

IN THE HIGH COURT OF JUSTICE

CLAIM No. HC-2016-001374

CHANCERY DIVISION

Jonathan Gaunt QC sitting as a Deputy Judge of the Chancery Division

BETWEEN:

ERGIN KARASU

Claimant

and

ADNAN NASIR

Defendant

Mr Arman Alam (instructed by 12 Bridge Solicitors of 486, Great West Road, Middlesex TW5 0TA) appeared for the Claimant/Respondent

Mr Ezra MacDonald of Pump Court Chambers (instructed by direct access) appeared for the Claimant/Applicant

**APPROVED JUDGMENT**

JONATHAN GAUNT QC sitting as a Deputy Judge of the Chancery Division

1. Mr Adnan Nasir is the tenant of No.482 Great West Road, Hounslow under a Lease dated 8<sup>th</sup> May 2009 which granted a term of 18 years from 25<sup>th</sup> March 2009 at a rent of £18,000 a year. That is about the only fact in this case upon which the parties are agreed.
2. The application before the Court arises out of events which took place on 30<sup>th</sup> April 2016 when Mr Nasir claims to have dismissed a Mr Sekin from his employment as manager of Mr Nasir's takeaway business known as "Woody Kebabs" conducted from the ground floor shop at 482 Great West Road, Hounslow. The Claimant, Mr Karasu, claims that since April 2015 he had been running the takeaway from that address, having agreed with Mr Nasir to buy an assignment of Mr Nasir's tenancy for £45,000, having been allowed into possession by Mr Nasir pending completion of that assignment and having paid Mr Nasir £25,000 on account and carried out £48,000 worth of improvements. Mr Karasu says that that weekend Mr Nasir changed the locks on the shop as a result of which Mr Karasu applied to the High Court for an injunction. The application came before Rose J on 3<sup>rd</sup> May. She stood it over until 6<sup>th</sup> May for evidence to be served.
3. Mr Nasir says that Mr Karasu had never been in occupation, nor had he run the takeaway shop. Rather Mr Nasir had been doing so through his manager, Mr Sekin. He did not change the locks. Rather on the Sunday morning he was called by one of his employees, who said that someone was trying to break open the door with a sledgehammer. The police were called and a man was arrested who proved to be Mr Sekin's brother. Mr Nasir says he never concluded any agreement with Mr Karasu, though there had been

negotiations and solicitors had been instructed, and he never received any money.

4. So there are issues about whether there was any agreement, whether any money was paid, who was in occupation as of 1<sup>st</sup> May 2016 and who was excluded.

5. Mr Karasu's application came before Mr Justice Morgan on 6<sup>th</sup> May. It was supported by a Witness Statement of Mr Karasu and a bundle of exhibits. There is some question as to whether/when these were served on Mr Nasir before the return date. I find on the basis of the Witness Statements of Mr Mohammed Shoib Syed and Mr Farhat Awan that Mr Karasu's Witness Statement and exhibits were served on Mr Nasir both at the premises and at his home address on 5<sup>th</sup> May, the day before the hearing, less than the three clear days required by the Rules.

6. Nevertheless Mr Nasir did well. He produced his own Witness Statement, which was given to Mr Karasu at Court and he briefed Counsel, Mr MacDonald. The Judge stood the application out until later in the morning to enable Mr MacDonald to take instructions. Counsel did not ask for an adjournment to file further evidence and appeared content to proceed. According to an Attendance Note taken by Counsel for Mr Karasu, the Judge took the view that there was a serious issue to be tried concerning the effect of the alleged agreement, accepted the evidence before him that Mr Karasu had been in occupation and deprecated Mr Nasir, as he thought, having taken the law into his own hands by changing the locks. He ordered Mr Nasir to give up possession to Mr Karasu and enjoined him until trial or further order from interfering with Mr Karasu's quiet enjoyment.

7. At this point I need to pause to look at the evidence that was before the Judge. In his Witness Statement Mr Karasu said that he had approached Mr Nasir in January 2015 and asked whether he was interested in selling his Lease; after much negotiation, it was agreed that Mr Nasir would assign the Lease to Mr Karasu for the sum of £45,000. Mr Karasu then said that he had paid Mr Nasir £5,000 and £20,000 in cash at the end of May 2015, the remaining balance of £20,000 to be paid on completion. He instructed Simon Noble, Solicitors, to deal with the assignment of the Lease. He then says that, *“together with my business partner Cehit Sekin”* he took occupation of the premises on 7<sup>th</sup> April 2015 and commenced trading; he spent two weeks renovating the premises and spent £48,000 on renovations and equipment. He renamed the business “Woody Kebabs” and thereafter paid the utility bills to the suppliers and sums equal to the quarterly rent to Mr Nasir; he also paid the rates and provided his solicitors with references for forwarding to the landlord’s solicitors to request their consent to the assignment. He was surprised when, on 27<sup>th</sup> January 2016, his solicitors told him that Mr Nasir had withdrawn his solicitors’ instructions.

8. Mr Karasu says that on 1<sup>st</sup> May 2016 he went to the premises to open up and found that the locks had been changed and that Mr Nasir’s family were inside. The police turned up (he does not say why) and he explained that he was the tenant and had been in occupation since April 2015 but the police refused to allow him entry.

9. I note that there was no reference in this Witness Statement to the agreement for the assignment ever having been reduced to writing and no

documents exhibited to support the alleged payments of £25,000 or the expenditure on renovation and equipment.

10. In his Witness Statement Mr Nasir said that there had been negotiations in February 2015 to sell the business to Mr Karasu and that they had agreed a price of £20,000, whereupon Mr Karasu had asked for the utility bills to be transferred into his name. Mr Nasir exhibited a letter from Mr Karasu's solicitors dated 27<sup>th</sup> March 2015 setting out the price and terms of sale stated to be "*subject to contract*". His solicitors then requested bank references and identification documents but these were not forthcoming and, according to Mr Nasir, Mr Karasu said that he did not have the money to proceed. When it became clear that Mr Karasu had no real intention of buying the business, Mr Nasir decided to focus on running the business and appointed an existing employee, Mr Cehit Sekin, as his manager.

11. In October, however, the references came through and, according to Mr Nasir, Mr Karasu said he was now in a position to buy the business. Mr Nasir instructed his solicitors to proceed with the sale. The references however proved out of date and inadequate and Mr Nasir then told Mr Karasu that the takeaway was no longer for sale. Mr Nasir then began to notice a number of financial irregularities in Mr Sekin's management of the business and Mr Sekin claimed that the business now belonged to him and Mr Karasu. Accordingly on 30<sup>th</sup> April 2016 Mr Nasir dismissed Mr Sekin.

12. His Witness Statement continued:

*"On 1<sup>st</sup> May 2016 I received a call from another member of staff saying that someone was causing damage to the takeaway. The police were called and the man in question was arrested. I understand that the man was Cehit's brother. Approximately 30*

*minutes later the Claimant and Cehit arrived on the premises and attempted to tell the police that the business belonged to them. The police sent the Claimant and Cehit away."*

13. In conclusion Mr Nasir said:

*"For the avoidance of doubt, I deny that the Claimant was unlawfully excluded. I am the lawful owner and occupier of the premises pursuant to the lease. There was no contract to assign the lease."*

14. He denied that Mr Karasu had taken occupation on the 7<sup>th</sup> April 2015 or had paid him £20,000 in cash in May.

15. Given the shortness of notice, Mr Nasir was unable to exhibit many documents to support his evidence, albeit that Mr Karasu had exhibited many more, chiefly gas bills in his name, which appear to have weighed with Morgan J.

16. The Order made by Morgan J did not incorporate the usual undertaking to issue proceedings immediately. This may be because the Judge thought that they had already been issued and there was indeed a paragraph in Mr Karasu's Witness Statement that seemed to suggest that. In fact proceedings were not issued in the Central London County Court until 28<sup>th</sup> July 2016, nearly 3 months later. I have been given no explanation for this and it is a factor which tells against continuing the injunction granted by Morgan J.

17. Even more significant is that the Particulars of Claim appeared to disclose no cause of action. They pleaded an agreement for the assignment of Mr Nasir's Lease for £45,000 and attached a copy of a document said to

be “the Sale Agreement”. The document is not dated or signed and is in extremely unusual terms. It is not expressed to be conditional on obtaining the landlord’s consent and provided for the buyer to take possession of the property on a date which was left blank. It was not referred to in Mr Karasu’s Witness Statement, was not consistent with the terms set out in Mr Karasu’s solicitors’ subject to contract letter of 27<sup>th</sup> March and does not appear to have been prepared by the solicitors instructed by either party. One is left at least wondering whether this document is not a later concoction produced to bolster Mr Karasu’s case.

18. However that may be, a contract for the sale of land has to be in writing and signed by both parties. If the attached document is “the Agreement” as is pleaded, it is a nullity. Counsel for Mr Karasu invited me to regard this as a technical difficulty easily remediable by amendment and referred me to the decision of the Court of Appeal in Yaxley v Gotts. That case established that section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 does not preclude the creation of an equity by virtue of the doctrine of proprietary estoppel. The Particulars of Claim did not, however, assert any such estoppel. I therefore asked Counsel to provide the Court during the adjournment with a draft of Amended Particulars of Claim setting out his case and indicated that this would be critical on the question whether the injunction was to be continued or discharged.

19. Counsel for Mr Karasu duly provided the Court with a draft amendment which advanced claims based on contract, proprietary estoppel and constructive trust. It appeared that in essence Mr Karasu’s case was that Mr Nasir had promised to assign the tenancy to him and that in reliance on that promise he had paid over £25,000, gone into occupation, carried on the

trade and discharged the outgoings of the business. The claim to have spent £48,000 on the premises was omitted and appeared to have been abandoned.

20. It is fair to say that Mr Nasir had had very little time between 5<sup>th</sup> and 6<sup>th</sup> May to assemble evidence to rebut Mr Karasu's claim. By an Application Notice dated 23<sup>rd</sup> November 2016 he asked for the interim injunction made on the 6<sup>th</sup> May to be discharged, the Claimant to be ordered to give possession of the premises back to the Defendant and for the claim to be struck out on the basis that it disclosed no reasonable cause of action.

21. This application is made pursuant to CPR 3.1(7). The jurisprudence shows that that provision does not give the Court an unfettered discretion. The Court's discretion might normally be appropriately exercised only (i) where there had been a material change of circumstances since the order had been made, (ii) where the facts on which the original decision had been made had been, innocently or otherwise, misstated or (iii) where there had been a manifest mistake on the part of the Judge in the formulation of his order. Moreover any application under this rule has to be made promptly.<sup>1</sup>

22. I am satisfied that the rule is engaged here. Mr Nasir has been able to put before the Court a mass of documentary material which, due to shortness of time, he was unable to put before the Court on the earlier occasion. Mr Nasir was also entitled to rely on the fact that Mr Karasu has since the Order was made, served Particulars of Claim which, absent amendment, disclosed no cause of action. The application has, however, been made far from promptly, something for which I have been given no satisfactory explanation

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<sup>1</sup> See Tibbles v SIG PLC [2012] 1 WLR 2591.



and which is only partly excused by Mr Karasu's own dilatoriness in issuing his County Court proceedings.

23. In support of his application Mr Nasir adduced a long Witness Statement dated 22<sup>nd</sup> November 2016, a bundle of exhibits and three other short Witness Statements. Once more there was an issue as to whether and when those had been served on the other party. I find that Mr Karasu was not served prior to the hearing on 7<sup>th</sup> December with either Mr Nasir's second Witness Statement nor the file of exhibits. These were, however, provided to his Counsel in the course of the hearing and over the course of the subsequent adjournment; he has answered Mr Nasir with a Witness Statement of his own and another from Mr Sekin both dated 12<sup>th</sup> December.

24. In his second Witness Statement Mr Nasir dealt with many matters, almost all of which are denied in turn by Mr Karasu. I remind myself that it is not for me to try issues of fact or credit on this application. I have, however, been troubled by the solicitors' correspondence exhibited at pages 9 to 18 of the exhibits to Mr Nasir's Witness Statement. This shows that Mr Karasu instructed solicitors in March that Mr Nasir had agreed to sell the Lease and business for £20,000 (not £45,000) "*subject to contract*". Mr Karasu's solicitors then asked for the conveyancing particulars one would expect and for the landlord's requirements for licence to assign. Mr Nasir's solicitors replied on 18<sup>th</sup> April in an email headed "*subject to contract*" with a copy of the Lease and Land Registry entries and asked for the usual references. On 30<sup>th</sup> April they forwarded the landlord's solicitors' requirements.

25. The references were not forthcoming until 23<sup>rd</sup> October. Mr Nasir's solicitors forwarded them to the landlord on 30<sup>th</sup> October and on 2<sup>nd</sup>

December the landlord's solicitors pointed out that they were out of date and requested new references. This request was forwarded to Mr Karasu's solicitors who did not respond further. I note that there is no reference in the solicitors' correspondence to the document relied on by Mr Karasu as having constituted "the Sale Agreement".

26. Although Mr Karasu disputes almost every other statement in Mr Nasir's witness statement, he does not exhibit any further solicitors' correspondence to supplement that exhibited by Mr Nasir.

27. In my judgment I should consider the present application by applying the approach to the grant of interim injunctions laid down by the House of Lords in American Cyanamide Co v Ethicon Limited [1975] AC 396 but bearing in mind (a) the Claimant's delay in issuing proceedings, (b) the Defendant's greater delay in issuing this application and (c) the fact that the Claimant is in possession of the premises and conducting an apparently profitable trade and has been since at least the date of Morgan J's Order.

28. The first matter on which the Court must be satisfied is that there is a serious question to be tried. I admit to having been considerably exercised by this requirement. It is well established that when negotiations are conducted "*subject to contract*", that means that either party can resile at any point before completion and thus precludes any claim based on proprietary estoppel. When I put this to Mr Alam, he suggested that the "*subject to contract*" nature of the negotiations was somehow expunged when Mr Karasu was allowed into occupation of the premises at the beginning of April 2015, notwithstanding that his own solicitors a matter of days earlier had described the agreement as "*subject to contract*" and Mr Nasir's solicitors

responded in similar terms. I also asked Counsel what was to happen if the landlord refused his consent to the assignment. Counsel's only response was that the Court could adjudicate on whether the landlord had unreasonably withheld his consent.

29. I bear in mind, however, Lord Diplock's warning that it is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. If Mr Karasu's account of the agreement to assign, his payment of £25,000 in cash and his entry into possession and subsequent trading is accepted at trial, I conceive that it is possible that his claim of proprietary estoppel might be made good. Morgan J appears to have taken the same view. I will therefore go to the next stage.

30. By the application before me Mr Nasir is seeking an injunction to evict Mr Karasu. I ask myself whether, if Mr Nasir were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of Mr Karasu's continuing to occupy the premises. It seems to me that, in principle, damages would be an adequate remedy, being the profits which Mr Nasir would have made if he had been in a position to trade from the premises.

31. The question then arises whether Mr Karasu would be in a financial position to pay those damages. Unfortunately, there is very little evidence as to Mr Karasu's financial position, other than the suggestion that he may be in a position to borrow £20,000 from friends and family. On the contrary hypothesis that Mr Karasu were to succeed at trial but had been wrongly

excluded from the premises, I ask myself whether Mr Nasir would be in a position to satisfy an undertaking in damages. I have no evidence whatever of Mr Nasir's ability to do so.

32. I am thus thrown back on the general balance of convenience. In view particularly of the fact that Mr Karasu is in occupation of and trading from the premises and has an active and established business and of the long and unexplained delay of Mr Nasir in bringing the present application, in my judgment the best solution is to leave Mr Karasu in occupation but on terms that he pay monies into Court sufficient to compensate Mr Nasir for the loss of the ability to trade in the event that Mr Karasu's claim fails. I bear in mind that whether Mr Karasu succeeds or not, he will owe Mr Nasir substantial sums: if he makes good the estoppel and the landlord's consent is forthcoming, he will probably be able to retain the premises but only on terms that he pays the £20,000 which he agreed to pay on completion; if, on the other hand, he fails, he will have to make good on his undertaking in damages.

33. There was evidence before me from Mr Karasu's accountant which both Counsel accepted showed that the business was making a profit of about £1,000 a month. I will therefore continue the injunction in favour of Mr Karasu but only on terms (a) that he pay £3,000 into Court by the end of January, a further £3,000 into Court by the end of February and a further £1,000 at or before the end of every subsequent month until judgment following trial, (b) that he continues to pay the rates and utility bills as they fall due and (c) that he pays to Mr Nasir seven days before each rent day a sum equal to the quarter's rent due to the landlord.

34. It will also be a condition of the continuance of the injunction that within 14 days of the handing down of this Judgment Mr Karasu issues an application in the County Court for permission to amend the Particulars of Claim (if permission is necessary) and for directions for the disposal of this matter. In the event of breach of any of these conditions the Order made by Morgan J will be discharged and Mr Nasir will be at liberty to apply for an order that Mr Karasu give up possession forthwith. The costs of this application will be in the case. Counsel have helpfully agreed a Minute of Order giving effect to this judgment.

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**JUDGMENT**

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