Neutral Citation Number: [2018] EWCA Civ 1823

Case No: A3/2017/2017

IN THE COURT OF APPEAL (CIVIL) DIVISION
ON APPEAL FROM CHANCERY DIVISION
(HHJ KLEIN)

The Royal Courts of Justice
Strand, London WC2A 2LL

Tuesday, 10 July 2018

Before

LORD JUSTICE LEWISON

LORD JUSTICE IRWIN

Between:

MAURICE MACNEILL IONA LIMITED
(T/A CENTURY 21 UK)

Applicant

- and -

C21 LONDON ESTATES LIMITED (1)

Respondent

YASEEN NOORKHAN (2)

Transcript of Epiq Europe Ltd 165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Email: civil@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr M Weaver (instructed by Smith Partnership Solicitors) appeared on behalf of the **Applicant**
Mr S Neaman and Mr A Feld (instructed by Metis Law LLP) on behalf of the **Respondent**

Judgment
(As approved)

1. LORD JUSTICE LEWISON: The issue on this appeal is whether Maurice MacNeill Iona Ltd ("MMI") lawfully terminated a written agreement, dated 20 December 2013, granting C21 London Estates Ltd ("C21 London") an estate agency franchise for the Chelsea area of London. That in turn raises the question whether MMI was entitled to terminate the appeal by what was said to be a breach of a term in the agreement amounting to a condition of the contract. His Honour Judge Klein held that it was not, on the ground that the term in question was not a condition. His judgment is at [2017] EWCA 998 Ch.

2. I can take the facts from the judge's clear and careful judgment. MMI holds the master franchise for the Century 21 estate agency brand in the United Kingdom and the Channel Islands. In February 2006, MMI, under a franchise agreement, granted to C21 Estate Ltd ("EREL"), as franchisee, the right to operate the Century 21 brand in Ilford. The franchise agreement was renewed in May 2012. On 20 December 2013 MMI, under another franchise agreement ("the Chelsea agreement"), granted to C21 London, as franchisee, the right to operate the Century 21 brand in Chelsea. Both EREL and C21 London were companies controlled by Mr Noorkhan.

3. Each of the franchise agreements was made on standard terms. The judge summarised the relevant terms as follows:

> "i) By clause 3.1.4 'Business' was defined as 'the operation of an estate agency - business in accordance with the terms and provisions of [the] agreement';
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> ii) By clause 3.1.8 'Gross Revenue' was defined as 'all monies...received or receivable...by you... directly or indirectly in connection with the business including, but not limited to, transactions and provision of ... [property services (including... conveyancing services [and] property manage services...
>
> iii) By clause 7.1.1, the franchisee agreed to pay MMI a Royalty Fee equal to 6% of the franchisee's Gross Revenue during the term of the agreement;
>
> iv) By clauses 7.1.2 to 7.1.4, Royalty Fees were due and payable on the settlement of each transaction monthly in arrears and the franchisee was required to regularly provide sufficient information to MMI in order that MMI could assess the franchisee's Gross Revenue;
>
> v) The franchisee was also required to pay MMI a Monthly Continuing Fee, and an NAF (National Advertising Fund) Contribution principally equal to 2% of the franchisee's Gross Revenue, payable monthly in arrears. Broadly, the NAF Contribution was intended to represent a contribution to a fund for advertising and marketing campaigns by MMI;
>
> (vi) By clause 11.2 the franchisee was required to pay promptly to MMI

all fees and contributions due under the agreement;

(vii) By clause 12.2, MMI was entitled to audit the franchisee's books and records..."

4. Termination was dealt by clause 15. It provided:

"15.2 This Agreement may only be terminated under the following terms and conditions.

...

15.2.3 **Termination by for Good Cause.** By us for good cause which will mean any material breach by you of your only obligations under this Agreement as determined by us in our sole discretion exercised in good faith. Good cause includes both curable and non-curable defaults, including those listed at sections 15.2.4 and 15.2.5 below...

15.2.4 **Curable Defaults; Notice.** After giving you 30 days' prior written notice of the proposed termination and the opportunity to remedy the breach during the entire notice period or such longer or shorter period as is required or permitted by law, if the breach is.

'15.2.4.1. The failure to pay when due any financial obligation to us... or to the NAF.

15.2.4.3 An audit by us of your records which discloses a deficient of at least 5% in amounts due under this Agreement within any three month period or your refusal to permit us to audit your operations and records, or your failure to reasonably co-operate with our audit of your operational and records...

15.2.4.15 Any other material breach of this Agreement not listed below as a non-curable default.

'Upon receipt of notice to terminate with right to remedy, you must immediately commence diligently to remedy that breach. If you remedy that breach during such period, our right to terminate this Agreement will cease, subject to termination for repeating the same default as described below.

15.2.5 **Non-curable Defaults; No Notice Required.** We reserve the right to terminate this Agreement immediately without prior notice and without your right to remedy for any of following causes;...

15.2.5.4 Any default for which we have issued you a notice of default during the last 12 months advising you of our intent to terminate for the same cause, even if the defaults were remedied, or

> 15.2.5.5 Any material misrepresentation or omission by you to us in the franchise application or otherwise with respect to acquiring the Franchise."

5. In the event of termination of the clause 15.7.2 provided for certain payments to be made by the franchisee.

6. Clause 21.14 contained an entire agreement clause which stated:

> "This Agreement and any written Addendum signed by our authorised officer and by you represents the entire integrated agreement between us and you and supersedes all prior negotiations, representations or agreements, either written or oral, between the parties and their respective representatives."

7. At the date when the Chelsea agreement was made, EREL had not been complying with its obligations under the Ilford agreement. It was not paying royalty fees or a NAF contribution on any of the income it received in relation to property management services (PNPs). In addition, it was not paying or had not paid on time royalty fees on income it received in relation to other services. This was a considerable concern to MMI; and it raised these concerns with Mr Noorkhan. By an exchange of e-mails Mr Noorkhan put forward a business plan; and the parties also discussed how to govern their future relationship. As a result, the standard terms applicable to the Chelsea agreement were varied by a side letter dated 20 December 2013. Having set out agreed proposals for allowing MMI to have access to C21 Estate's financial records, the side letter continued:

> "This arrangement for Ilford duly paying all royalties due on all of its income would be a contractually component of new deal to grant the Chelsea franchise - naturally the new franchise also make royalty payments on 100% of its income irrespective Spence of source or the historic status quo."

8. In effect, therefore, C21 London guaranteed performance by EREL of its payment obligations under the Ilford agreement. The side letter also went on to state that MMI required staff to attend Century 21 training: and to comply with the standard requirements of the franchise system including the use of the Century 21 e-mail address. The side letter was signed by both MMI and Mr Noorkhan.

9. After the making of the Chelsea agreement, EREL defaulted in paying PM fees under the Ilford agreement. The judge considered that the amount in issue was in the order of £2,500; plus another £940 attributable to royalty fees on other income.

10. On 22 October 2014 MMI served two notices. One, relating to the Ilford agreement, was a 'Curable Default Notice', under clause 15.2.4.1 of the Ilford agreement, requiring EREL to settle in full an invoice from MMI for unpaid PM fees and other royalty fees after the making of the Chelsea agreement. We are not concerned with that notice.

The other, relating to the Chelsea agreement, was expressed to be a "Non Curable Default Notice" given under clause 15.2.5. It stated:

> "We hereby exercise our right to terminate this agreement immediately without prior notice and without your right to remedy under the following clause:
>
> 15.2.5.5 Any material misrepresentation or omission by you to us in the franchise application or otherwise with respect to acquiring the Franchise.
>
> Failure to operate and implement the conditions of the side letter signed and dated in conjunction with the aforementioned agreement."

11. The judge decided that the alleged contractual ground for termination had not been made out by MMI and that, in consequence, the Non-Curable Default Notice did not have effect according to its terms. There is no appeal against that. MMI's secondary argument was that by serving the Non-Curable Default Notice it was accepting a breach of a condition of the contract by C21 London, namely breach of the terms of the side letter, which had the effect of bringing the contract to an end. The judge rejected that argument too, on the ground that the terms of the side letter did not amount to a condition of the contract embodied in the Chelsea agreement. MMI appeals on the ground that he was wrong.

12. The principal question is whether the terms of the side letter amounts to a condition of the Chelsea agreement. It is not suggested that there is any statute or binding judicial decision classifying the term as a condition. Accordingly, whether the contractual term amounts to a condition of the contract is in the first place a question of interpretation of that contract. Since it is a question of interpretation of a written contract, that exercise must be carried out without regard to the subjective intention or understanding of the parties. Mr Weaver, for MMI, sought to construct an argument based on what he said were admissions made by Mr Noorkhan in the course of his cross-examination. He said that he understood that the terms of the side letter were a condition of the Chelsea agreement. I reject this argument for a number of reasons. First, what Mr Noorkhan understood the effect of the contract to be cannot impact on its proper interpretation which is an objective exercise. Second, the word "condition" in English legal usage has a variety of different meanings; and since Mr Noorkhan is not a lawyer his understanding is a very unsafe basis for a judicial decision on whether the term in question is a "condition" in the relevant sense. Third, clause 21.14 contains an "entire agreement" clause with the consequence that whatever might have been agreed orally cannot have contractual effect. Fourth, Mr Noorkhan's evidence was not as unequivocal as Mr Weaver suggests. The judge summarised that evidence at paragraph 67:

13.

> "... Mr Noorkhan accepted that it was fundamental, to the acquisition of the franchise of the Chelsea territory, that EREL duly paid PM Fees. Indeed, Mr Noorkhan described this requirement as a 'condition' for the

> acquisition of that franchise. He also accepted that he appreciated, at the time that the Chelsea Agreement was made, that, if PM Fees were not paid, the Chelsea agreement could be terminated."

To describe a term as a "condition for the acquisition of the franchise" is not the same as describing it as a "condition of the franchise once acquired". If A is contemplating entering into a contact with B and has concerns about B's ability to perform the contract, he may insist that B's obligations are guaranteed by C. In that sense the guarantee is a condition of the making of the contract. The giving of a guarantee may be of a great commercial significance, such that the refusal to give it would be a deal breaker. But it does not follow that, once incorporated into the contract, any breach of the terms of the guarantee, however trivial, would entitle A to terminate the contract. Moreover, Mr Noorkhan was right to say that if PM fees were not paid under the Ilford agreement the Chelsea agreement could be terminated. It could be terminated either by a non-compliance with a Curable Default Notice; or, if the default were repeated within a 12-month period, by the service of a Non-Curable Default Notice. What Mr Noorkhan did not say was that he understood that a failure to pay PM fees under the Ilford agreement gave rise to an unrestricted right to immediate termination of the Chelsea agreement.

14. So, as a matter of interpretation, are the terms of the side letter a condition of the contract, such that any breach of those terms, however small, entitled MMI to terminate the contract? The best way to establish that a contractual term is a condition of a contract is to say so in terms, although even that is not necessarily conclusive (see L Schuler AG v Wickman Machine Tools Sale Ltd [1974] AC 235). However, that has not been done in this case. The side letter says no more than it is to be a "contractual component" of the Chelsea agreement. The question, then, is whether it is a matter of necessary implication that, objectively, the terms of the side letter must have been intended to take effect as a condition of the Chelsea agreement: see Bunge Corporation v Tradax Export SA [1981] 1 WLR 711 at 726. I emphasise the word "necessary".

15. The particular term is the guarantee of the promise to pay royalties under the Ilford agreement. Under the standard terms of the franchise agreement (which applies to both Ilford and Chelsea) the failure to pay punctually is expressly designated a Curable Default. To hold that a failure to pay royalties under the Ilford agreement is a condition of the Chelsea agreement would be to bypass the contractual structure, the dealing with non-payment under both agreements. Moreover, the consequences of non-payment of a trivial sum, or late payment by a trivial time cannot be said to have consequences so serious for the franchiser that there is any necessity for a breach of that obligation to be treated as a condition of a contract. I add to that the general approach that a court should not be over-ready to construe terms as conditions unless the contract clearly requires the court to do so: see Bunge at 727.

16. In my judgment, the judge was right to hold that compliance with the terms of the side letter was not a condition of the contract. C21 London raised another point by way of respondent's notice. However, in view of my conclusion it does not arise.

17. I would dismiss the appeal.

18. LORD JUSTICE IRWIN: I agree.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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