Case No: HQ12X02558

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/10/2014

Before :

MASTER COOK

- -

Between :

The Mayor and the Burgesses of the London Borough of Tower Hamlets	**Claimant**
- and -	
Rich Mix Cultural Foundation (a company limited by Guarantee)	**Defendant**

- -
- -

Zoe O'Sullivan (instructed by **London Borough Tower Hamlets Legal Department**) for the **Claimant**
Seb Oram (instructed by **Latham & Watkins**) for the **Defendant**

Hearing date: 9 July 2014

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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.

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MASTER COOK

Master Cook :

1. This is the trial of a preliminary issue involving a short point of contractual construction arising out of the Defendant's counterclaim in this action. Both parties agreed that the trial of this issue should be conducted by a Master and by consent order dated 2nd June 2014 they defined the issue as "*whether as a matter of law, clause 2.4 of the Service Level Agreement dated 26 September 2010 is unenforceable for lack of certainty*".

2. This position was confirmed by Mr Oram at the start of the hearing when I sought clarification from the parties as to the nature and scope of the preliminary issue in light of the matters set out at paragraphs 7 to 11 of his skeleton argument. Neither party has filed witness statements and my attention has been directed solely to the contractual documentation contained in the hearing bundle.

Background to the preliminary issue

3. The Claimant is a Local Authority. The Defendant is a registered charity and a company limited by guarantee incorporated in 2001 and which operates the Rich Mix Cultural Centre on Bethnal Green Road. The Defendant was established in or about 2004 pursuant to certain funding agreements set out at paragraphs 1 to 9 of the particulars of claim.

4. Paragraphs 2.1 and 2.2 of the Service Level Agreement [SLA] dated 26 September 2010 sufficiently explains the necessary background:

> "2.1 Rich Mix is an important cultural centre in Tower Hamlets London Borough. It provides managed cultural workspace, cinema and cultural space for the arts and exhibitions. It is a unique space in the Borough and has the potential to benefit the Borough greatly.
>
> 2.2 The Council has made significant investments in the centre since its inception and wishes to continue to support the centre to build up a sustainable business to support the cultural outputs set out in its objectives contained in its business plan 2011/11 *[sic]* – 2012/13, as referred to in clause 2.5 below"

5. The source of the continued funding to be provided under the SLA was a section 106 agreement made between Bishopgate Apartments LLP and the Claimant on 21 May 2008. Under paragraph 2(e) of Schedule 8 of the section 106 Agreement Bishopgate Apartments LLP was obliged to pay £2,093,978 for cultural social and community products. The Defendant was not named in this agreement.

6. On 2 August 2010 the Claimant's Strategic Development Committee which had responsibility for considering major planning matters within the Borough allocated the entire £2,093.978 to the Defendant.

7. I understand that a total of £300,000 was paid to the Defendant following execution of the SLA, the Claimant having being satisfied that certain business targets were being met.

8. Given this background it is a great shame that the parties are engaged in this litigation. In this action the Claimant seeks the sum of £850,000 alternatively damages for alleged breach of a forward funding agreement dated 13 September 2004. The Defendant denies liability and counterclaims for breach of paragraph 2.4 of the SLA.

9. Paragraph 2.4 of the SLA provides:

> "The parties have agreed to develop further performance targets within 8 weeks of this agreement in order to release three further payments funded from the section 106 moneys of instalments of £523,494 each provided that these section 106 moneys are received by the Council. The key performance areas are recorded in Appendix 2 and the parties agree to use their reasonable endeavours to agree performance targets to facilitate the release of the further section 106 Agreement sums. These performance targets and the related payment schedule shall be agreed in writing and appended to this agreement as Appendix 5."

10. Appendix 2 of the SLA provides:

> "Key performance areas as examples of the framework to guide performance standard development and negotiations for triggering the third payment in October 2010 (£200,000) and the remaining performance targets to trigger the three remaining payments of £523,494 each
>
> 1. Development of Community centred Arts Programme reflecting the Borough
>
> 2. Development of Robust Medium Term Business Plan
>
> 3. Performance against an agreed robust medium term business plan
>
> 4. Financial solvency
>
> 5. Formal Audited Accounts
>
> 6. Achievement of ACE outcomes and delivery of an educational programme to support LBTH schools and outreach work to support the LBTH community plan such as:-
>
> 6.1 Youth development
>
> 6.2 Hard to reach communities
>
> 6.3 Older people
>
> 6.4 Promoting understanding between faith groups

6.5 One Tower Hamlets etc"

11. I understand that the sum of £200,000 referred to in Appendix 2 was paid to the Defendant on 11 March 2011.

12. The Claimant's defence to the Defendant's counterclaim is that clause 2.4 of the SLA is unenforceable as lacking in certainty being in substance a mere agreement to agree, see paragraph 38 of the reply and defence to counterclaim.

The parties submissions

13. Miss O Sullivan points out that Appendix 5 of SLA is headed "Agreed Performance targets and Performance Schedule" but is marked "to be attached when agreed" and is otherwise blank. She submits that clause 2.4 of the SLA should be read as imposing on the parties an obligation to use reasonable endeavours to agree, within 8 weeks of signature, performance targets for the areas set out in Appendix 2.

14. Miss O' Sullivan submits that in the circumstances clause 2.4 is legally unenforceable as a mere agreement to agree in accordance with the long established principle to be derived from cases such as *Walford v Miles* [1992] 2 AC 128 where Lord Ackner said:

> "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations"

15. Whilst Miss O'Sullivan accepts that clause 2.4 is expressed as an obligation to use reasonable endeavours to agree performance targets she submits that the obligation remains uncertain and as the end result which the parties are intended to achieve remains wholly unclear the court cannot assess whether either of them has made reasonable endeavours to agree. She contrasts this position where the situation where the obligation is to use reasonable endeavours to achieve a clearly defined result such as the grant of an export licence. She referred to *Little v Courage Ltd* (1995 70 P&Cr 469 where Millet LJ said:

> "An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced. An undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, or try to agree, or negotiate with a view to forming an agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."

16. Miss O'Sullivan drew my attention to the case of *Phillips Petroleum v Enron Europe Limited* [1997] CLC 329. In this case the relevant clause in a gas sale agreement provided that the parties should use "*reasonable endeavours to agree, as much in*

advance as possible, but in any case not less than 30 days in advance, the dater on which the Seller … will commence deliveries of gas to the Buyer." The Court of Appeal, by a majority, rejected the buyer's argument that the clause imposed an enforceable obligation on the parties to co-operate in the performance of the agreement by reaching agreement on a date as soon as it was technically and operationally practicable to do so. Lord Justice Kennedy noted that the contract provided no guidance at all as to the circumstances in which either party might be found not to be using reasonable endeavours to agree. She submitted that that the same must apply to the requirement to use *"reasonable endeavours"* to agree performance targets contained in clause 2.4 of the SLA.

17. On behalf of the Defendant Mr Oram submits that the SLA has been partly performed and that in the circumstances the court can or should attempt to uphold the agreement especially in circumstances where the Claimant is only asserting uncertainty in a single clause of the agreement.

18. Mr Oram submitted that clause 2.4 of the SLA was sufficiently certain to support the Defendant's claim for damages as it does not provide the Claimant with a complete discretion as to the content of the performance targets. He submitted they were constrained by the primary of objective of the SLA as set out in clause 2.2 *"to allow the [Defendant] to build up a sustainable business to support the cultural outputs set out in its objectives contained in its business plan 2011/11 -2013"* and that the performance areas were sufficiently identified in Appendix 2 of the SLA.

19. Mr Oram referred to the case of *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] 1 Lloyds Rep 638 (CA) where the Court of Appeal approved the following propositions derived from *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] 2 Lloyds Rep 76:

> "i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that,
>
> ii) Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract from coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".
>
> iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract from coming into existence, again on the ground of uncertainty.
>
> iv) However particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms where that is possible, to enable the contract to be carried out.

> v) Where a contract has once come into existence, even if the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.
>
> vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest.*
>
> vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties agreement on a long terms relationship, or has had to make an investment premised upon that agreement.
>
> viii) …
>
> ix) …
>
> x) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute."

20. Mr Oram placed particular emphasis on the existence of an arbitration clause in the SLA. Clause 9.1 of the SLA provides;

> "All disputes or differences which shall at any time arise between the parties whether during in this agreement or afterwards touching or concerning this agreement or its construction or effect or the rights duties or liabilities of the parties under or by virtue of it or otherwise or any other matter in any way connected with or arising out of the subject matter of this agreement shall be dealt with in accordance with the procedures in Appendix 3."

21. Appendix 3 of the SLA is headed "Procedures regarding complaints, disputes and remedies for default or poor performance. Section 1 deals with complaints, section deals with default or poor performance and section 3 is headed "Arbitration" and provides:

> "Disputes which the parties cannot resolve to their mutual satisfaction will be referred to the Chief Executive and Board

> of Directors of the respective organisations and/or his/her nominee whose decision shall be final."

22. I am bound to say that I fail to see how this clause as drafted could ever resolve a difference of opinion between the two organisations. It is usual for such a clause to provide a mechanism for the appointment of a neutral third party to resolve such differences. For this clause to provide for effective arbitration the Court would have to imply a power for the Directors of the respective organisations to appoint a single nominee/expert. Mr Oram urged me to take this course arguing that the clause was sufficiently and broadly drafted as a dispute resolution mechanism.

Discussion

23. I have an instinctive degree of sympathy with the Defendant's position having entered into this contract in good faith and with the benefit of advisers, who no doubt negotiated with the Claimant's advisors to produce what was thought to be a workable agreement.

24. I remind myself that the terms of the preliminary issue do not require me to consider whether the whole SLA fails but simply whether clause 2.4 is unenforceable for lack of certainty. There is no claim for rectification currently pleaded.

25. There does not seem to me to any discernable difference between the parties on the applicable law. I certainly accept the submission of Mr Oram in relation to the case of *Mamidoil* that criteria (i) to (iv) apply to the situation where no contract has come into existence and criteria (v) to (x) apply where a contract has come into existence.

26. In my judgment clause 2.4 of the SLA is a classic example of an agreement to agree. The clause clearly requires the parties to negotiate with a view to agreeing performance targets which themselves are not defined or capable of definition by reference to the SLA. I do not find any assistance from the key performance areas set out in Appendix 2. With the exception of the provision of formal audited accounts Appendix 2 cannot help on the nature of the performance targets required. An example of the sort of targets that might have been envisaged by the parties is contained in Appendix 1 of the SLA by reference to the two payments of £150,000 made in August 2010.

27. I was told that £200,000 had been paid under clause 2.4 pursuant to an agreement reached between the parties under Appendix 2 in October 2010 but I received no formal evidence about this or what the agreed targets were.

28. This is a case where there would appear to have been some part performance pursuant to the disputed clause and I accept that the Court should strive if at all possible to give effect to the agreement. The difficulty is that the Court simply does not have any material to enable it to take a view on the implication of suitable performance targets. There is a limit to the extent to which the court can intervene to re-write the parties' bargain. Whilst, as the authorities show, the Court might be able to take a view on such matters as "a fair and reasonable price" , "fair value" or "reasonable repair" the court should not imply a term unless the term can be formulated with reasonable clarity precision, see *Chitty on Contract* 31st Ed Vol 1 13-101.

29. Clause 9.1 of the SLA clearly had the potential to fill the void left by the failure of clause 2.4 to set out suitable performance targets. Unfortunately as drafted the clause is simply not effective to resolve any deadlock between the parties or give a determination of the appropriate performance targets.

30. In the circumstances the contract simply does not contain sufficient objective criteria to enable that which has to be agreed or arrived at between the parties to be decided by an arbitrator even if the contract made effective provision for the appointment of an arbitrator or the court were prepared to fill the void left by the absence of an arbitrator.

31. In the circumstances Miss O'Sullivan's arguments prevail and I must answer the question set out in the preliminary issue "Yes". I would invite the parties to consider what if any consequential directions are required. If these can be agreed there will be no need to attend the handing down of this judgment.