SHERIFF APPEAL COURT

[2019] SAC (Civ) 40
HAM-A434-17

Sheriff Principal D L Murray
Sheriff Principal M W Lewis
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in an appeal in the cause

AIR TELECOM UK LIMITED

Pursuer and Appellant

against

ECG BUILDING MAINTENANCE LIMITED

Defender and Respondent

Appellant: McKinlay, advocate; Mellicks
Respondent: Gardiner, advocate; The Building Law Practice

15 November 2019

Background

[1] By agreement between the parties dated 7 June 2015 the appellant supplied without financial charge telephonic products, namely mobile telephones, and related equipment to the respondent ("the contract"). At about the same time, EE, a network operator, entered into an agreement with the respondent to keep the equipment connected (the "airtime agreement"). Through the contract and the airtime agreement the appellant facilitated provision by EE, of telephone coverage for the respondent. In return for providing a

customer to EE the appellant received payment from EE. The respondent paid EE for the telephone coverage. At the sole discretion of the appellant, but as a result of the respondent entering into the airtime agreement the appellant made a payment described as a "subsidy" to the respondent. By email of 20 July 2017 the respondent advised the appellant they were switching to a different telecom provider. The appellant responded that the contract had in fact already expired and since the respondent had missed the deadline to return the equipment they were liable to pay for it. The respondent offered to return the equipment but was told it was too late. The appellant commenced proceedings for £74,547.31 and after debate, by interlocutor of 18 March 2019 the sheriff sustained the second plea-in-law for the respondent, repelled the appellant's pleas-in-law, dismissed the action and found the appellant liable to the respondent in the expenses of the cause as taxed. This appeal is against that decision of the sheriff.

[2] The appellant's case is founded on clause 3 of the contract between the parties which provides for a minimum term of 24 months and clause 1.2 of the Standard Terms and Conditions attached thereto. The appellant avers that the contract commenced on 7 June 2015, when it was signed by John Bell, the respondent's IT manager, and that it ended on 7 June 2017. They submit that the expiry of the 24 months minimum period or term brought the contract to an end. Absent the contract being renewed by agreement, it automatically came to an end.

[3] Both parties accept that the contract provides that the equipment was to be returned by the respondent to the appellant within seven days of the termination date, failing which payment for the cost of the equipment was due. The sum sued for is said to reflect the cost of the equipment. Before the sheriff the respondent's primary position was that the

contract had not terminated on 7 June as claimed by the appellant and was still running on 20 July 2017 when the respondent offered to return the equipment to the appellant. The respondent's subsidiary argument was that even if the contract terminated after the expiry of 24 months it had not in fact commenced until the commencement date of the air time agreement, which was 27 July 2015. Accordingly the offer to return the equipment had occurred before the termination date and in either event the appellant was not entitled to the payment craved. The focus of the dispute in this appeal, as before the sheriff, is on the meaning of the contract. At issue between the parties were two questions, namely: did the contract automatically terminate at the end of the "minimum period"? and if so, did the minimum period have the same start and end date as the airtime agreement minimum term?

[4] Parties accepted that the interpretation of the contract could be determined as a matter of law without factual evidence beyond the contract and the airtime agreement.

[5] The contract comprises four clauses, attached to the contract and forming part of the contract is a further document headed "Standard Terms and Conditions". The relevant provisions of the contract are as follows:

> "3. **Commencement Term:** Minimum Period: 24 Months"

Clause 1.2 of the Standard Terms and Conditions provides:

> "The following words and expressions shall have the meanings set out below:"
>
> …"**Minimum Term**" means the minimum period of time which the Customer has agreed to maintain Connection(s) under the Airtime Agreement."

As the sheriff records, parties were agreed that the expressions "minimum period" and "minimum term" were interchangeable and meant the same thing. Standard term 3.3 is in the following terms:

> "Notwithstanding delivery and acceptance of the Equipment to the Customer, title to the same will not pass to the Customer but will be retained by Air Telecom UK Limited at all times. If [for] whatever reason this Agreement comes to an end (including for the avoidance of doubt the expiry of this Agreement) the Customer must return all Equipment to Air Telecom UK Limited within 7 days of the day on which this Agreement ends. If Air Telecom UK Limited has not received all of the Equipment within 7 days of the day on which this Agreement ends, it shall (at its sole discretion) be entitled to charge the Customer a sum equal to the cost of the Equipment (valued as at the date of this Agreement) which has not been received by Air Telecom UK Limited."

Clause 6 of the Standard Terms and Conditions deals with payments known as "payments and reclamation subsidies". 6.1 provides that appellant may, in their sole discretion, provide the respondent with a subsidy as a result of the respondent entering into an air time agreement with the network/service provider. The relevant wording of 6.4 is in the following terms:

> "Where a Subsidy is to be provided by [the appellant] … this amount will be provided during the Minimum Term".

Clause 9.1 of the Standard Terms and Conditions provides that the agreement may be terminated forthwith at any time by either party on written notice to the other party if any of a number of situations arise. These are, broadly, breach of contract and insolvency of either party. Clause 9.2 empowers the appellant to terminate the contract at any time.

Submissions for the appellant

[6] The appellant invited the court to recall the interlocutor of 18 March 2019, to repel the respondent's preliminary pleas and to appoint the cause to a diet of proof.

[7] The appellant submitted that the contract would automatically terminate on the expiry of the 24 month period on 7 July 2017. It was noted that there was no provision as to how the term may be extended or renewed by the parties. As a consequence, without

further notice being given to the customer, the customer, in this case the respondent, was automatically under an obligation to return the equipment within a seven day period, failing which the respondent was liable to pay the sum sued for.

[8] The sheriff's reference to the *Shorter Oxford English Dictionary* definition of the word 'minimum' failed to set out the full definition which is as follows:

> "B. adj.(chiefly *attributive*). [The noun used chiefly appositively.] That is a minimum; of or relating to a minimum; that is the least or lowest possible, usual, attainable, allowable, etc."

Particular note had to be taken of the sheriff's exclusion of the word "allowable" from the quoted definition. The sheriff had fallen into error by his overreliance on the dictionary definition in the early stages of his determination. Reference was made to *Stocker* v *Stocker* [2019] 2 WLR 1033, where it was held that the misuse of a dictionary definition amounted to an error of law.

[9] Proper use of the dictionary definition would have shown that both parties' interpretation of the contract was possible. That should have resulted in the sheriff having regard to the use of the word "expiry" in clause 3.3. The use of expiry anticipated that the contract could come to an end on expiry. The ordinary meaning of expiry means that the contract has to end after a particular length of time. Reading the contract as a whole it was for the minimum term. As the sheriff identified, clause 1.2 defines the minimum term in the contract:

> ""Minimum term" means the minimum period of time which the Customer has agreed to maintain Connection(s) under the Airtime Agreement".

The appellant conceded that the contract was not happily drafted but maintained that their interpretation did not deprive "minimum" of any meaning. Rather it reflected the parties' intention for the contract to be for a twenty four month period subject to earlier termination

on certain intervening events. In contrast, the respondent's interpretation deprived the reference to expiry in clause 3.3 of the Standard Terms and Conditions of any meaning. The appellant sought to rely on clause 3.3 to substantiate the charge of £74,547.31, being the cost of the equipment supplied, because the equipment had not been returned to the appellant by the respondent within seven days of the expiry of the agreement which expired at the conclusion of the minimum term.

[10] The appellant submitted it would not be a proper approach to have regard to a different contract (in this case the airtime agreement) to establish the date on which the contract between the parties commenced.

Submissions for the respondent

[11] The respondent moved the court to dismiss the appeal and adopted their note of argument and the reasoning in the sheriff's Note. In relation to the first question (when the contract came to an end?) this came down to the meaning of minimum and expiry. The construction which the appellant advocated was that the contract lasted for twenty four months unless extended, but that deprived "minimum" of any meaning. The use of the word "minimum" set twenty four months as the shortest duration for the contract; it did not set the longest duration. If twenty four months was intended to be the whole duration of the contract, "minimum" was redundant. Clause 3.3 related to the entitlement of the appellant to charge the respondent for the equipment when the contract came to an end. "Expiry of the agreement" follows the phrase "for the avoidance of doubt". The contention of the appellant that this section reflected a modification was undermined by use of the expression "for the avoidance of doubt." Clause 3.3 did no more than require the

equipment be returned at the expiry of the agreement. Without doing violence to "minimum" account could be taken of clause 9 of the Standard Terms and Conditions which provided termination provisions. It was observed that clause 9.2 permitted the appellant to terminate the agreement at any time. The approach proposed by the appellant to emphasise the reference to expiry in a different provision which may refer to something else was not how a reasonable person with the knowledge of the parties would alight on the true meaning of the contract.

[12] The sheriff had correctly had regard to commercial common sense, and there was no suggestion in his Note that he viewed commercial common sense as being determinative. The appellant suggested the sheriff had erred in law by referring to the dictionary definition of the word "minimum" as the starting point, and the sheriff was then criticised for using the definition as an "initial restriction" on construction. There was no substance to this criticism of the sheriff. There was no material difference in the dictionary definition used by the sheriff and the meaning accepted by the appellant, set out in paragraph 5.2 of their written submissions "the shortest period permitted". On the appellant's interpretation "minimum period" would mean a fixed period subject to renewal. "Minimum" would therefore add nothing to "period". "Minimum period" would also be the "maximum period". The appellant's position was that the term "expiry of the agreement" supported the inference that the agreement automatically expired at the end of the minimum period. Such an inference was not justified by the word "expiry" nor was it needed to give meaning to the word, which can also refer to the expiry of the 30-day notice period referred to at clause 9.2.1 of the Standard Terms and Conditions. The appellant was wrong to say there was no express provision for continuation of the

agreement beyond the minimum period. The word "minimum" adopting its ordinary meaning leads to an inference that the contract could continue for a longer period. Further it was irrelevant for the sheriff to have regard to the lack of an express provision for extension because the appellant's position was that the contract between the parties terminated at the end of the minimum period unless renewed. Neither was there any substance to the argument that the sheriff erred in finding the contract continued indefinitely. There was no general presumption that the contract must be of finite length and nothing in the contract made an indefinite duration implausible. The sheriff was, for the reasons he explained, correct to find that the contract did not automatically expire at the end of twenty four months.

[13] Turning to the relationship between the contract and the airtime agreement, the respondent did not accept as a proposition that the two documents required to be considered separately and individually. It was apparent that the two were intertwined. It was illogical to suggest that the contract commenced in advance of the airtime agreement when the opportunity for the respondent to use the equipment would not exist without the airtime agreement. It was equally illogical and contrary to commercial common sense that the respondent would remain bound by an airtime agreement at a point when they would have been required, on the appellant's interpretation, to have returned the equipment. The sheriff's conclusion that the two minimum terms would run in tandem was a sound and correct finding. The sheriff's approach in paragraph [45] of his Note that clause 1.2 of the Standard Terms and Conditions defines the minimum term by reference to the minimum period of time, which the customer had agreed to maintain connection under the airtime agreement, correctly led to his conclusion that the two minimum periods run in tandem.

Looking at the purpose of the contract and the airtime agreement, namely to regulate the supply and return of telephony equipment to enable the delivery of airtime services, it was a reasonable interpretation that both therefore commenced on 27 July 2015.

[14] The construction which the appellant maintained would result in an exceedingly onerous contract. This was the appellant's standard form contract, although it had not been argued before the sheriff as a matter of law that any ambiguity or vagueness should fall to be interpreted contrary to the interest of the appellant. The respondent did not however found on that, as their principal position was that the contract was not ambiguous. Indeed the respondent accepted that the court should not explore that approach as no authorities had been cited and it might be said that evidence would be required to sustain the argument; parties had agreed that the sheriff should determine the matter on the terms of the two documents without further evidence.

Analysis and decision

[15] Synthesised, the appellant's argument is that the contract was for a fixed two year period which commenced when the contract was signed. Their claim for the sum sued for rests entirely on that proposition as does the success of the appeal. We do not accept the submissions of the appellant. This is a poorly drafted contract, but a fair reading of the contract does not lead us to the interpretation which the appellant sought. We find no basis to draw the inference that the phrase 'minimum term' also establishes the maximum term. We find nothing to support that interpretation. The obligation, which is comprehensible and may well reflect commercial common sense, is that the respondent will maintain the airtime agreement with the network/service provider for a minimum

period. We find nothing to support the position of the appellant that it creates a defined term for the contract. As the sheriff observes if no steps are taken to terminate the contract it would simply continue. The respondent would have no obligation to pay anything to the appellant but the appellant had the power to terminate the contract which triggered the requirement for the respondent to return the equipment and, if it was not returned timeously, for payment to be made by the respondent to the appellant.

[16] As noted the parties were agreed as to the law to be applied and the jurisdiction has been effectively prorogated notwithstanding clause 10.11 of the Standard Terms and Conditions:

> "This Agreement shall be governed by English law and the parties submit to the exclusive jurisdiction of the English Courts".

The sheriff correctly had regard to the judgment of Lord Neuberger of Abbotsbury PSC, in *Arnold* v *Britton* [2015] AC 1619. He makes specific reference to the factors identified by Lord Neuberger at paragraph [15] and at paragraph [30] of his own note the sheriff highlights those of particular application to the interpretation of this contract.

[17] It is well recognised that a judge may have regard to a dictionary definition. We do not accept there to be any substance to the appellant's argument that the sheriff took the dictionary definition as his starting point. The reference by the sheriff to the dictionary definition follows his reference to the factors set out by Lord Neuberger in *Arnold* v *Britton. Stocker* v *Stocker* involved an action for defamation and, as may be seen in paragraph [25] of the judgment of the Supreme Court, the observations on the danger of the use of dictionary definitions were clearly restricted to that context. We do not read those observations as being relevant to the interpretation of a contract.

[18] We find no error in the approach of the sheriff or his conclusion that the intention of the parties was that the contract was to run for a period of not less than twenty four months. The adjective "minimum" is not in any way a synonym for fixed. It cannot be read as establishing a pre-determined end point. The Shorter Oxford English Dictionary, 6th edition, meaning of minimum as an adjective is:

> "… the lowest possible, usual, attainable etc."

There is no basis to depart from the natural meaning of minimum period. The answer to the first question is therefore that the agreement did not automatically terminate at the end of the "agreement minimum period."

[19] The commencement question does not arise given we are upholding the decision of the sheriff that the agreement did not automatically terminate at the end of the contracted minimum period. We shall however in deference to the submissions made express our view on the commencement question. Had we found there to be substance to the appellant's argument that the contract was to be interpreted as being for a twenty four month period we would have upheld the sheriff's conclusion that the commencement date of the contract cannot be the date of signing by the representative of the respondent, as the appellant submitted. It would be illogical for the contract, were it to be a fixed term contract, not to be coterminous with the airtime agreement. It would be absurd to enter into such a contract for a specific duration which did not align with access to telephone coverage. Further we note that clause 1.2 of the Standard Terms and Conditions defines minimum term as "the minimum period of time which the Customer has agreed to maintain Connection(s) under the Airtime Agreement." That too links the contract and the airtime agreement. It would also defy commercial common sense to have the contract be

for a fixed period when there is no suggestion that the equipment was provided on that date. We do however recognise that no evidence was given on when the equipment was provided, the sheriff being invited to determine the matter on the basis of the written provisions of the contract.

[20] We also conclude that, as no evidence was given, it is not open to this court to consider the interpretation of the contract on the basis that it was a standard form contract at the instance of the appellant. That was not argued before the sheriff and the respondent correctly did not seek that this Court consider that factor in the interpretation of the contract.

[21] We therefore accept that the sheriff was correct to uphold the defender's first plea-in-law having regard to the test as set out by Lord Normand in *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50:

> "The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves the averments he is bound to succeed."

We are satisfied that the contract does not permit the appellant to charge the respondent for the cost of the equipment where the respondent had sought to return the equipment when they did. We must therefore refuse the appeal and adhere to the interlocutor of the sheriff dated 18 March 2019.

Expenses

[22] Counsel agreed that the expenses of the appeal should follow success and we will award these to the respondent, granting sanction for the employment of junior counsel.