The Court of Appeal for Bermuda

CIVIL APPEAL No. 21 of 2010

Between:

LANCASHIRE INSURANCE COMPANY LTD.

Appellant

-v-

MS FRONTIER REINSURANCE LTD.

Respondent

Before: **Zacca, President**
Ward, J.A.
Auld, J.A.

Appearances: Mr. Narinder Hargun for the Appellant
Mr. David Kessaram for the Respondent

Judgment

Date of Hearing: **6 & 7 June 2011**
Date of Judgment: **5 August 2011**

WARD JA:

Introduction

1. On the 16th day of October 2008 Raphael Limited as landlord, Lancashire Insurance Company Ltd. as tenant/vendor and MS Frontier Reinsurance Ltd. as assignee/purchaser entered into a tripartite agreement for the assignment of a lease.

2. The Lease was in relation to the rental of commercial premises at Mint Flower Place, 8 Par-la-Ville Road in the City of Hamilton for the space of three years at the initial rate of $60 per square foot otherwise expressed as $65,100 per month from the first day of January 2009.

3. Pursuant to Clauses 2 and 6 of the Agreement, the plan was that Lancashire would take possession of the leased area being floors 5 and 6 of the building known as Mint Flower Place at #8 Par-la-Ville Road but would assign the lease to MS Frontier following completion of fitting out works on floors 5 and 6 of the adjoining building known as Power House at #7 Par-la-Ville Road. On the 23rd January 2009 Lancashire became the tenant of Mint Flower Place and it was expected that MS Frontier would have become the Assignee by April 2009 but in the event the call to take up the Assignment was not made until the 18th December 2009. Because of the delay and a decline in rental values between 16th October 2008 and 18th December 2009, MS Frontier served Notice of the Termination of the Agreement on the 13th January 2010.

4. Lancashire contends that the Agreement for the Assignment of the Lease was not validly determined by the service of the termination notice on the 13th January 2010. MS Frontier argues that it was. Kawaley J. found that the Notice to Terminate was validly served. Lancashire has appealed against that finding of the 7th October 2010 on the following grounds.

Ground 3A of the Grounds of Appeal, relating to the proper construction of the Agreement for the Assignment of the Lease dated 16th October 2008.

> *3.1 The learned judge erred in law in holding, in effect, that under Clause 1.1.2 of the Agreement dated 16 October 2008 for, inter alia, the Assignment of a lease ("the lease") of commercial premises situate at floors 5 and 6, 8 Mint Flower Place, Par-la-Ville Road in the City of Hamilton, the Condition Date is a date 15 days after the service of the written notice following the completion of the fit out works. The learned judge should have held that, on the true construction of the Agreement and the Notice dated 18 December 2009, the Condition Date was the date upon which the written notice was served upon the Respondent or any later date agreed upon by the parties.*
>
> *3.2 In the premises, the learned judge should have held that the Condition Date was either 18 December 2009, the date of service of the notice, or 31 December 2009 the date agreed upon between the parties' respective attorneys. The learned judge should have held that there was at the very lease prima facie evidence that the Condition Date was agreed to be 31 December 2009.*

5. The Condition Date was the date on which the assignment of the Lease had to take place. It is defined in Clause 1.1 of the Agreement as having the meaning:

> *The date falling no more than fifteen (15) Working Days following the later of*
>
> *1.1.1. completion of the Lease; and*
>
> *1.1.2. receipt by the Assignee of the Tenant's written notice confirming completion of their fit out works in relation to their occupation of the 5th & 6th floors of 7 Par-la-Ville Road, Hamilton and such written notice shall be given by the tenant immediately following the completion of its said fit out works.*

6. The attorneys for Lancashire served its Notice of Completion of Fit-Out Works at Power House on 18th December 2009. The Notice read:

> *We confirm that the Lease was completed on 23 January 2009 and we hereby give notice of completion of our client's fit out works to the 5th & 6th floors, 7 Par-la-Ville Road, Hamilton. Accordingly, the conditions set out in the Agreement have been satisfied and our client now requests the assignment to be completed without delay. The Deed of Assignment was sent to your attorneys on 30 November 2009 duly executed by our client and we look forward to its return to enable completion of the same.*

7. The conditions for triggering the Condition Date had now been met, namely, completion of the Lease and service of Notice of Completion of the Fit-Out Works at #7 Par-la-Ville Road.

8. Fifteen working days following 18 December 2009 would be a date after the 31st December 2009, namely, 13th January 2010.

9. However, pursuant to Clause 6.6 of the Agreement, if the Condition Date had not occurred by 31st December 2009, either party could terminate the Agreement. Clause 6.6 reads:

> *If for any reason the Condition Date has not occurred by the 31st December 2009 then the Tenant or the Assignee may serve written notice on the other to determine this Agreement and upon service of such this Agreement shall determine and cease to have effect and no party shall be under any further liability to any other party under this Agreement without prejudice to any pre-existing right of action of any party in respect of any breach by any party of its obligations under this Agreement.*

10. As the Agreement was not terminated by either party by 31st December 2009, under the power granted by Clause 6.6, it follows that the Agreement remained in force with the reciprocal obligations of the parties.

11. Counsel for Lancashire argued that having sent the Assignment of the Lease to MS Frontier's attorneys on 30th November 2009 followed by Notice of Completion of Fit Out Works on 18th December 2009, the Condition Date had occurred on the latter date and MS Frontier was under an obligation to take the assignment of the Lease.

12. Alternatively the Condition Date fell on 31st December 2009, the date of the purported agreement between Ms. Fox and Mr. H. Kessaram, the representatives of the respective parties.

13. The learned judge found that the Condition Date defined in Clause 1.1 could not be viewed as crystallizing until the parties agreed a completion date within the 15-day window and, failing agreement, the Condition Date crystallized at the end of the 15-day period, namely, on 13th January 2010.

14. As the judge pointed out, Lancashire merely by serving its Notice of Completion of Fit Out Works could not demand that MS Frontier accept the assignment immediately, because there could be things such as inspection, remedial work and matters ancillary to completion which were required to be done.

15. We do not think that under the terms of the Agreement, Lancashire could unilaterally decide the date for completion.

16. As to the alternative argument, there was no concluded agreement between Ms. Fox and Mr. H. Kessaram. We put it no higher than that there was a date mentioned that they might try to work towards as a possible date for completion.

17. Counsel for Lancashire has submitted that an adverse inference should be drawn against MS Frontier because neither Harry Kessaram nor David Cooper, attorneys for MS Frontier, was called as a witness.

18. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, a medical negligence action where the issue was the appropriate standard of care, it was held that adverse inferences could only be drawn in relation to the failure to call a material witness if the witness' evidence was required to rebut prima facie evidence or a relevant fact or facts.

19. In rejecting the submission that an adverse inference should be drawn, Kawaley J. went on to hold that the evidence in support of the alleged agreement was very thin indeed. It was Harry Kessaram who suggested the date so as to avoid any apportionment of rent, but subsequent discussions did not lead to the conclusion that a firm agreement had been reached. At the highest they confirmed that the parties had tentatively or provisionally agreed that 31st December 2009 was a potential completion date which the parties should work towards. There was no confirmation in writing.

20. Unfortunately, these discussions took place in the middle of the Xmas season when many of the persons involved were about to take temporary leave of absence from their respective offices and could not give their undivided attention to completing the assignment of the Lease by 31st December 2009. Thus the final date for completion pursuant to Clause 6.6 passed while the protracted discussions were still in progress.

21. It was therefore not necessary to call either H. Kessaram or D. Cooper as witnesses as there was no evidence of a concluded agreement supporting 31st December 2009 as the agreed final date for completion of the assignment, and no adverse inference could be drawn from failure to tender them as witnesses.

22. We are unable to disturb this finding of fact.

23. Grounds 3.3, 3.4 and 3.5 of the grounds of appeal read:

> *Grounds of Appeal which only arise if the learned judge's interpretation of Condition Date under Clause 1.1.2 of the Agreement is upheld.*
>
> *3.3 The learned judge erred in law in holding that the Agreement for the assignment of the lease had been validly determined by the Respondent. Instead, for reasons stated below the learned judge should have held that the Agreement had not been validly determined by the Respondent and that, accordingly, the Appellant was entitled to an order for specific performance of the Agreement.*
>
> *3.4 The learned judge erred in law in holding that the Respondent was entitled to serve a termination notice pursuant to Clause 6.6 of the Agreement notwithstanding that the time for contractual completion of the Agreement had already arrived. The sole ground given for the Respondent's submission to the contrary was that this argument amounted to a "wholly uncommercial construction that makes no sense whatsoever" and that they were "inconsistent with the terms of the Agreement, properly construed." This does not amount to a sufficient giving of reasons for rejecting the Appellant's case and the Appellant appeals on that ground alone.*

> *3.5 The learned judge should have held that on the true construction of the Agreement, once the date for completion of the Agreement had arrived (13 January 2010), it was no longer possible to serve a termination notice under Clause 6.6. of the Agreement and accordingly that the Respondent's notice of the same date purportedly served under Clause 6.6 of the Agreement was invalid and of no effect.*

24. If termination must occur before the arrival of the Condition Date, then the Notice of Termination from MS Frontier would have been served too late. If termination could occur on the Condition Date or before that date had passed, then the Notice of Termination had been validly served by MS Frontier.

25. On 18th December 2009 MS Frontier, on receipt of the Notice of Completion of Fit Out Works, could have invoked the provisions of Clause 6.6 and terminated the Agreement on the ground that, in the absence of an agreement, the assignment of the Principal Lease could not take place before 31st December 2009. It did not terminate the Agreement but continued to hold discussions with Lancashire, as a result of which the judge held that the final date on which the assignment of the Lease had to take place became 13th January 2010.

26. The learned judge rejected the proposition that as soon as the Condition Date occurred there was a contractual duty for MS Frontier to accept the Assignment and held that MS Frontier had a right to terminate on the Condition Date. As long as the Condition Date had not passed, the exercise of the right was suspended but not lost. As it were "the ides of March had come, but not gone". Until 13th January 2010 had passed, until the close of business on that day, MS Frontier had the power to terminate the Agreement. It had the power to serve the Notice to Terminate up to the last second of the business day of 13th January 2010 and the service of the Notice was valid.

27. Counsel for Lancashire submitted that once the Condition Date had occurred after 31st December 2009, neither Lancashire nor MS Frontier had the right to serve Notice of Termination under Clause 6.6 because once the Condition Date had occurred, both parties came under a primary contractual obligation to assign the Lease and to accept the Assignment under Clause 2.2, after which it was no longer open to either party to determine the Agreement by serving the Notice of Termination.

28. The learned judge rejected that submission. We hold that under Clause 2.2 the assignee, MS Frontier, accepted the Lease from the tenant, Lancashire, on the terms set out in the Agreement. Clause 6.6 was one of the terms and would govern both parties so that the

contractual obligation with respect to the Assignment would not eliminate the right of termination.

29. There was attached to the Principal Lease of the premises a Contingent Lease of furniture and fittings which would only become operational if MS Frontier became the Assignee of the two floors at Mint Flower Place.

30. Until MS Frontier had assumed the obligations under the Principal Lease, the terms of the Contingent Lease could not take effect; however, discussions by MS Frontier of actions which might be taken under the Contingent Lease could have led to the conclusion that MS Frontier intended to honour its obligations under the Principal Lease.

31. Counsel for Lancashire submitted that the conduct of MS Frontier, its actions and representations between 18th December 2009 and 6th January 2010 evinced an intention to take the assignment of the premises. That argument formed the basis of Grounds 3.6, 3.7 and 3.8 of the Grounds of Appeal which were:

> *3.6 Further or alternatively, the learned judge erred in law in his rejection of the Appellant's case to the effect that the Respondent had waived its right to serve a termination notice under Clause 6.6.*
>
> *3.7 Instead, the learned judge should have held that once the latest date for serving a notice under Clause 1.1.2 of the Agreement without there being a risk that the Condition Date would fall after 31 December 2009 (i.e. 8 December 2009), had passed, the Respondent was put to its election and, by its actions, irrevocably elected to continue with the Agreement, affirming the same and thereby waiving the right to rely on the termination provisions in Clause 6.6.*
>
> *3.8 Further or alternatively to the Appellant's case in paragraph 3.7 above, the learned judge should have held that, by the Respondent's representations and actions between 18 December 2009 and 31 December 2009 and the Appellant's actions in reliance thereon, the Respondent was estopped from relying upon Clause 6.6 and so waived their right so to do.*

32. Counsel for Lancashire relied on the following sequence of events in support of these grounds. On the 21st December 2009, Ms. Fox for Lancashire sent an email to Mr. Harry Kessaram of Cox Hallett Wilkinson, Attorneys for MS Frontier. Mr. Kessaram replied acknowledging receipt of the documents and expressing a belief that MS Frontier would want to visit the premises.

33. Counsel emphasised that there was no challenge to the validity of Lancashire's Notice of 18th December 2009. MS Frontier did not claim that it was irregular or defective or take

any other objection to it. On the contrary, MS Frontier gave every indication that it was proceeding to execute the Deed of Assignment. On service of the Notice of Completion of Fit Out Works, and having already served on 30th November 2009 the documents with respect to the assignment of the Lease for execution, Lancashire believed that the conditions set out in the Agreement had been satisfied and requested the Assignment to be completed without delay.

34. Following that on the 21st December 2009 Mr. Devery of MS Frontier sent an email to Mrs. Landy of Lancashire seeking an inspection of the furniture and fittings the subject of the Contingent Agreement. The request to arrange this inspection, Counsel argued, would be senseless if MS Frontier did not intend to proceed with the execution of the Deed of Assignment. Again on the 21st December 2009 there was a telephone call between Mr. Harry Kessaram and Ms. Fox in which Mr. Kessaram suggested a completion date of 31st December 2009 so as to avoid any apportionment of rent. On the 22nd December 2009 there was an inspection of the premises at Mint Flower prior to the expected transfer. Again on the 22nd December 2009 there was a discussion of the sale of some equipment which was owned by Lancashire which it had hoped to sell to MS Frontier. MS Frontier declined the offer to purchase the two items. On the 28th December 2009 the two items were removed at expense so that Lancashire could give vacant possession to MS Frontier. In order to complete the task it was necessary to remove and rebuild a wall. On the 30th December 2009 the attorneys for Lancashire sent an email to Mr. Cooper, an attorney for MS Frontier, who was holding on for Mr. H. Kessaram relative to completion on the 31st December 2009, but there was no reply from him. On the 5th January 2010 there was further contact but it did not advance things in any way. On the 6th January 2010 there was again contact relating to the furniture which was the subject of the Contingent Agreement, and on that occasion Mr. Devery of MS Frontier replied non-committally asking to be given a chance to deal with the matter the following week. There was no further communication until the receipt of the Notice of Termination.

35. Counsel for Lancashire submitted that MS Frontier's conduct had by 22nd December 2009 been sufficient to amount to an election to proceed with the Agreement.

36. In addition he has submitted that the Notice is entirely contrary to all the actions and representations of MS Frontier's attorneys and Mr. Devery and that, at the very minimum, such conduct amounts in law to a waiver of any defect in the Notice which was served on the 18th December 2009.

37. Election, waiver and estoppels are interconnected, the one leads to the other. In *Estoppel by Representation* by Spencer Bower 4th Edition at page 359 the principle of election is described as follows:

> *Where A in dealing with B is faced with inconsistent courses of action which affect B's rights and obligations and knowing that the two courses of action are inconsistent and that he or she has the right to choose between them and communicates that choice to B, A is prevented from afterwards resorting to the course of action which he has deliberately rejected and communicated to B his intention of rejecting…. B must be entitled to rely on A's deliberate choice with confidence.*

38. We must ask ourselves the question whether the conduct of MS Frontier, its actions and representations, would have led a reasonable observer to the conclusion that MS Frontier had elected to continue with the Agreement, thereby waiving the right to rely on the termination provision in Clause 6.6 as extended and placing itself in the position where it was estopped from doing so.

39. Waiver involves the voluntary or intentional relinquishment of known rights. There must be an unequivocal communication of intention whether by words or conduct. As Potter L.J. said in *Flacker Shipping Limited v Glencore Grain Limited* [2002] EWCA Civ. 1068 at Para 66

> *It was clear that whether or not a party entitled to notice had waived a defect upon which it subsequently sought to rely would depend upon the effect of the communications or conduct of the parties, the intention of the party alleged to have waived its rights being judged by objective standards. In an appropriate commercial context, silence in response to the receipt of an invalid notice in the sense of failure to intimate rejection of it might therefore at least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, to put it another way, might amount to acceptance of the notice as complying with the contract pursuant to which it was given.*

40. In discussing the quality of the representation in *The Law Relating to Estoppel by Representation* by Spencer Bower 4th Edition at page 76 the author stated:

> *To found a valid estoppel or waiver, a representation must be clear and unambiguous, or unequivocal.*
>
> *If the language, conduct or silence is open to more than one reasonable interpretation, only one of which carries the relevant representation, it is ambiguous or equivocal, and will not found an estoppel from denying the substance of the representation.*

41. The learned judge found that there was no unequivocal representation of intention that MS Frontier intended to waive its right to terminate. Further, MS Frontier was not estopped by its conduct from exercising its termination rights and it did not unambiguously represent by its conduct that it intended to complete the transaction.

42. Counsel for Lancashire submitted that if MS Frontier wished to reserve its rights, there was clearly a duty upon it to speak. He continued that there was a duty on contracting parties not to conduct themselves in such a way as to mislead. The duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person, against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.

43. In *Tradax Export S.A. v Dorada Compania Naviera S.A.* ("The Lutetian") [1982] 2 QB (Com. Ct) 140 at page 157 Bingham J. (as he then was) cited a passage from Spencer Bower and Turner, *Estoppel by Representation*, 3rd Edition at page 49 where it is stated:

> *The parties to a transaction are entitled to assume, as against one another, omnia rite esse acta; each of them is entitled to suppose that the other has fully discharged all such obligations (if any) of disclosure or action against himself as may have been created by the circumstances. If, therefore he receives from that other no intimation, by language or conduct, of the existence of any fact which, if existing, it would have been the latter's duty, having regard to the relation between them, the nature of the transaction, or the circumstances of the case, to reveal, he has legitimate ground for believing that no such fact exists, or that there is nothing so abnormal or peculiar in the nature of the transaction, or in the circumstances of the case, as to give rise to any duty of disclosure, and to shape his course of action on that assumption; in other words, he is entitled to treat the representor's silence or inaction as an implied representation of the non-existence of anything which would impose, or give rise to, such a duty, and, if he alters his position to his detriment on the faith of that representation, the representor is estopped from afterwards setting up the existence of such suppressed or undisclosed fact.*

44. We do not think that this principle of law imposed upon MS Frontier an obligation to warn Lancashire that if the delay continued in fitting out Floors 5 and 6 of Power House it would have to consider invoking the provision provided in Clause 6.6 of the Agreement. The language of Clause 6.6 spoke for itself. There could have been no mistake as to its meaning.

45. We agree with the learned judge that MS Frontier did not unambiguously represent by its conduct that it intended to complete the transaction. There was no clear and unambiguous representation such as is required in the doctrine of estoppel.

46. From a moral perspective the conduct of MS Frontier in engaging in subtle delaying tactics could be viewed as less than honourable, but it had no obligation to look after the best interest of Lancashire who would have done better to recall the Mafia prayer: "God protect me from my friends." It should also have ensured that any fitting out works necessary for the transfer of the premises would have been completed before 8th December 2009. In the interaction between 30th November and 31st December 2009, MS Frontier never stated categorically the date for completion. It was an omission which was not lost on Lancashire, hence Ms. Fox's reference to "keeping the fingers crossed" in an e-mail of 21st December 2009 to Simon Robinson of Conyers, Dill & Pearman, for she had heard rumblings that MS Frontier no longer wanted the premises.

47. In the instant case, judging by an objective standard, although MS Frontier had not served its Notice of Termination by 31st December 2009, it cannot be said that by continuing to treat the contract as subsisting, it had therefore waived its right to serve Notice of Termination on or before any agreed future date for termination.

48. At all times there was a termination date. Under the original Agreement it was 31st December 2009. Then it was extended by agreement to 13th January 2010. Until then Lancashire could not apply for an order of Specific Performance.

49. After 13th January 2010, if MS Frontier had not served Notice of Termination by then, it could have been argued that it had waived its right to rely on the termination clause, or that it had elected not to rely on it, or that it was estopped from relying on it. But before that date, the argument would have been premature.

50. The agreed final date for termination was 13th January 2010. The notice was served before the close of business on that day. We agree with the Judge's reasoning set out in paragraph 26 above.

51. In so far as there is a complaint by Lancashire about the insufficiency of reasons for rejecting its case, we are of the view that it lacks merit. There was a full and reasoned judgment of some thirty-five (35) pages and 68 paragraphs in which adequate reasons were given for the findings of the learned judge.

52. In *English v Emery Reimbold & Strick Ltd*. [2002] 1 W L R 2410 it was held that a judicial decision which affected the substantive rights of the parties should be reasoned, although some judicial decisions, e.g. interlocutory case management decision, did not require reasons; that, while a judge was not obliged to deal with every argument or identify or explain every factor which weighed with him, the issues the resolution of which were vital to his conclusion should be identified and the manner in which he resolved them briefly but clearly explained, so that his judgment enabled the parties and any appellate tribunal readily to analyse the reasoning essential to his decision.

53. In our view the learned judge dealt with the various topics adequately.

54. Accordingly the appeal is dismissed.

_____
Ward, JA

I agree

_____
Zacca, P

_____

I agree

Auld, JA