19 December 2012

PRESS SUMMARY

Geys (Appellant) v Société Générale London Branch (Respondent) [2012] UKSC 63
On appeal from: [2011] EWCA Civ 307

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Wilson, Lord Sumption, Lord Carnwath

BACKGROUND TO THE APPEAL

Mr Geys was employed by Société Générale, London Branch ("the Bank") as Managing Director of European Fixed Income Sales from 9 February 2005. He had a written contract and further terms were incorporated into it by the Bank's Staff Handbook. The contract contained a provision permitting either party to terminate his employment by giving 3 months' notice. The Handbook contained a payment in lieu of notice ("PILON") clause. It reserved the Bank's right to terminate his employment "at any time with immediate effect by making a payment to you in lieu of notice (or, if notice has already been given, the balance of your notice period)." If exercised, the contract required the Bank to make a termination payment including a "Compensation Payment". This was to be calculated by reference to the date when the employment terminated. If the date was after 31 December 2007, Mr Geys was entitled to a Compensation Payment reflecting awards made to him for the calendar years 2006 and 2007. If it was before that date, it would be assessed by reference to his awards in 2005 and 2006, which were significantly lower.

On 29 November 2007 Mr Geys was summarily dismissed in breach of the terms of the contract. On 18 December 2007 the Bank paid into his bank account the correct sums due to him under the PILON clause. The Bank then sent Mr Geys a payslip and P45 setting out the payments. He first saw them on 7 or 8 January 2008. On 2 January 2008 Mr Geys' solicitors wrote to the Bank saying Mr Geys had decided to affirm his contract and requesting further details on the termination and associated payments. On 4 January 2008 the Bank wrote to Mr Geys giving further details. George Leggatt QC (sitting as a Deputy High Court Judge) held that the date when Mr Geys received the Bank's letter (deemed to be 6 January 2008) was the first time it notified him that it had exercised its contractual termination rights. The Court of Appeal (Arden, Rimer, Pitchford LLJ) held that it had been terminated on 18 December 2007 when the PILON was made into his account. The Bank's primary case was that the contract was terminated on 29 November 2007 when Mr Geys was summarily dismissed. This was rejected by the Court of Appeal, who were bound by *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448. In that case the common law principle that a repudiatory breach terminated a contract only if and when it was accepted was applied to contracts of personal service.

Four issues came before this Court: (1) Does a repudiation of an employment contract, which takes the form of an express and immediate dismissal, automatically terminate the contract (this is the automatic theory) or – as was held in *Gunton* – does the normal contractual rule apply that repudiation must be accepted by the innocent party (this is the elective theory)? (2) When in accordance with the PILON clause was Mr Geys' contract terminated? (3) Is there any conflict between the 3 months' notice provision in the main contract and the PILON clause in the Handbook? (4) Is Mr Geys entitled to claim damages for wrongful dismissal and for a breach of the tax efficiency provisions in the contract, as well as the termination payment, or is he required by the terms of the contract to have waived those claims?

JUDGMENT

The Supreme Court allows Mr Geys' appeal by a majority of 4:1 (Lord Sumption dissenting).

REASONS FOR THE JUDGMENT

On the first issue, the majority upheld the elective theory that a wrongful repudiation terminates the contract only if and when accepted by the innocent party. The automatic theory rewarded a wrongful repudiator of an employment contract, allowing him to select a termination date that suited him to the detriment of the innocent party. The theory also failed to explain cases where, following an unaccepted repudiation, provisions that did not survive the termination had been enforced against the repudiator, such as those relating to competition or disciplinary procedures [69, 75]. Nor had it been applied in the employment context to the extent that its proponents suggested [CA 83-86, 88-89]. There was a circularity in the premise that "there is no remedy so there is no right so there is no remedy." [89] Concerns are expressed about how far the automatic theory, if valid, would extend [95-6]: Should dismissals/resignations be treated differently if they are (1) express or implied; (2) immediate or delayed; or (3) outright or less than outright, and is the distinction workable? (4) If a fundamental breach other than by dismissal does not attract the automatic theory, why should breaches for dismissal, which strike more clearly at the continuation of the contract? (5) If extended to constructive dismissals, it is inconsistent with the notion that resignation is in response to a fundamental breach, as well as the inherent need for acceptance. (6) The theory could be extended to contracts for services with similar consequences.

Lord Sumption held that *Gunton* was contrary to the consensus existing up the 1970s. Innocent parties did not have an unfettered right to treat the contract as subsisting. He drew attention to Lord Reid's qualification in *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 that a repudiated contract can only continue with the co-operation of both parties. Innocent parties cannot treat contracts as subsisting if they cannot perform or enforce it and its subject matter and core obligations have ended. It creates problems of mitigation, it compels an employee to accept repudiation or mitigate loss of his bargain when in law it has not been lost, and it leaves an employer with penumbral liability for an uncertain duration. The elective theory in this case produces an unjust result giving Mr Geys a windfall, despite suffering no substantial loss measurable in damages [110].

On the second issue, the majority held that it was not until 6 January 2008, when Mr Geys received the Bank's 4 January 2008 letter, that the right to terminate under the PILON clause was validly exercised [61]. The PILON clause did not dispense with the requirement for an employee to be notified of termination [54, 61]. The employment relationship required the other party to be notified in clear and unambiguous terms that the right to end the contract was being exercised, and how and when it is intended to operate. An employee should not be required to check his bank account to discover if he is still employed [58]. The employee's bank is not his agent for the receipt of notification of what the payment is for [60].

On the third issue, the Court was unanimous. It saw no inconsistency between the 3 months' notice contractual provision and the Handbook's PILON clause. The contract set out one method of termination, but it was not the only method. The PILON clause could be read as a qualifying provision to the contract. A court, in the face of two seemingly inconsistent provisions, must try to reconcile them conscientiously and fairly [25].

On the fourth issue too the Court was unanimous. It held that Mr Geys could claim for damages for wrongful dismissal and for breach of the tax efficiency provisions. The contractual provisions imposed mutual obligations on both parties: the Bank was obliged to make the termination payment and Mr Geys was obliged to enter into the termination agreement. There was no provision entitling Mr Geys to waive that obligation so that he could preserve his claims. If he failed to enter into it, he would be in breach of contract and liable to the Bank for damages [33]. The provisions purporting to require Mr Geys to waive his right to claim damages conceived in favour of the Bank, and any ambiguity must be construed in Mr Geys' favour [39].

References in square brackets are to paragraphs in the judgment.