LAW PUNDITS

Collidge v. Freeport Plc

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COLLIDGE (appellant) v. FREEPORT PLC (respondent)

[2008] EWCA Civ 485

[2008] IRLR 697

Court of Appeal, (CA)

100 Contracts of employment

199.6 Compromise agreement

The facts:

Sean Collidge was the founder of Freeport plc, which created and managed out-of-town shopping precincts selling designer goods at discount prices. He was the chief executive and a director of the company.

When it was alleged that Mr Collidge was guilty of financial impropriety, the board of directors of Freeport decided that he should be suspended for three months whilst an investigation was carried out. Mr Collidge maintained his innocence. He proposed that he should resign and enter into a compromise agreement with the company. The board accepted that proposal, but stated that the investigation into the allegations would continue.

The agreement provided that "Subject to and conditional upon the terms set out below, [Freeport] will: (a) pay to you the sum of £445,680 gross as compensation in respect of the termination of your employment ..." Other payments or benefits were then set out in sub-clauses (b)-(f). Clause 7 of the agreement contained warranties from Mr Collidge, and it began with the words: "You warrant as a strict condition of this agreement ..." Clause 7(b) contained the warranty that "there are no circumstances of which you are aware or of which you ought reasonably to be aware which would constitute a repudiatory breach on your part of your contract of employment which would entitle or have entitled the company to terminate your employment without notice."

The day before the agreed compensation was due to be paid, Freeport's solicitors wrote to Mr Collidge's solicitors saying that the investigation had revealed that in the absence of explanation by Mr Collidge he was in breach of clause 7(b) and so payment could not be authorised. Mr Collidge consequently commenced proceedings in the High Court.

The judge found that clause 7(b) was a precondition, a condition precedent, to Freeport's liability to perform its obligations under the contract, and that Freeport was therefore entitled to withhold payment under the compromise agreement. Mr Collidge appealed.

The Court of Appeal (Lord Justice Waller, Lord Justice Tuckey and Lord Justice Sedley) on 5 March 2008 dismissed the appeal.

The Court of Appeal held:

199.6

The judge had not erred in finding that clause 7(b) was a precondition, a condition precedent, to Freeport's liability to perform its obligations under the contract.

It was a condition, a sine qua non, of the obligation to pay that the facts should be as warranted in clause 7 of the agreement. Both the words used and the context in which the agreement came to be made supported that view.

The agreement was structured in such a way as to make the performance by Freeport of its obligations conditional upon the terms which provided what Mr Collidge had to do. The opening words of the agreement provided that Mr Collidge had to comply with those terms before Freeport was liable to perform its obligations. That point was emphasised by the opening words of clause 7: "You warrant as a strict condition". That clause did not simply require the warranties to be given; it contained promises that they were true at the date of the agreement.

That construction was put beyond doubt on considering the context in which the agreement had been made. The board had wanted to suspend Mr Collidge whilst it carried out its investigations into his conduct. If that had happened, the investigation would have revealed ample grounds for summary dismissal. However, Mr Collidge had denied misconduct and so the board had agreed termination arrangements with him conditional upon his warranty that he had done nothing wrong, with the investigation into the allegations continuing. In that way, Freeport had protected itself in the event that it was subsequently shown that the promise that Mr Collidge had given was untrue.

Accordingly, the appeal failed.

Cases referred to:

Castioni, Re [1891] 1 QB 149 HC

Appearances:

For Mr Collidge:

DAVID READE QC, instructed by Mayer Brown International LLP

For Freeport plc:

PAUL NICHOLLS, instructed by Dechert LLP

1

LORD JUSTICE TUCKEY: This is an appeal from the decision of Jack J ([2007] EWHC QB 1216 (QB), [2007] All ER (D) 457 (May)) who dismissed the claimant, Mr Sean Collidge's, claims made under a compromise agreement ('the agreement') with the defendant, Freeport plc. The claimant was the founder of Freeport whose business involved the creation and management of out-of-town shopping precincts selling designer goods at discount prices. At the time of the agreement he was its chief executive and a director. The agreement provided that he would be paid certain sums of money and receive other benefits upon terms which included his resignation from these posts and a term which said:

> 'You warrant as a strict condition of this agreement that as at the date hereof ... (b) there are no circumstances of which you are aware or of which you ought reasonably to be aware which would constitute a repudiatory breach on your part of your contract of employment which would entitle or have entitled the company to terminate your employment without notice.'

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The judge found that this term was a condition precedent to Freeport's liability to perform its obligations under the agreement. The two-week trial before him was largely devoted to factual issues as to whether this condition had been fulfilled. Freeport relied on a number of serious allegations of dishonesty in support of its contention that the condition had not been fulfilled. The judge held that there were numerous circumstances of which the claimant was aware which constituted repudiatory breaches on his part of his contract of employment which would have entitled Freeport to terminate his employment without notice. Rix LJ refused permission to appeal this part of the judgment but gave permission to argue issues of construction and consequential and ancillary issues of law and/or legal analysis.

3

The genesis of the agreement was concern among members of the Freeport board about allegations of financial impropriety by the claimant. At a meeting of the board on 29 March 2006 it was proposed that the claimant should be suspended whilst these allegations were investigated. The claimant denied the allegations and said he did not want to be suspended, but the board voted that he should be suspended for three months whilst an investigation was carried out. After he left the meeting the claimant indicated that he would rather resign and negotiate a compromise agreement. The board agreed to take this course but the claimant was told that the investigation would nevertheless still proceed. The terms of the agreement subsequently reached were embodied in an offer letter from Freeport to the claimant dated 31 March 2006 which the claimant accepted and agreed to by signing a copy of the letter.

[2008] IRLR 697 at 698

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The structure of the agreement is important. It starts by saying:

> 'Subject to and conditional upon the terms set out below, [Freeport] will:
>
> (a) pay to you the sum of £445,680 gross as compensation in respect of the termination of your employment; and'

there then followed letters (b) to (f) which detailed other payments or benefits which Freeport were to provide. The terms are then set out in 13 numbered clauses in the following pages of the agreement preceded by the words, 'The terms ... are that you hereby irrevocably agree as follows'. The terms included resignation as an employee and director, no claims under employment law and obligations of confidentiality and cooperation. The term in question is clause 7(b). Sub-clauses (a), (c) and (d) of clause 7 warranted that the claimant had not failed to disclose any personal injuries which might give rise to a claim, had not made any claim arising out of his employment or its termination and had not obtained employment.

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Payment of the agreed compensation was due, if it was due at all, on 27 April 2006. The day before Freeport's solicitors wrote to the claimant's solicitors saying that the investigation had so far revealed that in the absence of explanation by the claimant he was in breach of clause 7(b) and so payment could not be authorised. The claimant's solicitors said that the payment was due and these proceedings followed shortly afterwards.

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At trial Mr David Reade QC for the claimant argued that clause 7(b) was not a condition precedent in the sense that its performance was a precondition to the enforceability of the agreement or its payment provisions, but if it was it had been met simply by the claimant giving the warranty. In rejecting these arguments the judge said:

> '8. In my judgment, the effect of the introductory words to Freeport's obligation to pay, "Subject to and conditional upon the terms set out below" and of the introductory words to clause 7, "You warrant as a strict condition of this agreement", is that if the facts are not as set out in sub-clauses (a) to (d) of clause 7, Freeport is under no obligation to pay. In short, it is a condition, a sine qua non, of the obligation to pay that the facts shall be as warranted. That is plainly the sense of "conditional" in the introductory words to the obligation to pay. I consider that "strict condition" in the introductory words to clause 7 is to be construed in the same way. I consider that warranty is used in the sense that it is sometimes used in insurance contracts as being a condition in the sense of a sine qua non of the insurer's liability ... That is consistent with the use of both warranty and condition in the same phrase ... It is also consistent with what, in my view, the intention of the parties may be presumed to be. That intention might have been more simply expressed as "Freeport do not have to pay if 7(a), (b), (c) or (d) are not so."'

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Mr Reade had argued that the clause 7 warranties only became conditions of the agreement giving rise to the ordinary remedies for breach of such a term. Here Freeport had not elected to treat the claimant's repudiatory breach as bringing the agreement to an end, at least before his right to payment had accrued. Any loss which it could otherwise claim as damages for the breach was caused by Freeport's voluntary act in failing to accept the repudiation.

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The judge rejected what he described as 'this complex analysis' as a further reason for concluding that his construction of the agreement was correct. Mr Paul Nicholls for Freeport had submitted that if the compensation had become payable, as Mr Reade contended, Freeport could set off a counterclaim for damages for breach of contract for the same amount. In the event that the judge accepted Mr Reade's contention Mr Nicholls had applied for permission to amend to add such a counterclaim. The judge said that if his construction of the agreement was wrong he would have given permission to amend and, as I understand it, would have accepted Mr Nicholls' submission about this so the claimant would still have ended up recovering nothing.

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Mr Reade has advanced much the same arguments before us as he did before the judge. He relies on the fact that the words to be construed appeared in an offer letter and says that by agreeing to its terms the claimant was doing no more than agreeing to give the warranty which he did. This became a term of the agreement but not a precondition of Freeport's obligation to meet their obligations under it. Mr Reade also submits that it served the purpose of ensuring that representations made by the claimant became conditions of the agreement. To have had the effect contended for by Freeport and found by the judge the agreement would have had to say: 'If you breach clause 7 we will not have to pay or if we have paid you will have to repay'. As it is, it cannot have been contemplated that minor breaches of the other clause 7 warranties would absolve Freeport from performing any of its obligations under the agreement and clause 7 has to be construed for its effect as a whole. Mr Reade also submits that the judge's analogy with insurance warranties is inapt; the use of both the words 'warrant' and 'condition' in the opening words of clause 7 show no awareness of any such concept.

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I do not accept these submissions. I think it would be sufficient to say that I agree with the reasons given by the judge. Both the words used and the context in which the agreement came to be made support this view. The agreement is structured in such a way as to make the performance by Freeport of its obligations (a) to (e) at the beginning of the agreement conditional upon the terms which follow which say what the claimant has to do. That is what the opening words of the agreement say: the claimant is to comply with those terms, which include resignation, waiver of statutory rights etc, before Freeport is liable to perform its obligations. This point is emphasised by the opening words of clause 7: 'You warrant as a strict condition'. This clause does not simply require the warranties to be given; it contains promises that they are true at the date of the agreement.

199.6

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This construction of the agreement is put beyond doubt, I think, when one considers the context in which it was made. The board had wanted to suspend the claimant whilst it carried out its investigations into his conduct. If that had happened the investigation would have revealed ample grounds for summary dismissal. But the claimant denied misconduct and so the board agreed termination arrangements with him although the investigation would continue which were conditional upon his warranty that he had done nothing wrong. In that way Freeport protected itself if it was subsequently shown that the promise which the claimant had given was untrue.

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Mr Reade's point about the other sub-clauses of clause 7 does not take him very far because, on his own case, each of these sub-clauses became conditions of the contract, breach of which would have been repudiatory. If the repudiation had been accepted the agreement would have come to an end and Freeport would have had no liability to perform any of its obligations. So any minor breach of those sub-clauses could have had the consequence of relieving Freeport of all liability to the claimant.

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Although I accept that it is most unlikely that the parties had any insurance analogy in mind when they made the agreement, the agreement in this case is so drafted as to have the effect which insurance warranties have and I do not take the judge as saying any more than that.

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These conclusions make it strictly unnecessary to consider the alternative way in which Freeport's case can be put. If clause 7(b) was not a condition precedent but simply a condition of the agreement, breach of this condition would be repudiatory and entitle Freeport to bring the agreement to an end, but it is common ground that they did not elect to do so. What, in those circumstances, is the position if before discovering the claimant's breach Freeport had paid him the agreed consideration; or, if by not electing to repudiate, Freeport had become liable to pay? Freeport say it could recover or set off the amount paid or to be paid as damages for breach of the condition.

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Mr Reade's first point is that any loss suffered by Freeport would be the consequence of its voluntary decision not to accept the repudiation. But that, in my judgment, is a bad point. Freeport were not obliged to accept the repudiation. It is the breach which will have caused its loss and it is not contended that Freeport waived any such breach.

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Mr Reade's second point is that it does not automatically follow that damages for breach of clause 7(b) would equal the full amount of the compensation payable to the claimant. The agreement did not allocate the compensation to any particular obligation assumed by the claimant and it contained a package from which Freeport obtained benefits such as legal certainty and no adverse publicity as well as confidentiality and cooperation by the claimant. In argument we pressed Mr Reade to say how damages would have to be assessed if he was right about this. Other than saying that the damages should be less than the total consideration paid or payable to the claimant he was understandably unable to give any convincing answer to this question. The reason for this is obvious: the task is well nigh impossible. Such legal uncertainty cannot have been intended by whoever drafted this carefully worded agreement. This points strongly to the fact, as I have already concluded, that the agreement contemplated that if the clause 7 promises were untrue, nothing would be due to be claimed whether or not Freeport elected to affirm the agreement.

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For these reasons I would dismiss this appeal.

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LORD JUSTICE SEDLEY: If MacKinnon LJ's officious bystander had asked the parties to this compromise agreement what would happen if it turned out that Mr Collidge had been in fundamental breach of his contract of employment, it is the appellant's case that he would not have got the straightforward reply: 'In that case he doesn't get paid, and if he has been paid he has to give it back'. Instead Mr Reade QC submits that the mutual response would have been to the effect that this would give the company a choice of accepting the breach as putting an end to the compromise agreement and, with it, to Mr Collidge's other contractual obligations, or affirming the agreement and seeking whatever remedy might be available for the breach of conditions.

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I respectfully think that the officious bystander, if given such a reply, would have thought the parties were pulling his leg. He would have been confirmed in that suspicion if he had asked, as we asked Mr Reade, what the agreement would have needed to say in order to have the effect contended for by the company. Mr Reade's answer was that it would have to say something like: 'In the event that any of these conditions proves not to be the case you will not be paid, or if you have been paid will have to repay the compensation sum.'

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The officious bystander would in my view have replied that that was exactly what the agreement already said; and that is my response too. Mr Reade's brave argument to the contrary, if I may respectfully say so, at times put me in mind, in the context of drafting contracts, of what Stephen J said in *Re Castioni* [1891] 1 QB 149 at 167 about the process of drafting statutes: it is not enough to produce something which a person reading in good faith can understand; it is necessary to produce something which a person reading in bad faith cannot misunderstand. I of course make no imputation of anything less than good faith to Mr Reade in his endeavours as an advocate before us. But the meaning of this contract was plainly what Tuckey LJ has said it is, and for the reasons he has given I too would dismiss this appeal.

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LORD JUSTICE WALLER: I also agree. On the true construction of this agreement, particularly the words at the beginning of clause 7, it was clearly agreed that if the facts warranted were not true, Freeport would have no obligation under the agreement. It is also my view that, because that is the proper construction of the agreement, if Freeport had in fact paid but found the facts were untrue later, Freeport would have had a claim to the return of any of the payments they had made. Thus, for the reasons given by both my Lords I would also dismiss this appeal.

Rakesh Rajani Barrister