The Court of Appeal for Bermuda

CIVIL APPEAL No 13 of 2014

Between:

AIRCARE LTD

Appellant

-v-

WYATT SELLYEH

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Mr. Narinder Hargun and Mr. Ben Adamson, Conyers Dill And Pearman, for the Appellant
Mr. Timothy Marshall, Marshall Diel and Myers Limited, for the Respondent

Date of Hearing: **4 March 2015**

Date of Judgment: **20 March 2015**

JUDGMENT

Kay, JA

Introduction

1. This appeal is concerned with the construction of a provision in a share purchase agreement ("The Agreement") whereby Aircare Limited ("Aircare") agreed to repurchase for cancellation Aircare shares which were then held mainly by its managers and employees. There were two outside shareholders, one of whom was Mr. Wyatt Sellyeh. Under the agreement, the shares were to be repurchased in four tranches. We are concerned with the price to be paid by Aircare for the first

tranche. The Agreement, which was dated 30 May 2012, was made between Aircare, its shareholders and two other companies, inVenture Limited ("inVenture") and iAcquisition Limited ("iAcquisition"). The context was a merger, pursuant to a separate contract, of Aircare and iAcquisition.

2. The price to be paid for the repurchase of the first tranche of shares was covered by clause 3.2 of the agreement. Clause 3.2(i) provided:

> "for each First Tranche Share to be repurchased by [Aircare] on the First Tranche Repurchase date [ie June 1 2012], an initial Share Purchase Price of BD$1,485.64 (One Thousand Four Hundred Eighty Five Bermuda Dollars and Sixty four cents): PROVIDED that, upon receipt of the audited financial statements of [Aircare] for the year ended March 31, 2012 (expected on or about August 1, 2012), the Share Purchase Price paid for the First Tranche Shares shall be recalculated using a price equal to 4.7529 times the average EBIDA of the audited financial statements of [Aircare] for the years ended March 31, 2011 and March 31, 2012 and where such recalculation results in additional monies owed to the First Tranche Shareholders, such monies shall be paid to the First Tranche Shareholders on the Second Tranche Share Repurchase Date..."

3. The price to be paid for the repurchase of the second, third and fourth tranches, which were to take place in August 2012, August 2013, and August 2014 respectively, were to be calculated by reference to the audited financial statements of Aircare for the year ending 31 March 2012, 31 March 2013 and 31 March 2014. In respect of the second, third and fourth tranches, there was no provision for the recalculation of the repurchase price.

4. The reason for the recalculation provision in clause 3.2 (i) was that at the date of the Agreement (30 May 2012), the audited financial statements for Aircare for the year ending on 31 March 2011 were available, along with management projections for the year ending 31 March 2012, but the audited financial statements for that year were not expected to be available until 1 August 2012. The management projections had been prepared in August 2011.

5. Pursuant to clause 3.2(i) of the agreement, Aircare paid Mr. Sellyeh $1,485.64 for each of his 600 shares. Following receipt of the audited accounts, Aircare recalculated the price using the formula set out in clause 3.2(i). The recalculated

price was $1,376.69 – a significant reduction. Aircare claims that Mr. Sellyeh was only entitled to be paid this recalculated price and that it is entitled to recover $65,369.91 as an overpayment. Mr. Sellyeh, on the other hand, contends that clause 3.2(i), properly construed, had the effect that the "initial" price was a minimum price which could only be recalculated upwards and not downwards following receipt of the audited financial statements for the year ending 31 March 2012.

6. Following a hearing in the Supreme Court on 7th and 8th April 2014, in a judgment handed down on 20 May 2014, Hellman J held that the proper construction of clause 3.2(i) was the one advanced on behalf of Mr. Sellyeh. He dismissed Aircare's claim for recovery of the alleged over-payment. There is now before us an appeal by Aircare, represented by Mr. Narinder Hargun, which is resisted on behalf of Mr. Sellyeh by Mr. Timothy Marshall. I should add that although the appeal is concerned only with the issue of construction, at trial there was an alternative claim for rectification but it was abandoned before final judgment.

7. At this stage, it is appropriate to refer to some of the other provisions of the Agreement. Clause 3.2(i) was supplemented by clause 7:

> "On or about August 1, 2012, [Aircare] shall, upon receipt of the audited financial statements for [Aircare] for the year ending March 31, 2012, recalculate the Share Purchase Price for the First Tranche Shares using a price equal to 4.7529 times the average EBIDA of the audited financial statements of [Aircare] for the years ended March 31, 2011 and March 31, 2012 and where such recalculation results in additional monies owed to the First Tranche Shareholders, such monies shall be paid to the First Tranche Shareholders on the Second Tranche Share Repurchase Date."

Clause 7.3 provided:

> "On the Second Repurchase Date, [Aircare] shall effect the repurchase for cancellation of the Second Tranche Shares and shall pay to the Second Tranche Shareholders a price per Second Tranche Share as determined in accordance with section 3.2(ii) of this Agreement."

Similar provisions were made in clauses 7.4 and 7.5 in relation to the third and fourth tranches. Clause 13.5 contained a whole agreement clause in these terms:

> "This Agreement, including its Schedules, contains the whole agreement between the Parties in respect of the subject matter of this Agreement and supersedes and replaces any prior written or oral agreements, representations or misunderstandings between them relating to such subject matter. The parties confirm that they have not enters into this Agreement on the basis of any representation that is not expressly incorporated into this Agreement."

Schedule 1 contained a number of warranties but did not include any warranty as to the accuracy of the management projections upon which the initial price was based. As I have related, at the time of the Agreement those management projections were more than 6 months old. The judge found that the parties were aware of this and that if any party had waited to see the up-to-date figures, albeit unaudited, they would have been readily supplied.

The Law

8. There is no dispute about the basic principles of construction which fell to be applied. The starting point is the speech of Lord Hoffmann in *Investments Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 which set out the following principles:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to

the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749 .

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191 , 201:

'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business common sense.'"

It is axiomatic that the language used by the parties may have more than one potential meaning. In *Rainy Sky v Kookmin* [2011] UKSC 50 Lord Clarke said:

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonable have been available to the parties n the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense to reject the order."

However, where the parties have used meaningful language, "the Court must apply it" (para 23).

9. In the present case, the submission on behalf of Aircare is that this is a "two meanings" case in which business common sense compels an interpretation the judgment of clause 3.2(i) which requires both upward and downward recalculation. The response on behalf of Mr. Sellyeh is that clause 3.2(i) is unambiguous, providing only for upward recalculation. In the alternative, Mr. Marshall submits that, if this truly is a "two meanings" case, business common sense requires the restriction of recalculation to an increase in the initial price.
10. Having set out the principles and the trial submissions, Hellman J decided:

> "The wording of clause 3.2(i) will bear either construction. Each construction makes commercial sense from the point of view of the party proposing it and can be justified as making commercial sense objectively. With benefit of hindsight the Agreement could easily have been drafted to make clear which of the rival constructions was correct.
>
> In my judgment the decisive point is the absence of any express term providing for the recovery by Aircare from the First Tranche Shareholders of any amount by which the

> initial First Tranche Share Purchase Price exceeds the recalculated First Tranche Share Purchase Price.
>
> If such recovery were permitted then I would have expected the Agreement to provide for it in express terms, just as it provides for the payment by Aircare to the First Tranche Shareholders of any amount by which the recalculated First Tranche Share Purchase Price exceeds the initial First Tranche Share Purchase Price. Aircare failed to provide a convincing explanation for this discrepancy."

For those reasons, he dismissed Aircare's claim.

Analysis

11. At the forefront of his critique of the judge's reasoning, Mr. Hargun submits that, having correctly decided that this is a "two meanings" case, the judge fell into error by then reverting to a close consideration of the language – what it said and what it did not say – rather than proceeding to an assessment of which meaning was more reflective of business common sense. In my judgment, there is force in this submission. If this is a case of ambiguity, then it called for such an approach but did not receive it. On that hypothesis, it would be necessary for us to revisit the assessment carried out by the judge and to decide which interpretation is the one more consistent with business common sense.
12. At this point, however, it is necessary to refer to the respondent's notice whereby Mr. Marshall seeks to persuade us that the judgment below should be affirmed but on different grounds. It is his submission that the judge was wrong to hold that this is a "two meanings" case. On the contrary, he submits, the language is unambiguous and is only capable of meaning that recalculation of the initial price is restricted to an increase in the price. In other words the initial price is a floor price. He points out that in *Rainy Sky* Lord Clarke (with whom the other members of the Supreme Court agreed) was expressly adopting the approach which had been anticipated by Sir Simon Tuckey in the Court of Appeal [2010] EWCA Civ 582, para 19:

> "If the language...leads clearly to a conclusion that one or other of the constructions contended for is the correct one, the Court must give effect to it, however surprising or unreasonable the result might be. But if there are two possible constructions, the Court is entitled to reject the one which is unreasonable and, in a commercial context, the one which flouts business common sense."

We were referred to a number of other authorities but they add little to the exposition of principle which appears to be common ground.

13. Accordingly, I return to the central issue: is this a "one meaning" or a "two meanings" case? The answer to this question must be found with assistance from the factual matrix but without resort to the inadmissible background of the antecedent negotiations of the parties and their declarations of subjective intent, in accordance with Lord Hoffmann' second and third principles. At trial, the Judge received a great deal of evidence about the antecedent negotiations and the subjective intentions of the parties and those who had negotiated on their behalf. This was because, until a late stage of the proceedings, there were rival applications for rectification, in relation to which such evidence was admissible. However, both parties abandoned their rectification claims before judgment and it was incumbent upon the Judge, as it is upon us, to disregard the evidence which is inadmissible on the issue of construction.

14. In my judgment, this is plainly a "one meaning" case. Mr. Hargun submits that clause 3.2(i) is in three parts, and that the third part, which provides for the payment of "additional monies" following the prescribed recalculation, is no more than an ancillary administrative provision which gives no clue as to the substantive rights and duties which follow upon the recalculation. I disagree. It is a clear indication that recalculation would only lead to a variation of the initial price if it produced a price <u>increase</u>. If it had been intended to apply equally to a punative price <u>decrease</u>, one would expect the final part of clause 3.2(i) to have included a reference to a recalculation for repayment – with a transfer of money back to Aircare or a credit upon payment for the second tranche. However, clause 3.2(i) is silent as to that, as indeed is clause 7 which provided for post-completion events. Moreover, there is nothing at all unusual about an <u>ex post facto</u>

recalculation of consideration which accrues only for the benefit of one party – most rent review clauses are an obvious example. I do not consider that a reasonable person having the knowledge contemplated by Lord Hoffmann would infer from the language of clause 3.2(i) that it embraced a clawback provision. The parties are sophisticated business people, represented on both sides by expert advisors. That is part of the objective factual matrix. If clawback had been agreed, there is a strong expectation that it would have been the subject of express provision. Although I believe that the Judge was wrong to see this as a "two meanings" case, he was right to see the absence of an express clawback provision as decisive.

15. What I have said would be sufficient to dispose of this appeal. However I go further. If, contrary to my clear conclusion, clause 3.2(i) is susceptible to two interpretations, I am not persuaded that business common sense would point inexorably to the meaning put forward by Aircare. It would not have been sensible for the sellers to expose themselves to the risk of clawback two months after they had received the initial payment on 1 June with no restrictions having been imposed on their use of it. Nor would it have been obviously sensible for Aircare to have imposed a clawback provision on sellers, over 90% of whom continued to be employed by Aircare and in relation to whom the entire structure of the deal was based on Aircare's natural desire to incentivise them through the remaining years of the sequential transaction. These, it seems to me, would be powerful reasons in support of a conclusion that, if it had been necessary to embark upon an exercise of evaluating business common sense, the balance would come down in favour of Mr. Sellyeh's construction. I should add that, in the course of their submissions on the issue of business common sense, both counsel tended to dip into the treasure chest of subjective evidence. These parts of their submissions demonstrated the sound reasons which underlie the prohibition upon such an exercise.

Conclusion

16. It follows from what I have said that I would dismiss this appeal because I am satisfied that clause 3.2(i), properly construed, is plainly inconsistent with a right of clawback. The submission contained in the respondent's notice if correct.

Kay, JA

I agree

Baker, P

I agree

Bell, JA