Case No: BL-2018-000967

Neutral Citation Number: [2018] EWHC 3195 (Ch)

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2018

**Before** :

**The Honourable Mr Justice Zacaroli**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **(1) URT GROUP LIMITED** | **Claimants** |
| **(2) BRISTOL CARS LIMITED** | |
| **(3) URT PRODUCTION LIMITED** | |
| **- and -** | |
| **(1) PASCAL ALEXANDER FULTON DOWERS** | **Defendants** |
| **(2) DON'T LOOK BACK HOLDINGS LIMITED** | |
| **(3) BELGRAVE BUSINESS CENTRE LIMITED** | |

**Ms Jennifer Meech** (instructed by **Pitmans LLP**) for the **Claimants**
**Mr Gary Blaker QC and Mr Joseph Ollech** (instructed by **Ronald Fletcher Baker LLP**) for the **First and Second Defendants**
**Mr Gary Blaker QC and Mr James Couser** (instructed by **Ronald Fletcher Baker LLP**) for the **Third Defendant**

Hearing date: 14 November 2018

# Judgment Approved

**Mr Justice Zacaroli :**

Introduction

1. On 22 October 2018, in an extemporary judgment (the "October judgment"), I granted the Claimants' application for an injunction requiring the Second and Third Defendants to provide access to premises occupied by them so that the Claimants could recover items of their property on those premises.

2. I refer to the October judgment for the background to this matter. For the purposes of the issue dealt with in this judgment, it is necessary to record merely the following:

   (1) I concluded in the October judgment that the Claimants were the owners of various items of property situated at premises at Heath Place in Bognor Regis (the "Premises");

   (2) The Premises had been occupied, until 15 February 2018, by URT Composites Limited ("Composites"), a company associated with the Claimants, pursuant to a lease with the Third Defendant;

   (3) Composites went into liquidation on 8 February 2018. Its liquidators disclaimed the lease on 15 February 2018;

   (4) On 1 March 2018, the Third Defendant granted a lease of the Premises to the Second Defendant (although this was subsequently amended so that a part of the Premises – shown by red-hatching on the plan annexed to the lease – was retained by the Third Defendant). The Second Defendant went into occupation of the Premises on 8 March 2018.

3. One of the issues that I dealt with in the October judgment was the extent to which there was a seriously arguable defence that certain items on the Premises (the "relevant items") were landlord's fixtures such that they had passed (initially) to the Third Defendant and (subsequently on the grant of the lease to the Second Defendant) to the Second Defendant.

4. The only basis on which it was then argued that the relevant items were landlord's fixtures was because of the nature and purpose of their annexation to the premises. It was pleaded in paragraph 48.2.1 of the defence of the First and Second Defendants, that "…the [relevant] items are so affixed to the DLBH Premises that to remove [sic] would be to destroy them and/or to destroy the DLBH Premises such that they have become part and parcel of the land and are lawfully demised to the Second Defendant."

5. For the reasons set out in the October judgment, I rejected this argument, and concluded that there was accordingly no seriously arguable defence that the relevant items were landlord's fixtures. In accordance with the approach adopted by Lewison J in *Trad Hire & Sales Limited v Holbrook Investments Limited* [2010] EWHC 90 (Ch), it was therefore unnecessary to consider the remaining stages in the *American Cyanamid* test and I ordered delivery up of the relevant items.

6. The parties took time to agree the terms of the order required to give effect to the October judgment (which also related to a number of other items on the Premises, none of which were claimed to be landlord's fixtures). In the meantime, the

Defendants sought advice from Leading Counsel. As a result of that advice, the Defendants identified a new and different argument to the following effect:

(1) The relevant items had been *tenant's* fixtures during the period within which Composites held the lease of the Premises;

(2) As a matter of law, tenant's fixtures must be detached from the land upon the later of (i) the expiry of the tenant's lease and (ii) the date on which the tenant ceases possession of the demised land. If not so detached, then title to the fixtures irretrievably vests in the landlord;

(3) The relevant items remained on the Premises upon termination of Composite's lease and, for that reason, vested in the Third Defendant and subsequently became vested in the Second Defendant as leasehold owner of the Premises.

7. In light of this new point, I invited the parties to make submissions as to whether it was appropriate to re-open my decision and, if so, whether I should reach a different conclusion in respect of the Claimants' application for delivery up of the relevant items. A further hearing was arranged for 14 November 2018. Having heard submissions from the parties, I informed them (with detailed reasons to follow) that: (1) I was prepared to re-open my decision; (2) in light of the new argument, I concluded that there was a seriously arguable defence to the claim for delivery up in respect of the relevant items; (3) this conclusion necessitated a consideration of the remaining stages of the *American Cyanamid* test; (4) as I had indicated in the October judgment, the precarious financial position of the Claimants meant that I could not be satisfied that the Defendants would be adequately compensated in damages if an injunction was granted, but the Defendants were successful at trial, and the balance of convenience came down in favour of refusing the injunction.

8. Accordingly, while I confirmed my decision to order delivery up of all other items, I reversed my decision to order delivery up of the relevant items. This judgment contains my reasons for doing so.

<u>The discretion to re-open the decision in the October judgment</u>

9. In support of their contention that it was open to me to re-visit my decision relating to the items alleged to be landlord's fixtures, the Defendants relied on *Re L and another (Children) (Preliminary Finding: Power to Reverse)* [2013] 1 WLR 634, in which the Supreme Court held that the power of a judge to reverse his or her decision at any time before the order was drawn up and perfected by being sealed by the court was not limited to exceptional circumstances.

10. In *In re Barrell Enterprises* [1973] 1 WLR 19, the Court of Appeal had concluded that when oral judgments had been given, the successful party ought "save in the most exceptional circumstances" to be able to assume that the judgment was a valid and effective one.

11. In *Re L*, however, Baroness Hale of Richmond JSC at [27] said:

> "This court is not bound by the *Barrell* case or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the

> judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in *Stewart v Engel* [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *In re Blenheim Leisure (Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances."

12. In the *Blenheim Leisure* decision (referred to by Baroness Hale in the passage cited above), Neuberger J had noted, as one example of a circumstance which justified a judge reversing his or her decision, "the parties' failure to draw to the court's attention a plainly relevant fact or point of law".

13. The Claimants contended that the conclusions that I had reached in the October judgment precluded the Defendants raising this new point of law. Ms Meech, for the Claimants, submitted that my finding, based on the decision in *Berkley v Poulett* [1977] 1 EGLR 86, that the relevant items were not "fixtures" meant that I had already concluded that the items were merely chattels, and so could not have been tenant's fixtures. The only conclusion I reached in the October judgment, however, was that the relevant items were not landlord's fixtures, that being the only issue raised for decision. I was not concerned to determine whether the items, if not landlord's fixtures, were chattels or tenant's fixtures. That question remains open.

14. Insofar as Ms Meech was contending that an item, which was not a fixture for the purposes of the test laid down in *Berkley v Poulett*, could not be a tenant's fixture, then I reject that submission. *Berkley v Poulett* was itself not concerned with the distinction between a landlord's fixture and a tenant's fixture. The fact that an asset does not satisfy the test for a fixture as laid down in *Berkley v Poulett*, because its annexation to the land is for the purpose of the better enjoyment of the asset rather than to improve the realty, does not mean that it cannot be a tenant's fixture. It would be a tenant's fixture (per the test set out in Woodfall on Landlord and Tenant at paragraph 13.1.4.1, to which my attention was drawn by the Claimants in the hearing which led to the October judgment) if it was annexed to the land, for the purpose of trade or convenience, and was physically capable of being removed without substantial damage to the land or the fixture.

The exercise of the discretion to re-open the decision in the October judgment

15. I am satisfied that the new point raised since the date of the October judgment constitutes one of the circumstances which can justify the court re-opening a decision that has not yet been reflected in a sealed order. It is a new point of law which, if correct and if applicable in the circumstances of this case, would provide a defence to the claim for delivery up of the relevant items.

16. In exercising my discretion, I have regard to the fact that (as noted in *Re L*), each case turns on its own circumstances and that it is necessary to have regard to the overriding objective of dealing with cases justly.

17. A number of points militate against re-opening the decision on the facts of this case. First, it was for the Defendants to raise this argument if they wished to rely upon it. Second, the failure to draw the court's attention to the point was therefore that of the Defendants alone. Third, it was raised at a very late stage. Fourth, even when it was raised it was not accompanied by any application to amend the Defence. So far as the last point is concerned, Mr Blaker QC, appearing for the Defendants (for the first time at the hearing on 14 November 2018), submitted that no amendment was required in view of the fact that the defence of the Second Defendant already pleaded the legal conclusion that the relevant items were landlord's fixtures. I have set out the pleading at paragraph 4 above. It is clear that the only legal basis on which it is asserted that the items are landlord's fixtures is by reason of the degree of annexation. The new point has an entirely different legal basis and, if it is to be pursued, requires an amendment to the pleading. I ordered, at the hearing on 14 November 2018, that such an amendment be made.

18. The Claimants contended that, while the court has jurisdiction to allow late amendments and an amendment could, exceptionally, be made on a point of law even on an appeal to the Court of Appeal, the new point raised issues of both law and fact, so that it would be inappropriate to allow this late amendment (and an amendment would not be allowed on appeal).

19. In my judgment, however, notwithstanding the new point was raised very late in the day, this is materially different from a case where a new point is raised late in the day before a trial.

20. There is a broad similarity between the approach I took in the October judgment (following *Trad Hire & Sales*) and a case where a claimant seeks summary judgment on the grounds that there is no seriously triable issue raised by the defence. In such a case, it is not unknown for a defendant to contend that even if its defence, as currently pleaded, does not raise a seriously triable issue, this defect can be cured by amendment. If the amendment raises a seriously triable issue, summary judgment may be defeated.

21. In considering whether a defendant should be allowed to rely on a new point, by way of amendment, in the context of an application for summary judgment, different considerations apply to those that would apply where a late amendment is made at or immediately before a trial.

22. Whereas a late amendment that raises a question of fact might be refused immediately before a trial (where, for example, the amendment would necessitate an adjournment of the trial: see, for the relevant principles, *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at [38]), in the case of an application for summary judgment, the fact that the amendment raises a point of fact (as opposed to, or in addition to, a point of law) is unlikely to be a reason for refusing the amendment. Unless it is a case where the claimant can show that, if the point had been raised earlier, it might have been in a position to demonstrate (to the standard required on a summary judgment application) that the alleged new fact was hopeless, no additional prejudice is caused to a claimant because the new point is one of fact as opposed to law. That is because the only question to be determined on the application is whether the new point gives rise to a serious issue to be tried. If it does, there would usually

be no disruption to the ordinary course of the proceedings because the trial would be some way off in the distance.

23. In the circumstances of this case, had the point been raised at the hearing which led to the October judgment, it is difficult to see what prejudice would have been caused to the Claimants that could not have been compensated in costs. Similarly to the extent that prejudice is caused to the Claimants by reason of the point being raised *after* the October judgment but before the order giving effect to it was sealed, it is compensated by an order for costs in their favour (which I made at the hearing on 14 November 2018).

24. There is no question of the Claimants having relied on the October judgment to their detriment, and no question of other litigants being disadvantaged by the new point being taken only after the October judgment (save only to the extent that the Court was required to list a further short hearing in order for the issue to be aired).

25. It is also important to bear in mind, in light of the overriding objective to deal with cases justly, that if at trial it is established that the relevant items have become the property of the Defendants, then they are likely to have suffered substantial damage as a consequence of the injunction requiring them to deliver up the items to the Claimants.

26. In all the circumstances, I conclude that this is a case where I should revisit my decision so that the Defendants have the opportunity to raise the argument, provided that it raises a seriously triable issue, to which I now turn.

Serious triable issue

27. I have already explained that nothing in the October judgment precluded the argument that the relevant items are tenant's fixtures. I am satisfied, based on the evidence that I referred to in the October judgment, that there is a serious issue to be tried as to whether they are tenant's fixtures, or merely chattels. For the most part, there was insufficient evidence adduced by either party for the court to reach a conclusion either way on the point. In the case of the autoclaves, the evidence demonstrated that they were screwed to the floor and while I concluded that this was for the better enjoyment of the autoclaves (as opposed to for the improvement of the realty) that is not inconsistent with them being tenant's fixtures.

28. In support of their contention that tenant's fixtures remaining on the property at the termination of the lease become vested in the landlord, the Defendants cited *New Zealand Government Property Corp v HM&S Ltd* [1982] QB 1145, 1161-1162, per Dunn LJ:

> "I believe the true rule at common law to be that a tenant has the right to remove tenant's fixtures so long as he is in possession as a tenant, whether by holding over, or as a statutory tenant under the Rent Acts, or upon an extension of a lease of business premises under Part II of the Landlord and Tenant Act 1954…
>
> … If the tenant surrenders his lease and vacates the premises without removing the tenant's fixtures, then he is held to have abandoned them. But if he surrenders his lease, either expressly or by operation of law, and remains in possession under

> a new lease, it is a question of construction of the instrument of surrender whether or not he has also given up his right to remove his fixtures. If nothing is said, then the common law rule applies, and he retains his right to remove the fixtures so long as he is in possession as a tenant."

29. The Defendants further relied on Woodfall on Landlord and Tenant, at paragraphs 13.157.4 and 13.157.5.

> 13.157.4: "If the tenant gives up possession in consequence of the surrender, it is considered that he must remove his fixtures (if at all) before he gives up possession."
>
> 13.157.5: "The same principles apply to disclaimer as apply to any other termination of a tenancy. However, where the court makes a direction as to the date on which a disclaimer is to take effect, if may make such order with respect to fixtures as it thinks fit". (No application was made to the Companies Court in connection with the disclaimer to give such direction, or make any order with respect to fixtures, in this case.)

30. The Claimants did not seriously challenge these propositions, and cited no authority on the point.

31. In response to the objection that the relevant items were the property of the Claimants, and not of the tenant, Mr Blaker QC suggested that, as between landlord and tenant, it was irrelevant who owned the items: whoever brought them onto the Premises, once the degree and purpose of their annexation satisfied the test for tenant's fixtures, they were to be regarded as such for the purposes of the rule (as against the landlord) that they could be removed only during the period of the tenancy. The third party would be left to such remedies as it may have (likely to be for damages) against the tenant. Mr Blaker QC said that, while he could find no authority for this proposition, neither was there any authority to contradict it.

32. A potentially powerful objection to the argument is that a disclaimer "does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person": see s.178(4) of the Insolvency Act 1986. Neither counsel was able, however, to point to any authority which had considered the interplay between (1) s.178(4) of the Insolvency Act 1986, (2) the rights of a third party whose property was situated (with its permission) on premises leased by another company and (3) the common law principle that a tenant loses the right to remove its fixtures after going out of possession on termination of its lease. I consider, in the absence of any authority either way, notwithstanding that there are powerful contrary arguments, that the proposition of law advanced by the Defendants is at least arguable.

33. I note, moreover, that a person who claims an interest in disclaimed property may apply to the court for the vesting of the property in, or for its delivery to, a person entitled to it: see s.181(2)&(3) of the Insolvency Act 1986. No such application has (so far) been made here. It is at least arguable that if a third party finds itself in the position of the Claimants here, its remedy lies in making such an application.

34. A further possible objection to the Defendants' argument, on the facts of this case, is that there is a passing reference, in correspondence exhibited to the Claimants' witness statement, to the Claimants having requested access to the Premises *prior to* the date upon which the lease was disclaimed by Composites' liquidator. Mr Blaker QC accepted that a court would be influenced, in deciding whether a landlord (or subsequent tenant) could take advantage of the new point raised by the Defendants, by the fact that a landlord had prevented either the tenant or the third party from removing the assets during the period of the tenancy. There is, however, no direct evidence of precisely what communications took place as between the Claimants, the liquidators and the landlords in the period leading up to the disclaimer of the lease. It is an odd feature of this case that, although Composites went into voluntary liquidation, such that it is inherently likely that the Claimants had advance notice of the fact that it was going to go into liquidation, no steps appear to have been taken to ensure that the Claimants' property was removed from the Premises in advance of the liquidation. These are matters that require to be investigated at a trial, such as to give rise to a triable issue.

35. For these reasons, I conclude that the new point raised by the Defendants since the October judgment does give rise to an arguable defence, such that it would be inappropriate to adopt the approach taken in the *Trad Hire* case. The Claimants have already suffered significant delay in this case, between the issue of their application for delivery up and the time of the substantive hearing. I ordered, at the hearing on 14 November 2018, that the trial of the issue whether the Claimants are entitled to delivery up of the relevant items be tried as a preliminary issue, and that such trial be expedited.

36. In these circumstances, the remaining stages of the *American Cyanamid* test require consideration. In the October judgment, I considered the application of the remaining stages of the *American Cyanamid* test on the assumption that my conclusion that there was no seriously triable defence in respect of the claim to delivery up of the relevant items was wrong. I concluded (at paragraphs 42 to 46 of the October judgment) that, in that event, I would have refused to order delivery up of the relevant items. The Claimants did not seek to persuade me that my conclusion was, in that respect, wrong. Accordingly, I see no reason to change that part of my decision and I therefore refuse, in the light of the new point raised by the Defendants, the order for delivery up of the relevant items.