TRANSCRIPT OF PROCEEDINGS

Ref. E36YJ022

IN THE COUNTY COURT AT EDMONTON

Court House
59 Fore Street
Edmonton

Before DISTRICT JUDGE LETHEM

IN THE MATTER OF

RTA (BUSINESS CONSULTANTS) LTD (Claimant)

- v -

FERMAN AKSU (Defendant)

MR GIBSON appeared on behalf of the Claimant

MR REEVES appeared on behalf of the Defendant

JUDGMENT
17th AUGUST 2018, 12.15-12.38
(APPROVED)

JUDGE LETHEM:

1. If ever there was a case that demonstrates the truth, that the most perplexing legal problems may appear in the small claims track, as well as in more sizeable cases, it is this one. I have to decide a point upon which no authoritative guidance has been given in relation to Money Laundering Regulations. I also have to consider issues arising in relation to penalty clauses.

2. The decision arises against a background whereby the defendant was the owner and operator of a fish and chip business situated in Herne Bay in Kent. For various reasons, there came a time when she was minded to sell the property and, as I understand it, unsolicited, the claimants met and discussed with her the option of using them to sell the property. It is accepted that they sought from the defendant a registration fee. The defendant indicated that she was unable or unwilling to pay that registration fee. The fee was waived and, ultimately, the defendant entered into a contract dated the 5th of September 2017.

3. Now, the contract contains two provisions which are relevant to my consideration. At clause 11, the contract provided for the purposes of this judgment:

> "I accept that I will be deemed to have prevented you from selling my business or property if I:
>
> (a) fail to pay any agreed registration money by the agreed payment date;
>
> (b) fail to allow interested parties during the currency - to view, during the currency of this agreement;
>
> (c) should make any representations to any interested party that should deter them from progressing negotiations further and
>
> (d) should refuse or fail to make available to you any information that you deem necessary to assist you with the sale, including but not limited to copies of my/our trading accounts, a copy of the lease and/or copy of the energy performance certificate and identify documents for Money Laundering Regulations;
>
> (e) refuse to sell my business and/or property at a price that I have instructed you to set on my behalf. If I provide a cheque for the

registration fee, upon which I have subsequently countermanded payment of, for which my bank has failed to honour payment.
(g) if I have failed to provide you with the required identity papers that satisfy the Money Laundering Regulations 2007 within 28 days from the date of this agreement.

4. Clause 12 provides that non-withstanding the foregoing provisions:

> I agree that I shall have the option to cancel this agreement within the initial 12-month irrevocable agency period referred to in clause 2. If I exercise this option, or if I prevent you from selling the property and/or business, as defined in clause 11 above, during the period, I will compensate you for your loss of opportunity to earn a commission. As it's impossible to ascertain at this stage what such loss would be, I agree to pay to you, in compensation for your loss or opportunity to earn your commission, a sum which will be equal to one half of the commission as detailed in clause 3 as being agreed liquidated damages."

And the amount referred to in clause 3 was the sum of £20,000.

5. Subsequently, the claimant wrote to the defendants seeking information in compliance with the Money Laundering Regulations and I will come back to those, shortly. Suffice it to say that it is accepted that the letters were sent and probably received at the premises of the fish bar. However the defendant never saw those because she had had an unfortunate falling out with her father and was no longer resident at the premises. In the event she did not provide the information requested. As a consequence of the failure to provide the information required by the Money Laundering Regulations, the claimants invoked clause 11 of the agreement, raised an invoice for £10,000 and now sue upon that invoice.

6. Mr Reeves, who has represented the defendant argues two points before me, today. The first is in the alternative, either that there was no contract between the claimant and defendant because the Money Laundering Regulations prevents such a contract from

being in existence. Alternatively, if such a contract did exist, then it was an illegal contract and could not be performed.

7. The second, entirely discrete argument before me is that the sum of £10,000 set out in clause 12 of the agreement, is a penalty clause within the terms set out in the decision in *Cavendish Square Holding BV v Talal L Makdessi*. And I turn then to consider those two positions addressing, first, the Money Laundering Regulations. In this respect, it is right that I identify that the regulations I'm referring to are the Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 because as Mr Reeves pointed out, the contract, in fact, relates to, erroneously to the earlier regulations.

8. Now, regulation 28 sets out the obligations of due diligence placed upon parties to which the regulations apply and it's accepted, for these purposes, that the claimants were such a person. Regulation 30 is entitled, "Timing of verification," and reads as follows:

> **30.**—(1) This regulation applies when a relevant person is required to take any measures under regulation 27, 28 or 29.
>
> (2) Subject to paragraph (3) or (4), a relevant person must comply with the requirement to verify the identity of the customer, any person purporting to act on behalf of the customer and any beneficial owner of the customer before the establishment of a business relationship or the carrying out of the transaction.
>
> (3) Provided that the verification is completed as soon as practicable after contact is first established, the verification of the customer, any person purporting to act on behalf of the customer and the customer's beneficial owner, may be completed during the establishment of a business relationship if—
>
> (a) this is necessary not to interrupt the normal conduct of business; and

(b) there is little risk of money laundering and terrorist financing.

Regulation 31 provides:

> **31.**—(1) Where, in relation to any customer, a relevant person is unable to apply customer due diligence measures as required by regulation 28, that person—
>
> (a) must not carry out any transaction through a bank account with the customer or on behalf of the customer;
>
> (b) must not establish a business relationship or carry out a transaction with the customer otherwise than through a bank account;
>
> (c) must terminate any existing business relationship with the customer;

9. It is argued by Mr Reeves, on behalf of the defendant, that those requirements are binding upon the claimants and that the effect of the provisions are that the claimant cannot enter into a business relationship until such time as the requirements have been complied with. As such, it seems to me, that he's arguing that due diligence in accordance with regulation 28, is a precondition to the establishment of a contract.

10. The alternative view and a view which I am told was taken in a decision of the High Court in *RTA Business Consultants Limited v Bracewell* reported at [2015] EWHC 630 is that the contract was rendered unlawful. It existed but was rendered unlawful and unenforceable by virtue of the regulations. It has to be said that the *Bracewell* decision relates not directly to the matter that I have to decide, because at the time of the *Bracewell* decision, *RTA* had not registered for the purposes of the relevant regulations. Mr Gibson has argued on behalf of the claimants that this interpretation is incorrect. That the contract remains enforceable, notwithstanding that the Money Laundering Regulations had not been complied with.

11. Now, it seems to me, that the approach of the Money Laundering Regulations is to prevent there being a business relationship between parties until such time as the relevant information has been provided. And it seems to me that regulation 30(2) makes that very clear, where it says, " a relevant person must comply with the

requirement to verify the identity of the customer, any person purporting to act on behalf of the customer and any beneficial owner of the customer before the establishment of a business relationship or the carrying out of the transaction." And there is only one minor derogation from that, contained in regulation 3, namely if it is necessary not to interrupt the conduct of the business and if it is necessary that "there is little risk of money laundering". I attach some significance to use of the word 'necessary', this does not mean 'desirable' or 'convenient'. These regulations are drawn in restrictive terms, no doubt to provide a tight and inflexible framework so as to ensure that there is a proper application of due diligence.

12. Now, I have to say, that it has not been argued before me that regulation 30(3) is engaged. I have a witness statement from the claimant, from a Mr O'Reilly of the claimant, which has not sought to address those points at all. I therefore take the view that there is no evidence, whatsoever, that the exception provided for in regulation 30(3) is relied upon.

13. Further support for my interpretation of the regulation is provided in regulation 31 which is entitled, "Requirement to cease transactions," and requires the relevant person to terminate any business relationship if they cannot apply due diligence measures. This suggests that one simply cannot have an effective contract if one does not or cannot apply the due diligence measures. It would be strange if one could say that certain aspects of a contract survived while others did not. There is nothing in the regulations to suggest that there could be any division of the contact. It is all or nothing. No due diligence, no business relationship. Mr Gibson has not been able to satisfactorily explain what the status of the contract is if there is no due diligence. If, as the claimant suggests, the contract remains enforceable one wonders what that effective sanction is if there is no 'due diligence'.

14. Now, it was suggested to me by Mr Gibson that the provision of 31(1)(c) – "must terminate any existing business relationship with the customer;" - must operate to negate the argument that the regulations are a precondition to the existence of a business relationship. How, he asks, can one terminate a business relationship if none exists? In short the very assumption behind regulation 31(c) is the ability to form a business relationship before due diligence is applied. This, I understand, was argued before the

Luton County Court in a case, *RTA Business Consultants v Taylor*. I've seen the judgment of the district judge. I am told that it went on appeal to Her Honour Judge Bloom but I have seen no transcript or report of that decision. Thus I am free to conduct my own analysis.

15. It seems to me that Mr Gibson's approach cannot be sustained. The argument that he proposed was that there must be a business relationship for it to be terminated and, therefore, the operation of the regulation was not to prevent a business relationship but to prevent the continuation of the business relationship. As I suggested to Mr Gibson, during the course of submissions, it seems to me that that interpretation would create an impossible tension between 31(b) – "must not establish a business relationship" - and 31(c) - "must terminate any existing business relationship with the customer;". 31(b) prevents the very establishment of a business relationship, how then could 31(c) operate if no business relationship was established? 31(b), it seems to me, is designed for a situation where the obligation to apply due diligence under regulation 28 becomes engaged, at a time when there is no existing business relationship between the parties.

16. On the other hand, 31(c) applies to a different situation namely where the obligation of due diligence arises in relation to an ongoing business relationship. By way of example, consider a situation where the parties have been trading for many, many years, then the ownership of one the parties changes hands and regulation 28 becomes engaged. Then 31(c) is talking about a continuing relationship which must be brought to an end in accordance with 31(c). This, to my mind, emphasises and underlines the approach of the legislation which is to prevent there being any business relationship after regulation 28 is engaged, until such time as due diligence has been carried out.

17. In those circumstances, I prefer the interpretation that, in truth, the application of due diligence is a pre-condition to there being an effective contract between the parties and, in those circumstances, because due diligence did not take place in this case, there is no contract between the parties. If I am wrong in that interpretation, then I would adopt the approach in the *Bracewell* decision and say that one cannot contract to conduct an illegal contract and that therefore the contract would be unenforceable and void because of its

illegality. A matter proposed by Mr. Reeves but not argued at length before me. If this is the case then the claimant cannot rely on the penalty clause and the claim must fail.

18. That, effectively, disposes of the case but it's right that I should go on and consider the alternative point which was that relating to the penalty issue. Now, the way in which Mr Reeves has approached the matter is to say that the payment of the £10,000 must be out of all proportion to the obligations contained in the agreement. There is no dispute that the obligation is a secondary provision and hence the relevant passages of Cavendish are engaged.

19. Mr Reeves asked me to take into account the circumstances in which the contracts were negotiated. He points out that the claimant company are, according to the credit reference report, a significant company whereas the defendant was a small business person. He points out that the contract was largely upon the written terms of the defendant, no doubt culled from legal advice and from experience. He also argues that there is no evidence as to how or as to why the claimants set the clause at £10,000. He suggests that this is a broad-brush approach. Whilst he accepts that the burden of proof is upon him, he says that there should be some evidence from the defendants to explain the £10,000 figure. He points out that the various circumstances which the claimants seem to think it is legitimate to protect and which are set out in clause 11, cover a broad spectrum, from failure to pay a registration fee which would prevent any performance of the contract, to changing one's mind about a sale price which could occur at the last minute and after the claimant had carried out a considerable amount of work. He further makes the point that the defendant did not have proper advice. He makes the point that this is a standard clause and, therefore, argues that the clause is out of all proportion.

20. Mr Gibson, on behalf of the claimants, has pointed out that the defendant had the poser to refuse the contact, as indeed she did in relation to the registration fee. He says that the notion of approaching this issue as a pre-estimate of loss, is gainsaid by paragraph 31 of the *Cavendish* decision. That in those circumstances, one has to look at the overall situation and whether the impugned provision is (in partly), a detriment, out of all proportion to any legitimate interest. He points out that that legitimate interest

includes the fact that much work may have been done at the time that the default occurs. In short the clause applies to a multiplicity of situations including that where the claimant will have done all the work and yet only received half of the consideration. Mr Gibson thus argues that there should be no sliding scale but that one is entitled to approach the matter on a broad-brush basis.

21. Had I had to decide the case, on this point, I would have decided that the claimants are entitled to place in their contract, a clause which covers a breadth of default and that, to a certain extent, the *Beavis* aspects of the *Cavendish* decision would support that interpretation. Whilst I accept that the £10,000 may be out of all proportion to somebody who failed to pay the registration fee, it seems to me that it is not out of all proportion to somebody who changes their mind at the last minute.

22. In this respect, I remind myself of paragraph 32 of the *Cavendish* decision which is drawn, it seems to me, in broad terms, and that the clause has to be out of all proportion to any legitimate interest of the innocent party, in enforcing the primary obligation. And it seems to me that the claimant would have a legitimate interest in enforcing the obligation, particularly if they had done a considerable amount of work. I would, therefore, have found for the claimant on the penalty issue.

23. As it is, I have decided the matter on the money laundering issue and, in the circumstances, the claim is dismissed.

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

Approved.

Chris Lethem

District Judge C. Lethem | Edmonton County Court, The Court House, 59 Fore Street, Edmonton, London. N18 2TN | Phone 020 8884 6500

14.10.2018