In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012: No 431

BETWEEN:-

AIRCARE LTD

Plaintiff

-and-

WYATT SELLYEH

Defendant

JUDGMENT

(In Court)

Date of hearing: 7th and 8th April 2014
Date of judgment: 20th May 2014
Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiff
Mr Timothy Marshall, Marshall Diel & Myers Limited, for the Defendant

Introduction

1. This is an action for breach of contract, alternatively restitution, concerning the price payable by the Plaintiff, Aircare Ltd ("Aircare") to the Defendant, Wyatt Sellyeh ("Mr Sellyeh"), for the repurchase for cancellation of Mr

Sellyeh's shares in Aircare. The Plaintiff claims damages of $65,369.91 or alternatively restitution of that sum.

2. The Plaintiff further claims, and the Defendant counterclaims, rectification of the Agreement insofar as it does not reflect the parties' true intentions, although they disagree as to what those intentions actually were.

Factual background

3. Aircare is an air-conditioning company.

4. Mr Sellyeh is a chartered professional accountant of some 32 years standing. From April 2005 he has been the Chief Financial Officer ("CFO") of a local company called New Venture Holdings Limited ("NVH"). NVH was controlled by a man named Don Mackenzie. Its wholly owned subsidiaries included a company called Seaforth Investment Company Limited ("Seaforth") and Aircare.

5. In September 2007 NVH sold most of its shares in Aircare to its managers and employees. Mr Sellyeh was given the opportunity, which he took, to purchase around 600 shares, which was around 5% of the shares in the company.

6. From then on Aircare was owned by its managers and employees, who ended up with roughly 85% of the shares, and two outside shareholders. The outside shareholders were Seaforth and Mr Sellyeh. I shall refer to the shareholders collectively as "the Shareholders".

7. From September 2007 to February 2010 Mr Sellyeh was a director of Aircare. In his capacities as CFO of NVH and director of Aircare he became very familiar with the company and its operations.

8. The contract with which the Court is concerned is a written agreement dated 30th May 2012 ("the Agreement") between Aircare; the Shareholders; and two further companies: inVenture Limited ("inVenture") and iAcquisition Limited ("iAcquisition").

9. iAcquisition was wholly owned by inVenture, which was in turn wholly owned by the Ascendant Group Limited ("Ascendant"). Ascendant is an investment holding company which is publicly traded on the Bermuda stock exchange. It is the parent company of the Bermuda Electric Light Company Limited ("BELCO").

10. By a separate contract, concluded at about the same time as the Agreement, Aircare merged with iAcquisition. Under the Agreement the merged company ("Aircare") agreed to repurchase from the Shareholders for cancellation of all the shares which they held in Aircare.

11. The negotiations which led to the Agreement followed an approach to the Shareholders on behalf of Ascendant. They were conducted on behalf of the Shareholders by Aircare's general manager, Robert Platt ("Mr Platt"). Negotiations for the purchasers were conducted by Chris Coelho ("Mr Coelho"), who was Senior Vice President and Chief Financial Officer of Ascendant. Thus Mr Sellyeh did not negotiate directly with Mr Coelho. I have had the benefit of hearing oral evidence from all three men.

12. The Agreement was prepared by the purchaser's attorneys.

13. Clause 3 of the Agreement dealt with the share repurchase. This was to take place in four tranches. Clause 3.2 provided that the share repurchase price with respect to each tranche was to be calculated as follows:

> (i) 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; and

(ii) for each Second Tranche Share to be repurchased by [Aircare] on the Second Tranche Repurchase Date [ie August 1 2012], a price equal to 4.7529 times EBIDA of the audited financial statements of [Aircare] for the year ended March 31, 2012, divided by 12,452 (being the total number of issued and outstanding common shares in the Company immediately prior to the Completion Date);

(iii) for each Third Tranche Share to be repurchased by [Aircare] on the Third Tranche Repurchase Date [ie August 1 2013], a price equal to 4.7529 times EBIDA of the audited financial statements of [Aircare] for the year ended March 31, 2013, divided by 12,452 (being the total number of issued and outstanding common shares in the Company immediately prior to the Completion Date);

(iv) for each Fourth Tranche Share to be repurchased by [Aircare] on the Fourth Tranche Repurchase Date [ie August 1 2014], a price equal to 4.7529 times EBIDA of the audited financial statements of [Aircare] for the year ended March 31, 2014, divided by 12,452 (being the total number of issued and outstanding common shares in the Company immediately prior to the Completion Date).

14. The initial share repurchase price in clause 3.2(i) of the Agreement was calculated using a price equal to 4.7529 times the average EBIDA of the audited financial statements of Aircare for the year ended 31st March 2011 and management projections for the financial year ended 31st March 2012.

15. This was because whereas the financial year for Aircare ended on 31st March 2012, and the First Tranche Payment fell due on 1st June 2012, the audited financial statements for Aircare for that financial year were not expected to be available until 1st August 2012.

16. The management projections for the financial year ended 31st March 2012 on which the initial share repurchase price was based were prepared in August 2011.

17. As stated in the Agreement, the recalculated share price in clause 3.2(i) and the share prices in clauses 3.2(ii) to (iv) were based on Aircare's audited financial statements.

18. Clause 4 of the Agreement dealt with further obligations. Clause 4.1 provided that seven of the eight Shareholders who were managers or employees would enter into employment contracts with Aircare prior to the merger.

19. Clause 5 of the Agreement dealt with subsequent share transfers. Clause 5.1 imposed restrictions on share transfers by the Shareholders other than in accordance with Schedule 3 of the Agreement.

20. Clause 7 of the Agreement dealt with post completion events. Clause 7.2 provided:

> On or about August 1, 2012, [Aircare] shall, upon receipt of the audited financial statements for [Aircare] for the year ended 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.

21. 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 Tranch Share as determined in accordance with section 3.2(ii) of this Agreement.

22. Clauses 7.4 and 7.5 made *mutatis mutandis* the same provision for payments falling due under the Third and Fourth Tranches.

23. Clause 13.5 contained a whole agreement clause. This provided in material part:

> 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 understandings between them relating to such subject matter. The parties confirm that they have not entered into this Agreement on the basis of any representation that is not expressly incorporated into this Agreement.

24. Schedule 1 to the Agreement contained various warranties by the parties. But it did not include any warranty as to the accuracy of the management projections upon which the initial share purchase price was based.

25. Schedule 3 to the Agreement set out which shares would be repurchased in which Tranche. The shares of Seaforth and Mr Sellyeh, as the only non-management/employee shareholders, were to be repurchased as part of the First Tranche. Some of the shares of all but one of the other Shareholders were also to be repurchased as part of the First Tranche. However all the other Shareholders were required to retain at least some of their shares until the repurchase of the shares in the Fourth Tranche.

26. Thus the Agreement locked all but one of the management/employee Shareholders into Aircare for at least two years. The prices which they were to be paid for their shares were dependent upon Aircare's performance.

27. Schedule 4 to the Agreement contained a further whole agreement clause:

> This Deed (together with any documents referred to herein) constitutes the whole agreement between the parties relating to its subject matter and no variations hereof shall be effective unless made in writing and signed by each Party.

28. By the date of the Agreement the management projections upon which the initial Share Purchase Price was based were more than six months old. The parties to the Agreement would have been aware of this. I am satisfied that if any of the parties wanted to see up-to-date figures, albeit unaudited, they could readily have obtained them.

29. Pursuant to clause 3.2(i) of the Agreement, Aircare paid Mr Sellyeh $1,485.64 for each of his 600 shares. Upon receipt of the audited accounts, Aircare recalculated the Share Purchase Price using the formula in clause 3.2(i). The recalculated share purchase price was $1,376.69.

30. Aircare claims that Mr Sellyeh was only entitled to be paid the recalculated Share Purchase Price. It submits that he has been overpaid for those shares by the sum of $65,369.91, ie the difference between the initial Share Purchase Price and the recalculated Share Purchase Price.

31. Mr Sellyeh contests the claim. He submits that the initial Share Purchase Price was a minimum price which can only be varied upwards by recalculation and not downwards.

The law

32. The Agreement falls to be construed in accordance with the principles applicable to the construction of contracts generally. They were authoritatively summarised by Lord Hoffmann, with whom the majority of the House of Lords agreed, in Investor's Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL, at 912 – 913:

> (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 commonsense.'

33. The matrix of fact in the present case includes the factual background set out above. It does not include the negotiations of the parties and their declarations of subjective intent as these are inadmissible for this purpose. Neither does it include anything said or done by the parties after the

Agreement was concluded – see Foskett, The Law and Practice of Compromise, Seventh Edition, 2010, at 5-17:

> It is a well-established principle that the words and deeds of parties after the conclusion of a contract cannot be used as an aid to construction of the contract. [Ft: Chitty, Vol. 1, at para. 12-124. See also Arrale [1976] 1 Lloyd's Rep. 98 at 103 – 104, per Stephenson L.J.]

34. I was also referred to Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, UKSC. This dealt with the situation where the language of the contract will support conflicting interpretations. Lord Clarke SCJ, giving the judgment of the UK Supreme Court, stated at para 21:

> 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 reasonably have been available to the parties in 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 and to reject the other.

35. As to the existence of any implied terms in the Agreement, the applicable test was stated by Lord Hoffmann, delivering the judgment of the Board, in AG of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, PC, at para 21:

> It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on—but these are not in the Board's opinion to be treated as different or additional tests.

> There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

Relief claimed but not pursued

36. The claims for rectification were not pursued. This was doubtless because both parties realised that on the particular facts of this case the Court was unlikely to conclude that whereas the Agreement meant one thing, both parties had a common intention that it should have meant something else and were agreed as to what that other meaning was.

37. However the claims for rectification meant that both parties adduced evidence as to their negotiations and their declarations of subjective intent. Had this evidence been admissible on the construction point, it would not have resolved that point, as some aspects of the evidence favoured one party and some aspects favoured the other.

38. The Plaintiff did not pursue the claim for restitution. That is not surprising. If Aircare succeeds on its claim for breach of contract then the claim in restitution is redundant. If Aircare fails on its claim for breach of contract then Mr Sellyeh has not been unjustly enriched but has merely obtained what he bargained for.

The rival constructions

39. The case turns on the correct construction of clause 3.2(i) of the Agreement. When considering the parties' rival constructions it will be helpful to set out the clause again but to break it into paragraphs:

> [1] 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);

> [2] 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
>
> [3] 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[.]

40. Mr Adamson, counsel for Aircare, submits that paras [1] and [2] set out how the Share Purchase Price was to be calculated. It was an "*initial*" price because it was only provisional. Once the audited financial statements became available it would have to be recalculated. Thus the Share Purchase Price for the First Tranche would be calculated in the same way as the Share Purchase Price for the other three Tranches: it would be based on the company's audited financial statements. None of the other Tranches had a minimum Share Purchase Price.

41. Mr Adamson submits that para [3] dealt with timing and not entitlement. It provided that if the company did end up owing additional monies when the Share Purchase Price was recalculated then such monies would not be payable until the Second Tranche Share Repurchase Date. Thus it was merely an administrative provision. The whole agreement clauses were not intended to make the Agreement unmanageable by requiring the parties to spell out not only their respective entitlements but also each and every one of the consequences of those entitlements.

42. He further submits that Aircare would have been unlikely to agree to commit itself to a share price based in part on management projections rather than audited accounts because management, who were also Shareholders, would have had every incentive to produce an optimistic forecast.

43. Mr Marshall, counsel for Mr Sellyeh, submits that, on the contrary, para [3] states the purpose for which the Share Purchase Price for the First Tranche is

to be recalculated. Thus para [3] modified the meaning which para [2] would have had if clause 3.2(i) consisted of only paras [1] and [2]. He relies on the whole agreement clauses. If the contract allowed for the possibility of Aircare recovering part of the initial Share Purchase Price, then it would have said so in express terms. Or as Mr Marshall pithily put it: "*if it is not spelled out, it doesn't happen*". The price was initial because it was the price for the shares in the First Tranche as opposed to the shares in the subsequent Tranches.

44. 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.

45. 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.

46. 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.

47. In the premises Aircare's claim is dismissed. As I have upheld Mr Sellyeh's construction of the Agreement, his counterclaim for rectification is redundant and is also dismissed.

48. If either party wishes to address me as to costs then they may have the matter relisted for this purpose provided that they apply to do so within seven days of the date of this judgment. Otherwise, costs will follow the event. This means that, as Mr Sellyeh was the successful party, Aircare will

pay his costs of the action. Costs will be on a standard basis, to be taxed if not agreed.

DATED this 20th day of May, 2014

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Hellman J