

AMPARO CASTILLO BATEMAN (WIDOW & EXECUTRIX OF THE ESTATE OF BRIAN BATEMAN, DECEASED) (Claimant) v DANKS HOLDINGS LTD (Defendant) & BRISTOL & BABCOCK LTD (Third Party) (2009)

[2009] EWHC 2082 (QB)

QBD ([Mackay J](#)) 7/8/2009

CONTRACTS

INDEMNITY CLAUSES : INTERPRETATION : LIABILITIES : MESOTHELIOMA : SHARE TRANSFERS : TRANSFER OF LIABILITIES IN SHARE TRANSFER AGREEMENTS : INTERPRETATION OF CLAUSES

In interpreting a transfer agreement between two wholly-owned subsidiaries of the same parent company, a master was correct in deciding that the natural conclusion to be drawn from the words of the agreement, set against the background facts and objective commercial aim, was that all liabilities would pass from the transferring subsidiary to the other subsidiary unless specifically excluded.

The appellant company (B) appealed against a decision of a master ordering it to indemnify the respondent company (D) under the terms of a transfer agreement. D and B had been wholly-owned subsidiaries of the same parent company. Under the transfer agreement, B, who was described as the vendor, agreed to sell certain assets and liabilities of the business to D as the purchaser. B undertook to indemnify D against any and all losses, costs, liabilities and expenses arising out of or in connection with any and all actions, suits, proceedings, claims, demands, assessments and judgments arising from the carrying on of the business from the effective date of the agreement. Liabilities were defined to include "all creditors, liabilities and obligations of the vendor in connection with the business as at the effective date". D sought to recover an indemnity under the agreement against a claim for damages brought against it by the widow of a former employee who had contracted mesothelioma after alleged exposure to asbestos during his employment. B was joined as a third party. The master ordered a hearing which was in effect a summary judgment application by D against B, and the application was successful. The master held that liabilities included contingent liabilities such as that to the deceased former employee on the effective date of the agreement. Any other interpretation would have produced a result that would not have made commercial sense in that D would have been left at risk of future prospective or contingent liabilities. He considered that he was entitled to take into account background facts known to the parties and that, so far as liabilities were concerned, the natural conclusion from the words of the agreement set against the background facts and objective commercial aim was that all liabilities would pass unless specifically excluded.

HELD: The master's approach to the interpretation of the relevant parts of the agreement was correct and he did not take into account anything he should not have in reaching his conclusion. The key circumstance was that both parties were wholly-owned subsidiaries of the same parent company and the contract was intended to benefit the group of which both were members. The clear intention from the reading of the whole agreement was to effect a complete swap of the positions of the two companies whereby a shell company took over the goodwill and business of a trading company, together with all its staff as well as its liabilities. B, when it traded, had an exposure to long-tail claims by employees who had contracted diseases which might not become apparent and thus actionable for many years, even decades, after the exposure ceased. The parties must therefore have had that in mind when concluding the agreement and must have intended to deal with it. The overall effect of the contract was essentially as the master described it and the instant court agreed with his conclusion as to the meaning of its wording read in context, [Sirius International Insurance Co \(Publ\) v FAI General Insurance Ltd \(2004\) UKHL 54,](#)

[\(2004\) 1 WLR 3251](#) and [T&N Ltd, Re \(2005\) EWHC 2870 \(Ch\), \(2006\) 1 WLR 1728](#) applied.

Appeal dismissed

Counsel:

For the appellant: Lesley Anderson QC, Michael Rawlinson QC

For the respondent: James Potts

For Bateman: Richard Hiorns

Solicitors:

For the appellant: Keoghs

For the respondent: Berrymans Lace Mawer

For Bateman: Simpson Millar LLP

LTL 14/8/2009

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Case No: HQ08X02672

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR MASTER, MASTER WHITAKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2009

Before:

MR JUSTICE MACKAY

Between:

Amparo Castillo Bateman	<u>Claimant</u>
(widow and executrix of Brian Bateman Deceased)	
- and -	
Danks Holdings Ltd	<u>Defendant</u>
Bristol and Babcock Ltd	<u>Third Party</u>

Richard Hiorns (instructed by **Simpson Miller LLP**) for the **Claimant**
James Potts (instructed by **Berrymans Lace Mawer**) for the **Defendant**
Lesley Anderson QC and Michael Rawlinson QC (instructed by **Keoghs**) for the **Third Party**

Hearing dates: 31 July 2009

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE MACKAY

Mr Justice Mackay:

1. Two companies, wholly owned subsidiaries of the same parent company FKI PLC, are at the heart of this dispute. Their registered numbers are respectively 00328871 and 002580226. For the moment I will refer to them as 871 and 226 respectively. Their corporate history is important.
2. 871 was incorporated as Baileys Meters & Controls Ltd and in 1986 after two intervening changes in name became known as Bristol Babcock Ltd. Company 226 was incorporated as Voltacrest Ltd and changed its name to Danks Holdings Ltd.
3. By an agreement dated 3 September 1992 871 transferred certain assets and liabilities to 226. Simultaneously 871 changed its name to Danks Holdings Ltd and 226 changed its name to Bristol Babcock Ltd. I will refer to the former from now on as the Defendant and the latter as the Third Party.
4. Brian Bateman worked for the old 871 now the Defendant between 1959 and 1966 and was exposed, it is said, to asbestos. He contracted mesothelioma from which he died on 4 January 2007, and on 10 July 2008 his widow brought a claim for damages against the Defendant which seeks to recover an indemnity against that claim under the transfer agreement of the 3 September 1992.
5. The Senior Master ordered a “show cause” hearing on 19 January 2009, which was in effect a summary judgment application by the Defendant against the Third Party on the basis that it had no real prospect of successfully defending the claim against it. The Defendant succeeded in this application and the Senior Master ordered the third party to indemnify it against the widow’s claim.

The Agreement of 3 September 1992

6. This was described as an “intra-group asset transfer agreement” in which the 871 company was the vendor and the 226 company the purchaser. The agreement recited that “both the vendor and the purchaser are wholly owned subsidiaries of FKI Plc” and that they had “agreed that the vendor should sell and the purchaser shall purchase the Business as defined below in accordance with the terms of this agreement”.
7. There were relevant terms of the agreement as follows:-
 - 2.1 Subject to the terms and conditions of this Agreement the Vendor shall sell and the Purchaser shall purchase the Business as a going concern free from all liens, charges and encumbrances with effect from the commencement of business on the Effective Date, with the intent that with effect from the commencement of business on the Effective Date the purchaser shall carry on and continue the business in succession to and to the exclusion of the vendor.
 - 2.2 The assets and liabilities of the Business hereby transferred shall comprise the following:-
 - (a) the Goodwill
 - (j) the Liabilities.

Consideration

3.1 The consideration for the sale and purchase of the business shall be satisfied by the payment of the cash consideration in accordance with clause 3.2 and the satisfaction and discharge of the Liabilities in accordance with clause 3.3.

3.2 The cash consideration shall be satisfied by payment in cash or cleared funds to the Vendor upon Completion of the sum of [£9,569,000].

3.3 The purchaser shall pay satisfy and discharge the Liabilities and shall perform and fulfil the Contracts in accordance with their respective terms and shall keep the Vendor fully and effectually indemnified against all proceeding cost claims demands and expenses relating to the same.

Indemnity

6.1 The Purchaser hereby undertakes to keep indemnified and keep indemnify the Vendor from and against any and all losses, costs, liabilities and expenses arising out of or in connection with:-

6.1.1 Any and all liabilities and obligations of the Vendor expressly assumed by the Purchaser pursuant to this Agreement.

6.1.2 Any and all Liabilities and Obligations arising from the carrying on of the Business from the Effective Date; and

6.1.3 Any and all actions, suits, proceedings, claims, demands, assessments and judgement with respect to the foregoing.

In the definition clause of the agreement (clause 1) the following definitions appear:-

“The Business” – The business of the design, procurement, contracting, manufacturing, testing, installation, commissioning and sale of processed control instrumentation, products, services and engineered systems carried on by the Vendor at the Effective Date but for the avoidance of doubt not including the Excluded Assets.

“The Effective Date” – 1 January 1992

“The Excluded Assets” – (1) The business carried out by the Vendor under the name and style of each of “Bristol Babcock SA”, “Bristol Babcock Benelux”, “Bristol Babcock Iberica” and “Relais et Automatismes Industriels – RAI” and all assets and liabilities (whether actual or contingent) of whatsoever nature relating to such businesses including all employees employed in connection with such businesses.

“The Goodwill” – The goodwill of the vendor in connection with the business together with the exclusive rights of the purchaser to represent itself in carrying on the Business in succession to the Vendor including the right to all information exclusively relating to the business.

8. The next definition was at the centre of the dispute in this appeal.

“The Liabilities” – All creditors, liabilities and obligations of the Vendor in connection with the Business as at the Effective Date together with all the liabilities and obligations of the Vendor under the agency/licence agreements listed in Part 2 of the Schedule and all the liabilities of the Vendor in respect of the industrial claims brought against the Vendor as at the Effective Date brief details of which are set out in Part 3 of the Schedule hereto (and including without limitation all liabilities whether actual potential or contingent of the Vendor to taxation of any nature whatsoever ...).

9. In paragraph 15 of his reserved written judgment the Senior Master set out the principles to be applied to the interpretation of a written contract as contained in the House of Lords’ leading decisions in Investors Compensation Scheme v West Bromwich BS [1998] 1 WLR896 at 1384 per Lord Hoffman, BCCI SA v Ali [2002] 1 AC 251 at 8 and Sirius Insurance Co v FAI General Insurance Ltd [2004] 1 WLR 3251 at 18 and 19. I will not set those out again in this judgment. They are accepted as offering a guide to the principles to be applied though in practice it is sometimes difficult to draw the line at the margin of these principles. But the overriding point is that the meaning of a contract is that which it would have in the eyes of a reasonable person knowing the facts and circumstances that the parties to the transaction knew it. Therefore the relevant background facts, or “contextual scene”, or factual matrix may be the subject of examination by the court construing it.
10. It is agreed that this appeal should be conducted as a review of the Senior Masters decision, and not a re-hearing by me.
11. The outline of the Senior Master’s judgment followed these steps. He accepted the argument that as at 1 January 1992 the deceased was a contingent creditor of his employer relying on re T&N Ltd (2) 2005 EWHC 2870 Ch. He held that the natural and ordinary meaning of the words “all creditors liabilities and obligations of the Vendor in connection with a business as at the Effective Date...” included contingent liabilities such as that to the deceased on that date, and that that reading of those words was reinforced by what followed not undermined by it as the third party had argued. He thought that the Third Party’s construction would produce a result that would not make commercial sense, in that Danks and its directors would have been left at risk of future prospective or contingent liabilities. He considered that he was entitled to take into account background facts known to the parties and the “objective commercial aim and genesis of the agreement”, and that so far as liabilities were concerned the natural conclusion from the words of the agreement set against the background facts and objective commercial aim was that all liabilities would pass unless specifically excluded.

Did the Senior Master break the Parol Evidence Rule?

12. The Senior Master certainly recited the parts of the factual evidence that the Defendant relied on as relevant to construction of the contract. These are set out by him at 17(i) – (viii). Mr Potts for the Defendant argued before me that this was not disputed as being relevant and admissible evidence, because the Third Party had, prior to the hearing, indicated a number of passages in the witness statements that it did object to and these were excised. Miss Anderson QC for the Third Party said his position is overstated, and she can certainly be seen in the transcript of the argument (e.g. page 67) arguing strenuously against the admissibility of all this material. I think

it therefore wrong to approach this appeal on the basis that this material went in without challenge.

13. The Senior Master does not make plain whether he took the paragraph 17 matters into account, or any of them, and if so to what extent. At paragraph 33 he seemed hesitant at least about taking into account the instructions that had been given to the solicitors who drafted the agreement (for that would surely be another way of considering the subjective intention of the parties, which on any view would not be admissible); but from the way in which paragraph 33 continues it seems clear to me that it was from the face of the agreement itself that he derived all that he needed in order to construe the disputed clauses, and all that follows in that paragraph suggests that he did not offend against the principles which he had very clearly set out at the outset of his judgment.
14. Be that as it may the informed bystander envisaged by Lord Steyn in Sirius at para 18 would surely have had the following obvious features in mind, as should a court now construing the common intention of these parties.
15. First, both these parties were wholly owned subsidiaries of the same parent company. This is a key circumstance in my view. This was not a contract hammered out on the anvil of an adversarial or competitive relationship but one intended to benefit the group of which they were both members. This is an entirely uncontentious fact relied on by both sides and plainly apparent on the face of the contract – see recital A.
16. Secondly, the clear intention from the reading of the whole of the agreement was to effect a complete “swap” of the two companies’ positions whereby a shell company took over all the goodwill and UK business of a trading company (with minor exceptions in the form of overseas interests only excluded), together with all its staff, as well as all its liabilities. The final act to complete the process was an exchange of names. The result of all this was to present to the outside world 226, to revert to my earlier description of it, as if it were 871. Quite what the precise underlying commercial sense of all this was is not clear, and may well have included, as such agreements usually do, minimising the group’s exposure to tax as the Master thought it did. Miss Anderson does not really dispute that tax advantage was part of the picture, but says that it does not unlock the meaning of the contract, and there is force in that argument, but I am sure that the overall effect of the contract is essentially as the Master described it.
17. There is only one other fact which it seems to me must have been known to all parties and was relevant to what they were trying to do and it is this. 871 when it traded had an exposure to long-tail claims by employees who had contracted diseases of an insidious nature, which might not become apparent and thus actionable for many years, even decades, after the exposure ceased. This is because its personnel worked in asbestos-laden and noisy environments. That much is apparent from Part 3 of the Schedule. The parties must therefore have had that in mind when concluding this agreement and must have intended to deal with it.

The Meaning of the relevant contractual terms

18. The key to this case is of course the first three lines of the definition of “the Liabilities”. The Senior Master accepted at paragraphs 30 and 33 the Defendant’s

contentions about these words which can be simply restated. First, “all creditors, liabilities and obligations...” means what it says, and are words of sufficient width to encompass liabilities which might arise in the future but which are not known about at the time of the agreement. Whether one calls the liability to Mrs Bateman a contingent liability, a liability to a contingent creditor, an undisclosed claim or something else seems to me not to matter, but the authority of In re T&N (2) at para 60 is a helpful reminder that a contingent liability is not a legal term of art. David Richards J there defined it as follows-

“... the contingent liability to pay damages is a liability which, by reason of something done by the person (i.e. the use or distribution ... of asbestos or asbestos products) will necessarily arrive or come into being if one or more [of] certain events occur[s] (i.e. the onset of asbestos – related conditions in persons previously exposed to asbestos...)...the careless exposure of persons to asbestos ...will automatically by the operation of the law of negligence lead to the liability to pay damages, assuming the existence of the other necessary elements of a claim in negligence”.

19. The phrase which follows, “in connection with the business”, underlines the width of this whole clause, and serves as the Senior Master correctly put it to create an “expansive rather than restrictive category of liabilities and creditors”. That expansive definition is in any event what one would expect in a contract between two parties under common ownership.
20. Thirdly, the fact that liability for 14 known industrial claims, in being but not resolved or adjudicated upon at the date of agreement, is catered for and is introduced by the conjunction “and” is relied on by the Third Party as indicating that all other industrial claims are not to be included in what goes before. The Senior Master thought, and I agree with him, that such a construction fights against the obvious intention of the rest of the document. To my mind it makes no sense if unresolved but known claims were to be transferred to the transferee but unknown claims were not, given the fact that the parties must have known that there would be further claims as a matter of high probability. In 1992 any employer of personnel working in this field knew that the projection of future claims for mesothelioma would run on for many more decades (as recent past history has shown).
21. Much was made at the hearing before me of the issue of insurance. There was no evidence before the Senior Master as to whether either the Defendant or the Third Party held or, in the case of the latter, could obtain insurance against such claims as Mrs Bateman’s. I accept Miss Anderson’s argument that for the Third Party to obtain after the event insurance would be both expensive and difficult. What exactly the Defendant’s position was is unknown, and the nearest the Master got to getting information on the subject was a concession by its counsel Mr Potts that as one would expect with a reputable group of companies the Defendant 871 “would have had” employer’s liability insurance. But the Master said that there was no evidence about this matter and he was right to say so. Its relevance would depend on the details and whether in respect of this disease the Defendants’ insurance was effective and covered all years of potential exposure, not just for Mr Bateman but for all staff in, effectively, the preceding 50 or more years, the period over which such claims are

conceivable. The Third Party's argument, that it would have made no commercial sense to transfer unknown future claims to it, seems to me to be countered by the fact that it accepted the 14 claims which were known about, albeit they were inchoate and had not crystallised into liabilities of the transfer. That suggests to me either that it thought it could obtain the benefit of insurance (which seems most unlikely) or that it was prepared to accept a degree of uninsured exposure, in which event the argument that the parent company would not want a group member to be exposed to uninsured claims is not a persuasive one in my judgment. At all events this was a piece of additional or background evidence that the Third Party wanted the Master to look at in construing the contract. If it did it should have placed proper evidence before him and did not do so. But in any event I cannot see that it would have helped its position whatever that evidence might have revealed.

22. Furthermore, the fact that the liabilities of the vendor under agency/licence agreements listed in part 2 of the schedule are also expressly referred to in this clause as being liabilities transferred, and are introduced by the words "together with", indicates that the draftsman of this part of the agreement was concerned on what could be called a "belt and braces" approach to include in it material set out for the avoidance of doubt. There could have been little room for arguing that such liabilities and obligations were not covered by the words which preceded this part of the clause, but when one looks at them they were all overseas matters and it might have been argued, I suppose, that they should not have been included and so these words were added. So he included these words for the avoidance of doubt, albeit they were introduced by a phrase more commonly used in a conjunctive sense.

Conclusion

23. I am not persuaded that the Senior Master took into account anything he ought not to have taken into account in reaching his conclusion. I am not persuaded that his approach to this case was wrong and I fully agree with his approach to the construction of the relevant parts of this agreement. If he did include any consideration of inadmissible matters I would for my part without hesitation reach the same conclusion he reached as to the meaning of the relevant sections of this contract simply on the basis of the natural meaning of its wording read in its context, and I therefore dismiss this appeal.