Neutral Citation Number: [2018] EWCA Civ 62

Case No: A3/2017/2781

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, COMMERCIAL COURT
Mr Richard Salter QC sitting as a Deputy High Court Judge
CL-2016-00456

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2018

Before :

LADY JUSTICE ARDEN
LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN

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Between :

(1) INTERACTIVE E-SOLUTIONS JLT **(2) INTERACTIVE E-SOLUTIONS DMCC**	**Appellants**
- and -	
O3B AFRICA LIMITED	**Respondent**

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Mr Nigel Jones QC & Mr Edward Rowntree (instructed by **Child & Child**) for the **Appellant**
Mr David Cavender QC & Mr Michael Clark (instructed by **Milbank, Tweed, Hadley and McCloy LLP**) for the **Respondent**

Hearing date : 23rd January 2018

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Approved Judgment

Lord Justice Lewison:

1. The issue on this appeal from Mr Richard Salter QC is whether Interactive E-Solutions JLT can establish an arguable cause of action which is not barred by an exclusion clause contained in a Master Services Agreement (the "MSA") made between it and O3B Africa Ltd. The judge decided that it could not; and refused Interactive permission to re-re-re-amend its Defence and Counterclaim. At the end of the hearing we announced that the appeal would be dismissed, with reasons to be given later. These are my reasons for joining in that decision.

2. The MSA concerns the provision by O3B of global satellite services in Pakistan. Interactive provides satellite-based internet backbone infrastructure for fixed line and mobile telephone operators. The MSA operated as the governing framework agreement for specific orders of bandwidth from O3B's satellites, which were to be provided under specific Service Orders. The combination of the MSA and the Service Orders (of which there are three) required Interactive to pay monthly service fees. The obligation to pay was triggered by the service by O3B of a Service Commencement Notice specifying a Service Commencement Date. That is defined by Appendix B to the MSA as:

> "… the date set forth in a notice from O3B to [Interactive] that the Satellite System has been successfully placed into commercial operation and is ready for Service to commence…"

3. It is Interactive's case that in order for the satellite system to be successfully placed into commercial operation it must comply with Pakistani regulatory requirements. These are twofold. First, the approval of the Pakistan Telecommunication Authority (the "PTA") is required. This takes the form of a Telecommunications Infrastructure Licence. Second, there must be legal intercept compliance. This enables Pakistani law enforcement authorities to analyse and monitor communications.

4. O3B served a Service Commencement Notice on Interactive. Interactive has consistently maintained that that notice was defective because at the date that it was served the system could not have been successfully placed into commercial operation by reason of lack of regulatory approval. It has therefore refused to pay the Service Fees. In consequence of the non-payment O3B has purported to terminate the MSA.

5. Interactive pleads that the purported termination of the MSA was a repudiatory breach of contract, which it has not accepted. It claims specific performance of the MSA and, in the alternative, it counterclaims damages for breach of contract quantified at USD $55 million. The problem that the counterclaim faces is clause 10 (c) of the MSA. That provides:

> "*Limitation of O3b's Liability*. THE PARTIES AGREE THAT O3B'S SOLE OBLIGATION AND CUSTOMER'S EXCLUSIVE REMEDIES FOR ANY CAUSE WHATSOEVER (EXCLUDING FRAUD BUT INCLUDING LIABILITY ARISING FROM NEGLIGENCE), ARISING OUT OF OR RELATING TO THIS MSA, ANY SERVICE ORDER, OR ANY OTHER AGREEMENT BETWEEN CUSTOMER AND O3B ARISING OUT OF OR RELATED

> TO THIS MSA OR ANY SERVICE ORDER, UNDER ANY THEORY OF LAW OR EQUITY ARE LIMITED TO THOSE SET FORTH IN SECTION 6 AND SECTION 8 OF THIS MSA, AND ALL OTHER RIGHTS AND REMEDIES OF CUSTOMER OF ANY KIND ARE EXPRESSLY EXCLUDED AND WAIVED. Nothing in this MSA limits the liability of either Party arising from fraud. In no event shall O3b be liable for any indirect, incidental, consequential, punitive, special or other similar damages or loss of revenues, profits, business, savings or goodwill, whether foreseeable or not. Except as expressly provided in Section 6 and Section 8 of this MSA, in no event will O3b or any O3b Group member be liable to Customer or any End User for any loss, damages, liabilities, expenses or otherwise if occasioned by any defect in any of the Network Facilities, or the provision of Service to Customer, or any failure or delay in provision of Service to Customer, or any other cause. Without limiting the generality of the foregoing, Customer acknowledges and agrees that it shall have no right of recovery for the satisfaction of any cause whatsoever, arising out of or relating to this MSA or any Service Order, except against O3b for Confirmed Outages as provided in Section 6 of the MSA, against (i) O3b or any member of the O3b Group, (ii) any supplier of equipment or services to O3b in connection with (A) the launch, construction, operation, maintenance, tracking, telemetry and control of the Satellite System, (B) the Network Facilities, (C) Service, or (D) the provision of Service to Customer in any circumstances in which O3b would be obliged to indemnify such supplier, or (iii) any officer, director, employee, agent, partner or shareholder of any such supplier. The limitations of liability set forth in this Section 10 shall apply to the O3b Group."

6. The essential question on the appeal is whether Interactive's counterclaim falls within the words "excluding fraud". The mere fact that O3B repudiated the contract plainly does not. The nature of Interactive's case and its relationship to "fraud" is not entirely clear. I think that it is as follows (although I must make it clear that most if not all of the case is hotly disputed).

7. It was O3B's responsibility under the MSA to obtain all necessary regulatory approvals. O3B elected to provide the Services using a company whose name is abbreviated to TIS. On 15 February 2013 TIS applied to the PTA for a Telecommunications Infrastructure Licence, which was granted on 4 November 2013. On 31 March 2014, TIS applied for a commencement certificate pursuant to the terms of that licence . Following an inspection by the PTA, the PTA required certain matters to be addressed before granting the commencement certificate. In response to the requirements of the PTA Mr Naveed Malik, the Vice President (Finance) of TIS wrote to the PTA on 15 July 2014. His letter contained three untrue statements, which it is alleged that Mr Malik knew to be untrue. It is "likely" that the content of the letter was copied to or made known to O3B.

8. On 21 August 2014 the PTA provided a commencement certificate. Although it is not clear from the draft pleading whether this was the same thing as the Telecommunications Infrastructure Licence (neither of which is in the appeal bundle), it seems probable that it was not. Some of the terms of the Telecommunications Infrastructure Licence are pleaded. Clause 6.9 of the Licence is headed "Commencement Certificate". It provides that a licensee must not provide infrastructure to a licensed telecom operator unless it has obtained from the PTA a commencement certificate evidencing that the PTA is satisfied that it has established its infrastructure; and in addition that the PTA is satisfied that the licensee is able to provide the services to the required quality.

9. The PTA provided the commencement certificate on 21 August 2014. However, despite the provision of that certificate, the PTA wrote to TIS on 16 October 2015, directing it to ensure legal intercept compliance. It also wrote to Interactive's sister company (Diallog Broadband) on 25 January 2016 to instruct it not to begin operations using TIS's facility, and it wrote again to TIS on 7 March 2016 directing it not to begin commercial operations because legal intercept compliance was lacking. The draft pleading goes on to allege that O3B knew that its infrastructure was not legal intercept compliant and that it was not entitled to apply for or be granted a commencement certificate. The application for the commencement certificate was made fraudulently. It is further alleged that O3B knew that any certificate that might be granted would be conditional on being legal intercept compliant. It knew that its infrastructure was not legal intercept compliant; and consequently its reliance on "the commencement certificate" as founding a claim for payment under the MSA was fraudulent. The last reference to the "commencement certificate" seems to be a reference to the Service Commencement Notice under the MSA; but it may refer to the commencement certificate given by the PTA under clause 6.9 of the Telecommunications Infrastructure Licence. Which it is does not matter.

10. What is clear from the draft pleading is that it is not alleged that Interactive was misled by anything said or done by or on behalf of O3B. On the contrary it has consistently maintained that the Service Commencement Notice was invalid precisely because O3B was not entitled to put the system into commercial operation. Nor is it alleged that the PTA was misled by the letter containing the allegedly untrue statements. In short Interactive pleads no cause of action against anyone in which an allegation of dishonesty is a necessary averment. Mr Jones QC on Interactive's behalf accepted that an allegation of dishonesty was not a constituent part of the counterclaim.

11. The short point, then, is whether the only claims that fall outside the scope of the exclusion of liability in clause 10 (c) of the MSA are claims where fraud or dishonesty forms part of the gist of the claim. In a short but closely reasoned judgment the judge answered that question affirmatively. Mr Jones QC says that the exclusion does *not* mean what the judge said that it meant. So much is clear from his argument; but let me say at the outset that it is quite unclear to me what Mr Jones says that the exclusion *does* mean. Mr Jones says that that does not matter, because on this appeal all that we are concerned with is whether the judge's interpretation of the clause was wrong. I do not agree, for two reasons. First, when a question of contractual interpretation comes before a court its principal task is to decide what the

contract does mean. Second, the fact that one party's interpretation cannot be properly formulated in itself casts doubt on whether that interpretation is correct.

12. We might begin by reminding ourselves of Diplock LJ's well-known statement in *Letang v Cooper* [1965] 1 QB 232, 242 that "[a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

13. The general approach to the interpretation of contracts is not in doubt. It has been comprehensively discussed by the Supreme Court in a series of cases over the last few years culminating (for the time being) in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. I will not attempt to summarise or paraphrase it. As Lord Hodge said at [9] the legal profession has sufficient judicial statements of this nature.

14. It is, however, necessary, to say something about exclusion clauses. The traditional approach of the courts towards exclusion clauses has been one of hostility. A strict and narrow approach to their interpretation held sway. This began to change with the passing of the Unfair Contract Terms Act 1977. Since then the courts have become more accepting of such clauses, recognising (at least in commercial contracts made between parties of equal bargaining power) that exclusion and limitation clauses are an integral part of pricing and risk allocation: see *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] PNLR 29 at [57]. As Briggs LJ put it in *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128, [2016] 1 CLC 573 at [19]:

> "Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. … The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means."

15. The legal background to what has been called the fraud "carve-out" to exclusion clauses was described by Flaux J in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 (Comm) at [124]:

> "In *Thomas Witter Limited v TBP Industries* [1996] 2 All ER 573 at 598, Jacob J considered that, for the purposes of the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977, it would inevitably be unreasonable "to exclude misrepresentation for fraudulent misrepresentation". Thus, there is a risk that a clause drafted too broadly (i.e. so as to extend to fraudulent misrepresentation) will be entirely ineffective. To avoid that risk, it has become common drafting practice to include fraud carve-outs of the kind seen in Clause 10 of the SPA in a wide variety of commercial contexts to make it clear that the relevant exclusion clause does not operate to exclude liability for fraud. The carve-out reflects the commercial common sense that a contracting party may be prepared to assume the risk of negligence by his counterparty, but not the risk of fraud."

16. He then quoted several examples. As Mr Jones rightly said, these clauses differ in their individual wordings, but the general thrust of them is much the same.

17. The wording of the clause also points in the same direction. The following points are largely taken from the skeleton argument of Mr Cavender QC and all are, in my judgment, well-founded.

18. First, the main heading to Section 10 is "*Liability-Related Provisions*". This shows that the entire clause is concerned with the subject of liability, which must mean legal liability.

19. Second, the introductory heading of clause 10 (c) refers to the limitation of O3B's "liability". Again, this must mean legal liability as a result of some cause of action advanced against it.

20. Third, the first sentence of the provision, following on from the heading, is capitalised for emphasis and refers to O3B's "*SOLE OBLIGATION*" and Interactive's "*EXCLUSIVE REMEDIES*", in respect of "*ANY CAUSE WHATSOEVER*" arising from the MSA or any Service Order under it. "Obligation" must mean "legal obligation"; and "remedies" must mean remedies to which Interactive would be entitled as a matter of law. Although, as Mr Jones points out, the contractual phrase is "cause" rather than "cause of action" that must be what it means, because Interactive would not be entitled to a "remedy" except as a result of a cause of action. Mr Jones rightly says that one of the ordinary meanings of "cause" is "reason", and he points to its use in that sense in clause 9 of the MSA which deals with force majeure. In that context, where the contract is dealing not with breach but with failure or delay, clearly "cause" means "reason". But the context of clause 10 is quite different. Clause 10 is dealing with legal liability. However, even if Mr Jones is right to say that "cause" means "reason" it must still be the reason why Interactive is entitled to a remedy.

21. Fourth, the clause goes on to refer to "REMEDIES FOR ANY CAUSE WHATSOEVER … UNDER ANY THEORY OF LAW OR EQUITY." The reference to any theory of law or equity must mean a legal system (such as English law by which the MSA is governed). It must follow that "remedies for any cause … under" such a system must mean the remedies available under that system as a result of a cause of action. Even if "cause" is interpreted as "reason" that would not change the emphasis on "remedies for" a particular reason.

22. Fifth, the clause goes on to say: "customer acknowledges and agrees that it shall have no right of recovery for the satisfaction of any cause whatsoever, except for confirmed outages". The judge said that in this phrase "cause" must mean "cause of action" because it is a cause of action that give rise to a right of recovery. I agree. As the judge also correctly said, although it is perfectly possible for parties to use the same word in a different sense within the same clause, that is some pointer to the fact that the word "cause" in the first sentence means "cause of action".

23. Finally, after the capitalised section the clause states that "Nothing in this MSA limits the liability of either Party arising from fraud." The phrase "liability arising from fraud" must mean liability in relation to which fraud is a necessary averment, otherwise the "liability" would not arise from fraud. It would arise from something else.

24. Mr Jones argues that if the judge's interpretation is right, then much of clause 10 (c) is superfluous. The judge acknowledged this point but did not find it weighty. In my judgment he was right. On any view the MSA is a prolix document. Clause 10 (c) itself is repetitive. The argument that a particular interpretation of a contractual provision makes other parts of the contract redundant is advanced from time to time. However, the argument from redundancy seldom carries much weight because, as it has been graphically put, drafters frequently employ linguistic overkill and try to obliterate the conceptual target by using a number of phrases expressing more or less the same idea.

25. Mr Jones accepted that the fraud relied on must be a relevant fraud. However, I was unable to discern what criteria he advocated as determining whether a particular fraud was or was not relevant. In the context of legal liability for claimed loss, it seems to me that the only workable criterion is whether an allegation of fraud is a necessary ingredient of the legal basis on which loss is claimed: in other words, whether an allegation of fraud is a necessary averment to support a cause of action. Since clauses like clause 10 (c) are intended to allocate risks between contracting parties, with the object of promoting certainty, this interpretation goes with rather than against the grain of the commercial purpose of the clause.

26. These are the reasons (which echo those of the judge) that led me to join in our decision to dismiss the appeal.

Lady Justice Asplin:

27. I agree.

Lady Justice Arden:

28. I also agree.