Neutral Citation Number: [2024] EWCA Civ 5

Appeal No: CA-2023-000137
Case No: CL-2022-000210

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Mrs Justice Cockerill
[2022] EWHC 3287 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/01/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE COULSON
and
LORD JUSTICE PHILLIPS

BETWEEN:

DASSAULT AVIATION SA
Claimant in these proceedings/Respondent to the appeal
Respondent in the arbitration

and

MITSUI SUMITOMO INSURANCE CO LTD
Defendant in these proceedings/Appellant in the appeal
Claimant in the arbitration

Chris Smith KC and **Benjamin Joseph** (instructed by **Norton Rose Fulbright LLP**) for the **Defendant/Appellant** (MSI)

Paul Stanley KC, **Nico Leslie** and **Daniel Carrall-Green** (instructed by **Addleshaw Goddard LLP**) for the **Claimant/Respondent** (Dassault)

Hearing dates: 12 December 2023

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APPROVED JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS

Introduction

1. At its core, this appeal raises a single issue of contractual interpretation. The clause to be construed is a non-assignment clause in a contract dated 6 March 2015 for the sale of two Falcon maritime surveillance aircraft and spares (the aircraft) from Dassault in France to Mitsui Bussan Aerospace Co. Ltd. (MBA) in Japan (the sale contract). The sale contract was governed by English law. The aircraft were, however, to be sold on by MBA to the Japanese Coast Guard under a purchase contract of the same date governed by Japanese law (the sub-sale contract).

2. Article 15 in the sale contract (article 15) was headed "assignment – transfer" and provided as follows:

> this Contract **shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party** and any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party.
>
> Notwithstanding the above and subject to a Seller's prior notice to Buyer, Seller shall have the right to enter into subcontracting arrangements with any third party, for the purpose of the performance of this Contract [emphasis added].

3. The proper interpretation of article 15 arose because Dassault challenged the jurisdiction of the arbitrators (Lord Lawrence Collins, Joe Smouha KC and Simon Crookenden KC) in an ICC arbitration in London initiated by MSI against Dassault in mid-2021. MBA had entered into a contract of insurance with MSI on 30 September 2017 (the insurance contract) to insure the risk of it (MBA) being held liable to the Japanese Coast Guard for late delivery of the aircraft. The aircraft were indeed delivered late. MBA duly claimed against MSI under the insurance contract. On 11 May 2020, MSI duly paid approximately JPY 1.8 billion (in respect of agreed liquidated damages due under the sub-sale contract) to the Japanese Coast Guard.

4. The arbitrators decided, and it was common ground before us, that, as a result of the payment made by MBA's insurers (MSI), MBA's claims against Dassault were transferred to MSI by operation of law under article 25 of the (Japanese) Insurance Act (Act No. 56 of 2008) (article 25). The insurance contract also provided (by article 35) for the transfer of third party damages claims from MBA to MSI, but the arbitrators also decided that the transfer of rights in this case had **not** taken place under that provision.

5. Article 25 (of the Insurance Act) provided as follows under the heading "Subrogation Regarding Claim":

> An insurer, when the insurer has made an insurance proceeds payment, shall, by operation of law, be subrogated with regard to any claim acquired by the insured due to the occurrence of any damages arising from an insured event … , up to the smaller of the amounts listed below …

6. The majority of the arbitrators (Lord Collins and Mr Smouha) decided that, because the transfer of the third party claims from MBA to MSI was by operation of law under article 25, Dassault's consent was not necessary under the prohibition of assignment in article 15. Accordingly, they held that the arbitral tribunal had jurisdiction to deal with MSI's direct claim against Dassault. Mr Crookenden dissented on a single point. He held that any transfer of rights from MBA to MSI under the insurance contract "would be the consequence of the voluntary decisions of MBA and MSI to enter into [the insurance contract]".

7. Dassault appealed to the High Court under section 67 of the Arbitration Act 1996. Cockerill J (the judge) allowed the appeal, deciding that the arbitrators had no jurisdiction to decide the dispute between MSI and Dassault. She said expressly that she had reached her conclusion with an unusual degree of hesitation [121]. She concluded, in substance, that (i) a series of old authorities delineated, in relation to non-assignment clauses, a distinction between willing/voluntary and unwilling/involuntary transfers [112], (ii) the wording of article 15 pointed towards its general application, subject only to what was saved by the words "by any party", which could perfectly well accommodate "[t]he same degree of voluntariness indicated in the authorities" [113], and (iii) the context/commercial purpose indications were not sufficiently clear or weighty to displace the position indicated by a consideration of the words [119]. In essence, therefore, the judge decided that article 15 (of the sale contract) caught and prohibited the transfer of MBA's claims to MSI under article 25 (of the Insurance Act).

8. On this appeal, MSI contends that the plain meaning of article 15 is that the sale contract cannot be assigned or transferred "by any Party". MBA did not transfer its claims under the sale contract to MSI. Those claims were transferred to MSI by operation of law under article 25, as the arbitrators unanimously held and was not challenged by Dassault here or below. A transfer by operation of law is not one made "by any Party". Moreover, the authorities support the proposition that an assignment by operation of law does not violate a non-assignment provision.

9. Dassault supports the judge's reasoning. Article 15 was a wide prohibition that should be given its full effect. There were good commercial reasons why the parties would have wanted to prevent all transfers. Those reasons included commercial confidentiality in the terms of the sale contract and the specifications of military equipment. As a matter of natural language, the words "by any Party" were apt to include the words "caused by any Party". MBA's transfer to MSI was a voluntary one that MBA had caused by entering into the insurance contract, claiming under it and benefitting from the monies paid out.

10. Both parties made submissions about whether article 15 would or would not have prevented MSI making a subrogated claim against Dassault in MBA's name had the insurance contract been governed by English law. Ultimately, it seems to have been accepted on all sides that it would not. Whilst the juridical basis of the right of subrogation in English law is a matter of considerable academic interest, it does not seem to me that the question really arises on the facts of this case.

11. I have decided that the arbitrators were right about the proper interpretation of article 15 for the reasons that follow. The essential point is that I do not think that the words of article 15 are ambiguous or unclear. They prevent any transfer that is effected by a party to the sale contract, but not a transfer that is effected by operation of law. It is not,

therefore, necessary to consider whether the commercial matrix of fact points in favour of one of two possible meanings of article 15. But even if one could, it is far from clear that article 15 was intended to catch transfers arising from insurance payouts, by whatever law those insurance contracts might be governed.

12. It is perhaps important to note three matters of commercial background at the outset. First, both sides in effect agree that it remains open, in theory at least, to MBA to make a direct claim in its own name against Dassault (so far as Dassault was concerned, that was made clear in oral argument). Secondly, it has not been explained to us why that has not happened thus far, but the possibility does not affect the legal questions we have to decide. Thirdly, despite the coincidence of names, we were told that MBA and MSI are not connected parties.

13. I will proceed in this judgment to deal with (i) the terms of the sale contract, (ii) the authorities that the parties have cited so far as relevant, (iii) the correct approach to the interpretation of article 15, and (iv) the proper interpretation of article 15.

The terms of the sale contract

14. I have already recited the terms of article 15 at [2] above.

15. Article 20.1 of the sale contract provided as follows under the heading "Confidentiality":

> Except with the written consent of the other Parties, each Party shall keep confidential and shall not disclose any part of the Contract or of any of its provisions including its exhibits to any third party, except : (i) with respect to disclosures undertaken by Seller, to the sole extent such disclosures are required by Government representatives/banking institutions of the countries involved, in particular for the purpose of obtaining the required export licences or to negotiate and perform contractual arrangements with Mission System Manufacturer; (ii) with respect to disclosures of non-technical information undertaken by a Party, to the sole extent such disclosures are made by a Party to its financial, taxation or legal outside counsels which shall be bound by confidential obligations consistent with the provisions of this Article 20…

16. Article 22.4 of the sale contract provided under the heading "Third Party Rights" that:

> Any person that is not a party to this Contract shall have no rights under the Contract ("**Rights of Third Parties Act of 1999**") to enforce any terms of this Contract. This Article does not affect any right or remedy of any person which exists or is available otherwise and pursuant to that Act.

17. The sale contract had two provisions that envisaged the parties taking out insurance. Article 23.1.5 provided that Dassault would be responsible for subscribing appropriate insurance policies to cover its liability for loss and damage caused to "Buyer Furnished Equipment", whilst it was in Dassault's custody. Article 25.3 provided that MBA would subscribe all insurances required which might occur in connection with the ferry flight by which Dassault was to deliver the aircraft to Japan (see article 5.1.2 of the sale contract).

The relevant authorities

18. At [39], the judge asked herself whether there was a rule or a presumption that transfers "by operation of law" were not caught by a non-assignment clause like article 15. Having dealt with a number of old first instance insolvency cases, the judge concluded at [64] that the authorities showed that non-assignment clauses did not generally exclude transfers which occurred "by operation of law" in a broad sense. The focus was, she said, on whether the transfer occurred outside the voluntary control of the transferring party.

19. The judge seems to have derived such a principle primarily from Rowlatt J's judgment in *Cohen v. Popular Restaurants* [1917] KB 480. In that case, a lease contained a covenant not to assign without consent, such consent not to be unreasonably withheld to a respectable and responsible person. The question was whether an assignment by a liquidator appointed in a members' voluntary winding up of the tenant company to "a married woman of no financial position" was caught by the non-assignment clause. Rowlatt J distinguished the bankruptcy and compulsory winding up cases, holding that in those cases, an assignment was not a voluntary act. Conversely, in *Cohen*, "[t]he assignment was the act of a liquidator brought into existence by the voluntary act of the company, the passing of a special resolution to wind up the company voluntarily".

20. It seems to me that the old insolvency cases do not enunciate a general principle applicable to the interpretation of non-assignment clauses in commercial contracts. Instead, they seem to me mostly to turn on the nature of the insolvency under which the transfer in question took place.

21. The question in this case is simply whether article 15, on its proper interpretation, invalidated the transfer of MBA's claims against Dassault under the sale contract to MSI effected under Japanese law by the operation of article 25. That, as it seems to me turns on what article 15 is to be taken as meaning as a matter of English law. I turn, therefore, to consider briefly the principles of contractual interpretation to be applied.

The correct approach to interpretation

22. There was no dispute between the parties under this heading. I will be forgiven for citing the two leading Supreme Court authorities.

23. In *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 (*Rainy Sky*), Lord Clarke said this at [21]:

> The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If 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.

24. In *Wood v. Capita Insurance Services Limited* [2017] UKSC 24, Lord Hodge summarised the position again at [9]-[15]. I cite only short excerpts from that important passage:

> 10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. …
>
> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In *Arnold* [*Arnold v. Britton* [2015] AC 1619] all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: *Arnold* (paras 20 and 77). …
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 …

25. I propose to adopt the approach that I have shortly summarised.

<u>The proper interpretation of article 15</u>

26. I have tried already to describe the commercial background to the sale contract. The parties did not expressly envisage that MBA would insure its liability for delay under the sub-sale contract. They did, however, envisage that both Dassault and MBA would take out other insurances (see articles 23.1.5 and 25.3 referred to at [17] above). Presumably, it was envisaged that the parties would consent to the assured satisfying their disclosure obligations to their insurers notwithstanding the confidentiality provisions of the sale contract. It is now submitted by Dassault that the confidentiality provisions support a rigid interpretation of article 15.

27. It can certainly be said that the military nature of the subject matter of the sale contract made confidentiality important to the parties. We are not, however, concerned with an allegation that MBA breached the confidentiality provisions in the sale contract by making any necessary disclosures to MSI. Moreover, it does not seem to me that the

fact that the parties wanted confidentiality for their contractual arrangements points towards one or other of the suggested interpretations of article 15.

28. The words of article 15 are clear. They provide that the sale contract "shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever". As it seems to me, the key words for our purposes are "by any Party". The central question is whether the transfer of MBA's claims against Dassault (which was effected by article 25 as the arbitrators unanimously held) was a transfer **by** MBA. It is said that, by voluntarily insuring against payments for delay under the sub-sale contract, claiming under the insurance contract, and accepting the payout under the insurance contract, MBA was, in effect, voluntarily causing or agreeing to the article 25 transfer.

29. In my judgment, the problem with this argument is that the arbitrators unanimously decided that MBA's claims against Dassault were transferred to MSI by operation of law under article 25. Article 25 provides that the insurer "shall, by operation of law, be subrogated with regard to any claim acquired by the insured due to the occurrence of any damages arising from an insured event". Mr Crookenden dissented on the basis that the transfer was the consequence of the voluntary decisions of MBA and MSI to enter into the insurance contract. But that was not, in my judgment, the correct question. The correct question was whether the transfer was made **by** MBA, not whether the transfer was caused as a consequence of certain actions taken by MBA. The transfer was, as the arbitrators decided, not made by MBA. The transfer was made by operation of law. Had it been made under article 35 of the insurance contract, the position might well have been different. But the arbitrators decided as a matter of fact that the transfer had occurred, as I have said, by operation of law.

30. Moreover, the words in the second part of article 15 to the effect that "any such assignment, transfer or attempt to assign or transfer any interest or right hereunder shall be null and void without the prior written consent of the other Party" do nothing to change the meaning of the words I have already interpreted. The second part refers to any **such** assignment or transfer, which depends on the wording of the first part for its meaning. Thus, the assignments and transfers which are rendered null and void by article 15 are assignments or transfers "**by any Party** to any third party, for any reason whatsoever" (emphasis added).

31. For these reasons, I cannot agree with the judge's approach. She started from the position that there were two possible meanings of article 15. She thought it was an admissible interpretation of article 15 to regard a transfer effected by operation of law under article 25 as a transfer by MBA. I do not agree. In those circumstances, I do not think that one needs to proceed to undertake the detailed iterative process of interpretation explained in *Rainy Sky* and in *Wood v. Capita*. Nor do I think it is useful to consider whether an English law subrogation would or would not be caught by article 15, since that is not in issue in this case. That said, however, as I recorded at [10] above, it seems to have been accepted by the parties that article 15 would not have prevented MSI making a subrogated claim against Dassault in MBA's name, had the insurance contract been governed by English law.

32. I take the clear view that the objective meaning of the language which the parties chose to use in article 15 means that it did not invalidate a transfer by operation of Japanese law under article 25 of the Insurance Act. I reach that conclusion taking into account

the sale contract as a whole and its wider context as explained in this judgment and by the judge.

33. For these reasons, I would allow the appeal against the judge's decision and reinstate the award of the arbitrators.

Conclusion

34. I would allow the appeal.

Lord Justice Coulson:

35. I agree.

Lord Justice Phillips:

36. I also agree.