

JERSEY / JUDGMENT

ROK Construction Limited v Angel Fish Limited

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Contract - decision on the interpretation of a contract between the Representor and the Respondent. [2018]JRC189 Royal Court (Samedi) 9 October 2018 Before : T. J. Le Cocq Esq., Deputy Bailiff, and Jurats Pitman and Dulake Between ROK Construction Limited Representor And Angel Fish Limited Respondent Advocate C. Hall for the Representor. Advocate D. S. Steenson for the Respondent.

judgment

the deputy bailiff: 1. This is a request for a decision on a preliminary issue arising out of the interpretation of a contract between ROK Construction Limited (“the Representor”) and Angel Fish Limited (“the Respondent”). The contract, which is in the standard JCT form SPC/XQ 2011 (“the JCT contract”), relates to the construction on a site known as the Hotel La Tour in St Aubin. That site is owned by the Respondent. 2. A dispute under the JCT contract has arisen between the Representor and Respondent. The Representor wishes to refer the dispute to arbitration, the Respondent maintains that on a proper construction of the JCT contract it is not open to the Representor to do so without the Respondent’s express agreement which has not been provided. 3. Accordingly, the Representor seeks an order that the Court declares:- “There is an agreement between the Representor and [the Respondent] by virtue of which they have agreed to refer disputes under the [JCT contract] to arbitration in accordance with the Arbitration Jersey Laws.” 4. The law relating to the construction of contracts has been stated in the judgment of the Court of Appeal in Trilogy Management Limited v YT Foundation (International) Limited and others [2012] JCA 152 where the Court said at paragraph 37 et seq:- “37. In La Petit Croatie Limited –v- Ledo [2009] JCA 221 this Court considered the approach in this jurisdiction to the construction of documents generally. It endorsed the principles set out in the judgment of Commissioner Page in In Re Internine Trust [2005] JLR 236 at paragraph 62. At paragraph 11, Martin JA, with whom the other members of the Court agreed, summarised those principles as follows: “The aim is to establish the presumed intention of the parties from the words used; but the words used must be construed against the background of the surrounding circumstances, which means the circumstances that must be taken to have been known to the [parties] at the time. These circumstances include anything that would have affected the way in which the language would have been understood by a reasonable man, except that evidence of subjective intention is ordinarily inadmissible. The words must also be read in the context of the document as a whole, and should so far as possible be given their ordinary meaning; but a different meaning may have

to be given to them if a reading of the document as a whole and common sense so require.”

38. This summary is consistent with views recently expressed in the United Kingdom Supreme Court in *Rainy Sky SA –v- Kookmin Bank* [2011] 1 WLR 2900: see paragraph 14 in the judgment of Lord Clarke of Stone-cum-Ebony JSC, with whom the other members of the Court agreed.
39. To the summary by Martin JA the following supplementary points can be added:-
 - (i) First, where parties have issued unambiguous language the Court must apply it: (per Lord Clarke in *Rainy Sky SA* at paragraph 23). The Court cannot rewrite the language which the parties have used in order to make it conform to business common sense (per Hoffmann LJ in *Co-operative Wholesale Society Ltd –v- National Westminster plc* [1995] 1 EGLR 97, cited in *Rainy Sky SA* at paragraph 23). Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation (per Lord Steyn in *Society of Lloyd’s –v- Robinson* [1999] 1 WLR 756, cited in *Rainy Sky SA* at paragraph 25). (ii) Second, however, the Court should be astute to remember that, language being a flexible instrument, if the words used are capable of more than one construction that which appears most likely to give effect to the commercial purpose of the agreement should be chosen (per Hoffmann LJ in *Co-operative Wholesale Society Ltd –v- National Westminster plc*); the Court ought generally to favour a commercially sensible construction over technical interpretations and undue emphasis on niceties of language (per Lord Steyn in *Society of Lloyd’s –v- Robinson*). If therefore there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other: see *Rainy Sky SA* at paragraphs 21, 23 and 25. (iii) The exercise of construction is therefore essentially one unitary exercise (per Lord Clarke in *Rainy Sky SA* at paragraph 21), “neither uncompromisingly literal nor unswervingly purposive” (per Sir Thomas Bingham MR in *Arbuthnott –v- Fagan* [1995] CLC 1396).
40. Advocate Journeaux also submitted that cases where the Court is asked to depart from the natural meaning of the language used by the parties fall on a spectrum. The clearer the language that the parties have used, the slower the Court should be to displace that meaning by reference to considerations of the commercial consequences. He relied on the recent statement by Briggs J in the English High Court in *LB Re Financing No 3 Ltd –v- Excalibur Funding No 1 Plc* [2011] EWCH 2111 (Ch) at paragraph 46:- “Commercial absurdity may require the court to depart even from the apparently unambiguous natural meaning of a provision in an instrument, because “the law does not require judges to attribute to the parties an intention they plainly could not have had”; see per Lord Hoffmann in the ICS case at page 913. Questions of commercial common sense falling short of absurdity may however enable the court to choose between genuinely alternative meanings of an ambiguous provision. The greater the ambiguity, the more persuasive may be an argument based upon the apparently greater degree of common sense of one version over the other.” The JCT contract 5. The relevant articles of the JCT contract are as follows:- “Article 7: Adjudication If any dispute or difference arises under this contract either party may refer it to adjudication

in accordance with clause 9.2. Article 8: Arbitration Where Article 8 applies then subject to Article 7 and the exceptions set out below, any dispute or difference between the parties of any kind whatsoever arising out of or in connection with this contract shall be referred to arbitration in accordance with clauses 9.3 to 9.8 and the JCT 2011 edition of the Construction Industry Model Arbitration Rules (CIMAR). The exceptions to this Article 8 are:- Any disputes or differences arising under or in respect of the construction industry scheme or VAT, to the extent that legislation provides another method of resolving such disputes or differences; and Any disputes or differences in connection with the enforcement of any decision of an adjudicator. Article 9: Legal Proceedings Subject to Article 7 and (where it applies) to Article 8, the English Court shall have jurisdiction over any dispute or differences between the parties which arises out of or in connection with this contract.” 6. On the same page of the JCT contract, at note [12] it is said:- “If it is intended subject to the right of adjudication and exception stated in Article 8 that disputes or differences should be determined by arbitration and not by legal proceedings, the contract particulars will state that Article 8 and clauses 9.3 to 9.8 apply and the words “do not apply” must be deleted. If the parties wish any dispute or difference to be determined by the courts of another jurisdiction, the appropriate amendment should be made to Article 8 (see also clause 1: 11 and schedule 5 parts 1 and 5).” 7. In the Contract Particulars a number of elections are required indicating that certain provisions apply or do not apply. This is done, as anticipated in the note set out above, by deleting the word “applies” or deleting the phrase “does not apply” with regard to each of the elections. For example, in the JCT contract the paragraph relating to “collaborative working” is left as “does not apply” with the word “applies” being deleted. With regard to the election for “cost savings and value improvements,” this is applied by the deletion of the words “does not apply” and leaving the word “applies” undeleted. 8. With regard to Article 8, the arbitration provisions, which are at issue in this application, the phrase “apply/do not apply” have been left untouched. Neither alternative has been deleted. However in guidance expressly contained within the reference to that Article the following is to be found:- “(If neither entry is deleted, Article 8 and clauses 9.3 to 9.8 do not apply. If disputes and differences are to be determined by arbitration and not by legal proceedings, it must be stated that Article 8 and clauses 9.3 to 9.8 apply.)” (original emphasis) 9. Accordingly if the JCT contract represented the only document to be considered in this matter it is clear that the parties did not apply the arbitration provisions and, accordingly, any dispute must be dealt with, absent an agreement outside the JCT contract to arbitrate, by legal proceedings.

10. The matter does not necessarily rest there however. In addition to the JCT contract the parties signed what, we are informed, is a standard amendment to the JCT contract known as “Addendum 1” which has for its title “Amendments to the contract for use in the Island of Jersey” (Addendum 1). This addendum is not lengthy and for our purposes we think it is important to set it out in full. It states, as follows: “1.1 Notwithstanding anything herein contained to the contrary the interpretation of this Contract and all matters arising thereunder shall be governed by and construed in accordance with the laws of the Island of

Jersey and the Contractor and all sub-contractors shall file with the Employer an address for service within the jurisdiction. 1.2 In particular the changes to the wording of the Contract includes, but is not limited to the following:- .1 Any reference to any Act of Parliament any instrument, rule, or order made under any Act of Parliament or any regulations, or byelaw shall be substituted by anything analogous to or having a substantially similar effect to any such Act of Parliament, instrument, rule or order under any such Act of Parliament or any regulations or byelaw under or in connection with the following: Orders in Council, Ordinances, any regulations and orders or statutory instruments of or applicable to the Island of Jersey. .2 The words 'United Kingdom Government' will be deleted and the words 'States of Jersey' will be inserted. .3 The words 'Local Authority or Statutory Undertaker' or 'local authority' or 'statutory undertaker' will be deleted and the words 'competent States or Parochial Authority' will be inserted. .4 The words 'Law of England' will be deleted and the words 'Laws of the Island of Jersey' will be inserted. .5 Reference to Arbitration Acts shall be replaced by Arbitration (Jersey Laws current to the Base Date. .6 Any arbitration or legal proceedings or hearings shall be held within the Island of Jersey. .7 Any reference to resolving disputes by Adjudication shall be deleted and replaced by resolving disputes by Arbitration in accordance with the Arbitration (Jersey) Laws current at the Base Date. .8 The Construction (Design and Management) Regulations (CDM Regulations) do not apply in Jersey and are not incorporated into this agreement. .9 Reference to 'VAT' in Clause 4.4, Schedule 1 or elsewhere in the Contract shall be replaced with 'GST' which shall be applied in accordance with the Goods and Services Tax (Jersey) Law 2007."

11. The Representor argues that by signing Addendum 1, and by substituting the words in the JCT contract for words more suitable to this jurisdiction the parties showed a clear intention to refer any dispute to arbitration. The Representor argues that, in its form as amended by Addendum 1, Article 7 set out above would read:- "If any dispute or difference arises under this contract either party may refer it to arbitration in accordance with clause 9.2."
12. An amendment in these terms would be somewhat strange. Section 9.2 of the JCT contract refers to adjudication which, on the Representors analysis, would be replaced with the words "arbitration". It may be that the provisions of section 9.2 could be transposed to refer to arbitration instead of adjudication but there is express reference to "the scheme" which shall apply to any "adjudication". The scheme is defined within the JCT contract as part 1 of the "schedule to the Scheme for Construction Contracts (England and Wales) Regulations 1998". No argument was put to us on the contents of that document and whether it can be applied in an arbitration.
13. On another interpretation of Addendum 1 it may be intended to alter Article 7 to read:- "If any dispute or difference arises under this contract either party may refer it to arbitration in accordance with the Arbitration (Jersey) Laws current to the base date."

14. This, however, is speculation as clause 1.2.7 of Addendum 1 does not make the position clear. Indeed, another interpretation could be simply that clause 1.2.7 is designed to remove any reference to adjudication and that the matter should be resolved thereafter by reference to the arbitration provisions.
15. Insofar as it refers to arbitration itself, Addendum 1 amends the provisions in the JCT contract by doing nothing more than changing references to the Arbitration Acts by reference to “Arbitration (Jersey) Laws” and providing that reference to VAT should be replaced by “GST”.
16. No alteration is made to the Contract Particulars nor to the notes to those Contract Particulars requiring the deletion of words to clarify whether those provisions are to apply or not.
17. For example, note [12] referred to above would, with the amendments added by Addendum 1, read:- “If it is intended, subject to the right to resolve disputes by arbitration and exceptions stated in Article 8 that disputes or differences should be determined by arbitration and not by legal proceedings, the contract particulars must state that Article 8 and clauses 9.3 to 9.6 apply and the words “do not apply” must be deleted...”
18. It appears to us that there is, potentially, a conflict within the provisions of the JCT contract in its reference to arbitration. The “adjudication” provisions, as amended by Addendum 1, might on one analysis appear, if there were nothing else, to afford a free-standing right to arbitrate. The arbitration provisions, however, require a positive election by the deletion of inapplicable words to ensure that arbitration happens. Both note [12] and the note in the Contract Particulars set out at paragraph 8 above makes it clear that, so far as those clauses are concerned, arbitration does not arise unless it is expressly selected by the parties.
19. There has been no evidence placed before us that might bear upon this potential ambiguity. We have heard no witnesses and there is no affidavit and all of the documentation is put before us as exhibits to the Representor’s representation.
20. The matter is somewhat further confused by the fact that the parties have, at page 15 of the JCT contract, apparently elected the Royal Institution of Chartered Surveyors to appoint both an adjudicator and an arbitrator. This seems to us to be an example of where little consideration has been given to how the addendum is to be interpreted in amending the body of the JCT contract.
21. We are informed, and it was not argued to the contrary, that Addendum 1 is a standard document made to convert certain parts of the JCT contract, also a standard document, which originates in the United Kingdom, into a form amenable to Jersey law.

22. The Representor argues that it is in effect an election for arbitration but it does not appear to us that such is inarguably the case. All it is doing on one level is to determine how expressions within the JCT contract should be interpreted to make them amenable to Jersey law, but it does not extend to an express disapplication of the election provisions within the JCT contract and in our judgment cannot be interpreted as such.
23. We cannot resolve the matter on the basis of “commercial sense” or purpose as quite clearly the JCT contract itself anticipates that the parties may elect to arbitrate or chose to leave the matter to the courts. Either of those outcomes are possible and reasonable.
24. In our view, reading the JCT contract and Addendum as a whole, it is far from clear that the Addendum was intended to supersede the requirements that the parties elect for arbitration. No amendment was made by Addendum 1 to those words and we do not think that reading Article 7 and Article 8 together leads us to the conclusion that the parties have elected to submit all disputes to arbitration.
25. In the circumstances, we are not able to make the declarations sought by the Representor. The parties needed clearly to elect to refer the matter to arbitration which on the surface of the JCT contract as amended or otherwise by Addendum 1, they have not done. Authorities Trilogy Management Limited –v- YT Foundation (International) Limited and others

[2012] JCA 152.

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