Case note:

Lancashire Insurance Company Ltd v MS Frontier Reinsurance Ltd (2012) UKPC 42

Privy Council upholds lower Court rulings regarding the valid termination of assignment agreement

In a recent decision, the Judicial Committee of the Privy Council, Bermuda's highest court of appeal, unanimously held that MS Frontier had successfully terminated an agreement it had with Lancashire, to take an assignment of Lancashire's office lease to its former premises at "Mintflower Place", Par-la-Ville Road, Hamilton. Complex technical arguments concerning the interpretation of the assignment agreement and issues of waiver and estoppel were considered.

Facts

In 2008, Lancashire ("the Tenant") was in occupation of premises on two floors at "Mintflower Place", 8 Par-la-Ville Road, Hamilton, under a lease that was due to expire at the end of that year. The Tenant wished, on the termination of its lease, to move to alternative premises at Powerhouse Place, 7 Par-la-Ville Road. By June 2008, it had become clear that the alternative premises at Powerhouse Place would not be ready for occupation before the expiry of the Tenant's existing lease of the premises at Mintflower Place. Therefore, the Tenant, its landlord, Raphael Limited ("the Landlord") and MS Frontier ("the Assignee"), agreed that a new lease of the premises at Mintflower Place would be granted to the Tenant for a 3-year term commencing on 1 January 2009; that, when the premises at Powerhouse place had become available for occupation by the Tenant, the Tenant would assign to the Assignee the new lease of the premises at Mintflower Place; and that the Landlord would consent to that assignment.

The terms of that agreement were set out in a document dated 16 October 2008 ("the Agreement"). Completion of the assignment was to take place following service by the Tenant of a notice that it was ready to move to its new premises. The assignment was to be completed by the execution, by each of the Tenant, the Assignee and the Landlord, of a Deed of Assignment on a date, defined in the Agreement as "the Condition Date", which was no more than 15 working days after receipt by the Assignee of the notice served by the Tenant.

The new lease of the premises at Mintflower Place ("the Lease") was granted to the Tenant on 23 January 2009; the fit-out works to the premises at Powerhouse Place took longer to complete than had been anticipated; the Tenant served the relevant notice of completion of fit out on 18 December 2009; and the period of 15 working days after receipt of that notice by the Assignee expired on 13 January 2010.

The Agreement provided that if for any reason the Condition Date had not occurred by 31 December 2009, then either the Tenant or the Assignee could serve on the other written notice to determine the Agreement. Upon service of a termination notice the Agreement was to cease to have effect and no party was to be under any further liability to any other party.

Notice of completion of fit out was served by the Assignor on 18 December 2009. Under the terms of the Agreement completion of the assignment was due to take place on 13 January 2010 (the fifteenth working day following the service of the notice of completion of fit out as no agreement to complete earlier was reached between the parties). However, on that day the Assignee served notice of termination. In reliance upon that notice, the Assignee took the view that it was no longer under any obligation to take an assignment of the Lease. The Tenant disputed the validity of the notice and issued proceedings for specific performance of the Agreement.

At first instance, Kawaley J. (now Chief Justice), for reasons set out in his judgment dated 7 October 2010, dismissed the Tenant's claim for specific performance. His decision was upheld by the Court of Appeal for reasons set out in the judgment of Ward JA (with whom the other members of the Court, Zacca P and Auld JA agreed) on 5 August 2011.

Issues

The key issue in this case was whether, upon the true construction of the Agreement and in the events which happened, the Assignee could validly serve a termination notice (as it did) on 13 January 2010. To determine that issue, two questions had to be addressed: (i) whether, under the terms of the Agreement, it was open to either party, by service of a termination notice on the Condition Date, to determine its liability to complete the Assignment on that date ("the construction issue"); and if so, (ii) whether, by reason of its conduct between 18 December 2009 and 13 January 2010, the Assignee ceased to be entitled, by waiver or election, to exercise the right to do so ("the election issue").

Ruling

In relation to the construction issue upon a detailed analysis of the wording of the Agreement, the Privy Council held that to give business efficacy to the Agreement, the better interpretation of the Agreement was that there was an implied term that a termination notice could not be served after there has been a breach (by the party seeking to terminate) of its obligation to complete on the date fixed for completion. On the proper construction of the Agreement the Assignee had all day (i.e., until midnight) on the date for completion to complete the Assignment. There was, therefore, no basis for implying a term (as the Assignor sought to do) that a termination notice could not be served on the date for completion (the Condition Date). Consequently, it was open to the Assignee to serve the termination notice when it did.

With respect to the election issue, the Privy Council agreed with the conclusions of the trial judge and Appellate Court judges that the Assignee did not unambiguously represent by its conduct that it intended to waive its right under the Agreement to terminate the Agreement if the Assignment was not completed before 31 December 2009. The Privy Council referred to the observations of Lord Goff of Chieveley in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India ("The Kanchenjunga")* (1990) 1 Lloyd's Rep 391, 397-8:

> "It is a commonplace that the expression 'waiver' is one which may, in law, bear different meanings. In particular, it may refer to a forbearance from exercising a right or to an abandonment of a right. Here we are concerned with waiver in the sense of

abandonment of a right which arises by virtue of a party making an election. Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contracts or by the general law, to exercise a right, and he has to decide whether or not to do so. His decision, being a matter of choice for him, is called in law an election…"

Lord Goff went on to explain *(ibid)* that:

"…where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him – for example, to determine a contract or alternatively to affirm it – he is held to have made his election accordingly,…But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see Scarf v Jardine, (1882) 7 App CAs 345 at p 361, per Lord Blackburn and China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama (The Mihalios Xilas) (1979) 2 Lloyd's Rep 303 at p.307; (1979) 1 WLR 1018 at p.1024, per Lord Diplock)."

The Privy Council concluded that in the present case, the Assignee did not become entitled, under the terms of the Agreement, to exercise the right to serve a termination notice until after 31 December 2009. It was not until then that the Assignee needed to decide whether or not to exercise that right. On the evidence before the trial judge it was impossible to contend that, in the period from 31 December 2009 until 13 January 2010, the Assignee had acted in a manner which was consistent only with it having chosen not to exercise that right. Nor could it be said that, either during that period or at any time during the period from 18 December 2009 to 31 December 2009, the Assignee communicated to the Tenant, in clear and unequivocal terms, an election not to exercise its right to serve a termination notice under the Agreement.

For these reasons, the Privy Council dismissed the appeal and awarded costs of the appeal to be paid by the appellant subject to any representations to the contrary.

David Kessaram, Managing Director and Head of Litigation, and Louise Charleson, Associate, represented MS Frontier throughout the proceedings and instructed Jonathan Gaunt QC of Falcon Chambers in the Privy Council.