Case No: B2/2011/0383

Neutral Citation Number: [2011] EWCA Civ 1126

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAMBRIDGE COUNTY COURT
DISTRICT JUDGE KIRBY
OCB00761

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2011

Before :

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LADY JUSTICE HALLETT
and
THE RIGHT HONOURABLE LADY JUSTICE BLACK

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Between :

RODER UK LIMITED	**Respondent/ Claimant**
- and -	
1) ANTHONY JULIAN WEST **2) DAVID MARTIN PHILLIPS**	**Appellants/ Defendants**

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Mr Watson Pringle (instructed by **Mason Bullock**) for the **Appellants**
Mr Cameron Maxwell Lewis (instructed by **Fowler De Pledge**) for the **Respondent**

Hearing dates : 18th July 2011

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Judgment

Lord Justice Longmore:

Introduction

1. Every law student knows that s. 4 of the Statute of Frauds Act 1677 required (and still requires) a guarantee to be in writing if it is to be enforceable. What every law student may not know, however, is that Pasley v Freeman (1789) 3T.R. 51 decided that a representation by one person that another person was creditworthy was actionable if made fraudulently. Since oral guarantees would often have been preceded by some representation of creditworthiness, many cases were brought alleging that such a representation had been made, which the maker knew to be false. Not only was this an easy way round the Statute of Frauds but it led to litigation about oral representations or promises which the Statute had intended to keep out of court. Parliament decided to intervene by enacting section 6 of the Statute of Frauds (Amendment) Act 1828. Abbott CJ as Chief Justice of the King's Bench took an active interest in the matter and appears to have drafted the Act which was passed soon after he became Lord Tenterden and it is always known as Lord Tenterden's Act. Section 6 provides as follows:-

> "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon [sic], unless such representation or assurance be made in writing, signed by the party to be charged therewith."

Background

2. The defendants are the sole directors and shareholders of a company called Titan Marquees Limited ("Titan"), whose business was providing marquees for events. The respondent ("Roder") is a wholesaler of marquee equipment. Roder provided goods to Titan on ten occasions between 2002 and 2008. On each occasion the goods were provided expressly on terms that payment would be made within 30 days. Nevertheless Titan's account was in debit throughout the trading relationship between the parties, the extent of its indebtedness ranging between £4,000 and just over £40,000.

3. There was at trial a dispute as to the ownership of certain goods that Roder provided to Titan. This dispute concerned the incorporation into the contract of a retention of title clause, contained at clause 9 of Roder's standard terms and conditions. The clause provided that property in the goods sold would not pass until Roder had received full payment in cash or cleared funds for the price of the contract goods and all other goods agreed to be sold by Roder to Titan for which payment was then due. The District Judge held that Roder's terms (including Clause 9) were part of the contract between the parties.

4. In around March 2007, Roder threatened proceedings through a debt recovery firm called LPL Commercial Investigations and a payment plan was agreed between the parties whereby Titan would endeavour to make monthly payments of £1,000 to reduce the outstanding balance ("the Payment Plan"). Three payments were made

under the Payment Plan before it became apparent that payment could not be sustained at that level and a standing order was put in place for £500 per month. Payments at that level continued from July 2007 to October 2008 inclusive, when they ceased save that a few payments were made sporadically in May 2009 onwards.

5. On 17th March 2009 Ms Minall, Roder's Office Manager, called Mr Phillips to ask about the outstanding payments. He did not answer but called back. He told her that Titan had an insurance payout pending, and that once that was received it would be able to resume the Payment Plan. In fact no insurance payout was pending at the time.

6. In July 2009 there was a conversation between Mr Lavy, the managing director of Roder, and Mr West. Mr West said that Titan was "selling up" and that at the end of the trading season it would pay all of its creditors from the proceeds of sale.

7. Mr West did not reveal that on 31st May 2009 Titan had entered into an agreement with Richard Roff Limited ("Roff"), trading as Meadow Marquees. This Agreement provided inter alia that Meadow Marquees would provide Titan with labour and fuel to enable it to perform its contracts during the 2009 summer trading season. Titan would retain the bulk of the income earned from those contracts, which it would use to pay off its debts by the end of that season. At that time Titan would cease trading and property in its goods would pass to Meadow Marquees as consideration for the overheads borne by Roff. Titan did in fact cease trading on 31st October 2009 and Meadow Marquees acquired such assets as they had at that time.

8. Roder issued proceedings on 7th May 2010 and in its Amended Particulars of Claim they claimed in debt against Titan for unpaid invoices for the price of the goods, and in damages against the Directors in the tort of deceit. The basis for the latter claim was that as a result of the Directors' representations Roder had not sued Titan earlier than May 2010 or sought to recover its goods, which it had now lost the opportunity to do because Titan no longer had any assets and had ceased trading. Titan did not defend the claim and was not represented. Accordingly judgment was entered against it on the first day of trial.

9. The judge held

   i) Mr Phillips' representation that an insurance payout was pending was false to his knowledge;

   ii) Mr West's representation that Titan was selling up and that everyone would be paid in full from the proceeds of sale was made recklessly without regard to the likelihood of Titan being, in fact, able to repay its creditors;

   iii) in reliance on these representations Roder refrained from issuing proceedings in 2009 and also refrained from exercising their rights under the retention of title clause;

   iv) the Directors could not rely on section 6 of the Act because the oral representations had not been made with the intent or purpose that Titan should obtain credit; Titan already had credit and the intent of the representations was to avoid Roder repossessing its goods, or suing for outstanding sums;

v) the Directors were accordingly liable in the tort of deceit for the amount of the value of the goods in respect of which Roder would have been able to recover under the retention of title clause; the judge gave judgment for £6,500 against the second and third defendants.

10. It might be thought that the Act primarily looks to the initial obtaining of credit. This may be by consent or by legally enforceable agreement. Here credit of 30 days was written into the agreement. That expired a long time ago. Further credit was extended by virtue of the Payment Plan until Titan ceased performing it. Since October 2008 credit has been extended but it must be doubtful whether that extension can be said to be with the consent of Roder.

Submissions

11. Mr Pringle for the Directors submitted

i) the words "credit, money or goods" in the Act must be read disjunctively so that it is sufficient for a defendant to show that he made the relevant representation with the intention that the debtor obtain "credit". He did not have to show that he obtained "money or goods upon credit" just that he obtained credit;

ii) there was no need for the credit to be obtained pursuant to any agreement; it was sufficient that it was obtained with the consent of the creditor;

iii) the fact that credit was obtained (for 30 days) when the goods were delivered did not mean that it was not obtained again when agreement was reached on the Payment Plan first for £1,000 and then for £500 per month; nor that it was not obtained again when Roder decided not to sue for the debts or to retake possession of their goods as a result of the fraudulent representations;

iv) the judge's finding that the Directors' representations had not been made with the intent that Titan should obtain credit but with the intent that Titan should avoid repossession or being sued for outstanding sums was illogical because an intent to avoid repossession or being sued was the same thing as an intent that Titan should obtain credit.

12. Mr Maxwell Lewis for Roder submitted

i) the true interpretation of the 1828 Act was that the representation must be made with the intent or purpose that the debtor should obtain "money or goods upon credit"; in this case even if the representations were made in order to obtain credit, they were not made with the intent to obtain money or goods since there was no prospect in 2009 that Roder would then supply money or further goods to Titan;

ii) if that was wrong, the judge's finding of fact that the intent of the Directors was not that Titan should obtain credit was conclusive of the matter;

iii) in any event, all that had happened in the present case was that there had been an extension of credit already obtained not an obtaining of credit; the intent or purpose of the Directors was at most that the period of the credit (already

obtained) should be indefinitely extended; indeed the right interpretation of the facts was that, at the time the Directors made their representations, they intended to avoid payment altogether not that Titan should obtain credit with a view to payment at a later date.

The Act

13. The true interpretation of the Act has been a vexed question for some time and it is time that it should be resolved at the level of the Court of Appeal. It does not make grammatical sense in its present form and it is tempting to think that the word "credit" has become misplaced and should be after the word "upon" rather than before the word "money". This interpretation was favoured by 3 out of the 4 Barons of Exchequer sitting en banc in Lyde v Barnard (1836) 1 M & W 101 in which the question was whether a misrepresentation, that a particular fund in which Lord Edward Thynne had a life interest was charged with only three annuities, was a representation relating to Lord Edward's credit or ability within the statute. On that interesting point, the court was equally divided but they were able to produce a majority for the view that the word "credit" had been merely misplaced.

14. Gurney B said (page 104) that he had no doubt the words ought to be read as "may obtain money or goods upon credit". Alderson B said (pages 109-110):-

> "According to the view which I take of the act, the representation, in order to be within it, must, therefore, be of the third person's trustworthiness, as evidenced by his character, conduct, ability, credit, trade, or dealings, and must be one whereby, if true, that trustworthiness is increased. If indeed the real clause as drawn by Lord Tenterden stood thus, "To the intent that such third person might obtain money or goods upon credit," which is highly probable, this conclusion would be strengthened. But I do not rely on that which is, after all, only matter of probable conjecture from the ungrammatical state of the sentence as it now stands."

Parke B (than whom few judges have been more exact in matters of construction) said this (pages 115-116):-

> "The words of the clause in question are, it is to be observed, clearly inaccurate, probably from a mistake in the transcriber into the Parliamentary roll. We must make an alteration in order to complete the sense, and must either transpose some words, and read the sentence as if it were "to the intent or purpose that some other person may obtain money or goods upon credit," or interpolate others, and read it as if it were "to the intent or purpose to obtain credit, money, or goods on such representation." If we assume Lord Tenterden's object to have been merely to prevent evasion of the Statute of Frauds, as we think it was, and use this a key for the construction of the clause, it would induce one to prefer the former alteration, by which the clause is made clearly to apply only to cases where the purpose of the representation is to obtain personal credit for

> the third person: but then, it would not apply to all cases of such credit, for it would include money and goods only, not work and labour done for the third person, or houses or land let to him, on the faith of such representation; which, however, are cases by no means of so frequent occurrence as transactions in money and goods. On the other hand, if we make the latter alteration, using the same key to the construction of the clause, we must reject the words "money or goods" as surplusage, as they would be included in the general term credit. I think it highly probable that the first correction would make the clause such as Lord Tenterden originally wrote it; …"

15. On the other hand Lord Abinger CB said (at pages 123-124):-

> "With regard to the remarks which have been made upon the introduction into the statute of the word "upon", without any grammatical relation to the other words of the sentence, I must observe, that I am decidedly of the opinion that this word must be rejected as nonsensical, and that we cannot admit a conjectural transposition of it in order to interpret that statute. Neither do I think that either of the conjectures offered gives the most probable account for the introduction of the word. The manuscript of this clause most probably contained the word "thereupon"; on revising it, the author considered that the word was superfluous to express his meaning, and that it might possibly, if it had any effect, rather narrow the construction. He has therefore meant to strike it out, but has not carried his erasure with sufficient force through the latter part of the word. The word upon has, therefore, found its way into the print, and has escaped notice afterwards when the bill was in committee. The printers of bills for the two houses seldom commit an error on the side of omission. Every thing which is not beyond doubt erased in MS. is sure to be served up in print, and, if it should afterwards escape detection in committee, finds its way upon the rolls of Parliament, and into the Statute Book."

16. This court is not bound by decisions en banc of the Exchequer and is entitled to form its own view. But the opinion of the majority has stood for 185 years and is not to be lightly departed from. The fact is that the words "money or goods" are superfluous if the Chief Baron's construction is correct. I conclude, therefore, that the intent or purpose clause in section 6 is to be read as saying:-

> "to the intent or purpose that such other person may obtain money or goods upon credit."

17. If the statute is not construed in the way which the majority favoured in Lyde v Barnard, considerable difficulties are liable to arise as exemplified in the present case if what occurs is merely a postponement of a debt already accrued. An agreed postponement may be one thing; the debtor will have obtained further credit. But if matters just drift as they did in this case once the agreement for £500 per month was not complied with, is the debtor obtaining credit? Mr Pringle is almost certainly

correct that an enforceable agreement is not required for credit to be obtained within the statute. That was certainly held in relation to the old criminal offence of an undischarged bankrupt obtaining credit without informing the creditor that he was an undischarged bankrupt contrary to section 31 of the Bankruptcy Act 1883 (the predecessor of section 360 of Insolvency Act 1986), see R v Peters (1886) 16 QBD 636. It seems that all that is required is the assent of the creditor. But does the creditor assent to the obtaining of credit if he merely refrains from suing the debtor or (as in this case) refrains from re-taking possession of goods in respect of which he has retained the title?

18. It is fair to say that these problems were addressed when, 28 years after Lord Tenterden's Act, Parliament enacted the equivalent provision into the law of Scotland. Section 6 of the Mercantile Law (Scotland) Amendment Act 1856 provides:-

> "From and after the passing of this Act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person made or granted to the effect or for the purposes of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have effect."

There the word "upon" is omitted so "credit" is free-standing but there is an express provision relating to "postponement of payment of debt". One cannot, however, construe an Act of Parliament as if it said what another later Act says.

19. If, however, the true construction of section 6 of the Act is as set out above, these problems need not be resolved. The facts of this case do not fall within its scope. There was no purpose or intention on the part of the appellants, when they made the relevant representations, that Titan should obtain money. Still less was there a purpose or intent that Titan should obtain goods, since the relevant goods had been obtained many months before.

20. I would therefore accept the first of Mr Maxwell Lewis's submissions and dismiss this appeal.

Lady Justice Hallett:

21. I agree.

Lady Justice Black:

22. I also agree.