

JERSEY / JUDGMENT

Helm Trust -v- Chatfield [2013]

JRC 060 (15 March 2013)

[2013] JRC 060

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judgment

the bailiff: 1. This is an appeal from a decision of the Jersey Employment Tribunal (Mrs N Santos-Costa, Chairman presiding) dated 9 th October, 2012, whereby the Tribunal awarded the respondent £3,692.30 by way of unpaid notice pay for the period between 1 st

- 12 th January, 2011, (the "decision"). 2. Leave to appeal against the decision was granted by the Tribunal on 16 th November, 2012. The factual background 3. The findings of the Tribunal are set out in the decision. It is clear that much of the time before the Tribunal was taken up with the issue of whether, and if so when, notice of dismissal was given by Helm to the respondent. That matter has been resolved by the Tribunal in its decision and accordingly I propose only to summarise sufficient background to explain the nature of this appeal. 4. Helm employed the respondent as a trust manager pursuant to a written contract of employment dated 6 th June, 2006. The contract provided that it could be terminated by Helm upon three months' written notice. The respondent's remuneration was dealt with by a separate letter which was incorporated by reference in the contract. The respondent had brought a portfolio of clients with him and his remuneration was linked to the fees earned by Helm from that portfolio. 5. By a further letter of the same date, it was agreed that, in the event of the respondent ceasing to be employed by Helm for any reason, he would be free to approach those clients in his portfolio with a view of their moving with him and there would be no restrictive covenant in that respect. There would however be a restrictive covenant in relation to all other clients of Helm. It was further indicated that, in the event of his ceasing to be employed, there would be a discussion as to financial arrangements with a view to there being an incentive for the respondent to procure that the clients in his portfolio should remain with Helm. 6. It appears that, at the instance of Mr Durell , the managing director of Helm, the respondent was verbally informed on 27 th September, 2010, that he was suspended on full pay until further notice and that he should not attend the office. The next day, a board meeting of Helm resolved that the employment of the respondent would be terminated and that Helm would purchase the respondent's portfolio of clients on terms to be agreed by the parties. Later that day, the respondent met with Mr Durell and there was a conversation about the purchase of the clients and other matters. There was a dispute

between Mr Durell and the respondent before the Tribunal as to exactly what was said at that meeting. Mr Durell gave evidence that he had given notice of termination at that meeting, but that the respondent was very stressed about the situation and in his (Mr Durell's) opinion the respondent was simply not listening to what he was being told by Mr Durell . However Mr Durell conceded he had used somewhat uncertain language. The respondent said in evidence that he was confused and not sure if he had lost his job or was still on suspension. 7. There were further exchanges of e-mail and there appears to have been a meeting on 11 th October to discuss the situation. This was followed by a draft agreement dated 13 th October, 2010. It contained a provision for the purchase by Helm of the respondent's portfolio of clients and also dealt with other matters. It contained a provision to the effect " as at 30 th September 2010 our previous agreement for remuneration will cease ". However this draft was never signed and therefore never came into effect. 8. There appears to have been a further meeting on 25 th October and a further draft agreement was prepared dated 4 th November. The agreement was signed on that date by the respondent and on behalf of Helm. The relevant provisions of the agreement are as follows:- "Further to our meeting on Monday 25 October 2010 I am writing to restate the terms that we have discussed in relation to your retirement and the acquisition of your portfolio by Helm. The terms of our agreement are as follows:- 1. Effective from 1 January 2011 Helm agrees to acquire your portfolio for a consideration of 1 x gross recurring fees (GRF). GRF is defined as the fees billed, billable and collected in relation to your portfolio in any one year. The consideration period will be three years from 1 January 2011 and one third of this amount would be payable, in four instalments each year based on the consideration, calculated each quarter. If Helm is acquired during this period, the terms of this agreement will prevail. For the avoidance of doubt, GRF excludes disbursements. 2. As at 31 December 2010 all clauses contained in our previous agreements for remuneration will cease. 3. Work in progress as at 31 December will be assessed for recoverability and billed and collected and form part of the calculations for the share of profits to that date in accordance with how the calculations have been carried out previously. Due apportionment of annual domiciliary fees will also be calculated. ... 8. Intervening period 1 October - 31 December 2010 We will employ an administrator to look after your portfolio. As you are unable to administer your portfolio in accordance with your terms of employment and leave of absence in this period is in excess of your annual leave, and because you are still drawing a salary, we need to be compensated and a charge will be made for this work based on two thirds of the charge out rate of the person involved. ..." 9. As can be seen, the 4 th November agreement provided at clause 1 for the purchase of the respondent's portfolio of clients by Helm with effect from 1 st January, 2011, provided at clause 2 that all previous agreements for remuneration would cease as at 31 st December, 2010, dealt at clause 3 as to how work in progress as at 31 st December would be assessed for the purposes of working out the respondent's salary under the contract of employment, and further provided at clause 8 that for the period between 1 st October and 31 st December, when the respondent was going to be away sailing across the Atlantic, someone else would be employed to manage his portfolio and he would be charged for this. The Tribunal's decision 10. As already mentioned, the decision concentrates on

establishing whether, and if so, when notice of termination of employment was given by Helm to the respondent. However, in the course of reviewing the evidence, the Tribunal made certain findings in relation to the 4 th November agreement. 11. At paragraph 10, it noted that the 4 th November agreement contained a paragraph stating that " as at 31 December 2010 all clauses contained in our previous agreements for remuneration will cease ". 12. Paragraph 12 of the decision states as follows:- "The terms of the 4 th November Agreement made it clear that [the Respondent] was not expected to work for [Helm] any more. However the value of his client billing to the end of the year was bound up in the terms of his remuneration and sale package in the 4 th November Agreement and it was suggested by [Mr Durell] that [the Respondent] came in at the end of the calendar year in order to attend to this matter as he knew best the billing arrangements with his clients. Evidence was heard, and agreed by the parties, that [the Respondent] came in on the working days between Christmas and New Year 2010 and in the first week of 2011. It was noted that [the Respondent] was still 'locked out' of [Helm's] systems during this time and that he did not ask [Helm] for remuneration for this work even though the 4 th November Agreement made it clear that he would not receive remuneration after the 31 st December 2010 ." (emphasis added) 13. Later on at paragraph 19 the Tribunal said this:- "However, having said that [Mr Durell] did not assist the situation, it is also clear that [the Respondent] must take some responsibility too. [The Respondent] is an intelligent man who was working in a professional environment. He was aware of the circumstances for his departure from [Helm's] employment and also of the need to sell his clients to [Helm] in order to secure a retirement fund for himself. The terms of the sale are quite complicated and [the Respondent] seems to have negotiated himself around those without any particular difficulty (even if he did not like the end result) but for some reason he appears to be disingenuous about the fact that he was given notice." 14. Having reviewed the evidence, the Tribunal recorded its conclusion at paragraph 22 as follows:- "Accordingly the Tribunal finds that notice of termination of [the Respondent's] employment was given by [Helm] on the 13th October, 2010. In accordance with [the Respondent's] contract of employment, he should have been given 3 months' notice which meant that his employment terminated on the 12th January, 2011. [The Respondent] was paid by [Helm] until the 31st December, 2010. [The Respondent] is therefore entitled to receive a further 12 days' pay by way of outstanding notice pay due to him under his contract of employment." This sum was calculated at £3,692.30 and no issue is taken as to the calculation. This appeal 15. On behalf of Helm, Mr Buckley's submission is simple. He says that the Tribunal completely ignored the effect of the 4 th November agreement. That agreement could not be clearer. It provided for the purchase of the portfolio of clients with effect from 1 st January, 2011, by reference to fees billed from that date going forward; it provided that as at 31 st December, 2010, all clauses in previous agreements for the respondent's remuneration would cease; and it further elaborated that by making it clear that work in progress as at 31 st December would be assessed in order to calculate the billing levels to 31 st December which would dictate the respondent's salary for the period up to that date under his contract of employment. The 4 th November agreement varied the contract of employment. For the Tribunal to hold that

the respondent was entitled to remuneration at the level under his contract of employment for the period 1 st

- 12 th January, 2011, was to ignore the 4 th November agreement, which was binding upon the parties. 16. On the face of it, that argument seems unanswerable. It is trite law that parties to a contract may, by a further contract, agree to vary the original contract. That is as true in employment contracts as it is in relation to others. To give a simple example, suppose that a contract of employment provides for three months' notice of termination and also provides that, on termination, there will be a restrictive covenant restraining the employee from carrying on a competing business. In the absence of any further agreement, the employee is clearly entitled to be paid for three months after notice of termination is given. However, it would be open to the employer and the employee to agree that, in exchange for the employer agreeing not to enforce the restrictive covenant, the employee will forego his three months' pay during the period of notice. That will be a binding agreement for which there is valid cause . In the absence of some defect which renders the contract void or unenforceable, the parties will be held to it - la convention fait la loi des parties (see for example *Grove and Briscoe-v-Baker*

[2005] JLR 348 at para 10 per Bailhache, Bailiff). 17. On the face of it, that is exactly what has occurred here. The 4 th November deals mainly with the fact that Helm will purchase the respondent's portfolio of clients and fixes the price (or more exactly the method of calculating the price) that it will pay for those clients. But it also amends the original contract of employment in certain respects because, as part of the 4 th November agreement, the respondent and Helm agreed that the respondent would not be paid after 31 st December, 2010. That replaces the provision in the contract of employment to the extent that the respondent was no longer to be paid for three months following the notice of termination; only for the period from the date of the notice on 13 th October until 31 st December. 18. Somewhat puzzlingly, there is simply no mention of this issue in the decision despite the passage emphasised in paragraph 12 of the decision (quoted at para 12 above). I asked Mr Buckley whether the point he was now taking had been put before the Tribunal but he assured me that it had been. Although we have no transcript of the proceedings before the Tribunal, Mr Buckley's assertion is supported by the Chairman's note of Helm's closing submission to the effect that the 4 th November agreement 'concludes all matters between [the respondent] and Helm'. 19. In response to Helm's argument, the Respondent made a number of points:- (i) He asserted that Helm had broken the terms of the 4 th November agreement and had not paid him the amounts due for the purchase of his clients under that agreement He said that Helm should not be allowed to rely on that agreement for the purposes of determining his notice pay if Helm was not adhering to the agreement itself. However, the fact, if it be the case - and I have no way of knowing this at present - that Helm has not paid the correct amounts under the 4 th November agreement does not mean that the agreement is no longer in force. It means merely that the respondent has a right to bring an action against Helm seeking payment of the correct amount due under the agreement. (ii) He repeated the assertion which he

made before the Tribunal, namely that his contract of employment required three months' written notice of termination and he had never received written notice of termination. He disagreed with the Tribunal's finding that notice of termination was given on 13 th October. However, it is not open to him to make that point. The Tribunal has made a finding of fact that notice of termination was given on 13 th October. Appeals to the Royal Court are only allowed on matters of law and, unless he can satisfy me that the finding of fact is so perverse as to be a finding of fact that no reasonable tribunal could make it, there is no right of appeal. I am quite satisfied that the Tribunal's finding on this aspect cannot possibly be categorised as perverse. In any event, the respondent has not sought leave to appeal the Tribunal's decision. (iii) Although he accepts that the 4 th November agreement states that he will not be entitled to any remuneration after 31 st December, 2010, he says that it does not deal specifically with whether his employment was terminated. Accordingly he was still entitled to three months' notice with effect from 13 th October and he was therefore entitled to be paid for the period 1 st

- 12 th January. However, that is to ignore what the 4 th November agreement says. It provides expressly that the provision in his contract of employment dealing with remuneration will cease as at 31 st December; in other words he is not entitled to be remunerated under his contract of employment after that date. That subsequent agreement varies the contract of employment in this respect. It was therefore not open to the Tribunal to find that the respondent was still entitled to be paid after 31 st December simply because the contract of employment originally provided for three months' notice of termination. (iv) Finally, he submitted that he only entered the th November agreement under duress and it should not therefore be enforced. There are a number of difficulties with this line of argument:- (a) He does not appear to have taken the point before the Tribunal and it is not open to him to take it for the first time on appeal. (b) Such a contention is inconsistent with the findings of the Tribunal. The clear implication from the decision is that the Tribunal accepted that the 4 th November agreement was validly entered into. Any suggestion that the respondent was acting under duress is negated by the finding of the Tribunal at paragraph 19 that the terms of the sale contained in the 4 th November agreement were quite complicated and that the respondent seems to have negotiated about those terms without any particular difficulty. (c) I accept that if a contract is entered into under duress, it will be invalid (see *Bisson-v-Ferbrache*

[1981] JJ103). I am not aware of any Jersey case which gives guidance as to what may constitute duress but I consider that in this respect duress under Jersey law will have the same constitute elements as duress under English law (in the same way as undue influence under Jersey law is similar to that under English law - see *Toothill -v-HSBC Bank PLC*

[2008] JLR 77 at para 28). Chitty on Contracts (30 th edition) (Vol 1 at 7-003) makes it clear that there must be a wrongful or illegitimate threat which has a causal effect on a person's decision to enter the contract. Such threats may relate to the victim's person, his property or his economic interests but there must in all cases be some wrongful or illegitimate

threat. The respondent outlined to me the circumstances which he said amounted to duress. He said that the suspension came out of the blue and that despite repeated attempts, he could not obtain clarification from Mr Durell as to what his position was and whether he was merely being suspended or his employment was being terminated. He was in a terrible way and extremely stressed by it. This was added to by the fact that he repeatedly asked for meetings and clarification but did not obtain these. An additional factor was that he had committed to sail across the Atlantic and he was due to depart immediately after 4 th November. He was extremely anxious to secure the terms for the purchase of his portfolio by Helm before he left in case anything should happen to him during his sailing trip. His wife had made it clear to him that morning as he left for the meeting on 4 th November that he must not come back without an agreement with this protection. He was told by Helm that day that he must take it or leave it and he felt he had no alternative but to accept what was being offered, even though he did not think it was fair. He did however succeed in negotiating one change during the course of the day on 4 th November. He emphasised how stressed he was throughout this and how he was often in tears. (d) The difficulty with this is that, even on what the respondent told me, there is nothing to suggest any wrongful or illegitimate threat on the part of Helm. The fact that the respondent may have felt compelled to accept the terms because he needed to get it sorted out before he went off sailing cannot amount to duress. 20. For these reasons, I cannot accept any argument that I should find the 4 th November agreement to be of no effect because of duress. I am satisfied that it was a valid agreement. There was ample cause in that Helm was agreeing the price which it would pay in exchange for the acquisition of the portfolio of clients with effect from 1 January, 2011, and the termination of the respondent's salary under his contract of employment on 31 st December, 2010. 21. Under Article 94(1) of the Employment (Jersey) Law 2003 , the Royal Court may only interfere with a decision of the Tribunal where there has been an error of law. However, I am quite satisfied that the Tribunal erred in law in this case. Having found that notice of termination was given on 13 th October, it assumed that, because the contract of employment provided for three months' notice, the respondent was entitled to be paid for that period. That would undoubtedly have been so had there not been any subsequent agreement. However, the 4 th November agreement varied the terms of the contract of employment and provided that the payment of salary under the contract of employment would cease on 31 st December, 2010. There was no vitiating factor in relation to the 4 th November agreement and both parties must be held to a contract freely entered into - la convention fait la loi des parties . The Tribunal erred in law in ignoring the effect of the 4 th November agreement on the contract of employment. 22. It follows that this appeal is allowed and the decision of the Tribunal quashed. The respondent is not entitled to any salary under his contract of employment after 31 st December, 2010. Authorities Jersey Employment Tribunal Chatfield-v-Helm 198/11. Grove and Briscoe-v-Baker

[2005] JLR 348 . Bisson-v- Ferbrache

[1981] JJ103. Toothill -v-HSBC Bank PLC

[2008] JLR 77 . Chitty on Contracts (30th edition). Employment (Jersey) Law 2003. Page Last
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