IN THE EMPLOYMENT COURT
WELLINGTON

[2016] NZEmpC 49
EMPC 113/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SHANE ANDREW MERCER Plaintiff
AND	ROBERT LESTER MCINTYRE Defendant

Hearing:	17 November 2015 (heard at Wellington)
Appearances:	Plaintiff in person J Reardon, counsel for the defendant
Judgment:	4 May 2016

JUDGMENT OF JUDGE A D FORD

Introduction

[1] The challenge before the Court is rather unusual. It has its origins in a dispute between the parties over a mediated Record of Settlement (the "settlement agreement") dated 22 January 2014. In particular, it concerns the interpretation of a provision in cl 3 of the agreement allowing for interest of 10 per cent on the agreed settlement figure of $110,000.

[2] Mr McIntyre raised an employment relationship problem with the Employment Relations Authority (the Authority) over the dispute and in a determination dated 7 April 2015 the Authority found in his favour.[1] The Authority held that the phrase in question, "*the total sum of $110,000 plus interest of 10%"*

[1] *McIntyre v Core Technology Ltd* [2015] NZERA Wellington 34.

linked the interest component directly to the principal sum meaning that the interest component amounted to $11,000.[2]

[3] In this Court, Mr Mercer, who very competently appeared for himself, challenged the Authority's determination de novo. He pleaded and submitted that there is no "natural and ordinary meaning to the plain words used in the settlement agreement unless further provisions are implied". He contended that the interest provision required the words "plus interest of 10%" to be interpreted as meaning "10% per annum on the purchase price of $110,000".

[4] Mr Mercer also pleaded and submitted that as the provision for interest on the purchase price was for the benefit of the defendant, the interpretation of the interest provision that is least favourable to the defendant should be adopted. In this respect Mr Mercer sought to invoke what is known as the *contra proferentem* rule.

Background

[5] As Mr Reardon, counsel for the defendant, correctly submitted, the relevant facts are limited and it is not necessary to traverse the merits of the personal grievance in any detail. Suffice it to say that Mr McIntyre was employed by Core Technology Limited (Core) as a Regional Sales Director in June 2005 before his role changed to General Manager, Central Region. As the result of a dispute over restructuring, Mr McIntyre resigned in what he claimed was the context of a constructive dismissal. He launched a personal grievance. The parties went to mediation and resolved the differences which are recorded in the agreement.

[6] Mr McIntyre had acquired 100 ordinary shares in Core and 100 ordinary shares in another company, Aviarc Global Limited. These shareholdings were connected to his employment. As part of the terms of settlement, cl 3 of the settlement agreement provided that Mr Mercer, as the nominee for Core, would purchase Mr McIntyre's total share allocation in Core which, it was agreed, included his shareholdings in both companies.

---

2 At [18]-[20].

[7] The relevant provision in cl 3 of the settlement agreement relating to the purchase price (with actual names substituted for the legal designation of the parties before the Mediator) stated:

> 3. [Mr Mercer] will purchase [Mr McIntyre's] total share allocation for Core Technology the total sum of $110,000 plus interest of 10% in equal and consecutive instalments over 12 months with the first instalment due on 1 March 2014. …

[8] It was common ground that between 3 March 2014 and 4 May 2015, Mr Mercer paid the sum of $115,916.62. Mr Mercer contended that this was the full amount payable in terms of the settlement agreement. Mr McIntyre disagreed and maintained that the correct figure for payment was $110,000 plus interest of $11,000 making a total of $121,000. This case is about the $5,083.38 difference between those two figures.

[9] The schedule of payments produced to the Court is set out below. It records in the respective columns the date of each payment, the amount paid, the amount Mr McIntyre contends should have been paid and the "Difference". As was the position before the Authority, no evidence was presented and the case was argued on the basis of written submissions.

Date	Payment Amt Paid	Required Payment	Difference
3/03/2014	$10,010.51	$10,083.33	$72.82
2/04/2014	$10,023.06	$10,083.33	$60.27
1/05/2014	$9,920.09	$10,083.33	$163.24
30/05/2014	$9,867.35	$10,083.33	$215.98
2/07/2014	$9,769.14	$10,083.33	$314.19
1/08/2014	$9,711.64	$10,083.33	$371.69
1/09/2014	$9,633.79	$10,083.33	$449.54
1/10/2014	$9,543.38	$10,083.33	$539.95
3/11/2014	9,478.08	$10,083.33	$605.25
1/12/2014	9,392.69	$10,083.33	$690.64
31/12/2014	9,322.37	$10,083.33	$760.96
4/05/2015	9,244.52	$10,083.37	$838.85
	$115,916.62	**$121,000.00**	**$5,083.38**

Legal principles

[10] The application of the *contra proferentem* rule was considered relatively recently by the English Court of Appeal in *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores*.[3] The Court noted that: "The rule invites a construction adverse to the *proferens* where the clause is ambiguous".[4] It cited with approval the following passage from a Canadian case:[5]

> … If the doctrine does apply, it tells the Court to select one of the two possible interpretations of the contract, the one less favourable to the party who drafted the contract.

[11] The Court went on to state in relation to the *contra proferentem* rule:[6]

> … That rule has been said to have limited application in the interpretation of ordinary commercial contracts. In *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch 497, [2012] 2 WLR 470 Lord Neuberger MR observed at [68], in the case of a negotiated contract, that "*such rules are rarely if ever of any assistance when it comes to construing commercial contracts"* and that "*the words used, commercial sense, and the documentary and factual context are, and should be, normally enough to determine the meaning of a contractual provision*".

[12] Turning next to the principles of contractual interpretation, one of the most recent authorities on the topic is the judgment of the Court of Appeal in *Air New Zealand Ltd v New Zealand Airline Pilots' Association Inc*.[7] The Court noted that there had been two recent authoritative restatements of the correct approach to the interpretation of contractual provisions, citing relevant passages from each.[8] First, it referred to the statement from the judgment of the Supreme Court in *Firm P1 1 Ltd v Zurich Insurance Ltd*:[9]

> While context is a necessary element of the interpretative process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the

---

3 *Hin-Pro International Logistics Ltd v Compania Sud Americana De Vapores SA* [2015] EWCA Civ 401, [2016] 1 All ER (Communication) 417.
4 At [73].
5 At [73], citing *Crawford v Morrow* [2004] ABCA 150 at 68-69.
6 At [69].
7 *Air New Zealand Ltd v New Zealand Airline Pilots' Association Inc* [2016] NZCA 131.
8 At [34].
9 *Firm P1 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [63].

> wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[13] The second passage cited by the Court of Appeal in *Air New Zealand Ltd*[10] was from the judgment of Lord Neuberger in *Arnold v Britton*:[11]

> When interpreting a written contract, the Court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. …

[14] Finally, in relation to the principles applicable to implying terms into contracts, this Court notes the observations made by the United Kingdom Supreme Court in another recent judgment: *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd*.[12] That case dealt with the interpretation of a lease and required the Court to consider the principles by reference to which a term is to be implied into a contract. Lord Neuberger, delivering the majority judgment, stated:[13]

> In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. …

[15] Lord Neuberger observed that the process of implication involved a "rather different exercise from that of construction" and went on to adopt the following

---

10 *Air New Zealand Ltd v New Zealand Airline Pilots' Association Inc*, above n 7, at [35].
11 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].
12 *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843.
13 At 28.

explanation by Sir Thomas Bingham MR in *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd*:[14]

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpretation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extra ordinary power.

Discussion

[16] In relation to the application of the *contra proferentem* rule, Mr Reardon submitted that the wording in question was not "so ambiguous that the Court cannot discern the objective intention of the parties." His principal submission, however, was that the rule had no application because Mr McIntyre was not the "proferens". In other words, the settlement agreement had not been prepared or drafted by Mr McIntyre but by the mediator using a standard mediation form. I agree with that submission. The *contra proferentem* rule has no application.

[17] Turning to the ordinary and natural meaning of the words at issue, as the case did not involve the presentation of any oral evidence, similar submissions on construction were presented to the Court as those that were made to the Authority. After considering those submissions, the Authority stated, relevantly:[15]

> [23] … I am unwilling to conclude that there is one single definition of the word "interest" or that there is a singular practice which governs the application of interest on a debt between parties. When and how interest is set or accrues is a matter for parties entering into such an arrangement to decide for themselves.
>
> [24] … there is no reference in the settlement agreement to indicate that the parties agreed to calculate interest on a per annum basis or words which suggest that some of the interest component, in and of itself, will be reduced by monthly payments made within the notional 12 months.
>
> …

---

[14] At 29, citing *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) at 481.

[15] *McIntyre v Core Technology Ltd*, above n 1.

> [27] I accept clause 3 is not artfully written but I consider the agreement between the parties is captured by applying a natural and ordinary meaning to the plain words used in the settlement agreement. The phrase "*the total sum of $110,000 plus interest of 10%"* links the interest component directly to the principal sum. In this respect I agree that interest was set at 10% of the total sum of the purchase price of shares and is $11,000 as Mr McIntyre contends. It follows that Mr McIntyre's claim prevails.

[18] In this Court, Mr Mercer was critical of the settlement agreement. He described it as:

> … not a safe contract for the purpose of a "Sale and Purchase" agreement; it's too simplistic, lacks relevant and crucial details in key areas, and was drafted by someone without the prerequisite experience (to draft this type of contract). Furthermore, this is an agreement between two parties who are in mediation; therefore it can be assumed the environment will be unfriendly and matters are unlikely to be easily resolved …

[19] Mr Mercer also submitted:

> - The Core Technology accountant saw two ways to calculate the equal monthly payments, one was equally splitting the principal (paying equal principal amounts) and the other equalising the interest to make the payment amounts equal. She said either could be considered acceptable and decided decreasing Monthly payments would be considered the normal way.

[20] Mr Mercer referred to "two additional people representing Core Technology at the mediation session" and stated they "could attest that all agreed with the following":

> "The idea was that we would be paying over 12 months rather than upfront and so there would be an interest cost on the unpaid money. Which was a sliding scale interest cost, [t]hat is, you pay interest on the amount outstanding."

[21] As noted in [3] above, Mr Mercer submitted that there was no natural and ordinary meaning to the interest provision in the settlement agreement and he pleaded that it, therefore, required that "plus interest of 10%" was to be interpreted to mean "10% per annum on the purchase price of $110,000." By analogy he submitted that the meaning contended for by the defendant required the words "plus interest of 10%" to be interpreted to mean "plus 10% of the purchase price of $110,000."

[22] Mr Reardon contended that the Authority was "entirely correct" in its interpretation of the interest provision. He also made what would appear to be a strong submission based on the requirement that the payments were to be made "in equal and consecutive instalments over 12 months". The point Mr Reardon stressed was that the way in which Mr Mercer had paid the purchase price (evidenced by the schedule of payments referred to in [9] above) was by "reducing (i.e. unequal) monthly instalments."

[23] Mr Reardon also referred to what he called the "rhetorical question" asked by Mr Mercer in relation to the defendant's approach to the interpretation of the language used, namely, "why wouldn't the parties just write '*the purchase price shall be $121,000'* instead of *'110,000 plus 10%?'"*. Mr Reardon's answer was:

> 8.2 The correct legal answer is that it does not matter what the subjective intentions of the parties were in drafting the contract in this way.

Conclusions

[24] It seems to me that Mr Mercer is effectively asking the Court to interpret the provision in question in a particular way so as to avoid an outcome which the Core accountant and other advisers (which the Court did not hear testimony from) deem in hindsight to be an imprudent or bad outcome; but that is not a permissible approach to the interpretation of a contract. In *Air New Zealand Ltd* the Court of Appeal cited the following passage from *Arnold v Britton*:[16]

> [20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed to, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

---

[16] *Air New Zealand Ltd v New Zealand Airline Pilots' Association Inc*, above n 7, at [67] citing *Arnold v Britton*, above n 11.

[25] The Court of Appeal in *Air New Zealand Ltd* re-emphasised the point by stating:[17]

> It is unprincipled to interpret the contract so as to avoid a bad outcome for one party …

[26] Having carefully considered the submissions of both parties, I respectfully agree with the Authority's interpretation of the phrase in question. It seems to me that the objective meaning a reasonable person having all the background knowledge of the parties to the settlement agreement would give to the phrase, "*the total sum of $110,000 plus interest of 10%"* is that the interest percentage was linked directly to the principal sum meaning that the total purchase price of the shares was to be $110,000 plus $11,000 interest giving a total figure of $121,000.

[27] Such meaning is consistent with the contractual context in particular, as Mr Reardon stressed, with the requirement for payments to be "in equal and consecutive instalments over 12 months". On Mr Mercer's interpretation, a sliding scale of interest would and did in fact result in unequal consecutive instalments.

[28] I do not see that the interpretation contended for by the defendant flouts business commonsense in any way. The parties were not dealing with an amortized bond or mortgage situation where the principal sum is paid down over the life of the Security Document. With the help of a mediator they were able to reach agreement on the amount the plaintiff would be required to pay for the shareholding in question. In an ideal world, having reached such agreement, the total consideration would have been paid over to Mr McIntyre and he would then have had the immediate use of the money. He would have been free to make that money work for him by, for example, investing in shares, property or some other commercial enterprise. The money was rightfully his.

[29] However, as Mr Mercer was not in a position to pay the purchase price immediately, Mr McIntyre was not able to have the immediate use of the funds. In those circumstances, it makes commercial sense for him to be fully compensated for his lost opportunities. It seems to me that an informed reader would appreciate that

---

[17] At [75].

the interpretation argued for by Mr McIntyre presented a fair way of achieving that objective.

[30] I see no basis for having to imply a term into the contract in order to ascertain the true meaning of the language used.

[31] The plaintiff's challenge is unsuccessful. Mr McIntyre is awarded the sum of $5,083.38, being the difference between the figures in dispute of $121,000 and $115,916.62. The defendant claims, and is awarded, interest at five per cent per annum on the amount of $5,083.38 from 1 February 2015 down to the date of payment.

[32] The defendant is entitled to costs. If costs cannot be agreed upon then Mr Reardon is to file and serve submissions within 21 days of the date of this judgment and Mr Mercer will have a like period from the date of service in which to file submissions in response.

A D Ford
Judge

Judgment signed on 4 May 2016 at 10.00 am