

Case No: C2QZOX0V

IN THE COUNTY COURT AT SHEFFIELD

On appeal from Employment Judge Brain

Sitting as a Judge of the County Court

Sheffield Appeals Centre
The Law Courts
West Bar
Sheffield
S3 8PH

Friday, 15 December 2017

BEFORE:

HIS HONOUR JUDGE ROBINSON

BETWEEN:

METRO FINANCIAL SOLUTIONS LLP

Claimant/Respondent

- and -

TENET CONNECT SERVICES LTD

Defendant/Appellant

MR HUGH JORY QC (instructed by Kennedys) appeared on behalf of the Appellant

MR TOBIAS HAYNES (Solicitor) (instructed by FS Legal Solicitors LLP) appeared on behalf of the Respondent

JUDGMENT
(As Approved)

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8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.dtiglobal.com Email: courttranscripts@dtiglobal.eu
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1. JUDGE ROBINSON: This is an appeal from a decision of Employment Judge Brain, sitting as a judge of the County Court made on 12 April 2017. Employment Judge Brain was exercising the jurisdiction of a District Judge.
2. The issue on appeal is short, but important. It concerns the recovery by Tenet from Metro, of charges levied by the Financial Conduct Authority, the successor body to the Financial Services Authority and the applicability of section 3 of the Unfair Contract Terms Act 1977 to the relevant contractual term.
3. Both Metro and Tenet are engaged in the financial services industry. Until 30 September 2016, Metro was an appointed representative of Tenet. The relationship was agent and principal respectively. The FCA applies a levy to Tenet which Tenet recovers from its appointed representatives on a *pro rata* basis.
4. Historically the levy was calculated by reference to the number of appointed representatives, but that method of calculation changed as from April 2014. A little explanation is required. The relevant financial accounting period of Tenet is 1 October 2015 to 30 September 2016. The relevant levy year for the FCA is 1 April 2017 to 30 March 2018. The levy, which Tenet must pay for the FCA year April 2017 to March 2018 is calculated by reference to the turnover generated by the appointed representatives during Tenet's accounting year, October 2015 to September 2016. Metro resigned from Tenet on 30 September 2016.
5. Tenet charged Metro with the sum of £2,657.30 in respect of the portion of the 2017/2018 FCA levy calculated by a reference to the turnover generated by Metro in the accounting year down to 30 September 2016. Metro said that was unfair. It was having to pay a levy for the FCA year April 2017 to March 2018 when it was no longer an appointed representative of Tenet. Furthermore, Metro has remained in business in the financial services sector and so had to pay its own FCA levy direct to the FCA for the same period, April 2017 to March 2018.
6. Metro issued proceedings for the return of the money deducted. It was allocated to the small claims track. The judge allowed the claim. Tenet appeals with permission granted by me. In the court below, Mr Morris, a partner in Metro represented Metro and Mr Fletcher from Tenet represented that company. Before me Mr Hugh Jory QC has appeared for Tenet. Mr Tobias Haynes has appeared for Metro. Both have filed extremely helpful skeleton arguments and I am grateful to both of them for their oral submissions today.

The Judgment

7. The judge found that the contractual relationship between the parties was governed by a document entitled "Terms of Service 2011." The material clauses are, in my judgment, correctly identified by Mr Jory, as being: 2.12; 3.1; 3.2; 5.6 and 14. Those clauses read as follows,

2.12 The monthly charge and other charges due from the Client to TenetConnect or retainable by TenetConnect in accordance with the terms of this Agreement and the current charges sheet as revised from time to time.

3.1 In relation to the services provided by TenetConnect to the Client (and the Customers of the Client) TenetConnect is entitled to levy the charges. The Client is entitled to receive from TenetConnect the balance of Commission after the deduction of the Charges.

3.2 The amount of the Charges shall be notified by TenetConnect to Clients from time to time and shall be calculated according to the current charges sheet issued by TenetConnect.

5.6 TenetConnect may also make deductions from the Commission in respect of agreed additional charges, claw backs initiated by a relevant Institution and for any other amounts payable to TenetConnect by the Client, under the Agreement or otherwise, but which are unpaid.

14.1 In the event that TenetConnect:

- (a) Incurs any liability whatsoever (whether at common law or by virtue of any legislative enactment or regulation, or by virtue of the rule or regulations of any professional or regulatory body or organisation, or by any other means); or
- (b) Suffers or pays any claims of any nature; or
- (c) Suffers any loss or damage of any nature; or
- (d) Incurs or pays any costs or other expenditure of any nature in respect of any act omission or representation of the client or any partner, director, employee, agent or representative of the client (including the client having acted in excess of the client's authority as an agent of TenetConnect) including but not limited to any such cost or expenditure arising out of or in connection with any complaint or disciplinary proceedings against the client relating to any business conducted by the client prior to the date of his entering into the Agreement

The client shall indemnify TenetConnect against any such liability claim, loss, damage cost or expenditure in full and on written demand by TenetConnect.

14.2 The indemnity given to TenetConnect by the client under paragraph 14.1 shall not prevent TenetConnect from exercising any other rights it has against the client under the Agreement or otherwise.

14.3 The client shall indemnify TenetConnect against any liability, claims, loss, damage cost and expenditure incurred in respect of, or arising out of, or otherwise connected with, any delay or failure by the client to observe any of the client's obligations contained in the Agreement, including in particular any failure to observe or comply with any other directions, instructions, procedures, rules or codes or standards of practice referred to in the Agreement or provided under the Agreement from time to time.

14.4 The client shall indemnify TenetConnect against any costs, charges, fees or any other losses incurred as a result of TenetConnect:

(a) complying with any regulatory requirements imposed by the FSA as a consequence of the client not complying with its obligations under the Agreement; or

(b) investigating complaints made by customers of the client in respect of Business conducted whilst the client was still bound by the terms of the Agreement.

14.5 The client shall indemnify TenetConnect against any liability, claims, loss, damage, cost and expenditure incurred or in respect of, arising out of or otherwise connected with any mis-representation, negligence, dishonesty, misconduct or fraud by or of the client or any partner, director, employee, agent or representative of the client.

14.6 Any liability of the client to indemnify TenetConnect under this Agreement shall continue notwithstanding the termination of the Agreement.

8. It is common ground that the proportion of the FCA levy deducted from Metro's commission amounted to a charge within clause 2.12, which Metro was obliged to pay under clause 3.1. The judge also found that a document dated 2 August 2013 dealing with the FCA's method of calculating the levy was sent by Tenet to all of its appointed representatives and constituted adequate notice of the charges due from time to time under clause 3.1 as submitted by Mr Jory in his skeleton argument.
9. I also agree with Mr Jory's analysis that by clause 14.1 of the terms of service Metro was obliged to indemnify Tenet in respect of the relevant FCA levy, which Mr Jory describes as the disputed levy.

10. Clause 4.6 is also relevant, it is short and I read it once more:
"Any liability of the client to indemnify TenetConnect under this Agreement shall continue notwithstanding the termination of the Agreement."

The essence of the judge's decision are his determinations first that section 3 of the Unfair Contract Terms Act 1977 applied to clause 14 of the terms of service agreement and second, that the requirement of reasonableness imposed by UCTA was not satisfied.

11. The Appeal

The relevant parts of section 3 of UCTA read thus:

"(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term -

...

(b) claim to be entitled -

(i) to render a contractual performance substantially different from that which was reasonably expected of him..."

12. The basic point taken by Mr Jory is that this provision relates only to aspects of performance rendered by the relevant contracting party, in this case by Tenet. Mr Jory submits that the enforcement of an indemnity clause by Tenet does not amount to performance of any aspect of the contract by Tenet. He also observes that at the time of enforcement of the indemnity by Tenet, the contract had been terminated and so talk of Tenet rendering performance under a contract which no longer exists is difficult conceptually.
13. In my judgment, for the purposes of section 3 of UCTA, performance under a contract by the relevant party to that contract involves the discharge in whole or in part of some obligation imposed on that party by the contract. An obvious example would be the obligation to provide goods or services. In this case, in my judgment, there is no question of Tenet rendering performance of any obligation due by Tenet under the terminated contract. By deducting the share of the FCA levy referable to the trading activities of Metro during the accounting period down to September 2016, Tenet was enforcing a liability of Metro which it was entitled to do by virtue of clauses 14(1) and 14(6) of the terms of service. This is so even though the liability of Tenet to the FCA seems to have arisen after the contract with Metro was terminated.
14. Mr Haynes sought to argue that the action of Tenet in deducting money from commission due to Metro amounted to some sort of contractual performance within the meaning of section 3(2)(b)(1) of UCTA. Whilst the argument was attractively and persuasively presented, I have to reject it for the reasons given.

15. I see the force also in the argument deployed by Mr Jory that section 4 of UCTA, before the repeal of that section, dealt specifically with indemnity clauses in contracts made with consumers. Why, he asked rhetorically, was there any need for section 4 if indemnity clauses were caught by section 3?
16. In the light of my determination there is no need to consider the reasonableness test in UCTA. However, I have to say that I see no degree of unreasonableness in requiring the person whose actions are responsible for the levy being imposed upon Tenet having to pay the *pro rata* amount of the levy. The reasons for that conclusion include the fact that the *pro rata* amount of the charge arose as a result of the trading activities of Metro over which Tenet had no control and the fact that the apportionment of risk as between Tenet and Metro over who would bear the burden of paying the levy was clear from the contract even to a person unsophisticated in the interpretation of contracts.
17. Mr Haynes argued that the manner in which the FCA might alter the way in which it calculated the levy could not have been in the contemplation of the parties at the time the contract between them was entered into. In my judgment, he is absolutely correct in that assertion, that is why well drawn contracts make provision for determining who should bear the risk of unforeseen events. This contract did just that in a manner which seems to me to have been fair and reasonable.
18. The appeal is allowed and judgment set aside.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: courttranscripts@DTIGlobal.eu

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