ENGLAND AND WALES COURT OF APPEAL

Armchair Answercall Limited v People in Mind Limited

[2016] FICR 23; [2016] EWCA Civ 1039

Moore-Bick, Ryder and Christopher Clarke LJJ

11 and 26 October 2016

Contract – Frustration – Foreseen or foreseeable event – High degree of foreseeability required – Assumption of risk – Disentitling fault of invoking party – Performance after event relevant – Franchisees terminating agreements foreseen and partly caused by complainant

Summary
This was an appeal from a decision of the Mayor's and City of London County Court that a contract for consultancy services to a franchise business was not frustrated by all franchisees terminating agreements.

Facts
A franchisor of a telephone answering business engaged a consultant to manage the transition to a new method of conducting the business which would involve a loss of business by the franchisees. After some time but before the expiry of the consultancy agreement, the franchise agreements were terminated because of the unhappiness of the franchises with the new method. The consultant continued to provide some services to the franchisor for five months until the franchisor terminated the consultancy agreement, arguing that it had been frustrated by the termination of the franchise agreements. At the end of its term, the consultant sued for the balance of the moneys due under the consultancy agreement. The judge dismissed the franchisor's argument of frustration and awarded judgment to the consultant for the full amount plus interest.

The franchisor appealed, arguing that the whole purpose of the consultancy agreement to provide services in relation to franchises was destroyed when the franchise agreements ended and that this was neither foreseen nor foreseeable as likely or possible.

The consultancy agreement required the consultant to assist personnel with any aspect of the "Transition" for 12 months, with "Transition" being defined as:

> … all aspects of the implementation process involved in ensuring that the Franchise Operations (the Franchisees, the Existing Customers, the New Customers and the operation of the Existing Business and the New Business) work in accordance with the revised Method, as a result of the provision of the Services as set out in this Agreement.

"New Customer" and "New Business" were a customer or business who were not then contracted to the franchisor (and therefore not serviced by a franchisee). As a result of this clause, the consultancy agreement provided for services other than in relation to franchisees.

The consultant argued that the agreement foresaw the possibility of the franchisees not accepting the new method in its provision for termination of franchise agreements and its statement that "the Transition is unlikely to be effected without issues arising with individual Franchisees and Existing Customers which could result, directly or indirectly, in some loss of Existing Business". It also argued that communications by the franchisor to the franchisees were not conciliatory and caused the franchisees to terminate their agreements.

Held, (per Christopher Clarke LJ, Moore-Bick, Ryder LJJ agreeing) dismissing the appeal:

(1) The consultancy agreement was not frustrated because it continued to be performed for five months after the alleged frustrating event, services were to be provided other than in relation to franchisees, the event was foreseeable as it was clearly a real possibility that the franchisees might not accept the new method and their failure to accept was partly due to the confrontational conduct of the franchisor. [44], [47], [48], [51]

(2) Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the laws declares both parties to be discharged from further performance. [28]

National Carriers Limited v Panalpina (Northern) Limited [1981] AC 675; *Davis Contractors Limited v Fareham Urban DC* [1936] 696, cited.

(3) Frustration is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains. [22]

Pioneer Shipping v BTP Tioxide Limited [1982] AC 724, cited.

(4) A frustrating event must be some outside event or change of extraneous situation without blame or fault on the invoking side. [29]

J.Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1, cited.

(5) An event that is actually foreseen cannot ordinarily found a claim of frustration. Where events are foreseeable but not foreseen, much turns on the degree of foreseeability, with a high degree being required to exclude the doctrine of frustration. [30]

Edwinton Commercial Corp v Tsavliris (Worldwide Salvage & Towage) Ltd [2007] EWCA Civ 547, cited.

(6) Frustration, if it occurs, is a definite event. Whether any given event is a frustrating event is, once the facts said to constitute the event have been determined, a question of law. If it was, the fact that the parties did not immediately treat it as such does not alter the position. What the parties did or did not do after the event may, however, be a pointer to whether the event was in truth a frustrating one. [51]

(7) The consultancy agreement could be performed after termination of all franchise agreements because the definition of "Transition" was wide enough to include services in relation to acquisitions, systems development, bid compilation and franchisee recruitment in the future, Existing or New Customers and existing or future franchisees. [42]

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Bonallack & Bishop for the appellant.
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CAMERON FORD