



Neutral Citation Number: [2010] EWCA Civ 161

Case No: B2/2008/2252

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM TORQUAY AND NEWTON
ABBOTT COUNTY COURT
Mr Recorder Gardner
7EX02631

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2010

Before:

THE RT HON LORD JUSTICE SEDLEY
THE RT HON LORD JUSTICE JACOB
and
THE RT HON LORD JUSTICE PATTEN

Between :

Philip Nicholas Shaw

**Appellant/
Defendant**

- and -

Lighthouseexpress Ltd

**Respondent
/Claimant**

Nathan Wells (instructed by Ashton Bond Gigg)
for the Appellant
Stefan Ramel (instructed by Over Taylor Biggs) for the Respondent

Hearing date: 15 February 2010

Approved Judgment

Lord Justice Jacob:

1. The appellant is an Independent Financial Advisor (“IFA”). During the 1990s he had a contractual relationship with a partnership called Berkeley Wodehouse Associates (“BWA”). BWA operated through a network of IFAs, each operating under a standard form of contract with BWA.
2. Although the contract between the appellant and BWA itself was lost, the trial judge, Mr Recorder Gardner QC, held that it was in the same form as another IFA contract which was produced. There is now no dispute as to the form of the main contract. Its title is “an Appointed Representative Contract” (“ARC”).
3. Whilst he was one of the partnership’s IFAs the appellant advised a Mrs Lalaz in relation to an investment. On 27 January 2006 the Financial Services Ombudsman ruled that Mrs Lalaz had been mis-advised and that she should be compensated. That compensation was paid by the successor in title to BWA, a company now called Lighthouseexpress Ltd (“The Company”).
4. Mr Shaw resigned from his position with BWA with effect from the 17th December 1999. The BWA partnership sold its business to the Company by an agreement called a Business Sale Agreement (“BSA”) of 30 March 2001.
5. The question in this case is whether the Company can claim repayment by way of indemnity of the sum ordered to be paid by the Financial Services Ombudsman to Mrs Lalaz. That sum is relatively small, being £14,585.75 with interest. We were told that there may be other possible cases which turn on this case. Whether that is so or not is immaterial. It is common ground for the purposes of this appeal that the award was enforceable against the Company as successor to BWA.
6. Mr Nathan Wells on behalf of the appellant takes a number of points. The first mentioned in his skeleton argument he describes as “not freestanding”. It is that the evidence given by a Miss Grigg, the Company’s Finance Director, was accepted by the Judge when it ought not to have been. It is said that Miss Grigg was not employed by the previous partnership and was only employed eighteen months after the appellant had resigned from BWA. So she had no direct knowledge of any of the relevant matters.
7. This is not (save in respect of a point I mention more specifically below) a significant matter however, for the case turns essentially on the terms of the two agreements. And besides Miss Grigg was able to give evidence based on a familiarity with BWA’s records which had passed to the Company.
8. Mr Wells’ first substantive point was that the terms of the ARC were not fully proved. Clause 4.5 provided that the “Enterprise” (effectively Mr Shaw) “shall comply with and abide by” a number of items, including in particular the Firm’s (i.e. BWA’s) Compliance Manual, Office Instruction, Associate Update and possibly other communications. None of these documents could be produced. So, submitted Mr Wells, the court has not got the full contract. Since any term of the contract must be construed in the context of the whole agreement and that cannot be done, the case fails.

9. I reject this attack. It is inherently unlikely that any of the “missing documents” could have any relevance to the construction of the clauses of the ARC in contention. Indeed when I asked Mr Wells whether he could even postulate a clause of a missing document which might be relevant, he was unable to do so. The Judge was fully entitled to proceed on the basis that he had all that mattered, namely the terms of the ARC itself.
10. Mr Wells’ second point was that, if the ARC did contain an indemnity clause, there had been no valid assignment of the right of indemnity to the Company. This contention took the form of three subpoints.
11. The first and second sub-points run together. It was submitted that, since an equitable assignment was relied upon, there was no clear identification of the specific right being assigned, and that was necessary in law.
12. It is true that an assignment must sufficiently identify the chose in action the subject of the assignment. That is self-evidently so. Unless you can say the terms of an assignment cover the chose concerned, it will not operate. So the only question is whether the terms of the BSA operated to assign the right of indemnity. In approaching this question one must do so on the now well settled basis of a reader who is informed as to the background to the agreement trying to work out what the parties meant by the words they used.
13. The most important clause, that which will inform the reader as to what the BSA is about, is clause 2: “The Vendor shall sell and the Purchaser shall purchase the Business as a going concern comprising the Intellectual Property and the Goodwill and the benefit (so far as the Vendor can assign the same) of the Contracts at the Purchase Price”. The reader would also know that the basic purpose of the BSA was to take over the entire business and assets of the partnership. So he or she would not expect anything (including a right of indemnity) to be left behind.
14. The definition of the Contracts in the BSA reads:

the current contracts, agreements and engagements of the Vendor at the Completion Date relating to the Business including those listed in the Schedule but excluding the Excluded Contracts.
15. Mr Wells submitted that because Mr Shaw had resigned over a year before the BSA, his contract with the partnership, the ARC, was not a “current contract, agreement or engagement of the Vendor.” I reject that. If, as I think it does (see below), the ARC contains an indemnity clause that clause continued in effect following the termination of what might be called the active aspects of the contract. The contract remained alive at least as far as the indemnity clause was concerned. It also remained alive so far as commissions which became due to Mr Shaw were concerned. I see no reason to construe “current contracts” narrowly so as to exclude live (i.e. “current”) contractual obligations owed to or by the partnership. On the contrary there is every reason to construe the phrase widely – that will achieve the obvious intention of the parties to get everything into the Company.

16. Mr Wells took another point about the assignment. He submitted that the right of indemnity could not, as a matter of construction of this agreement, be assigned in law: it was purely personal to BWA. I confess I was surprised by this contention. After all there is nothing inherent in the nature of an indemnity (contrast for example, a right to personal services or a publishing agreement) which calls for it to be unassignable.
17. Mr Wells cited an old case, *Sheers v Thimbleby* (1897) 76 LT 709 in support of his argument, particularly relying on the judgment of Chitty LJ. I do not think it supports his contention. All that Chitty LJ said was this:

I think that the guarantee was incapable of being transferred in equity. On its true construction it was a guarantee to Sergeant personally against loss, and only he or his legal personal representatives could sue on it, and only for loss sustained by Sergeant, or his estate after his death.

So it turned on the true construction of the guarantee in that case.

18. Further Mr Ramel, for the Company, showed us a case, *British Union and National Insurance Co v Rawson* [1916] 2 Ch. 276, where a right of indemnity, on the true construction of the documents in that case, was held assignable. He submitted that the true position is summed up in *Andrews & Millett* Law of Guarantees, 5th Edn. at p.312:

In the absence of a prohibition against assignment a contract of indemnity may also be enforced by an assignee. However such contracts depend on their true construction and if the obligation is intended to be personal, an assignee may not be entitled to enforce it.

19. Turning to the contract in this case, the ARC, I can think of no reason why on its true construction the right of indemnity should be personal to BWA and so not be assignable and every reason why it should be assignable. After all the partnership was not self-evidently never going to change – more partners might come in or some go and there was always the possibility of the business being transferred to a company, as indeed it was. There was no reason for the indemnity to remain frozen to the existing partnership, which is the effect of Mr Wells' contention
20. Next Mr Wells submitted that the relevant indemnity clause was void for uncertainty. The legal principles were not in dispute. Mr Wells referred us to the well known speech of Lord Wright in *Scammell v Ouston* [1941] AC 251 at p.268 about when a contractual term may be void for uncertainty. The test is that in order to be binding the words must be “sufficiently definite to enable the court to give it a practical meaning.” It is not enough that a clause is difficult to construe. Courts are most reluctant to hold that contracts are void for uncertainty – particularly business contracts. Void for uncertainty is a last resort conclusion.
21. I turn to the relevant clause. It reads:

16.5 If the Firm is required to meet the costs charges or other expense including any excess charged by the PI insurers the Firm shall charge the Enterprise with any such costs, charges or excess whether or not liability for the cost charge or excess has been agreed by the Enterprise. The Excess is set out in the Schedule of Fees and Charges.

If the Firm has to pay any legal costs which result from defending a claim which results from the negligence or inability or lack of control on the part of the Enterprise or its Agent such legal costs shall be recovered from the Enterprise together with any additional costs of recovery of the debt.

22. Earlier the agreement had made provision about Professional Indemnity Insurance. Under clause 5.4 the Firm was obliged to maintain a PI policy on behalf of its registered individuals, but this was subject to some detailed provisions about payment. Under clause 5.4.1 for instance provision was made for what was to happen if the Fees and Charges exceeded a certain amount. The Enterprise was to “be invoiced with any excess.” There was a Schedule (Schedule 2) which set out the maximum contribution by the Firm in respect of regulatory fees, the ICS levy and PI Insurance and provided for “Professional Indemnity Insurance Excess Charge to be paid by the responsible Registered Individual (or Enterprise)”. This was to be paid “as invoiced.”
23. Mr Wells submitted that the opening words of the clause were so wide as to include any debt (e.g. a gas bill) owed by the Firm. That was simply too absurd. And there was nothing else in the clause which enabled the court to give a practical limitation or meaning to the words. So it was void for uncertainty.
24. I do not agree. The context of the clause is clearly taken from clause 5.4 and the Second Schedule dealing with apportionment of matters such as apportionment of fees and insurance costs between the Firm and the Enterprise. Fairly obviously the clause is to be read as relating to those matters. Costs, charges and expenses which clause 5.4 and Schedule 2 identify are to be borne by the Enterprise are to be payable by the Enterprise pursuant to clause 16.5.
25. One of those items is any “excess” on an insurance claim. This is a well-known technical term meaning a sum to be borne by the insured in respect of a particular type of insured risk. Technically the insured is simply not insured for the risk below the “excess” just as he is not insured for risks not identified in the policy at all. But in the context of this agreement the meaning is, if not exactly plain, sufficiently discernable. The Enterprise is to pay the “excess” in the technical insurance sense.
26. I would add that this construction makes good business sense. It loads the “excess” on the IFA who will have been responsible for the claim rather than on the Company.
27. Mr Wells’ next point, logically, was this: that it was not proved that the sum paid in respect of Mrs Lalaz claim was a PI insurance excess. The suggestion is that the kind of claim made by Mrs Lalaz was not within a type of insured risk at all. The Judge found that it was. So Mr Wells has to show that there was no material upon which he could properly so find.

28. The Defence had specifically said “The Claimant is further required to prove that [the sum paid to Mrs Lalaz] was within the excess of the Claimant’s professional indemnity insurance.” The Insurance contract in place at the relevant time was not produced. Nor was any explanation given as to why not. What was produced was a Schedule to a PI insurance contract covering the period 2nd October 2004 to 1st October 2005. Even then the whole policy – which would identify the types of risk insured – was not produced.
29. Moreover it seems clear that the Company did have the insurance policy at hand when it first contemplated action against Mr Shaw. For two 2005 letters by Jo Potter, the Company’s Complaints Manager, were in evidence. The first (30th March), headed “Lalaz complaint against Phil Shaw” said she was calculating quantum and added “You should note that there is no PI cover for this complaint.” A later letter shows she had quantified the amount of the claim.
30. Putting the effect of these two letters together, Mr Wells submitted the clear inference is that by the date of the first letter there had been no quantum calculation. From that it followed that when Jo Potter said “there is no PI cover” she cannot have been meaning that the claim was within the excess – she would have to know how much the claim was for to say that.
31. All the Judge said about this point was this:

As a subsidiary point, it was submitted that the existence of the professional indemnity insurance should be doubted in view of the letter asserting that there was no PI cover emanating from BWA Limited at p.129 which was written before the Ombudsman had quantified his award. Miss Grigg said that this was simply wrong and that the loss would have been covered by the insurance policy, the schedule of which is set out at p.173 of the trial bundle, and so was the subject of a £15,000 excess in respect of each claim, which evidence I accept.

32. There are difficulties with that. First the Judge was mistaken in saying the Schedule was the schedule to the insurance policy. It was the schedule to a much later policy – at the very least one could not reliably assume that the excess set out in that would have been the same five or so years earlier. Second the Judge accepted Miss Grigg’s assertion that the loss would have been covered by the insurance policy. Given that she was not there at the time, and did not give evidence that she had actually seen the policy, that was not evidence at all. Thirdly the Judge did not really analyse the two letters from Miss Potter. Fourthly he overlooked the fact that Miss Potter clearly had the policy – she could not have written the first letter without first having seen it. So the Claimants had it at a time when they were contemplating a claim against Mr Shaw. Fifthly he overlooked the fact that the question of the excess was a matter in respect of which the claimant had clearly been put to proof by the Defence. The failure to produce the policy was in the circumstances of great weight – and all the more so since some sort of thought had apparently been given to the point, for otherwise why was the much later Schedule produced?

33. I have come to the conclusion that the Judge's finding on this point cannot be supported. Given the circumstances the bare assertion of Miss Grigg was simply not enough. The legal burden of proof lay on the claimants and they did not discharge it. Accordingly I would allow the appeal on this ground.
34. Mr Wells' next ground was that the Ombudsman's award was the fault of the Company. It was said that because the Company had lost some of the documents it was not able to defend the claim. So the finding could not be laid at Mr Shaw's door. I do not accept this submission. Whilst it is true that the award makes reference to the missing document – a "Fact Find" – it is clear that overall the Ombudsman was satisfied that the product sold to Mrs Lalaz was quite unsuitable for her circumstances. Given that was so, the missing documents were most unlikely to have made any difference. The Judge was entitled to come to the conclusion he did.
35. Mr Wells' final ground was based on the following clause:

4.17 The Enterprise and its registered individual(s) shall each be jointly and severally liable for the debts and liabilities of the Enterprise for a period not exceeding six calendar years following resignation or termination from any part of this Contract.

36. He submitted that this was a limitation clause. The Judge rejected that but did not go on to consider what it did mean.
37. There is no doubt that the clause is difficult to construe – indeed Mr Ramel went so far as to say, in a mirror image of the dispute about clause 16.5, that it was void for uncertainty.
38. The first problem comes from the inclusion in the clause of "its registered individuals." It appears to make them "jointly and severally liable". But these people are not parties to the ARC. The definition clause defines "registered individual":

"a registered individual" means any individual employed or engaged by the Firm or the Firm's Appointed Representative in respect of whom an application for registration under FIMBRA Rule 5.5.4 or Rule 12.3.1 has been accepted by FIMBRA and whose registration has not ceased or been terminated under Rule 6.5. The title registered individual is granted by the regulatory authority acting in accordance with the Act following approval of an application to the regulatory authority by the person specified in paragraph 4 of Schedule 1 to operate as or to trade as an Appointed Representative of the Firm.

"Appointed Representative" is itself defined as meaning "a person firm or company who is engaged by the Firm under this Contract". It is the same as "the Enterprise". So when the clause speaks of "its [i.e. the Enterprise's] registered individuals" that must mean what one would expect – anyone engaged by the Enterprise who is FIMBRA accepted.

39. Given the rules as to privity of contract this apparently makes no sense. The contract between the Firm and the Enterprise cannot itself bind the Enterprise's registered individuals. Nor can the contract govern the relations between the Enterprise and its registered individuals.
40. So, submitted Mr Ramel, either the clause is simply legally ineffective in seeking to bind the Enterprise's registered individuals, or it was completely unintelligible and so void for uncertainty.
41. I do not accept that submission. The parties were clearly in this business contract trying to provide for something. Standing back one can see what that was. The whole of clause 4 is providing for "The Enterprise's Obligations." It makes clear sense – indeed it would be necessary – for the Enterprise to owe obligations not only in respect of what it did, but also in respect of what was done by its registered individuals. I think that is what the clause is about. The language chosen is infelicitous (as lawyers are apt to say) or awful (as people say) but the meaning just about gets over.
42. Once one sees that, the clause begins to make sense. One is not over the difficulties however. For it goes on to say the Enterprise is to be liable "for the debts and liabilities of the Enterprise". There is a bit of a difficulty about that – for taken literally it is saying the Enterprise shall, quite generally, be liable for its own debts. That is trite and meaningless. Clearly what is meant is "debts and liabilities *owed to the Firm.*"
43. Then there is a bit of plain sailing – the liability to the Firm is to last for a period of six years following resignation or termination. I confess I am not quite sure what "from any part of this Contract" means, but it is not necessary to investigate it further.
44. What does matter is that the liability is to end after the six year period. The clause is a limitation clause. That makes business sense. Once the Enterprise and the Firm have had nothing to do with each other for that period, the Enterprise is to be free of claims – just as in the case of statutory limitation. I suppose one of the commonest ways this could happen would be if the IFA retired. It is entirely reasonable for such a person to be free of claims not made within six years.
45. One is not entirely out of the woods even at this stage, however. For how is the clause to work? What if a claim is made against the Enterprise during the six year period but only resolved after – can it rely on the clause then? Is it enough for a formal demand to be made within the period, or would actual proceedings be necessary? Or is there an even lesser requirement that it is enough that the Enterprise learns of facts which might result in a claim being made against it?
46. Again I think the reasonable reader can reach a conclusion about that. It would be absurd to read the clause as absolving the Enterprise unless a claim is made and resolved – if necessary by litigation – within the period. That would be an invitation to string things out – which cannot have been intended.
47. So something less than a final resolution of the claim will be enough to stop time running. The choice is between notification of a claim or the provision of information from which the Enterprise could work out that a claim might be made. I prefer the

former: It provides certainty and places a clear onus on the Firm to tell the Enterprise within the period that a claim will be made, or at the very least, depending on the Firm's own liability (which may still be contingent) may be made depending on the contingency. That enables the Enterprise, within the time period, to get about investigating the claim and, where it is possible preparing its defences. That was most likely the purpose of the clause.

48. I am conscious that construing these few lines has not been easy. Their author(s) probably will not take pride in having achieved so much difficulty with so few words.
49. But having got there the resolution of this point now becomes easy. The Company did not make any claim, contingent or otherwise, before the expiry of the six year period following Mr Shaw's resignation. He is therefore protected by clause 4.17.
50. In the result I would allow the appeal on this ground also.
51. I would only part with this case by complimenting both counsel on the precision and brevity of their submissions and, although I differ from him in respect of two of the many points he had to decide, for the clarity and brevity of the Recorder's judgment.

Lord Justice Patten:

52. I agree.

Lord Justice Sedley:

53. I am not certain that I would have differed from the Judge on the issue of the policy excess, but I agree that this appeal must be allowed on the ground that clause 4.17 affords a limitation period which has been exceeded.