St John's CHAMBERS

Commercial team newsletter

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Nick Pointon examines further developments in the concept of relational contracts in light of the recent High Court decision in Bates v Post Office Ltd (No. 3) [2019] EWHC 606 (QB).

Emma Price addresses the burden of proof of inducement in misrepresentation claims and the principles applicable to recovering transferred losses following the Court of Appeal decision in BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc [2019] EWCA Civ 596.

Charlie Newington-Bridges analyses the principles applicable to challenges to arbitration awards under section 68 of the Arbitration Act 1996 as considered by the High Court in his recent case, Gracie v Rose [2019] EWHC 1176 (Ch).

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COMMERCIAL, BANKING, INSOLVENCY AND CHANCERY LAW

Contributors to this edition

Nick Pointon (Call 2010) is a specialist commercial and chancery practitioner, ranked as a leading junior by Chambers UK in both fields. Read more here.

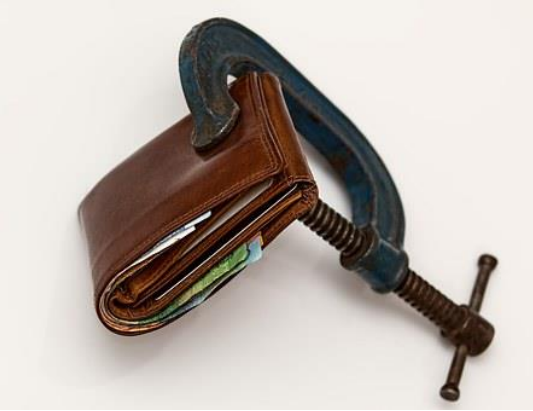
"Nick is exceptionally able for his age, very user-friendly and a bright rising star. He's simply exceptional on paper and dominating in the courtroom. I would happily instruct him on a complex matter ahead of barristers twice his call." **CHAMBERS UK, 2019**

Charlie Newington-Bridges (Call 2011) undertakes a wide range of commercial and chancery work in litigation, arbitration and mediation. He has experience of substantial, complex and high-value litigation in the High Court and the Court of Appeal. Read more here.

"Charlie provides an exemplary service, and is extremely thorough and commercially minded. He is well liked by clients, diligent in his preparation and excellent in court. 'He easily gets his head around complicated matters, providing sound and practical advice.'" **CHAMBERS UK, 2019**

Emma Price (Call 2014) has a varied commercial and chancery practice and undertakes advisory and court-based work across the areas of commercial, real estate and wills & trusts. She is regularly instructed to appeal in the County Courts for trials and also procedural matters, including CCMCs, preliminary hearings and interim applications (such as pre-action disclosure, strike out and set aside). Read more here.

Annie Sampson (Call 2015) has a broad commercial and chancery practice. Her commercial experience includes advising and acting in respect of a wide variety of contractual disputes, in particular those with a professional negligence element or where the contract is an oral agreement or is poorly drafted. Read more here.



Letting it go: Want of consideration and economic duress

Simantob v Shavleyan [2019] EWCA Civ 1105 & Times Travel (UK) Ltd v Pakistan International Airlines Corporation [2019] EWCA Civ 828

Annie Sampson

In two recent judgments, the Court of Appeal has considered the enforceability of agreements not to pursue existing claims. In the first, Simantob v Shavleyan [2019] EWCA Civ 1105, in order to allow him to pursue the sum outstanding under a settlement as originally drafted, the claimant sought to rely upon an alleged want of consideration for the subsequent variation of that settlement. While in Times Travel (UK) Ltd v Pakistan International Airlines Corporation [2019] EWCA Civ 828, the claimant asserted that it was entitled to avoid a contract under which it had agreed not to pursue past claims due to economic duress.

Want of Consideration

Background

In Simantob v Shavleyan, the parties were both dealers of Islamic antiquities. During the course of their business dealings, the defendant came to owe money to the claimant. Subsequently, on 1 May 2010, the parties entered into a settlement agreement, pursuant to which it was agreed that the defendant would pay the claimant $1,500,000 on 21 May 2010 in full and final settlement. The agreement also stipulated that if the defendant did not make payment on that date, he would pay $1,000 per day for each day by which the payment was late.

While the defendant did not make payment on the agreed date, he did later make serval part payments. The result of this was that by April/May 2014, $400,000 of the principal sum remained owing, along with several hundreds of thousands of dollars in interest. However, the defendant had since 2011 disputed the enforceability of the term imposing interest at $1,000 per day. In April/May 2014, the parties agreed to vary the settlement agreement, such that the claimant would accept $800,000 in settlement of the defendant's liabilities under the settlement. At the same time, the defendant had given the claimant eight post-dated cheques totalling $800,000.

The claimant had concerns about the ability of the defendant to honour the cheques and over the next 18 months, those cheques were replaced with others. Although the defendant made one payment to the claimant in the sum of $200,000 in March 2016, he asked the claimant not to cash any of the other post-dated cheques. Having lost patience, the claimant issued a claim against the defendant on 29 April 2016, but in that claim, he sought payment of all sums which would have fallen due under the settlement agreement as originally drafted, all but $200,000 of which represented interest. In response, the defendant rejected the claim for interest at $1,000 per day as a penalty. When granting summary judgment for the claimant in respect of the sums outstanding under the varied agreement, the Master dismissed the defendant's argument that the interest amounted to a penalty. The outstanding issues, including whether any variation was supported by good consideration, proceeded to trial.

> *"It is one thing for a person to threaten a claim or defence in which that person has no confidence at all. It is quite a different thing for a person to intimate a claim or defence which, whilst the person recognises that it raises a doubtful or undecided point, he or she also believes in and intends to pursue it in court if necessary."*
>
> Simantob v Shavleyan [2019] EWCA Civ 1105 *per* Simon LJ at [49]

First Instance Decision

The Judge held that '*forbearance to run the defences that were subsequently unsuccessfully run in the summary judgment proceedings*' amounted to valid consideration.

Court of Appeal Decision

The claimant appealed on the basis that, on grounds of public policy, '*the alleged consideration was of no value in law because it was found by the Master to have no real prospect of success and therefore had no objective value at the date of the April/May variation*'.

The claimant's argument was, however, rejected by the Court of Appeal. This was a defence which, while doubtful, the defendant had intimated for some years and intended to pursue in court, as he eventually did. That the defence was subsequently held to have no real prospect of success did not prevent the defendant's forbearance amounting to valid consideration, particularly when taking into account that the validity of the consideration must be assessed at the date of the variation and not with the benefit of hindsight. When rejecting the appeal, the Court of Appeal further noted '*the public policy in favour of holding people to their bargains*' and that '[i]*t is in the public interest to encourage reasonable settlements*'.

In brief...

Agreeing not to pursue even a defence which is subsequently held to have no real prospect of success can be valid consideration for the variation of an agreement, provided that the defence is not one in which the party asserting it has no confidence in at all.

Economic Duress

Background

In Times Travel (UK) Ltd v Pakistan International Airlines Corporation, the claimant was a family-owned travel agency based in Birmingham dealing almost exclusively in the sale of flight tickets to members of the Pakistani community in and around Birmingham for travel to Pakistan. The defendant was the only airline operating direct flights between the UK and Pakistan.

In 2008, the claimant was appointed an agent for the defendant and was thereby permitted to sell tickets for its flights. In fact, it was held that had the claimant been unable to sell tickets for the defendant's flights, the claimant would have gone out of business.

Under the 2008 agreement, the claimant was entitled to certain commissions. However, there were disputes in respect of payment of the same from an early stage. The claimant regularly sought payment of outstanding commission from the defendant, but when other agents threatened proceedings in respect of unpaid commission, the defendant advised the claimant not to pursue that course of action and that an amicable solution could be reached. The claimant took that advice.

In 2012, the defendant terminated its agreement with the claimant, but offered less favourable terms for re-appointment as an agent. The defendant then reduced the claimant's allocation of tickets by 80%. This had a major impact on the claimant's business and would have put it out of business had it continued much longer. Only a week after its ticket allocation had been reduced the claimant signed the new, less favourable, terms and its ticket allocation was restored to its usual level. Crucially, under the terms of the new agreement, the claimant released the defendant from all claims arising under the prior arrangements.

The claimant subsequently claimed for commission due under the previous agreement. The defendant defended the claims principally on the basis that all the claims had been compromised and released under the terms of the new agreement. In turn, the claimant challenged the validity of the new agreement on the ground of economic duress.

First Instance Decision

The Judge at first instance began by noting the requirements for economic duress:

- there must be illegitimate pressure applied to the claimant;
- the pressure must be a significant cause inducing the claimant to enter into the contract; and
- the practical effect of the pressure is that there is compulsion on, or lack of practical choice for, the claimant.

The Judge concluded that '*although acting lawfully, the defendant, PIAC, has placed illegitimate pressure on TT*'.

Court of Appeal Decision

The defendant appealed on the basis that the pressure applied was not illegitimate: it was not a breach of contract, a tort, other actionable wrong, or an offence.

The Court of Appeal therefore summarised the principles relevant to determining what lawful activity can nonetheless constitute illegitimate pressure:

- firstly, the nature of the pressure must be considered; and
- if the threat is one of lawful action, the nature of the demand which the pressure is applied to support must then also be considered.

> "*the central legal issue is that the doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief*"
>
> Times Travel (UK) Ltd Pakistan International Airlines Corporation [2019] EWCA Civ 828 *per* Richards LJ at [105]

When assessing the nature of the demand, in accordance with CTN Cash and Carry v Gallagher [1994] 4 All ER 714, the court is concerned primarily with whether the defendant acted in good faith, i.e. did the defendant genuinely believe the demand to be well-founded? Further, for these purposes, it does not matter whether the belief is reasonable, provided it is genuine.

Therefore, as the claimant had not established bad faith on the part of the defendant, it followed that it had failed to establish economic duress and that the appeal would be allowed.

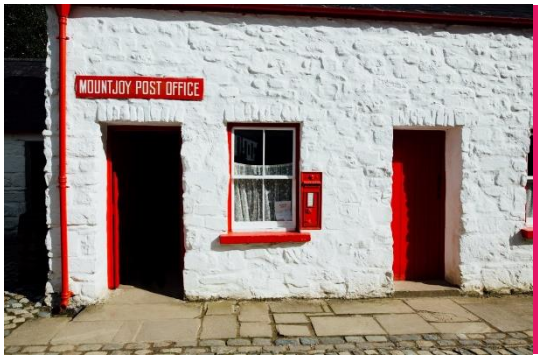
When allowing the appeal, the Court of Appeal further noted that '*the common law has always rejected the use, or abuse, of a monopoly position as a ground for setting aside a contract, leaving it to be regulated by statute*'. As a result, the claimant must suffer the consequences of the inequality of bargaining position between it and the defendant.

In brief…

The concept of lawful act economic duress has not been expanded to include demands, which the other party genuinely, but unreasonably, believes to be well-founded.

Comment

As a final comment in Simantob v Shavleyan, Simon LJ notes that the significant uncertainty surrounding the validity of the expectation of some commercial advantage as consideration for the acceptance of a less advantageous payment than was originally agreed did not fall to be considered and thus persists. Yet, as it stands, the suggestion made by the editors of Chitty on Contracts that the protection of creditors would '*now* [be] *more satisfactorily performed by the expanding concept of economic duress*', has not been taken up either. As a result, this area of law remains liable to fine distinctions and inconsistent decisions, which has the potential to lead to '*harsh result*[s]', as indeed was considered by Arden LJ to be the case in Times Travel v Pakistan International Airways.



Good faith in relational contracts

Bates v Post Office Ltd (No. 3) [2019] EWHC 606 (QB)

Nick Pointon

Background

In 2000 the Post Office introduced an electronic point of sale system, named '*Horizon*'. All sub-postmasters were required to use it. The sub-postmasters' contracts with the Post Office imposed liability on the sub-postmasters to make up any accounting losses identified by the system. The Horizon system identified shortfalls in some sub-postmasters' accounting. Many had their contracts with the Post Office terminated; others received criminal convictions, following prosecutions brought by the Post Office itself. The sub-postmasters maintained that Horizon's software was defective, and disputed the discrepancies it identified. The Post Office argue that Horizon is '*robust*', and it is for the sub-postmasters to convincingly prove any errors on its part. If the sub-postmasters are correct, say the Post Office, it will represent an '*existential threat*' to the Post Office's ability to carry out its business as it presently does.

Roughly 550 sub-postmasters brought group litigation against the Post Office. A selection of disputed points were identified for resolution as preliminary issues. Among them was the sub-postmasters' contention that their contracts with the Post Office were 'relational' contracts, into which a duty of good faith was to be implied.

Relational contracts

Relational contracts have been identified before. Lord Steyn used the term as long ago as in Johnson v Unisys [2003] 1 AC 518, at 532: '*One possible way of describing a contract of employment in modern times is as a relational contract*'. The modern development of this concept received a boost in the judgment of Leggatt J in Yam Seng v Int'l Trade Corp [2013] EWHC 111, but by 2016 some commentators queried whether it was simply '*a passing fad that will soon be forgotten*' (Professor Hugh Collins, '*Is a relational contract a legal concept?*', 2016). Fraser J has, by this decision, firmly dispelled that suggestion.

What makes a contract relational? Fraser J said at paragraph 721 that '*whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not*'.

The fact that there was a substantial imbalance of power between the Post Office and individual sub-postmasters was held to have no effect upon whether the contracts were relational ones (paragraphs 722 and 724). Helpfully, Fraser J provided a non-exhaustive list of the characteristics which were relevant to this question at paragraph 725:

> '*1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.*
>
> *2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.*
>
> *3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.*
>
> *4. The parties will be committed to collaborating with one another in the performance of the contract.*
>
> *5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.*

6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.

8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.

9. Exclusivity of the relationship may also be present.'

Save for the first, none of these characteristics is individually determinative of the question in either direction. In the present case Fraser J found all of these characteristics to be present, and then some (identified at paragraphs 728 – 731).

Implied obligation of good faith

Fraser J accepted as the starting point that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts, where it was in accordance with the presumed intentions of the parties (paragraph 721).

What does the finding of 'relational' contracts contribute to the issue of good faith? At paragraph 738 Fraser J said "*I find that this means the contracts included an implied obligation of good faith. This means that both the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people. Transparency, co-operation, and trust and confidence are, in my judgment, implicit within the implied obligation of good faith.*"

The Court accepted that an express term to the contrary would prevent the implication of an obligation of good faith even in a relational contract, but absent such language the implied obligation would arise without the need to show that it was obvious or necessary.

Significantly, the Court held that further duties flowed from this implied obligation of good faith, including:

- a duty upon the Post Office to keep proper records, providing a basis for any exercise of its power to claim losses from its sub-postmasters; and
- a duty not to claim payment of losses without first establishing the fact of the loss and investigating its cause.

The sub-postmasters contended for a total of 21 different implied terms, 17 of which were held to be consequential upon the contracts being found to be relational, and a further 2 of which were implied on ordinary principles (paragraph 746 et seq). It is therefore clear that the status of a contract as '*relational*', and the accompanying duty of good faith (absent express disavowing language), can imply a great deal of specific obligations when fleshed out in the context of the particular '*relational* relationship.

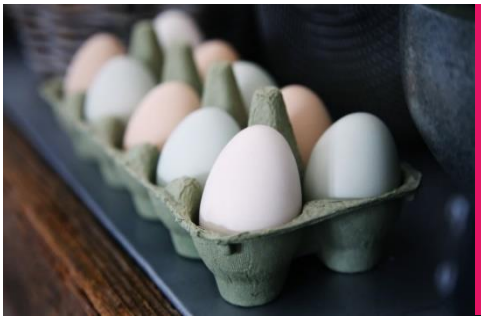
Conclusion

The decision represents a substantial victory for the sub-postmasters in the early stages of this litigation. The Post Office subsequently, but unsuccessfully, sought to recuse Fraser J from hearing any further aspect of the proceedings on the grounds of bias ([2019] EWHC 871 (QB)).

For the rest of us it represents a significant boost to the development of relational contract theory and the role played by good faith in English contract law. Those drafting potentially relational contracts will need to consider carefully the use of express terms to negative the default implications. Those litigating will need to consider carefully whether theirs is a relational contract, and the potentially very useful implications which follow.

"The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not"

Bates v Post Office Ltd (No. 3) [2019] EWHC 606 (QB), *per* Fraser J at [721]



Inducement and transferred loss

BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc [2019] EWCA Civ 596

Emma Price

Background

The Defendant ('Rembrandt') contracted with the Claimant ('NIVE') to buy a quantity of egg products over a two-year period for specified prices per kilogram, provided that its procedures in the Netherlands satisfied the US regulatory authorities. The authorities gave approval. Before that happened, however, NIVE emailed Rembrandt saying that there would be unanticipated extra regulatory costs and that the prices would have to be increased. Rembrandt agreed a price increase and a new contract was made in materially the same terms as the original contract, save that the prices had been increased. Shipments commenced. Subsequently, NIVE informed Rembrandt that some of the egg products would be supplied by its sister company ('Henningsen').

Rembrandt's solicitors in due course wrote to NIVE alleging that NIVE was failing to comply with US inspection requirements and suspending Rembrandt's continued performance of the two-year contract. NIVE brought proceedings for loss of profit on the sales that would have taken place but for such suspension of performance, including loss of profit in respect of the product supplied by Henningsen. Rembrandt defended the proceedings on the grounds that: (i) in breach of contractual warranty, the product did not comply with US regulations; and (ii) the second contract had been procured by NIVE's fraudulent misrepresentation that the increased sale price was calculated by reference only to the extra costs incurred as a result of compliance with US regulations, whereas, in truth, the increased price included an element of profit as well as the increase in cost.

First Instance Decision ([2018] EWHC 1857 (Comm))

Teare J held that the product supplied by NIVE did comply with US regulation; there was no appeal against that. He further held that the agreed increase in the sale price included an element of profit and that representations in certain email correspondence about the price increase were false representations deliberately made and that Rembrandt believed the increase to be a genuine estimate of additional cost. They thus constituted fraudulent misrepresentations. He held that in law there was a presumption that Rembrandt relied on the representations and it was for NIVE to prove that the second contract would have been made even if there had been no fraudulent misrepresentation. NIVE could not do that. Teare J therefore held that Rembrandt was entitled to rescind the second contract, such that NIVE was restricted to a claim for loss of profit based on the sale prices in the first contract. Teare J concluded that NIVE could make no claim in respect of the product supplied by Henningsen, but could only claim for its own loss.

The Appeal

There were two principal issues on appeal. The first concerned the requirement of inducement in fraudulent misrepresentation, namely, on whom the burden of proof lies and what must be proved. The second was whether, if a contract of sale is performed partly by the seller as the contracting party and partly by a non-contractual party but with the consent of the buyer, the contracting party can recover for both its own losses and those of the non-contracting party, in the event that the buyer, in breach of contract, refuses to perform.

> *"It is surprising that these are still controversial questions in English law especially since the test for inducement in cases of innocent or negligent representation appears to be settled..."*
>
> BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc [2019] EWCA Civ 596, *per* Longmore LJ at [15]

Inducement

The Court, having reviewed a number of Victorian authorities, held that the law at the end of the 19th century had assimilated the requirement of inducement in the tort of deceit and in actions for rescission for fraudulent misrepresentation and could be stated as being that the representee had to prove he had been materially '*influenced*' by the representations, in the sense that it was '*actively present to his mind*'. Whereas there is a presumption that a statement, likely to induce a representee to enter into a contract, did induce him, which is merely a presumption of fact that is to be taken into account along with all the evidence. There was no requirement, as a matter of law, that the representee should state in terms that he would not have made the contract but for the misrepresentation, but the absence of such a statement was part of the overall evidential picture from which the judge had to ascertain whether there was inducement or not. The fact that there were other reasons (besides the representation) for the claimant to have made the contract did not mean that he was not induced by the representation made.

The Court did not consider that the modern authorities added much to the conclusions drawn from the earlier ones. It held that there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent representation intended to cause him to enter the contract and that inference will be '*very difficult to rebut*'.

On the facts, the Court declined to interfere with Teare J's decision. Having reminded himself of the strength of the presumption that a representee will have acted on a fraudulent statement intended to be acted upon, Teare J had said that Rembrandt's evidence established that it might have agreed to the increase in price if the representation had not been made, but he had not thought that the evidence overall had sufficient clarity and cogency to persuade him that it would have agreed to the requested price increase, even if the representation had not been made. He was not relying on any rule of law and he had not reversed the burden of proof. He was merely saying that the factual presumption had not, on the evidence, been rebutted. As such, the first appeal was dismissed

> *"...the known third party benefit is an essential component of the broader ground. It is a consistent feature of the authorities..."*
>
> BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc [2019] EWCA Civ 596, *per* Coulson LJ at [52]

Transferred loss

Having considered a number of authorities (including Linden Gardens Trust v Lenesta Sludge Disposals [1994] 1 AC 85, Alfred McIpine Construction Ltd v Panatown Ltd [2001] 1 AC 518 and Swynson v Lowick Rose LLP [2017] UKSC 32), the Court had no hesitation in concluding that, as a matter of law, for a successful claim for transferred loss that seeks to rely on the so-called broader ground (as explained in Linden Gardens and Panatown), the claimant has to show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.

On that basis, NIVE's claim for transferred loss had to fail. The Court held that, at the time the contract was made, Rembrandt was not even aware of the existence of Henningsen, let alone the possibility that Henningsen might be providing some of the egg product on behalf of NIVE. NIVE, therefore, could not bring itself within the broader ground. As such, the Court concluded that Teare J had been right to reject the transferred loss claim and the second appeal was also dismissed.

Comment

The case provides helpful clarification of the incidence and operation of the burden of proof of inducement in cases of fraudulent

misrepresentation, the Court having noted its surprise that such questions were still controversial in English law, given the test for inducement in cases of innocent or negligent representation appeared to be settled (in the form that the representee has the burden of showing inducement, in the sense that he has to show he would not have entered into the relevant contract had the representation not been made).

As to the transferred loss issue, the judgment is clear that the '*known third party benefit*' is an essential component of the broader ground. The Court also reflected that, if it was irrelevant, it would mean that a main contractor would always be able to claim against the employer the losses suffered by his sub-contractor, even if the employer had no knowledge of the sub-contractor, or even that a sub-contractor was going to be used at all. It considered that that would not only be contrary to the general rule, that a party can only recover the losses that it has itself suffered, but it would also turn transferred loss, which is meant to be a narrow exception to that rule, into a commonplace route of recovery.

In brief...

- There is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent representation intended to cause him to enter the contract and the inference will be '*very difficult to rebut*'.
- The representee has to prove that he was materially "influenced" by the representations, in the sense that it was '*actively present to his mind*'.
- For a successful claim for transferred loss that seeks to rely on the broader ground, the claimant must show that, at the time that the underlying contract was made, there was a common intention and/or a known object to benefit the third party or a class of persons to which the third party belonged.

Challenging arbitration awards

Gracie v Rose [2019] EWHC 1176 (Ch)

Charlie Newington-Bridges

Background

The parties to the arbitration were Mr Gracie, the 50% shareholder and director of Dorset Build and Maintenance Company Limited ('the Company'), and Mrs Rose, the executor of the estate of her deceased husband, a former director and 50% shareholder of the Company.

A shareholders' agreement was agreed and signed on 1 April 2005 ('the Shareholders' Agreement'). The Shareholders' Agreement provided a mechanism for the valuation of the shares in the Company in the event that a shareholder died. In particular, a schedule to the Agreement provided shareholders of the Company with a definition of the goodwill value of the Company for the purposes of the valuation of the shares to be purchased in the event of a shareholder's death.

At a management meeting dated 29 November 2011, Mr Gracie alleged that it was agreed that there was an error in the Shareholders' Agreement relating to the word '*aggregate*' and that the '*Goodwill Value*' in the Shareholders' Agreement would be amended or varied so that the word '*aggregate*' would be replaced by the word '*average*'. Alternatively, he said there was a mistake in the Shareholders' Agreement and it should be rectified.

On Mr Gracie's account, this meant, in essence, that the value of the goodwill in the company for the purpose of valuing shares in a buyout was the average of 3 years' profit rather than the aggregate of 3 years' profit. Clearly, this would make a significant difference in the amount that would have to be paid to Mr Rose's estate for his shares.

Arbitration Award

Under an arbitration clause in the Agreement, the matter went to arbitration. The award, in a section titled '*Issues in Dispute*', made no mention of the issue of mistake and rectification. In fact, the words '*mistake*' and '*rectification*' were not used in the issues section of the award at all.

However, in a further section in the award it is stated that '*alternatively, it is argued that it was agreed between the parties to the Agreement that there was a mistake in the original Agreement and that the word 'aggregate' should be replaced by the word 'average*''.

In a later paragraph, the arbitrator stated that he did not doubt the authenticity of notes in a notebook that recorded that the director/shareholders had agreed that there was mistake in the Shareholders' Agreement. However, he found that a typed-up version of those notes were not reliable evidence.

The arbitrator decided that the shares held by the estate of the Deceased should be purchased on the basis of an aggregate of goodwill rather an average of the goodwill value.

Mr Gracie's challenge to the award was that the key issue of mistake and rectification had not been dealt with by the arbitrator and, if it had, he would have been obliged to find in Mr Gracie's favour because of his view on the notes.

Judgment

In his judgment, HHJ Russen QC noted that section 68 of the Arbitration Act 1996 provides parties to an arbitration with a means to challenge arbitration awards by applying to the courts on the grounds of serious irregularity. What is meant by serious irregularity is set out in subsection 2 of that section and includes a failure to deal with all the issues and a failure to conduct proceedings in accordance with the procedure agreed by the parties.

HHJ Russen QC considered Fidelity Management v Myriad International Holding [2005] EWHC 1193 (Comm), a case in which an appeal under section 68 was made to the court following an arbitration. In that case, it was held by Morison J that:

> s68 was designed as a '*long stop*' to deal with those extreme cases where for one reason or another something [in terms of subsection (2)] went seriously wrong with the arbitral process.

The Fidelity case goes on to provide a useful summary of the three most important points in relation to section 68(2)(d):

- Section 68(2)(d) is '*designed to cover those issues the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference*'. The court will intervene only to remedy a situation in which a claim has been overlooked or a key issue has not been addressed.
- It is not to be used as a means of launching a detailed enquiry into the manner in which the tribunal considered the various issues. It is concerned with a failure, that is to say where the arbitral tribunal has not dealt at all with the case

of a party so that substantial injustice has resulted.

- Arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.

In the case of Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd [2010] EWHC 442 (Comm), a challenge to an arbitrator's award under, *inter alia*, section 68, Mr Gavin Kealey QC sitting as a deputy High Court judge said the following in relation to dealing with essential issues in an arbitration award at [38]:

'*It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of s 68(2)(b) is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined*'.

There would be a serious irregularity if the arbitrators failed to address all of the substantive issues put to them under section 68(2)(d), overlooking the argument, rather than just failing to explain their reasons adequately: Van der Giessen v Imtech Marine [2008] EWHC 2904 (Comm).

HHJ Russen observed that section 70(2) of the Act provides that an application under section 68 or an appeal under section 68 may not be brought if the applicant has not first exhausted "any available recourse under section 57 (correction of award or additional award)".

Section 57(3)(a) provides that a tribunal may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award.

HHJ Russen QC continued:

'*It is clearly with this potential overlap between the two rights of recourse in mind (which otherwise would require a choice between two diverging paths to be made by the applicant within the same 28 day period) that section 70(2) has been enacted. Its effect is clear and further confirmation of the restricted nature of the court's jurisdiction under section 68: see paragraph 11 above. A party should not be heard to complain to the court about serious irregularity in the arbitral process, in the arbitrator having arguably overlooked a key issue or head of claim or having expressed himself in uncertain or ambiguous terms, if that party has not first availed himself of the section 57 right which is an adjunct to that process*'.

On the question of whether an issue was not addressed, the judge found that the arbitrator's conclusion that the goodwill was to be calculated '*with no modification*' was apt to cover either or both issues *viz.* variation and mistake. While the judge did find that the language of the award was ambiguous or uncertain, the challenge was barred by section 70(2) because of a failure to seek clarification or resolution of the ambiguity on an application under section 57(3)(a).

Conclusion

The judgment emphasises that the recourse provided to parties to an arbitration under section 57 needs to be exhausted before a challenge under section 68 is made where the award is ambiguous or requires clarification. The difficulty of course lies in whether or not an issue has been disregarded altogether or the conclusion on the point is just not clear in the award.

The judgment provides a helpful and well-articulated guide to the authorities and their application in cases in which section 57 or section 68 may apply. Of particular interest to arbitration practitioners may be the judge's observations on the interplay between the two sections and how and when each applies.

Nick Pointon successful in the Jersey Court of Appeal

Alwitry v States of Jersey Employment Board [2019] JCA 134

Nick Pointon, together with Jersey Advocate Steven Chiddicks, successfully represented Consultant Ophthalmologist Mr Amar Alwitry before the Jersey Court of Appeal. Having succeeded at trial (see [2019] JRC 014), Mr Alwitry resisted the States of Jersey Employment Board's ("SEB") appeal, by which it sought to reverse that judgment in its entirety.

At an extraordinary sitting of the Court convened specifically to hear this appeal, Sir William Bailhache (Bailiff of Jersey), Jonathan Crow QC and Lord Anderson of Ipswich, KBE QC, accepted Mr Alwitry's argument that, upon the proper construction of the Jersey consultant contract, the SEB needed to demonstrate reasonable grounds warranting his dismissal for conduct. The Court further held that '*the SEB has fallen well short of discharging the burden of proving that it had reasonable grounds for terminating Mr Alwitry's Contract...*'.

In the face of the SEB's position, that the Court was not entitled to review the sufficiency of the reasons given for dismissal in a wrongful (as opposed to unfair) dismissal claim, this judgment secures substantial contractual protection for consultant doctors. Such protection is important in difficult hospital environments, where the consultant's duty to champion patient safety may come into conflict with the pressures of hospital management. In the absence of any lawful entitlement to terminate the contract on notice, Mr Alwitry is entitled to seek uncapped damages representing his future losses until retirement age. The case represents an example of the rare circumstances identified in obiter remarks by the UK Supreme Court in Edwards v Chesterfield NHS Trust [2012] 2 AC 22, in which a contract of employment creates a job for life, terminable only for cause.

Mr Alwitry's claim has attracted the support of the British Medical Association, who are funding these proceedings in the interests of all doctors. The Court of Appeal has rejected the SEB's application for special leave to appeal to the Privy Council. It is understood that the SEB will seek to renew that application to the Privy Council directly.

St John's welcomes Georgina Thompson as the latest member of the commercial and chancery team

Georgina joined Chambers in October 2019 following successful completion of her pupillage under the supervision of Alex Troup and John Dickinson. Georgina is currently building a broad practice in all areas of law within commercial and chancery. During her pupillage Georgina gained experience acting in insolvency proceedings, such as bankruptcy and winding up petitions; sale of goods and supply of services disputes; subsidence and other property damage claims, residential possession proceedings; and has made and resisted a variety of procedural applications.

To instruct Georgina please contact her clerk, Simon Lyons, on 0117 923 4696 or email: simon.lyons@stjohnschambers.co.uk.

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