

SCOTLAND / JUDGMENT

Burgerking Ltd v Castlebrook Holdings Ltd

[2014] ScotCS CSOH_36 (25 February 2014)

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[2014] CSOH 36 CA97/13 OPINION OF LORD TYRE in the cause BURGERKING LTD Pursuer;
against CASTLEBROOK HOLDINGS LTD Defender:

Pursuer: McColl; Davidson Chalmers. Defender: D. Thomson; Burness Paul LLP February 2014

Introduction

- [1] The parties to this action are, respectively, the tenant and the landlord of premises at Queens Drive Leisure Park, Kilmarnock, consisting of a fast food restaurant and surrounding land including car parking spaces. The pursuer wishes to sub-let the whole of the premises to a company named Caspian Food Retailers Limited ("Caspian") and, in terms of its lease, requires the consent of the defender. The defender has refused to grant consent. The pursuer seeks
- (1) declarator that the defender has unreasonably withheld consent and (2) decree ordaining the defender to issue written consent to a sub-lease by the pursuer in favour of Caspian. The matter came before me for debate of both parties' preliminary pleas to relevancy. The lease
- [2] The lease with which these proceedings are concerned was granted to the pursuer by the defender's predecessors in title, Dawn Developments Limited, in 1998. The relevant clause is paragraph 16 of Part 4 (Tenant's Obligations) of a schedule annexed to the lease. Under the heading "Alienation", the tenant's obligations are stated, with economy of punctuation, inter alia as follows: "16.1 Not to assign charge (by way of a fixed charge) sub-let or in any way for any purpose deal with the Tenant's interest in this Lease in whole or in part or share or part

with possession of the Premises in whole or in part except as herein permitted. 16.2 Notwithstanding the foregoing generality, not to assign this Lease without the prior written consent of the Landlord which consent shall not be unreasonably withheld or a decision thereon unreasonably delayed in the case of an assignation of the whole to a party demonstrably capable of implementing the obligations hereunder of the Tenant. 16.3 Notwithstanding the foregoing generality, not to sub-let the whole of the Premises without the prior written consent of the landlord whose consent shall not be unreasonably withheld or a decision thereon unreasonably delayed to a sub-tenant who is respectable and responsible..." The pursuer's application for consent

- [3] On 9 August 2012, English solicitors acting on behalf of the pursuer wrote to the defender formally requesting consent to the sub-letting of the premises to Caspian, a company incorporated in England with a registered office in Surrey. Enclosed with the letter was a note prepared by the proposed sub-tenant. As this note contains most of the information that was available to the defender when it took its decision to refuse consent, I shall set it out in full: "CFRL [i.e. Caspian] is owned by Mr Taji Zadeh and has acquired the operations of 26 restaurants from Burger King in Scotland. CFRL has been granted the exclusive right for future store openings in Scotland, and it is their intention to open a further 50 Burger King restaurants throughout the UK in the next five years. The estimated turnover for the business being run by CFRL is £25,000,000. Mr Taji Zadeh has since 1993 through another company he owns, owned and operated Burger King Restaurants. By 2004, through new store openings and acquisitions, he had 12 stores operating around the M25 including stores at the large shopping centres at Thurrock, Brent Cross and Woking. In December 2004 his company acquired Gowrings Plc. Gowrings owned and operated 41 Burger King restaurants in the South, South West and the Midlands including 16 Drive Thrus. Gowrings was the oldest UK Burger King franchisee, having started the business in 1985. Prior to the acquisition of the Scottish stores, his company was operating 54 restaurants with a combined turnover of £44 million for the 2011 financial year. Mr Zadeh's company appeared in the Sunday Times Fast Track 100 listing in 2008, and in 2010 Mr Zadeh was presented with the Brand Leadership award by Burger King in recognition of his outstanding contribution to the support and development of the Burger King brand in the UK. We attach details of the Landlords for the existing 54 restaurants and Mr Zadeh has stated 'we have an excellent relationship with our Landlords, with dealings going back in some cases in excess of 20 years.'"
- [4] On 14 August 2012, the defender's Scottish agents replied by email seeking further information to enable their clients "to consider the matter properly". The information sought included Caspian's last three years' audited accounts and references from at least two landlords of that company. On 20 August, the pursuer's English agents replied, advising that they did not have accounts for Caspian as it was a new company, formed in February 2011, which had been dormant until becoming involved with the pursuer in relation to purchasing the latter's Scottish business. For the same reasons no references from landlords were available. On 28 August, the defender's agents responded that as Caspian had no track

record, they had no idea whether the company was "respectable and responsible" (as required by sub-paragraph 16.3 above) and noted that no evidence to that effect had been produced. The email continued: "However, my clients will consider further applications either for [Caspian] with a guarantee by either Mr Zadeh or the main company in the group or consider an application to sub-let to either of these parties. If another company or Mr Zadeh wishes to be involved in the transaction my clients will need to be satisfied that they too are respectable and responsible and further financial information will be sought at that point."

- [5] Further email correspondence ensued, in the course of which the pursuer's English and subsequently Scottish agents attempted unsuccessfully to persuade the defender, through its agents, that Caspian's corporate background, taken together with the fact that the defender would retain the benefit of the pursuer's covenant as tenant, was such that there were no reasonable grounds on which to refuse consent to sub-letting. In one of those emails, dated 28 November 2012, the pursuer's agents asserted inter alia that Caspian were currently operating under subleases by it at various premises, namely "Overgate, St Enoch, Gyle, Braehead as well as all the others". The defender's final position was stated in an email from its agents dated 29 November 2012 as follows: "Not only must the sub-tenant be respectable and responsible, but the obligation to be satisfied when a landlord must not unreasonably withhold consent is that it must be shown that the proposed sub-tenant can perform the obligations under the lease. You have provided no evidence that this particular person (Caspian Food Retailers Limited) can carry out the non-monetary obligations under the lease. Nor have you provided any evidence that they are respectable and responsible. On the other hand, all you are saying is that there is nothing to say that they are not respectable and responsible, which is quite a different thing.." The remainder of this email emphasised the distinction, in the defender's perception, between the track record (which the defender acknowledged was "superb") of Mr Zadeh and his other companies on the one hand and the absence of any track record of Caspian itself on the other. It was reiterated that if the head company in the group were to provide a guarantee or to take the lease itself, then the defender would grant consent. The pursuer declined to procure any such guarantee and instead raised the present action. The law
- [6] The expression "respectable and responsible" in relation to a proposed sub-tenant or assignee is frequently used in commercial leases and has a long history. In *Wilmott v London Road Car Co Ltd*
- [1910] 2 Ch 525, the question for determination was whether a limited company was capable of being "a respectable and responsible person" for the purposes of consent to assignation or sub-letting. The Court of Appeal held that it was, and in so holding provided some assistance regarding interpretation of the words "respectable" and "responsible". At page 531, Cozens-Hardy MR observed: "I think the ordinary use of language justifies you in saying that a company is a respectable company. We all use that language habitually. We talk of a respectable insurance company, or a respectable bank, and in that case we refer

to the mode in which the company or the bank conducts its business... A company can have a reputation which is not the reputation of the individual directors, but the reputation of the company, the reputation which the company itself and itself alone can protect by means of an action of libel..." Fletcher Moulton LJ stated at page 535: "... The word 'responsible' is just as applicable to a company or any other incorporated body as it is to a person, and that has not been contested at the Bar. The whole argument on this part of the case has been based on the word 'respectable'. In my opinion the word 'respectable' points to the behaviour of the person, primarily in carrying on his business, but probably also in the whole of his external relations, and I cannot see why it is not just as applicable in that sense to a corporation as it is to a natural person. It is perpetually used with regard to corporations..." Perhaps most helpfully in the present context, Farwell LJ observed at page 537: "... The responsibility relates to financial capacity, and it has hardly been argued, and I think it is not arguable, that that is not as applicable to a corporation or limited company as to an individual. The lessor desires to have a responsible tenant whether the tenant be an individual or a corporation. He also desires to have a respectable tenant. 'Respectable' there means something which is worthy of respect. Why it should be said that the words 'respectable' or 'not respectable' are inapplicable to a limited company I fail to see. I think it is clear that a company has a reputation in the eye of the law..." Commenting on various passages from the judgments in the Wilmott case, including the first sentence of the dictum of Farwell LJ that I have just quoted, Danckwerts J stated in *Re Greater London Properties Ltd's Lease*

- [1959] 1 WLR 503 at page 507: "It is plain from those passages that the responsibility in question is not an abstract one, but is related to the particular circumstances of the case and, above all, to the amount of the obligations which the company is going to undertake; that is to say, the amount of the rent and the burden of the covenants and other obligations contained in the lease. It is not a theoretical matter. [Counsel for the tenant] is perfectly correct in saying that the matter must be approached having regard to the circumstances, and in a practical and realistic manner. That is, in my judgment, the way in which the matter has to be approached and decided, and not with regard to what I would, without any offensive intent, describe as a point which might be taken by a pedantic chartered accountant."
- [7] Reference was also made by the parties in the course of the debate to the summary by Lord Drummond Young in *Burgerking Ltd v Rachel Charitable Trust* SLT 224 at paragraph 16, under reference to previous Scots and English authorities, of the legal principles applicable to refusal by a landlord of consent to sub-letting. Arguments for the parties Argument for the defender
- [8] The submission on behalf of the defender largely re-stated the position taken by its agent in correspondence. On a proper construction of sub-paragraph 16.3 of the schedule to the lease, it was not necessary for the court to decide whether consent had been unreasonably withheld because the reasonableness test fell to be applied only if and when a proposed

tenant had passed the test of being respectable and responsible. The pursuer had placed no material before the defender to demonstrate that Caspian met either of those descriptions, as interpreted in *Wilmott* and in *Re Greater London Properties Ltd's Lease*. It was necessary to distinguish Caspian from its owner, Mr Zadeh, and from other companies that Mr Zadeh owned and which had a business track record. Caspian was a separate legal person and it was for the defender to satisfy the pursuer that it, rather than any other entity, was both respectable and responsible. It was not sufficient to assert that there was nothing to indicate that Caspian was not respectable and responsible. If, as the pursuer claimed, Caspian had begun to trade at certain locations it should have been possible to produce at least an early indication of its financial circumstances and landlords' references, yet none had been provided. Nor was it an error of law for the defender to raise the issue of Caspian's ability to implement the tenant's obligations: despite the fact that (in contrast to paragraph 16.2) there was no express reference in paragraph 16.3 to demonstrating such capability, it was relevant to the proposed sub-tenant's respectability and responsibility, especially the latter.

Argument for the pursuer [9] On behalf of the pursuer it was submitted that I should grant decree in terms of the conclusions of the summons as no relevant defence had been stated. By restricting its attention to Caspian and ignoring the corporate background, the defender had erred in law. Contrary to the position adopted by the defender, the commercial characteristics of the owners of a company did impact upon the responsibility and respectability of the company; it would be relevant, for example, to have regard to the fact that a company's directors had convictions for fraud. A recently-incorporated company in a reputable trading group carried a presumption of respectability. The admittedly "superb" track record of Mr Zadeh and his other companies could not legitimately be disregarded. The words "respectable" and "responsible" should not be read as terms of art but should be construed in the context of an application for consent to sub-let by a tenant who would remain bound by its covenant. In this context "responsible" should be taken to refer to an entity which takes reasonable steps to comply with any legal or wider societal obligations incumbent upon it. It was in any event incorrect to assert that no information had been provided regarding Caspian itself. The defender had been informed that Caspian had acquired a substantial business operation and that that operation was already being carried on by Caspian at various specified locations. The defender had also erred in law in giving as a reason for refusal the absence of evidence that Caspian could implement the tenant's obligations: that requirement was contained only in sub-paragraph 16.2, which was concerned with consent to assignation, and had no application to sub-letting. It was unnecessary to analyse the process, as the defender had submitted, as consisting of two stages. If a proposed tenant was not respectable or not responsible it would be reasonable to refuse consent. In the present case the defender had erred in deciding that Caspian was not respectable and responsible and had offered no other relevant reason for refusing consent. Decree should therefore be granted without any need for factual inquiry. Decision

- [10] It seems to me that there is merit in adopting the defender's two-stage approach: in other words, to address first the question whether a proposed sub-tenant is respectable and responsible. If it is not, then in my opinion the landlord is entitled to refuse consent without justifying that refusal by reference to any reason other than the non-respectability and/or non-responsibility of the sub-tenant. That analysis is consistent with the opinion of AL Smith LJ in *Bates v Donaldson*
- [1896] 2 QB 241 at 246-7, construing a similar contractual provision: "It will be seen that it is only when a respectable and responsible person is proposed as assignee or undertenant that this clause (as to the permission not being unreasonably withheld) comes into play. If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission; if, however, the person proposed be respectable and responsible, then the lessor cannot unreasonably withhold his permission." This passage was distinguished by Lewison J while dealing with certain preliminary arguments in *Royal Bank of Scotland plc v Victoria Street (No 3) Ltd*
- [2008] EWHC 579 (Ch) at paragraph 23; the distinction was, however, on the basis of an English statutory prohibition (in section 19(1) of the Landlord and Tenant Act 1927) on restriction of cases where consent cannot be unreasonably withheld that has no Scottish equivalent. I consider that current Scots law accords with AL Smith LJ's dictum .
- [11] The issue in the present case is therefore whether, at the time when the defender refused consent, the pursuer had provided to it material which established that Caspian, the proposed sub-tenant, was "respectable and responsible". The question is one of the proper construction of that expression, having regard to the relevant surrounding circumstances, being the circumstances which were reasonably within the knowledge of the parties to the lease at the time when it was granted. In my opinion, the parties to the lease must be taken to have been aware when they included this commonly-used expression in sub-paragraph 16.3 that it had been the subject of interpretation by the courts. They would be aware that "respectability" had been held to refer to the manner in which the company in question conducted its business and to its reputation (*Wilmott* , per Cozens-Hardy MR at 531) and that "responsibility" had been held to refer to financial capacity (*ibid* , per Farwell LJ at 537). In my opinion, the defender is well founded in its submission that these characteristics must be borne by the particular entity proposed as a sub-tenant. I consider this to be more obviously the case with regard to responsibility. By using the word "responsible" in sub-paragraph 16(3), the parties agreed, in my opinion, that the landlord would be entitled to be satisfied as to the financial solidity of any proposed sub-tenant. It is not unheard of for one of the members of a group of companies to become insolvent while others survive; nor is it improbable that a company owned and directed by an individual would suffer insolvency yet that the owner and other corporate entities owned and controlled by him would continue to trade successfully. In my opinion a landlord who stipulates that a proposed sub-tenant must be responsible is reserving to himself the right to be satisfied as to the financial soundness of the sub-tenant itself and not as to the soundness of individuals or entities who might or

might not provide assistance in the event of financial difficulty. So far as respectability is concerned, it may be that little should be required to satisfy the landlord, but once again I consider that evidence of respectability should relate to the proposed sub-tenant itself. A company does not acquire respectability automatically along with its certificate of incorporation, although it may not be long before its mode of carrying on business affords sufficient indication that it could not reasonably be regarded as anything other than respectable. That is not, in my view, the same as an assessment of the respectability of the company's owners or of other companies in common ownership.

- [12] I do not consider that any doubt is cast on this analysis by the fact that in the case of sub-letting, as opposed to assignation, the landlord does not enter into a direct relationship with the sub-tenant and retains all of its rights against the tenant. The landlord has, or at least may have, an indirect interest in the financial soundness of the sub-tenant. The ability of the latter to meet its financial obligations to the tenant may, for example, affect the ability of the tenant in turn to meet its obligations to the landlord. A failure by the sub-tenant to carry on its business in a respectable manner could, in some circumstances, affect the return obtainable by the landlord from future letting. In the present case the defender does not suggest that there is any positive indication that the proposed sub-tenant lacks either respectability or responsibility but, as counsel for the pursuer acknowledged, the absence of any such positive indication is not of itself sufficient to satisfy the test. It has also to be borne in mind that the question raised in this case is one of contractual interpretation which does not fall to be resolved by close examination of the circumstances which have in fact now arisen. [13] *Royal Bank of Scotland plc v Victoria Street (No 3) Ltd*, to which I have already referred, raised an issue similar to the one with which this action is concerned. In that case the landlord refused consent to assignation on the ground, shortly stated, that the proposed assignee had only been incorporated some two months previously. When the case came before Morgan J for trial ([2008] EWHC 3052 (Ch)), the judge found in fact that the landlord did not regard the proposed assignee as a respectable and responsible assignee because it was a new company, because the landlord was told very little about it, because no guarantee nor adequate rent deposit was offered, and because the rent was substantial and there was a significant liability for dilapidations. It was conceded on behalf of the tenant that a reasonable landlord could in these circumstances reach the conclusion that the proposed assignee was not a respectable and responsible tenant on the basis that there was no evidence to persuade it to take a contrary view. There is no suggestion by Morgan J that this concession was wrongly made. The facts of the case are not on all fours in respect that it concerned assignation, and also in respect that in the present case it is not suggested that the defender lacked information about Caspian or its owner. It does, however, afford some support for the view that in assessing respectability and responsibility one must have regard to the track record of the proposed assignee/sub-tenant itself. If in the present case the pursuer had provided material demonstrating even a successful first few months' initial trading by Caspian, including landlords' references, it might have been difficult for the defender to justify any refusal of consent, but the pursuer chose to approach the matter as

one of principle. I would also observe that some (though not all) of the disadvantages listed by Morgan J at paragraph 31 of his judgment of having a lease assigned to a tenant who was not believed to be respectable and responsible would apply mutatis mutandis to a sub-letting. Disposal

[14] For these reasons I sustain the defender's first plea-in-law, repel the pursuer's pleas-in-law and dismiss the action. Expenses are reserved. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2014/2014CSOH36.html>

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