TRANSCRIPT OF PROCEEDINGS

Ref. E02YJ974

IN THE COMBINED COURT CENTRE AT KINGSTON-UPON-HULL

The Law Courts
Lowgate
Kingston-upon-Hull

Before DISTRICT JUDGE BESFORD

IN THE MATTER OF

RTA (BUSINESS CONSULTANTS) LTD

-v-

MEHDI KARIMIAN (1)

PARADISO Ltd t/a MEDICI (2)

Mr Rose appeared on behalf of the Claimant
Mr Reeves appeared on behalf of the Defendants

JUDGMENT
29th OCTOBER 2018, 14.18–14.56
(AS APPROVED)

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JUDGE BESFORD:

Introduction

This is a small claim between RTA (Business Consultants) Limited and Mr Mehdi Karimian, first defendant and a limited company, of which he is sole director and sole shareholder, Paradiso Limited, trading as Medici, second defendant. Medici is a restaurant business.

1. The claim has been brought for a maximum of £10,000, which limit as to value has been deliberate to bring the claim within the small claims procedure. In doing so, I echo the words of my colleague, Judge Chris Lethem, in *RTA (Business Consultants) v Ferman Aksu*, that the most perplexing legal problems appear in the small claims track, where there is often little guidance and little assistance.

2. At least in this case, I have had the benefit and the privilege of listening to argument from both party's advocates, who have clearly undertaken a great deal of work in analysing the various complex legal issues.

3. This has been a small claim, and as a small claim it has been conducted in a manner that I feel is most appropriate and proportionate. To that extent I have, effectively, dealt with this matter by way of submissions on the relevant law; by reference to the papers that have been filed, and which have largely been agreed; and the witness statements. I have a witness statement from a Mr Paul Francis O'Reilly, who is Executive Chairman of the claimant. Further, I have a witness statement from the first defendant, in his capacity as an individual, and also in his capacity as director of the second defendant.

4. Although the first defendant attended to give oral evidence, and I did not prohibit cross-examination, this issue has been dealt with on the witness statements only. Mr Karimian has not been called to give oral evidence.

5. The history of this situation is that the first defendant is the owner of all the shares of the second defendant, which is a restaurant company. The first defendant is also either the sole or the controlling director.

6. In July 2017, he was contacted by the claimant with a view to them seeking to sell the business, presumably as a going concern. A meeting took place around about the 12th

July 2017, between the first defendant on his own behalf, and on behalf of the second defendant, and a Mr Neil Smith on behalf of RTA (Business Consultants) (RTA).

7. The first defendant makes great play that the meeting was on his premises, at a time that was not convenient to him, and at a time when he was seeking to pursue his business. At the time he felt under pressure and could not give it the time he normally would and presumably did not have time to ask questions.

8. Mr Karimian says that he signed the contract dated the 12th of July 2017, which contract forms the subject of this claim. The court file contains a copy of the signed contract, signed by Mr Karimian and a duly appointed representative for RTA. The contract was signed by Mr Karimian on behalf of himself and the company for the sale of the business.

9. The contract consists of some 19 clauses, and whilst there has been some brief discussion as to whether there was a second page, nothing hinges on this point. All parties accept the contract consisting of 19 clauses makes no reference to any other documents or clauses that are not within the 19 clauses. I am treating the document before me, consisting of the 19 clauses as the entire contract.

10. As per most of these contracts, it is largely pre-printed. The clauses and contract has been prepared by RTA. It naturally favours them, as one would expect. The opportunity and ability for the defendants to re-negotiate is very limited. However, I am satisfied, as demonstrated by the evidence I have heard, and also by looking at the contract, that there was some scope and, in fact, the defendants took up that scope to negotiate some slight variations and amendments.

11. The purchase price of £649,950 and the lower figure of £550,000 were inserted and therefore, are bespoke to this particular contract. Whilst the first defendant complains that the figure was an unrealistically high valuation, this is the figure agreed upon. I suspect that the reality is that, at the time, the first defendant looked to RTA's professional experience to value the business, which was substantially more than he believed. The value however within the context of this action is irrelevant.

12. The commission was also bespoke. This is not a case where RTA came with a price/figure they demanded be paid. They inserted a price one assumes by agreement following the opportunity to negotiate. The fact that the first defendant did not, is neither here nor there. It is a figure that was inserted and was clearly there to be seen.

13. Secondly, in this particular case there were some negotiations on the terms. The requirement to pay an upfront fee was waived. Again, that clearly demonstrates that, notwithstanding the proforma nature of the contract, there was some element of control/negotiation afforded to the defendants. This was not a situation where RTA have prior to the meeting inserted a set of figures to the obvious detriment of the defendants. So, although this is a pre-printed form, there was some aspect of negotiation.

14. The contract was signed on the 12th July 2017. Under the terms of the contract, RTA were to market the business for somewhere between the two agreed figures**.** It would appear that the contract was for an initial minimum 12-month duration. Of relevance to this claim is clause 8. Clause 8 confirms that the parties agree that no representations have been made to the defendants by the claimant's representative and, there were no collateral agreements or terms between me/us, other than the agreements and terms recorded herein. In other words, it was an entire contract clause.

15. Paragraph 12 is also relevant. In terms clause 12 states that if the contract is terminated within 12 months, then a fee of some 50 per cent of the agreed commission of £60,000 plus VAT is payable on demand. The figure of £60,000 is from clause 3, which clause sets out the agreed commission.

16. Having signed on the 12th July, the defendant sought to cancel the agreement promptly within some seven days, by letter dated 19th or 20th of July. In consequence of clause 12, RTA submits that they are entitled to £30,000, plus VAT, but have only sought to recover £10,000 in total.

17. The defendants have defended this claim for several reasons; they allege that there was serious misrepresentation on the part of the RTA agent, Mr Smith. In particular, Mr Smith stated that the contract could be cancelled without charge/penalty within 14 days of signing. It was on this basis, having regard to this representation, that Mr Karimian signed. Mr Karimian says he signed it relying upon that representation, namely that he had 14 days to reject the contract if on reflection it was not required.

18. Secondly, it is alleged that this was a contract that was signed off premises, and is therefore governed by the Consumer Rights Act. The contract can without reason be set aside, providing it is set aside within 14 days, or 14 days of receiving the appropriate information.

19. The defendants cancelled within the 14 days, so the issue of when the appropriate information was provided does not apply.

20. Alternatively, the damages figure of £30,000 is a penalty clause, and as such it should be struck out and, effectively, the claim should fail on that basis.

21. Alternatively, this is a contract that is governed by Money Laundering Regulations and the claimants have failed to comply with the appropriate regulations, in particular the Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017. As such, the contract is null and void as it has never come into existence and therefore, there cannot be a claim on behalf of RTA.

22. Alternatively, if it's not a penalty clause it's an unreasonable clause. Either the payment of £30,000 is unreasonable or, alternatively, paragraph 8 is an unreasonable clause under the Unfair Contract Terms Act, in that the contract seeks to limit and exclude liability for any representations made prior to signing.

23. And lastly, but not least, the skeleton argument raises an issue that no demand has been made of the second defendant, in that the second defendant has not received an invoice for £10,000 or £30,000, which complies with the appropriate HMRC Regulations. If an invoice has not been raised, no cause of action has arisen yet.

24. There are a number of issues.

25. To go back to where I began; I've already determined the situation in relation to the first defendant. I am satisfied that the first defendant is a consumer within the Consumer Rights Act 2015. He is not wholly or mainly engaged in the sale of shares or businesses. As such he has, by statute the right to cancel a contract signed off premises within 14 days. He did so. Therefore, the claim against the first defendant is dismissed.

26. The second defendant is not an entity that comes within the Consumer Rights Act as it is a limited company. The position of the second defendant is a little more complicated.

27. Firstly, misrepresentation; the only evidence I have is that of the second defendant which has not been challenged in the statement of Mr O'Reilly. I am told that, unfortunately, Mr Smith has now left RTA. On the evidence of the first defendant I am satisfied that a representation was made by Mr Smith that if the defendant signed he could cancel, without penalty, within 14 days.

28. I have reached this decision as firstly, that is the unchallenged evidence of the first defendant who signed on his own behalf and on behalf of the second defendant.

29. Secondly, the defendant's evidence has the ring of truth. This gentleman is a chef, not a lawyer. He cancelled the contract well within the 14 days. How would a chef know that he could so cancel, if he had not, in fact, been told? A party's right to cancel an off premises contract within 14 days is not something that is generally known around Hull. So, the evidence of the first defendant and his actions, lead me to accept this is a representation that was given to him.

30. Can the second defendant cancel this contract, even though the second defendant has signed the contract, which includes that 'whole clause' phrase?

31. Firstly, is the second defendant bound by the clauses in the contract? I appreciate Mr Karimian was busy, possibly pestered however, I'm afraid in English law, a person is bound by what they sign. I am satisfied that there was nothing underhand in obtaining Mr Karimian's signature. I am further satisfied the terms were not hidden in some way, or that he was prevented from reading the terms, other than by pressure of work. However, anyone signing a contract is likely to be under pressure. The contract is only one page. He signed directly underneath the clauses. It is inconceivable that he did not see there were some clauses above where he signed. He had the opportunity to read them and there is no suggestion in his evidence, that he was prevented. He chose not to do so. To that extent, the clauses are relevant as the defendant had notice of them.

32. Which then gets to the next interesting point. Are these clauses something that the claimants can rely on?

33. I am satisfied there's been a misrepresentation. The misrepresentation is in my judgment fundamental. It has been made by RTA's employee. In my view, it is inconceivable that the employee did not know what the terms of the contract he was selling were. As previously found, Mr Smith clearly made a representation that Mr Karimian had the opportunity to cancel within 14 days, and that statement was an inducement to sign. To that extent the inference I must reach is that Mr Smith has made that representation, knowing it to be false and knowing that the first and second defendant had relied upon that misrepresentation in signing. It is, in my view, a misrepresentation akin to fraudulent, in as much as, it must have been made as the last throw of a dice by Mr Smith, to obtain the defendants signature.

34. There is significant case law on entire contracts clauses, and whether they can be set aside. I think one of the leading cases is *AXA Sun Life Services*, which was also considered in the recent case of *NF Football Investments Limited, Nottingham Forest Football Club v NFFC Group Holdings Limited* v *Al–Haswai* [2008] EWHC 1346 Chancery. It was a first instance decision by Master Bowles, Chancery Master sitting in the High Court. The application was to strike out a claim on the basis that there was no, or no real prospects of it succeeding. In *NF Football*, Master Bowles considered the contract and looked at the clause excluding misrepresentation. I'm mindful and, in fact, the article I've been looking at, warns to treat the case with caution as, firstly it was not a decision reached at a full trial, and secondly, the Master, did not consider section 8 of the Unfair Contract Terms Act, and its effect on section 3 of the Misrepresentation Act 1967. The case therefore comes with considerable warnings.

35. Section 3, of the Misrepresentation Act, as now amended, says, *"If a contract contains a term which would exclude or restrict – (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason by reason of such misrepresentation, that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977, and it is for those claiming that the term satisfies that requirement to show that it does."* I have to say, it is difficult to see why it is in this particular case, reasonable to exclude representations from employees of RTA, as opposed to people who the company cannot control.

36. I also have regard to the fact that the representation was explicit and was clearly made with the sole intention of obtaining a signature. It is difficult to see why it should be reasonable to allow it to stand when the whole purpose, as I've said, of the misrepresentation was to bring Mr Karimian and his company within the terms of the contract and clause. To that extent I don't see that in the context of the misrepresentation made by Mr Smith, that this clause is a fair and reasonable term to force upon the second defendant. I fully accept the second defendant's submission that clause 8 is an unfair contract term.

37. It the 'representation' clause is excluded, then it follows that the defendants are entitled to rely upon Mr Smith's representation that the contract can be cancelled within 14 days without penalty. As the contract was cancelled in accordance with the variation, the claimant is not entitled to any damages.

38. The second point I have to consider is the penalty clause. Is the liquidated figure of £30,000, a penalty clause? Is it out of all proportion to what is necessary and appropriate to protect RTA? This, as I've said, was a contract that was entered into between the parties, where the parties agreed a figure in respect of commission. This was not a pre-printed or pre-conceived figure. It was a figure open to negotiation. Whilst it is quite a sizeable sum, as with any estate agents, it is a sum by reference to a percentage of the anticipated sale price.

39. The defendant argues that, given that they cancelled the contract promptly the claimants can't have done anywhere near the amount of work that would justify £30,000 being a realistic pre-assessment of their losses.

40. In my judgment it's not that sort of contract. It's a contract for services, and sometimes a house or business will sell within minutes on one brief telephone call, other times it may take a long time at vast expense, time, trouble on the part of the estate agents. Therefore, I don't think that one can look at the figure by reference to the work that has been undertaken.

41. I appreciate that the claimants have only sought £10,000; that is a matter for them. But when assessing what is the figure to be considered, I have taken it to be the £30,000. This was a figure that was negotiated between the claimants and the defendant.

42. The correct way to look at this figure is, if this contract had been allowed to conclude, then the claimants would have recovered £60,000, which was a figure that the parties had agreed. The claimant has on premature termination of the contract lost the opportunity to earn that commission. I don't think that £30,000 is an unrealistic sum by way of liquidated damages..

43. Further, I fully accept the position set out in judgment of District Judge Lethem's case that I have been referred to, *RTA v Aksu*, starting at paragraph 18 and concluding at paragraph 22.

44. The second point is this money laundering issue. There has been considerable tightening up within financial institutions, to ensure that with any financial transaction there is a trail as to how money has been generated or assets acquired. The law places an obligation on certain persons, or entities, who deal in such transactions, to satisfy themselves as to who they are conducting business with. It is accepted that for this particular transaction the claimants, come within the relevant regulations.

45. The regulations are enforceable through the Ombudsman and there are penalties if transactions caught by these regulations are not followed. The argument is, whether or not a failure to follow the regulations on the part of the claimant, renders the contract void, voidable or in fact, negates the whole contract in that the contract cannot come into existence until the checks and verification of the defendant has been completed.

46. Judge Lethem, in his case, has very succinctly highlighted the competing clauses between the requirement to undertake these checks, and effect if the checks have not been completed. I'm satisfied that the judgment and the reasoning of Judge Lethem, is the correct view of the law' and I accept the conclusion that he has made. Effectively, a contract does not come into existence until the due diligence checks have been completed.

47. Judge Lethem raised the suggestion of an alternative decision, in the case of *RTA (Business Consultants) v Taylor*, which was a decision of a Deputy District Judge, which went on appeal before Her Honour Judge Bloom. Judge Lethem did not have the reasoning of Her Honour in that appeal when giving his judgment. Whilst both parties accept it is not binding upon me, Mr Rose has produced a copy of the skeleton argument submitted by RTA in that case together with a copy of the original decision of the District Judge, giving permission to appeal the question of necessity under regulation 93(a) of the Money Laundering Regulations. I have further been provided with a copy of the grounds of appeal and importantly, a copy of her Honour Judge Bloom's decision. Unfortunately, I don't have a transcript of Her Honour Judge Bloom's judgment in support of her decision.

48. What appears to me from the limited papers is that RTA succeeded on the appeal and the decision of the Deputy was set aside. Looking at the grounds of appeal; the appeal is, that the Judge was wrong to find, whether as a matter of fact or law, that the claimant was in breach of the money regulations. Alternatively, if the claimant was in breach, that the breach rendered the contract unenforceable. In respect of that second, or alternative ground, they argue, that the District Judge was correct to find the contract was not tainted with illegality, but there were no other grounds upon which she could find that the contract was unenforceable.

49. Unfortunately, I do not know whether the appeal Judge set aside the Deputies order because the decision was wrong, ie to find that the regulations applied, or whether the breach rendered the contract unenforceable. The papers I have been shown do not disclose the basis of the decision. What I do note however, is that Her Honour Judge Bloom, remitted the matter back for a re-hearing, limited to the issues raised in paragraph 9 of the defence, which I've not seen. I am told that the re-hearing related to the revision of information pursuant to section 18 of the Estate Agency Act 1979 and, the regulations made thereunder. But

regulation 18 would appear to provide, under regulation 18(4), a requirement to incorporate within the Estate Agency Act, any other regulations set out by the Secretary of State. That would include the money laundering regulations. So, it may be, in allowing the appeal, Her Honour Judge Bloom, has still opened up for further argument and assessment, the money laundering issue.

50. With the lack of clear information, I don't derive a lot of comfort from the judgment of Her Honour Judge Bloom. In consequence I return to what I think is the very well reasoned arguments of Judge Lethem. I think that the situation in practice is that there must be some penalty to compel parties to comply with the regulations. It makes sense to me, to interpret the regulations so that no contract comes into existence until the various checks have been undertaken and the regulations complied with. It follows that on the money laundering issue that I would have dismissed the claimant's case.

51. Lastly, on the invoice I again have no information at all. Normally I would have expected the claimant to have produced a copy of the invoice which forms the basis of their claim. I don't have one for the second defendant. It would have been interesting to see whether the invoice initially was for £30,000 or the £10,000 now claimed. If one's going to apply the strict rules of evidence, the claimant would have to satisfy me as to what the claim is, and the usual way is to exhibit a copy of the invoice. Whilst the claimant has exhibited a copy request for payment addressed to the first defendant, it expressly records that it is not a tax invoice. However, the first defendant of course, would not be able to recover the VAT because it is assumed he is not VAT registered.

52. The lack of an invoice addressed to the second defendant is a minor point, which may have been corrected on application and possibly adjournment. However, I flag up this issue as being one more issue which goes against the claimant.

JUDGE BESFORD: Anything else I've not addressed? No.

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

This transcript has been approved by the Judge