IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CIRCUIT COMMERCIAL COURT
[2018] EWHC 3021 (Comm)

No. LM-2018-000012

Royal Courts of Justice

Friday, 12 October 2018

Before:

HIS HONOUR JUDGE SIMON BARKER QC
(Sitting as a Judge of the High Court)

B E T W E E N :

URBAN RETREATS LIMITED — Claimant

- and -

HARRODS LIMITED — Defendants

MS D. ROMNEY QC (instructed by Rosenblatt) appeared on behalf of the Claimant.

MR J. McCAUGHRAN QC (instructed by Cooley (UK) LLP) appeared on behalf of the Defendant.

J U D G M E N T

JUDGE BARKER QC:

1 This is an application which concerns the true construction of certain provisions in a settlement agreement made on 23 March 2018 between Urban Retreats Limited, which is the claimant, and Harrods Limited, which is the defendant.

2 That settlement agreement brought to an end a licence arrangement under which the claimant occupied a part of the defendant's department store where, as a result of that occupation, the claimant operated a hairdressing and beauty salon and also a spa. The termination date agreed on by the parties was approximately a month after the date of the settlement agreement; it was 22 April 2018. The defendant itself continued to operate the salons and the spa after the termination date and many of the claimant's staff in the hairdressing salon, the beauty salon, and the spa transferred over to the defendant under the TUPE regulations.

3 The issue between the parties is whether an indemnity given under a particular clause, clause H in the settlement agreement, covers certain remuneration earned by the spa and salon staff prior to the date of termination. The sums involved are identified as salaries in respect of the period of 1 to 22 April in the total sum of £149,374, commission payments, which are habitually paid monthly in arrears, for March 2018 totalling £145,046, commission payments earned in the period 1 to 22 April 2018 in the total sum of £80,675, and a further sum for holiday pay over the month of April to the 22 of that month totalling £12,208. The grand total of all of that is £387,303.

4 The relevant indemnity clause is at clause 12H and there are four aspects of that clause which are in dispute and fall for construction as a result of this application. They are subclauses (a), (b), and (e) and the meaning attributed to the term "employment liabilities". Clause 12H reads:

> "The Licensee [which is the claimant] shall fully indemnify and keep fully indemnified Harrods [the defendant] against all Employment Liabilities [a defined term] in connection with:
>
> (a) All salaries, emoluments, or other sums payable by the Licensee to or in respect of any member of staff including but not limited to holiday pay, tax, and national insurance contributions which fall due [and those are the critical words] after the commencement date [which was a date in 2001] prior to the termination date of this agreement [which is 22 April 2018];
>
> (b) Any liability or obligation arising under or in connection with any member of staff, or any collective agreement which applies to them after the commencement date but prior to the date of termination of this agreement
>
> ...
>
> (e) Any other claim by any member of staff the responsibility for which passes to Harrods … and which has its cause of origin on or after the

> commencement date but prior to the date of termination of this agreement."

5 The clause then continues:

> "...and shall not seek to join Harrods as a party to any proceedings which may be instituted against it in connection with such matters."

6 Employment Liabilities is defined in this way:

> "Employment Liabilities shall mean:
>
> (i) all contractual payments; (ii) all actions proceedings, costs (including legal costs) losses damages fines penalties compensation awards demands orders expenses and liabilities connected with or arising from all applicable employment laws including but not limited to the Employment Rights Act 1996, the Sex Discrimination Act 1995 as amended, the Equal Pay Act 1970, the Race Relations Act 1976, the Disability and Discrimination Act 1995, Article 141 of the Treaty of Rome, the Equal Pay Directive No. 75/117, the Trade Union Labour Relations (Consolidation) Act 1992, as amended, the National Minimum Wage Act 1998, the Public Interest Disclosure Act 1998, the Data Protection Act 1998 and any legislation replacing or amending the same but with the exception of any liabilities which occur under the Transfer and Undertakings (Protection of Employment) Regulations 1981 other than such liabilities which arise as a consequence of or in connection with a breach by the Licensee [which is the defendant] in clause 12(G), clause 12(I), and clause 12(K)."

7 The scheme of clause 12 was described by Mr McCaughran QC who appears for the defendant as being intended to cover and embrace, with subclause (e) as a catchall for anything outside clause (a) to (d), all staff liabilities originating prior to the termination and the passing of the business to Harrods. He submitted that the clause should be read in that context. That seems to me, in so far as I have been taken to the agreements, to be the right approach to construing this clause.

8 As to Clause 12(a) and the words "which fall due", Ms Romney QC, who appears for the claimant, submitted that that necessarily imports that the obligation to pay has been triggered and that the words "which fall due" are not apt to cover a situation where the liability for, for example, a salary has arisen but the actual date of the payment has not yet passed.

9 If that is right, and I recognise and accept that that is a common way in which the phrase "which fall due" is understood, then that would pass a surprising windfall to the claimant because it would have had the benefit of the revenue that has been generated from all of the employment over the course of the three-plus weeks from 1 to 22 April, plus the revenue generated in march which had triggered commission obligations payable at the end of April.

10 In my judgment, read in context in this case the words "which fall due" are not necessarily and obviously required to be understood as a meaning which are already due for payment.

11 The converse, or the wider meaning, that the words may also embrace obligations which have arisen, even though the payment date or obligation has not yet arrived or crystallised, is a reasonable construction. The words are, it seems to me, ambiguous to begin with and such a construction makes clear business sense whereas the converse construction does not.

12 So, I agree with the contention on that sub-clause as contended for by Mr McCaughran.

13 Under the subclause (b), Mr McCaughran also submitted that "any liability" must mean what it says "any liability" and that would include, even if he is wrong in respect of subclause (a), a liability which has not yet actually become payable. Ms Romney submitted that "any liability" should mean any other liability. I reject that latter submission. First of all, the word 'other' is missing and per contra, under subclause (e), the word "other" is expressly included. So as a matter of drafting, if 'other' was intended to be included or understood as included, it is likely that, at the time, the parties reaching their agreement would have included that word. For this reason, I again favour the construction advocated by Mr McCaughran.

14 In relation to subclause (e), it is not so much of a matter of construing the clause as pointing out, as Mr McCaughran did, that it is more or less a sweep up clause which suggests that the scope of clause 12H was intended to be to ensure that everything which occurred prior to the termination date should, even if payment was actually made by the defendant, be the obligation, through an indemnity, of the claimant and that is, it seems to me, the correct reading of those words.

15 There is then the question of whether there is a further complication through the meaning to be attributed to Employment Liabilities as defined in the agreement. Mr McCaughran argued that it is significant that the clause itself is structured separating "all contractual payments" from "all actions, proceedings..." etc, first of all numerically and, secondly, by punctuation. That seems to me to be right and to result in no injustice when one comes to read the clause as a whole so that the employment legislation and regulations, following on from the (inaudible) and (inaudible) also the exception of the TUPE regulations, attaches to the sub (ii) but not to sub (i).

16 That is a fair reading of the definition. It does make business sense and a contrary reading could lead to challenging commercial common sense. So I, again, accede to and agree with the interpretation advocated on behalf of the defendant.

17 That is my decision.

CERTIFICATE

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This transcript has been approved by the Judge