IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2017] EWHC 2455 (Ch)

No. HC2017002081

Rolls Building

Friday, 11th August 2017

Before:

MR JUSTICE ROTH

B E T W E E N:

BROTHERS ENTERPRISES LIMITED

Claimant

- and -

NEW WORLD HOSPITALITY UK LIMITED

Defendant

MR M BOOTH QC (instructed by RLS Law) appeared on behalf of the Claimant.

MR J McLINDEN QC and MR T BISHOP (instructed by Woodroffes Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE ROTH:

1 This is the restored application for an interim injunction. It arises on a dispute between two adjacent trading businesses regarding the interference with an easement by right of way for customers of the one over the premises of the other. But it has generated a great deal of heat with serious allegations being made by each party against the other, including regarding the conduct of their respective solicitors. That has continued in this hearing. Each side has accused the other of acting in a high-handed fashion and being deliberately misleading. There is no doubt in my mind that this dispute has been greatly exacerbated by the very unfortunate conduct on both sides.

2 This is the third occasion on which the matter comes before the court. An injunction, effectively without notice, was granted by Mr Justice Norris in the Applications Court on 24 July with a return date of 31 July. On that date, Mr Justice Mann refused to continue the injunction immediately but adjourned the matter to come on as a motion by order. That is how it comes to be before this court today. It has come with a time estimate of half a day. That was a serious underestimate. There are a significant number of issues and documents which both counsel wish to explore and, unsurprisingly, the matter took a full day. As a result, there has been no opportunity for more careful preparation of this judgment which otherwise the seriousness of the case would have merited.

3 The background to the matter is this. The claimant company runs the business of a restaurant trading as "Oliver's Steakhouse" at 25 London Street, W2, which is close to Paddington Station. As its name suggests, Brothers Enterprises Ltd is owned by brothers, two brothers in this case, Murat and Celal Kuccuk. I shall refer to them for convenience, without intending any discourtesy, by their first names. Celal is the only director. There is a third brother, Cemal, known as "Jimmy", who features prominently in the story. He runs another restaurant called the San Marco Restaurante, which I am told is across the road at 10 London Street. The business of Oliver's Steakhouse has been trading for some four or five years. It is open seven days a week.

4 The defendant, New World Hospitality Ltd, runs a hotel, the Royal Norfolk Hotel. The company appears to trade as "Myhotels". That company is owned by Mr Jason Catifeoglou and Mr Andreas Thrasyvoulou. I shall similarly refer to them by their first names without intending any discourtesy. Jason is a director of Myhotels Group, which he said was founded by Andreas. Andreas's son, Stef Thrasyvoulou, also features in some of the exchanges that took place.

5 There is another premises adjoining these two, a public house called "The Dickens Tavern", which appears to be operated by Greene King. The position is, looking at it from London Street, that Oliver's Steakhouse Restaurant is immediately to the right of the Royal Norfolk Hotel, and then to the left of the hotel as you look at it from the street is The Dickens Tavern. Unusually, there are no separate toilet facilities within either the restaurant or the tavern. Both of those use the toilets of the hotel. It is not in dispute that, by reason of an underlease referring to the superior lease, the claimant has a right of way over part of the premises of the hotel. It is expressed in the superior lease at the second schedule as being "for all purposes during the term to pass along the entrance hall, the corridors, passages, landings and stairways forming part of the building as coloured on the plan," and "the right, in common with other tenants and occupiers of the ground floor and basement restaurant premises, to use the male and female basement and ground floor lavatory accommodation." It was pursuant to those easements that the customers of Oliver's Steakhouse have been using the toilets in the hotel.

6 The access to the hotel is through an internal door from the restaurant. It goes without saying that the availability of toilet facilities for their customers is fundamental to the operation of the restaurant. The hotel is now undergoing a very major refurbishment. It will reopen under a new brand as the Pilgrim Hotel under a project planned for completion later this year. Already in late 2016 and early 2017, there were discussions, primarily between Jason and Jimmy, as to what might be involved in these works. There was discussion about a possible reconfiguration of the restaurant, suggested by Jason, but that was not accepted. Jimmy, as I have made clear, is not the owner. The company - that is, the claimant - belongs to his brothers, but he conducted some of those discussions and he says, unsurprisingly, that he kept his brother Murat informed.

7 In particular, on 21 February 2017, Jason sent an email to Jimmy in which he said this:

> "As you know, the hotel renovation programme is well underway and now reaching the final and most critical stage. With this in mind, the work that we have proposed on the ground floor reception area and public toilets which will affect access from Oliver's Steakhouse will need to be agreed. We have had a few discussions about this to date but I have yet to hear back from you with regard to your proposed solution. As the scheduled works are planned to take place before the start of summer, we need to come to an agreement and sign off on the final designs by the end of February, so I kindly ask you to come back to me as soon as possible in order to proceed with an amicable solution.
>
> Furthermore, it is our obligation as the landlord to inform our tenants when any major works take place on the premises and therefore [we] will be writing to City Restaurants to inform them of our intentions".

8 City Restaurants owned, I am told, the head lease but shortly thereafter they ceased trading. There is no evidence of a letter to City Restaurants. It may be that one was sent: I do not know one way or the other.

9 Jimmy did not respond to that invitation to discuss a solution for access and there were some follow-up emails from Jason to him pressing the point over the next few weeks, but he never engaged with it. There, it seems, matters were left. What is clear to me is that nothing was ever agreed, either through Jimmy or with the actual owners or director of the claimant, as regards the "solution" to the problem of access that was raised in the email of 21 February.

10 I can fast forward to July this year. By then, the works at the hotel were underway and, on 12 July, the project manager, a company called Keytask Management Ltd, wrote a letter addressed to Oliver's Steakhouse, 25 London Street. The subheading was: "Re 25 London Street refurbishment of Royal Norfolk Hotel's public areas".

> "We are writing to you on behalf of our client, Royal Norfolk (Paddington) Ltd. Further to the facade and room refurbishments that have been ongoing for the past few years, the hotel will soon be undergoing construction works to its entrance lobby, shop front, first floor restaurant, corridors throughout and the plant room in the basement. The work will commence on 17 July 2017 after the hotel closes to the public on 15 July and will continue for ten weeks, ending approximately on 29 September 2017".

11 Further down, the letter says:

> "Access to the hotel's ground floor toilets will be hoarded off from the construction as access through the hotel front entrance will be restricted to construction personnel only for health and safety reasons. Access to these toilets will be via the Greene King pub and through a hoarded off corridor for females. Male toilets in the basement will remain as is".

Then there is some reference to possibly having to have unisex toilets for a short period.

12 However, the claimant says that it never received this letter. The evidence is that it was posted and not sent with an email, but that the post for Oliver's Steakhouse in fact goes to the hotel which was still open on 13 July. But there has been no evidence from anyone working at the hotel that such a letter was collected or delivered to the claimant.

13 Mr McLinden QC, for the defendant, suggests that the claimant's evidence that the letter was not received should not be accepted: in other words, that it is false. It would be quite wrong for me to come to a firm conclusion on that on an interim hearing conducted on the basis of witness statements. But I can and should say that it seems to be inherently implausible in the light of what followed, as I consider that receipt of a letter in those terms would have provoked a strong reaction.

14 On any view, that was unfortunate because this letter was clear notice that access to the toilets would be closed from 17 July, potentially for ten weeks. Although there had been the discussions back in February which had forecast that there might need to be some arrangements, it is clear to me that the claimant had never previously been told, first, of the date on which access would be prevented or, secondly, of the duration of the obstruction. I consider that, on any view, such notice was clearly required and would have been the most sensible thing to do to spark proper discussions about how the problem of access could be dealt with. I am inclined to the view that in any event giving notice only five days before the event was too short, but I consider that the obvious course for the defendant to have taken in the light of all the previous discussions was to send the notice either to the director of the claimant company by email or, given that all the previous discussions had been with Jimmy, to Jimmy. It does not matter for this purpose that Jimmy was not himself a director or owner of the claimant. It seems to me obvious that if Jimmy had received it, he would have passed it on to one of his brothers.

15 What happened is that, five days later on 17 July when the staff and Murat came to prepare the restaurant for its opening time of 12 noon, they found that the door to the corridor leading to the toilets in the hotel was being blocked off. That prompted a furious reaction on their part, to the extent that the police were called. There is no need for me to go into the details of what then happened that day. What happened over the following days was that there were exchanges between the solicitors for the two parties trying to find a way out and various proposals were sent back and forth.

16 The reality is that, without direct access or some suitable alternative within the premises, the customers of the restaurant would need to go out into the street, walk some ten or 12 paces along past the building works being carried out to the front of the hotel to the Dickens Tavern. Then they would access the toilets through the tavern. Obviously, that is very unsatisfactory. The claimant says it cannot operate a restaurant under those conditions, although that is disputed by the defendant. Like Mr Justice Norris and Mr Justice Mann before whom this case has come, I am inclined to agree with the claimant.

17 Then, the following Monday - that is 24 July - the application was made for an interim injunction in the interim applications list. The first notice sent to the defendant of that application was by an email sent at 12.30 pm. However, that email did not go through. It bounced back, so it was in fact only at about 1.30 pm that the defendant's solicitors were informed that an application was being made. Unsurprisingly, there was therefore no attendance by the defendant at the hearing. Mr Justice Norris granted interim relief for a short period, as I have already mentioned, in circumstances to which I shall return.

18 On 31 July, when the matter came back before Mr Justice Mann, the injunction was not renewed. Apparently, that is because there were issues over the fire safety certificate which meant that the restaurant could not immediately open in any event. Indeed, it had not reopened between the granting of the injunction on 24 July and 31 July. I do not think it is necessary to go further into the questions surrounding the fire safety certificate, although they were the subject of submissions before me.

19 In the interim, yet further witness statements have been served and there is also an expert report and a supplementary report from a Mr Barrie Trevena, who is a very experienced environmental health officer. That initial report dated 30 July dealt with the question of whether there was a risk in opening the restaurant without an internal toilet by reason of licensing conditions. The licence is of course held from the local licensing authority: here, the City of Westminster. Mr Trevena said:

> "It is my opinion that it would be highly unlikely that an environmental health officer would take issue with the temporary arrangement for access along the route marked red on the plan and that the council would similarly be highly unlikely to intervene in the matter on a formal basis or serve a notice pursuant to s.20 in that regard".

S.20 is a reference to s.20 of the Local Government (Miscellaneous Provisions) Act 1976. The route to which he is referring is the route going out into the street, across the frontage of the hotel to the tavern.

20 Further, the defendant has made proposals for alternative access from the back of the restaurant by the kitchen. That would obviate the need for customers to go out into the street. It would involve, however, the erection of a barrier separating off the food and cooking area and the removal of one of the units in the kitchen. Murat at first said that that would be contrary to health and safety requirements, but the supplementary report of Mr Trevena explains in some detail that that would be acceptable as a temporary measure. The claimant however continued to object to that proposal, as it says it cannot run this restaurant with even this relatively small reduction in the kitchen area.

21 Thus, we end up with a situation where the defendant says that it needs to block the existing access in order to carry out the refurbishment works to the hotel reception and the foyer area. The claimant says that, if the existing access is blocked off, then none of the alternatives proposed is acceptable and it cannot operate the restaurant.

22 It is in the light of that that I turn to the question of interim relief. Although this is an interim application, if an injunction is granted, the trial would be a long way off and certainly long after the proposed completion - on even an extended completion date - of the hotel works. Indeed, the possibility of working on the foyer and reception area before 12 noon each day but not thereafter, when the restaurant opens, would be not only hugely disruptive to the building works; it would be undoubtedly very expensive and might indeed

lead to the termination of the existing building contract because of the way the works have evidently been planned. Conversely, if an injunction is refused and the claimant succeeded at trial, then the interference would be over so any question of injunctive relief would be academic.

23 Therefore, this is not the usual kind of interim injunction case where the *American Cyanamid* test of the balance of convenience can simply be applied. It is appropriate and necessary to consider the underlying likelihood of success: see *Lansing Linde v Kerr* [1991] 1 WLR 251. However, an injunction is a discretionary remedy and all relevant matters are to be taken into account. The first relevant matter is whether the defendant has put up any arguable defence to the claim. Mr McLinden argues that it might be entitled to interfere with the easement because of a provision in the third schedule of the superior lease. At (iv) of the third schedule, the right is given, with or without workmen and others, as may be necessary and at all reasonable times after notice [save for emergencies] to enter upon the demise premises for the purpose of, and then (c):

> "… redecorating, repairing, maintaining, renewing or rebuilding any structural part of the building or any adjoining premises of the lessor".

24 That right relates to the premises demised under the superior lease. It does not govern the retained premises which are subject to the easement. Mr McLinden acknowledges that, but submits that there is effectively a lacuna in the lease, and that it must be an obvious implication that this right should apply also to the rights of way under the second schedule. I can see that that is arguable, although the implication of terms in a written lease is of course not easy to establish. I do not feel that I can say with any confidence that it is an argument that is likely to succeed.

25 Secondly, Mr McLinden says that there is here no substantial interference. I do not accept that submission. This is the total blockage of a right of way. True, it is only temporary. In response to a question from the court, I was informed that the building contractors say that it will be required for seven weeks from today: that is, to the end of September. There is no doubt that that is relevant. Access to toilets, as I have already mentioned, is fundamental for a restaurant: see also the observations as regards temporary interference in *Barrie House (Freehold) Ltd v Bin Mahfouz Company (UK) Ltd* [2012] EWHC 353 (Ch) at para.41.

26 However, as I have mentioned, an injunction is discretionary. If it is not granted, the claimant still has its remedy in damages. On a damages claim, if it took the course of keeping the restaurant closed over the period, it would of course have to show that it was reasonably justified in doing so instead of accepting the defendant's proposed alternative arrangement. But, if it could show that, it would then recover a financial award of its estimated loss.

27 The question whether to confine the claimant to the remedy in damages instead of granting an injunction was addressed in the well-known case of *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. There, in a frequently cited passage, A L Smith LJ said this:

> "In my opinion, it may be stated as a good working rule that –
>
> (1) If the injury to the plaintiff's legal rights is small,
>
> (2) And is one which is capable of being estimated in money,

(3) And is one which can be adequately compensated by a small money payment,

(4) And the case is one in which it would be oppressive to the defendant to grant an injunction:-

then damages in substitution for an injunction may be given".

28 A L Smith LJ went on to make clear that what constituted a small payment is a relative matter. What have come to be known as the *Shelfer* guidelines have been subject to consideration and discussion in many cases since. In *Gafford v Graham* [1998] EWCA Civ 666, Nourse LJ said that the discretion can be exercised even if the amount of damages would be large. Many of the cases are summarised and discussed in the judgments of the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13. See in particular the judgment of the President of the Court, Lord Neuberger, who, after discussing some of the previous authorities, said this at paras. [119] to [120]:

> "The approach to be adopted by the judge when being asked to award damages instead of an injunction should, in my view, be much more flexible than that suggested in the recent cases of *Regan* and *Watson.* It seems to me that (1) an almost mechanical application of A L Smith LJ's four tests, and (2) an approach which involves damages being awarded only in 'very exceptional circumstances,' are each simply wrong in principle and give rise to a serious risk of going wrong in practice …
> The court's power to award damages in lieu of an injunction involves a classic exercise of discretion which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal suggested in *Regan* and *Watson.* And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in *Jaggard* where he said:
>
> 'Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion in some cases by granting an injunction and in others by awarding damages instead. Since they are all cases on the exercise of discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that, in similar circumstances, it would not be wrong to exercise the discretion in the same way, but it does not follow that it would be wrong to exercise it differently'."

29 Then, Lord Neuberger continued, at para. [121], to say:

> "I would accept that the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not. And, subject to one possible point, I would cautiously (in the light of the fact that each case turns on its facts) approve the observations of Lord Macnaghten in *Colls*, where he said:
>
> > "In some cases, of course, an injunction is necessary - if, for instance, the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an

> unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money".

30 Lord Neuberger continued at [122] to express some doubt about Lord Macnaghten's observation that the court ought to incline to damages, taking the view that there should be no inclination one way or the other. Then he said, at [123]:

> "Where does that leave A L Smith LJ's four tests? The application of any such series of tests cannot be mechanical. I would adopt a modified version of the view expressed by Romer LJ in *Fishenden.* First, the application of the four tests must not be such as 'to be a fetter on the exercise of the court's discretion'. Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted".

31 Mr Booth QC, for the claimant, emphasises strongly that what is at issue here is a property right. To refuse an injunction, he submitted, would involve expropriation of the claimant's right and that is something which the court should not license. I think that puts it too high. This is a temporary interference for the purpose of refurbishment of the adjoining property of a kind that is to be expected for any old building. Anyone taking a lease would realise that this might at some point become necessary. Mr Booth pointed out that the *prime facie* remedy for interference with an easement, unless there is a clear defence, is an injunction. He took me to the passage in *Gale on Easements* at para.14-63. Mr Booth stressed that the defendant had here behaved in what he described as a very high-handed fashion, simply turning up on 17 July without warning and blocking access. He stressed that no notice at all that this was impending had been given.

32 Mr McLinden referred me to the 21 February email which I have already quoted from. But not only was that many months before; it is wholly unspecific as to when the works would interfere with access to the toilets and for how long that interference would last.

33 Notice *was* given by the letter from the project manager of 12 February that I have quoted but, as I have said, that was almost certainly not received. I think it is astonishing that there was no communication in similar terms from Jason to Jimmy or one of the other brothers. I accept that the defendant had tried to engage in discussion with the claimant about this matter and get an agreement back in February, but the claimant was well aware that those discussions had not got anywhere and therefore that a potential problem remained.

34 Those factors count in favour of the grant of an injunction. However, Mr McLinden urged me strongly to look at the way the claimant had conducted itself in these proceedings. He emphasised in particular two aspects. First, the failure to give proper notice of the application on 24 July. Secondly, the failure at the hearing of that application to make frank and full disclosure to the court.

35 As regards the first, the solicitors of the respective parties had been in communication throughout the week following 17 July. The claimant's witness statement, on which the application on 24 July was based, was signed on Friday, 21 July. I am told, although I did

not see it, that the draft order that was placed before Mr Justice Norris was also prepared on 21 July. The decision to seek an injunction must therefore have been taken either on Friday 21 July or possibly first thing in the morning of 24 July. No attempt was made at communication with the defendant's solicitors until the email that was sent at 12.30, albeit unsuccessfully, and that was not long before the application was being brought to court at two o'clock.

36 Mr Booth frankly acknowledged that this was perhaps regrettable. I regard it as beyond regrettable. I think it is wholly inappropriate conduct in the circumstances of this case. There was nothing desperately urgent about seeking relief on 24 July. The interference had begun on 17 July. The restaurant, even when interim relief was granted, did not reopen and there is no reason that I can see why the claimant could not have come to court on 25 July and given at least one day's notice. The explanation for what happened may be that the partner responsible was out of the office on Monday, 24 July, but that cannot be a justification or excuse. It cannot be emphasised too strongly that where interim relief is being sought, only in the most wholly exceptional circumstances can there be justification for not giving notice to the other side. Such circumstances include a case where giving notice would risk defeating the very substance of the relief that is being sought, as in a freezing order or a search order, or possibly where dissemination of confidential information is imminent; but those are far removed from the circumstances of the present case.

37 As to the second - that is, disclosure to the judge - the claimant's solicitors had raised the previous week the possibility that their client might seek an injunction. Thus, the solicitors to the defendant wrote to the solicitors to the claimant on 17 July, making various points about what was taking place. In that email, Mr Roger Brown of the defendant's solicitors said this:

> "If you proceed with an application to the court, kindly bring to the attention of the court all of the correspondence of today and ideally please apply upon notice to us".

The "correspondence of today" that he referred to included a copy of the project manager's letter of 12 July, which was sent under cover of an email to Jimmy on 17 July.

38 When the matter came on for hearing before Mr Justice Norris, the judge made clear at the outset of the hearing that he had not read the witness statement to which those letters were exhibited, but counsel for the claimant did not take the judge to those letters. It is quite insufficient on a without notice application to leave material that should relevantly be drawn to the attention of the judge simply buried in an exhibit. That is not a criticism of counsel in this case as apparently junior counsel who then appeared was himself only instructed at 1pm and received a copy of the witness statement when he got to court. That may also explain another aspect of that hearing which I regard as serious.

39 Counsel told Mr Justice Norris that the claimant could not open the restaurant, among other things, because of the licence conditions affecting the absence of direct access to toilets. In so saying, he followed what was said in the witness statement of Murat regarding licensing issues. That point clearly influenced the judge as it is referred to in his brief judgment. It was not correct, as the evidence of Mr Trevena makes clear, and that point has not been pursued.

40 Those matters, in my view, go to the question of whether it is just and equitable to grant injunctive relief. The overall conduct of the parties, it seems to me, must be a matter of relevance.

41 In the light of that, I turn to the so-called *Shelfer* guidelines. As to the extent of the injury, as I have mentioned, the defendant has now confirmed that the obstruction will last for seven further weeks and therefore cease by 29 September. The defendant has further offered an alternative solution, which is fully explained in Mr Trevena's supplementary report, and which seems to me to be feasible, although not ideal. From what I can see, the reduction in kitchen space involved is minimal. More particularly, as regards damages, I do not accept the argument of Mr Booth, even if the restaurant does reasonably have to close - and I should emphasise that is not a matter on which I can reach any firm view - that this is a case where loss would be difficult to quantify. The claimant is a trading business. What is at issue therefore for the claimant is a loss of profit from trading. The restaurant has a record of four years' prior trading and so the potential earnings for this August to September can be compared to previous years, and the potential position for 2017 can be considered on the basis of year-on-year growth in turnover and profit. I do not regard this as a case that is different from the usual issues of quantification of loss in a commercial setting with which these courts frequently have to deal.

42 Would it be oppressive to the defendant to grant an injunction? Not without some misgivings, because of the failure to give proper notice so that this matter could have been dealt with sensibly and in a timely fashion, I have concluded that it would. I think it is inevitable that an old building used as a hotel will at some point undergo certain building works and those might require temporary interference with rights of way over the premises. If that interference cannot be carried out, those works are very seriously hampered, if not precluded altogether. Even if it would not be oppressive, bearing in mind Lord Neuberger's observation at the end of para.123 of his judgment in *Lawrence v Fen Tigers* that the *Shelfer* guidelines should not be strictly applied, this is a case where, in my judgment, having regard to all the circumstances, an injunction should be refused.

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****This transcript is approved by the Judge****