[2014] JMSC Civ.69

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV00117/2006

BETWEEN	**AEDAN EARLE**	**CLAIMANT**
AND	**NATIONAL WATER COMMISSION**	**DEFENDANT**

IN CHAMBERS

Harold Brady and Kerriann Mitchell instructed by Brady and Co for the claimant

Kevin Williams and Colin Alcott for the defendant

April 24 and May 2, 2014

CIVIL PRACTICE AND PROCEDURE - SUMMARY JUDGMENT – RULES 15, 25 AND 26 OF THE CIVIL PROCEDURE RULES - INTERPRETATION OF CONTRACT

SYKES J

[1]Something went terribly wrong in the management of this case. The claim was filed on January 13, 2006 followed by the particulars of claim on January 18, 2006. The defence was filed on March 21, 2006. The defendant admits every single fact alleged by the claimant except one – whether there was an assessment of Mr Earle's work. Mr Earle says that that there was and the defendant says otherwise. The real issue in dispute in not whether there was an assessment but what is the true meaning of the contract. By March 21, 2006, having regard to the pleadings, no trial was needed. No pre-trial review was needed. No witness statements were needed. All that was lacking for final resolutions were submissions of counsel and judicial determination. Yet for eight long years the matter has been before the court. If ever there was case which could have been dealt with summarily, this was it. Happily, the attorneys have agreed that the court should enter judgment for the party whose interpretation prevails, thereby bringing the matter to an end without the further expense of preparing for a trial.

A brief summary

[2]Mr. Earle, the claimant, was contracted to work for the National Water Commission ('NWC'), the defendant, for two years. The contract provided for a gratuity to be paid at the end of the contract if Mr. Earle's work was regarded as satisfactory. The contract provided for termination on either side. Either party could give the other one month's notice. Mr. Earle exercised his contractual right to end the contract at sixteen (16) months. He did this by giving the notice in accordance with the terms of the contract. He claims payment of the gratuity on a pro rated basis which he calculates at JA$315,956.61. The NWC says he is not entitled to any gratuity. Both sides base their view on what each has called the proper interpretation of the contract. Before getting into the interpretation the court will refer to the relevant parts of CPR which govern this application.

The Civil Procedure Rules

[3]The court has before it a summary judgment application. This application is made under rule 15.2 (a). That rule permits the court to enter summary judgment on a claim or a particular issue if the court considers that the claimant has no real prospect of succeeding on the claim or the issue. Mr. Brady, counsel for the claimant, despite the absence of a similar application from the claimant suggested, and Mr. Kevin Williams, quite sensibly agreed, that if the claimant's interpretation prevails then the court should enter judgment for the claimant because under rule 15 (2) (b) it would mean that the defendant has no real prospect of successfully defending the claim or the issue.

[4]The principles applicable to summary judgment are, it is said, found in **Swain v Hillman** [2001] 1 All ER 91. The famous statement from Lord Woolf MR is that 'the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success … or they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success.' To get some understanding of what a fanciful case looks like one has to turn to Lord Hope in **Three Rivers DC v Bank of England** [2003] 2 AC 1, 260 – 261. His Lordship gave the following examples: (a) a party may prove the facts alleged but as a matter of law that party is not entitled to the remedy sought; (b) the factual allegations can be said to without substance even before a trial; and (c) the allegations of fact may be contradicted by the documents or other material on which the case is based.

[5]The application for summary judgment requires the court to 'prophesy' about the likely outcome of the case should it go to trial. Properly applied, it is a time-saving measure which eliminates the costs and time investment of a trial and in ordinary circumstances, lets the litigants know where they stand early in the day. Clearly, this did not happen in the present case.

[6]Rule 15.2 of the CPR complements and supports rule 25 which states that the court must further the overriding objective by actively managing cases. The active management of cases includes (a) identifying the issues at an early stage; (b) deciding which issues need full investigation and trial and accordingly disposing summarily of the others; (c) consider whether the likely benefits of taking a particular step will justify the costs of taking it and (d) dealing with as many aspect of the case as is practicable on the same occasion (rule 25.1 (b), (c), (h) and (i)).

[7]Rules 15 and 25 fit nicely with rule 26 which gives the court the power to dismiss or give judgment on a claim after a decision on a preliminary issue (rule 26.1 (2) (j)).

[8]In light of the parties' suggestion and the lack of disagreement on the facts the court has decided to exercise its powers under rules 25 and 26 on this summary judgment application and to enter judgment for the successful party.

The principles applicable to the interpretation of contracts

[9]The current approach to the interpretation of contracts is set out in Lord Hoffman's judgment in **Investor Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98. Since that seminal restatement of contractual interpretation, there have been a number of important refinements. The Court of Appeal of Jamaica has accepted Lord Hoffman's restatement (**Goblin Hill Hotels Ltd v John Thompson** SCCA No 57/2007 (unreported) (delivered December 19, 2008) and **Clacken v Causwell** SCCA 111/2008 (unreported) (delivered October 2, 2009). Before the refinements, the principles. According to Lord Hoffman the interpretation of a contract is the process of ascertaining what the documents would mean to a reasonable person having all the background information 'which would reasonably have been available to the parties in the situation in which they were at the time of the contract.' Background, in this context, means 'anything which would have affected the way in which the language of the document would have been understood by a reasonable man.' This expansive meaning of background (also called 'matrix of fact') includes that information which was 'reasonably available to

the parties' but excludes previous negotiations. The meaning of the document is not to be approached with an Oxford dictionary at the interpreter's elbow trying to fit the dictionary meaning of the words used into the document but rather the document must be looked at as a whole and the interpreter must try to find out what the words used by the parties meant in light of the relevant background at the time of the contract. In carrying out this task, the interpreter begins with the prima facie assumption that the parties used correct language, grammar, syntax and understood the conventional meaning of the words they used to express their contract. The interpreter embarks on his task of interpretation by assuming that contracting parties used the words in their commonly understood sense at the time of the contract and that is the meaning that should prevail unless the context and circumstances suggest another interpretation should be given (**Thompson and another v Goblin Hill Hotels Ltd** [2011] 1 BCLC 567 (PC)). However, the interpreter must be alive to the possibility (since it happens occasionally) that the parties may simply have used the wrong words, syntax and grammar but the meaning is very clear. In other words, while the parties may not be Mrs. Malaprop, they may have more in common with her than with Derek Walcott (**Mannai Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd** [1997] A.C. 749, 774(Lord Hoffman)).

[10]The interpreter should also be aware that where the document has been crafted by lawyers or it is obvious that care was taken in putting the document together, one does not lightly conclude the parties have made linguistic mistakes (**Jumbo King Ltd v Faithful Properties** [1999] 2 HKCFAR 279 (Lord Hoffman)). Of course, it is entirely possible that they did. Even though it is possible that linguistic, syntactical and grammatical errors were made, the court is to give effect to '**to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean**' (my emphasis) (Lord Hoffman in **Jumbo King Ltd**).

[11] Now to the refinements. It used to be said that before reference could be made to material outside the four corners of the contract there had to be an ambiguity. This

view has fallen by the way side (**R (on the application of Westminster City Council) v National Asylum Support Services** [2002] 4 All ER 654). It is now equally, plain that the fact that a document is on the face of it clear does not preclude the court from examining the surrounding circumstances to whether see the prima facie meaning remains intact or is affected by the matrix of fact (**Static Control Components (Europe) v Egan** [2004] 2 Lloyd's Rep 429). The law has advanced now to the point where background information includes the law and proved common assumptions even if the assumptions were incorrect (**BCCI v Ali** [2002] 1 AC 251).

The terms of the contract

[12] The contract was signed on December 3, 2002. It was drafted by the NWC and presented to Mr. Earle. Clause 2 states that the contract is for two years. Clause 3 provides that the agreement is subject to the conditions set out in the Schedule which is stated to be part of the agreement. The parties have focused their attention on clauses 3, 8 and 9 of the Schedule. However, for a proper interpretation the court must have regard to the whole document in the context in which it was created.

[13] Clause 3 of the Schedule reads:

> *Save and except for the Commission's right of immediate termination for misconduct, either party may at any time, terminate the contract only by giving the other party one (1) month's prior notice in writing. In the case of the Commission's terminating the contract, the Commission, may elect to pay, in lieu of such notice, one (1) month's salary to [Mr Earle] which said salary shall include …*

Clause 8 of the Schedule states:

Subject to clause 9, a gratuity, which will be subject to tax, at the rate of 25% of the basic salary earned during the period of the engagement will be paid to [Mr Earle] on completion of the term of engagement. Gratuity shall be payable at the end of the term. Gratuity may be paid at the end of each year of the term, if at the date hereof [Mr Earle] is in prior continuous contract services with the Commission in excess of two years. … Such gratuity or portion thereof shall be paid as part of the compensation … under this agreement

Clause 9 of the Schedule provides:

On the anniversary of each year of service an evaluation exercise shall be conducted for the purpose of assessing [Mr Earle's] performance … Gratuity shall only become payable if on completion of the evaluation [Mr Earle's] performance is deemed at least commendable.

[14] Clause 10 of the Schedule deals with circumstances in which the NWC shall have the right to terminate Mr. Earle's contract with immediate effect. Clause 11 speaks to termination on the grounds of ill health.

[15] Part of the matrix of fact relied by Mr. Williams is the Ministry of Finance, Planning and Public Service's circular no 11 dated September 23, 1997, which states that gratuity is payable on the expiration of a contract period being not less than two years in the first instance and thereafter gratuity may be paid annually. It also states that, for local contracts, the maximum gratuity allowed is twenty (25) percent of basic salary earned during the applicable period of the contract. These guidelines, while not of the status of an Act of Parliament or a secondary legislation, do have an impact on the operation of government agencies.

[16]In view of this court, another aspect of the matrix of fact is that the NWC operates within the financial architecture established by the Ministry of Finance. That ministry may establish guidelines that public bodies are expected to abide by.

[17]Mr. Brady submitted that the contract did not refer to any of these circulars and therefore should be ignored by the court. He also submitted that the NWC was a statutory body and must act within the four corners of its statute and the governing statute does not say or imply that these circulars form part of any contract entered into between the NWC and any other party.

[18]Mr. Brady pressed that the contract (clause 3 of the Schedule) spoke only to the NWC terminating the contract in breach of the one month notice but did not speak to what would happen if Mr. Earle terminated the contract before the end of the contractual period. This led counsel to submit that that must mean that if Mr. Earle was the one who terminated the contract, as was the case here, then he is entitled to all his contractual benefits that accrued right up to the point of termination. This meant that Mr Earle was entitled to the gratuity on a pro rated basis (since the contract did not expressly exclude it) and therefore his claim has proper legal and factual foundation.

[19]Mr. Williams responded by submitting that the contract has set out what the parties agreed and where the contract did not provide for a particular eventuality then the court should not ‘fix’ the contract by putting it in. He also submitted that the very terms of the contract (clauses 8 and 9 of the Schedule) established that a gratuity was only payable when two years were completed and an evaluation done. The contract did not run its course and no evaluation was done and so there is no entitlement to any gratuity.

[20]This will omit from consideration the question of whether an evaluation was done. That is a disputed area of fact but in accordance with rule 26.1 (2) (k), the court will exclude that issue from determination because substantive justice can be

done between the parties. The agreed fact of termination of the contract before the end of the two years is sufficient to enable a decision to be made.

The interpretation

[21] Mr. Williams' interpretation of clause 3 is that the NWC can terminate the contract without cause and when this happens, according to Mr. Williams, then Mr. Earle would be entitled to one month's pay which would include one twelfth of the annual gratuity to which the Mr Earle would have become entitled. There is no need to decide whether this is correct. In the opinion of this court clause 3 (read along with other provisions and the relevant background information) gives NWC the right to terminate the contract in two circumstances other than those which would permit immediate dismissal. The first is termination after one month's notice. The second is termination without notice. In the second instance NWC must pay one month's salary and that salary must include the stated portion of the gratuity. The contract does not speak to any gratuity payable if the other party terminates the contract before the two year period ends. The contract simply did not provide for that circumstance. The same clause provides that at the end of the contract period of two years a gratuity is payable. If the contract is extended beyond two years then a gratuity is payable at the end of each succeeding year after the initial two year period. Indeed the contract deals specifically and only with the payment of gratuity if the contract is terminated by the NWC without giving Mr Earle one month's notice. The contract does not address what should happen if Mr. Earle terminated the contract before the end of the two year. There is no need to imply any term to the contrary as suggested by Mr. Brady.

[22]Lord Hoffman in **Attorney General of Belize and others v Belize Telecom Ltd and another** (2009) 74 WIR 203 stated that the court has no power to improve on what the parties agreed. The court cannot introduce terms to make the contract better. fairer or more reasonable. The sole job of the court is to decide what the parties meant at the time the agreement was signed. Implication only arises where something has happened that was not expressly provided for in the contract.

According to Lord Hoffman, the most usual consequence of this is that had the parties intended to address the situation they would have said so and not having addressed it then they meant the contract to operate as worded with the loss falling where it may. Here the parties must have obviously thought of the circumstance that has occurred here. After all, if the contract spoke to what should happen if the NWC terminates the contract without giving one month's notice surely they must have thought of what would happen should Mr. Earle terminate the contract before the end of the contract period. The omission to address whether any gratuity is payable in the event of Mr Earle terminating the contract does not automatically mean that any gratuity was payable on a prorated basis.

[23]A close examination of the contract and the matrix of fact point to restriction on the payment of gratuity. In each circumstance in which a gratuity is payable there are preconditions and circumstances that must be satisfied. This would suggest that if there was a circumstance that was not provided for and such a circumstance was one which would be obvious then that is a good indication that the parties did not intend to provide for it with the consequence that gratuity is not payable in the circumstances not provided for.

[24] The court is satisfied that the parties made all the provisions for the payment of the gratuity that they intended to make. It is not this court's function to make the agreement better, fairer or more reasonable. The court's role is simply to give effect to what the parties agreed. It follows from this that Mr. Earle is not entitled to be paid any gratuity if he terminated the contract before the two year period.

Disposal and order

[25]Summary judgment is entered for the defendant with costs to be agreed or taxed.