release Mr Annauth or the guarantor from the obligations arising under the lease including, amongst other things, rental obligations.

6. CPL instructed a debt collection agency, Guardian Recovery Services ("GRS"), to recover the money owed.

7. On 16 January 2013 an agreement was made by GRS on behalf of CPL that the debt would be paid in instalments of £50 per month ("the compromise agreement"). It was said that the account would be reviewed every six months and legal action would be taken if payments were missed. CPL contends that this agreement was made only with the guarantor. Mr Annauth contends, and the judge found, that it was made with both the guarantor and Mr Annauth.

8. At the time of the compromise agreement the outstanding rent was approximately £50,000 and interest was accruing at about £10 per day. As the judge observed at [7] to offer to pay instalments at £50 per month was "not a munificent offer, for two reasons: first, even ignoring the interest it would take over 120 years to pay the debt; and secondly, it was less than the rate at which the interest was accruing".

9. On 9 June 2014, CPL served a statutory demand for recovery from Mr Annauth of the entire amount outstanding on the account. This demand was set aside by DJ Dancey on 13 October 2014 on the grounds that it was arguable that the claim had been compromised by the agreement of 16 January 2013.

10. On 5 March 2015, CPL issued proceedings for the recovery of the outstanding arrears. As at that date the total amount allegedly payable was £55,115.

The judgment

11. The trial of CPL's claim took place on 28 February 2016. At the trial, on behalf of CPL there was witness statement evidence from Mr Adams and Mr Scahill of GRS and from Mr Lever of solicitors Coupe Bradbury, but none of them were called. On behalf of Mr Annauth, there was witness statement and oral evidence from him and his sister and witness statement evidence from Mr Clifford Morris of solicitors Paris Smith.

12. Judgment was reserved and was handed down on 25 May 2016. By an order of that date Mr Recorder Levene dismissed CPL's claim. In doing so he held as follows (with references in brackets to the relevant paragraph number of the judgment):

    (1) The guarantor was entitled to act as Mr Annauth's agent and this was accepted by both Mr Annauth and CPL [1].
    (2) Mr Annauth and the guarantor instructed a firm of solicitors, Paris Smith, to negotiate with GRS on their behalf about payment of rent [6].
    (3) There was a binding agreement between CPL and Mr Annauth that CPL would accept payment of the debt at £50 per month in exchange for which CPL would not issue proceedings [8].
    (4) The guarantor acted as Mr Annauth's agent with his consent, as did Paris Smith. Paris Smith made an offer which resulted in the agreement on Mr Annauth's behalf and CPL "assumed that it was acting as his agent". He accepted the evidence of the guarantor and Mr Annauth that the offer was made jointly and that at no time was CPL or GRL misled [14].
    (5) CPL thought that it was dealing and contracting with both Mr Annauth and his sister and agreeing a compromise of the liability of both of them. At no time did CPL suggest that it was reserving the right to claim the full amount from Mr Annauth [16] [18].
    (6) It was clearly stated and understood (at least by Mr Scahill and GRS) that CPL would not sue as long as the £50 was being paid. Mr Annauth had stuck to his side of the bargain [19].
    (7) One payment was made a day late but "nobody made a fuss about that", thereafter payments were made on time and accepted, time was not of the essence and this was not repudiatory [8][9].

The grounds of appeal

13. CPL has permission to appeal on the following grounds:

    (1) *Ground 2* – The judge erred in concluding that Mr Annauth was a party to the compromise agreement which was in fact entered into between the CPL and the guarantor;

(2) *Ground 3* – The judge erred in concluding that CPL's covenant not to sue the guarantor extended to and discharged Mr Annauth from payment of the outstanding sum;
(3) *Ground 4* – The judge failed to have regard to the fact that, under the compromise agreement CPL impliedly reserved its right to sue Mr Annauth;
(4) *Ground 5* – The judge erred in finding that CPL was bound by the covenant not to sue in spite of the fact that the compromise agreement had been breached.

14. In addition, a further ground has been introduced as a result of questions raised by Henderson LJ at the oral renewal hearing renewal for permission to appeal, permission on the papers having been limited to grounds (2) to (4). Following that hearing permission to add a new ground (1A) was sought from Henderson LJ on the papers and granted by him on the basis that it raised a "pure issue of law". That further ground is as follows:

> *Ground 1A* – The judge erred in treating the compromise agreement as enforceable. The debt would never have been discharged and so such a compromise is contrary to the rule in *Foakes v Beer* (1884) 9 App Cas 605 that a creditor is not bound by a promise to accept part payment as full settlement of a debt.

15. I would observe that this is not necessarily a "pure issue of law". As illustrated by the recent case of *MWB Business Exchange Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2016] 3 WLR 1519 questions involving factual matters such as "practical benefit" and estoppel may well arise in relation to issues of this nature.

Grounds (2) – (4)

16. The central issue which arises in relation to these grounds is whether the judge was wrong to hold that Mr Annauth was a party to the compromise agreement.

17. The compromise agreement was made as the result of an exchange of emails and letters on 15 and 16 January 2013 ("the January 2013 documents") between Paris Smith and GRS. Paris Smith were solicitors who had earlier acted for Mr Annauth and the guarantor in connection with the surrender of the lease. CPL relies on the terms of these documents as showing that the agreement was made with the guarantor only. These documents provided as follows:

(1) On 15 January 2013 Paris Smith wrote to GRS on a letter headed "Our Client: Anoushka Annauth". The letter stated that "our client's financial position has not improved from when we were originally dealing with your predecessors", that "our client" has already provided a statement of means, that "she is prepared to make payments of £50.00 per month" which is "all our client can realistically afford at the present time". It also stated that "our clients asks for the return of the items that were left in the premises".

(2) On 16 January at 0938 Mr Scahill responded by email headed "Re: Without prejudice – Our Client – Anoushka Annouth" stating:

> "I have received your proposal and the offer will be accepted due to the current economic climate.
> The account will be reviewed every 6 months to make sure all payments are up to date. If payments are missed then we will take this that your client has broken their own promise to pay and will be forwarded to the legal team for immediate legal action to take place".

(3) By letter of the same day Paris Smith replied using the same letter heading as before and stating:

> "We refer to the above matter and your email of 16th January. Whilst our client is prepared to make payments, she confirms that she will not be able to make the first payment until 28th February 2013, and make payment on the 28th day of each month, thereafter.
>
> We would be grateful if you would confirm whether this is acceptable.
>
> As you will undoubtedly be aware, our client also wanted to collect items from the premises, which the Landlord would not allow because of the outstanding amount due being approximately £27,000.00 as of June 2011, immediately prior to our clients surrender of the lease.
>
> Our client believes that these items consisting of shelving and racking, had a value of approximately £6,000.00, and have either been disposed of by the Landlord, or provided to the current tenants of the premises as part of the fixtures and fittings. Our client considers that this sum should be removed from the total due to your client."

(4) By a further email at 16.15 the same day Mr Scahill responded by email using the same subject heading as before and stating:

> "The arrangement we will accept for the 28th February then each month after, the other issue is something you must take up with the client yourself.
>
> I would advise that at the moment since it has been so long since any payment has been made it might be a good idea to get some payments on the board before you ask if he is willing to drop the price of the debt at this moment in time, as once he sees that your client is making some effort to pay this he may be more willing to negotiate with you."

(5) The compromise agreement was thereby concluded.

18. CPL contends that on the true construction of the January 2013 documents the compromise agreement was made with the guarantor alone, the identified "client" in Paris Smith's letter of 15 January 2015. In particular, it is submitted that:

(1) It was apparent from the January 2013 documents that Paris Smith made the offer on behalf of the guarantor and not Mr Annauth. Those documents refer to Paris Smith's client in the singular and feminine sense.

(2) There was no evidence that Mr Annauth communicated his status of "principal"' to CPL/GRS.
(3) The judge erred in accepting the evidence of Mr Annauth and the guarantor that the offer letter was written on behalf of both of them. He failed to give any reasoning for doing so despite the evidence of the January 2013 documents and despite the judge having evidence that all consideration under the compromise agreement had been provided by the guarantor.

19. The terms of the January 2013 documents provide strong support for CPL's argument. They are headed by reference to the client being the guarantor. Within the body of the documents the client is generally referred to in the singular and as being feminine. The natural and ordinary meaning of these documents is that they reflect an agreement made with the named client, the guarantor.

20. The judge does not really address the terms in which the January 2013 documents are expressed. At [14] he makes reference to CPL's "specious analysis of the terms of the correspondence leading up to the agreement" but he does not consider or analyse those terms or explain why CPL's argument was "specious".

21. The judge found at [14] that in fact Smith Paris were acting on behalf of both Mr Annauth and the guarantor and that CPL "assumed" that Paris Smith was acting as his agent. There is, however, nothing in the terms of the January 2013 documents to explain why or how this should have been assumed. Considered objectively they are communications on behalf of and in relation to the identified client, the guarantor. Even if Paris Smith were in fact also acting on behalf of Mr Annauth that was not communicated, nor was it reflected in the terms of the compromise agreement and indeed was contrary to those terms.

22. The judge also said at [15] that he could see no reason why GRS should enter negotiations with the guarantor only while doing nothing to recover the debt from Mr Annauth. However, the liability of each was distinct, the guarantor was under a personal liability, even if secondary, and there was every reason for CPL to recover what it could from whoever it could. Further, there was evidence that GRS had been unable for some time to make contact with Mr Annauth. In any event, what matters most is what was agreed rather than the reasons for so agreeing.

23. The judge also made reference at [16] to an internal note of GRS after the compromise agreement was made in which it was explained to CPL that it had accepted "the arrangement they were offering but if they miss a payment then we will take them through the courts", emphasising the plural reference. As a post-contractual document, it cannot bear on the construction of what was agreed. In any event, "they" and "them" could well be a reference to the guarantor and the solicitors. Moreover, it was not a communication which crossed the line between the parties and as an internal note one would not expect any particular precision of language.

24. There were other points made in the skeleton argument at trial which were not relied upon by the judge but which I will nevertheless address. In particular, it was contended that:

(1) The language used in the January 2013 documents by both Paris Smith and GRS was imprecise. In particular, there was an indiscriminate use of the

plural and singular when referring to Paris Smith's clients. Whilst it was accepted that the majority of the references are in the singular, there are uses of the plural as well. For example, the letter of 15 January 2013 from Paris Smith refers to "clients asks" in the penultimate paragraph and GRS' email of 16 January 2013 states "your client has broken their own promise to pay" (emphasis added). In the same sentences, however, reference is made to the singular ("asks", "client"). Further, this does not explain the references made to the client in the feminine or to the guarantor as being the client in the heading of the correspondence.

(2) Given that Mr Annauth was the guarantor's brother it was unlikely that she would seek to extinguish her own liability whilst that of her brother remained. There was, however, good reason for the guarantor to seek to limit her personal liability and £50 per month was only 1/6 of the monthly interest liability.

(3) No separate offer had been put forward by Mr Annauth despite the fact that he was the leaseholder and primary debtor. This is correct but provides all the more reason for the guarantor to seek to limit her own liability.

(4) Mr Annauth was not specifically excluded from the negotiations or discussions, in circumstances where CPL was aware that Paris Smith was representing both him and his sister they had previously negotiated in tandem when surrendering the lease. This is also correct but related to dealings between Paris Smith and CPL's solicitors, Birkett Long, in 2011. In 2012 GRS made frequent attempts to contact Mr Annauth without success. They did, however, succeed in contacting Mrs Annauth and she referred them to Paris Smith. Paris Smith then wrote to GRS on 13 December 2012 referring to "Our Client: Anoushka Annauth", to emails exchanged between her and GRS and to an offer of payment which had been made. This was the immediate background to the January 2013 documents. Whilst Paris Smith had acted for both Mr Annauth and the guarantor in the past, by the end of 2012 they appeared to be acting for the guarantor alone.

25. Having had careful regard to the reasons given by the judge and to the further arguments advanced on Mr Annauth's behalf at trial, in my judgment none of them provide good or sufficient justification for departing from the natural and ordinary meaning of the January 2013 documents.

26. I would therefore allow the appeal on ground (2) and overturn the judge's conclusion that Mr Annauth was a party to the compromise agreement. In those circumstances, it is not necessary to consider the other grounds of appeal.

27. For completeness, it should be noted that at trial an alternative case of estoppel by convention was advanced on behalf of Mr Annauth. The judge made no finding on this issue and there is no Respondent's Notice seeking to rely on it for the purposes of the appeal.

Conclusion

28. For the reasons outlined above I would allow the appeal on ground (2).

Lord Justice McCombe

29. I agree.