JUDGMENT : MR JUSTICE MACKAY: QB. 1st May 2007

1. The claimant (the appellant in this appeal) is an English-registered company and the holding company of a group of companies, one of which owned a hotel in Norfolk. The defendant (the respondent) is registered in the Seychelles and agreed to buy certain assets from the group in the form of the Linford Hall Hotel for an agreed sum of £4 million. (I will call the parties "claimant" and "defendant" respectively.)

2. On exchange the defendant paid £1,050,000 as a deposit, leaving the balance of £2,950,000 to be paid. Due to financial difficulties the defendant was forced to seek a deferred completion for a substantial period of time.

3. There were a number of agreements between the parties and this appeal is concerned with one of them, the Consultancy Agreement dated 11th February 2005 and concluded on 1st March 2005 by deed. Under that agreement the claimant claims certain sums were not paid. The claimant brought these proceedings and obtained a default judgment, which the defendant applied to the Master to set aside, effectively on the basis that it had a real prospect of successfully defending this claim on the merits. The claimant has leave from the single judge to pursue this appeal principally as would seem on the grounds that the reasoning of the Master in reaching the decision he reached is (to put it kindly) opaque.

4. The issue before me, therefore, is whether the Master was wrong to have held as he did either for the reasons he gave, to the extent that he did give reasons, or whether there are other reasons on which he could have so found, as is alleged in a respondent's notice which has been put in.

5. I should start by giving the factual background to this agreement because it is more than usually relevant and important in this case. Before doing so, I say quite shortly and without elaborating on it, though I was invited to go further than this and to consider the pre-contractual statements and positions taken in negotiations by the parties, I decline to accept Miss Frazer's invitation to walk down that road and indeed I do not think it is necessary for me to do so. What I am about to set out is common ground and is, on any view of the authorities, material which I should and can look at to make sense of this agreement, if sense can be made of it.

6. There were a number of related agreements, four agreements in all, all concerning the sale of this hotel, in which the claimant was effectively the seller and the defendant the buyer. As I have said, the agreed purchase price was £4 million, a deposit was paid and the balance was not paid and the purchaser defendant sought and was given delayed completion for a period of up to two years. In the meantime it was allowed into occupation without being charged any rent.

7. One of the key figures in the Consultancy Agreement, as will be seen, was £147,500, on the face of it a curious figure but, explained by the fact that, as a matter of fact, as is common ground, it was calculated as being the product of 5% of the unpaid balance over a period of one year.

8. In the second year of the Consultancy Agreement, as will be seen, a different form of payment was envisaged, which was 2% over base. As I have said, the defendant was, notwithstanding its non completion of the contract, allowed into occupation rent free and, importantly, it is common ground also that the claimant provided absolutely no services under the Consultancy Agreement and at no time did the defendant ask it to.

9. With that introduction, therefore, I go to the Consultancy Agreement itself and the relevant terms, which I think I should read out. (I should say that the Agreement refers to the defendant purchaser as "the Client" and to the claimant vendor as "the Consultant").

   "1.1 The Client engages the Consultant to provide the services to the Client and the Consultant agrees to provide such services upon the terms and conditions set out below.

   3.1 The Consultant is retained on a non-exclusive basis to provide the services to the Client for such times and at such locations as may be agreed between the parties from time to time.

   3.2 The Consultant shall provide its services with reasonable care and skill and to be the best of its ability.

   3.3 The Client and Consultant agree that the services shall be performed by the nominated personnel. No change in personnel shall be made without the Client's prior approval, such approval not to be unreasonably withheld.

   4.1 In consideration of the services the Client shall pay to the Consultant the fees set out in Schedule 3.

   5.1 This Agreement shall immediately terminate when the sale agreement of even date herewith for the purchase by the Client of Linford Hall and Linford Hall Estate…has been completed and the Consultant has received payment in full of the sums due in accordance of the said agreement in Schedule 3 of this Agreement.

   9.1 This Agreement sets out the entire agreement of the parties…"

   Schedule 1: *"General business and advisory services and promoting the interests of the client generally at such times and in relation to such projects and matters as may be agreed between the Client and the Consultant from time to time."*

   Schedule 3A: *"The sum of £147,500 to be paid within such time or in such instalments as may be agreed between the parties but in any event by the earlier of…"*

   Then there is a blank date which it is agreed should read 1st March 2006. *"…(the first anniversary of the commencement of this Agreement) or on completion of the purchase pursuant to the written agreement between them of the even date herewith.*

   B: In the event that the purchase is not completed by"

There is then a blank date which the claimant again says should be 1st March 2006 and which is not an agreed date. Then: *"The Client shall in addition pay the Consultant such sum as shall amount to 2% over Lloyds Bank plc base rate from time to time calculated on a daily basis on the sum of £2,950,000 (additional payment) such additional payment to be payable to the Consultant monthly in arrears on the last day of each month until the purchase is completed or as may otherwise be agreed between the parties."*

10. The claimant's primary case is that on a simple and ordinary construction of this agreement the sums due under it, the £147,500 and the further payments, are now due to be paid under the contract, they not having been paid and time having passed for payment, and that that is so regardless of whether any work has been done by the claimant or services have been provided.

11. If Miss Frazer for the claimant is right about that, then it follows that there can be no question of there being an argument available to the defendant that there has been a total failure of consideration, one of the defendant's points below, because there was no obligation to work.

12. The defendant also argues, both here and below, that the contract is void for uncertainty, being in certain of its essential terms vague and meaningless. In support of that in the skeleton argument of the respondent for this appeal passages were cited from Lewison's The Interpretation of Contracts 3rd Ed, which include these, I take it, incontrovertible propositions:

"8.10 The task of the court is to construe the document according to the ordinary tenets of construction and then to determine whether the document as so construed is void for uncertainty.

8.11 Where parties have entered into what they believe to be a binding agreement, the court is most reluctant to hold that their agreement is void for uncertainty and will only do so as a last resort.

8.13 A provision in the contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the draftsman's mind or where it is not safe for the court to prefer one possible meaning to other equally possible meanings.

8.14 Save in exceptional circumstances the court will not recognise an agreement to agree as having any legal effect."

13. So my primary task is plain. It is to look at this contract on standard principles and seek to divine the presumed common intent of the contracting parties. It plainly is intended to be a contract and it is drawn up by lawyers. It is formal and it is indeed entered into by deed and gives every appearance of a document which both sides agree appear to understand as imposing legal obligations on them.

14. There are two authorities of the many that have helpfully been cited to me which will be familiar to students of contract law in their first or second terms but are very important statements of principle in this area of law of which I am grateful to be reminded. The first is ***Hillas v Arcos*** [1932] 147 Law Times 503. At 514 Lord Thankerton, in a long passage which I think I should cite, said:

"Businessmen often record the most important agreements in a crude and summary fashion. Modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly without being too astute or subtle in finding defects. But on the contrary the court should seek to apply the old maxim of English law verba ita sunt intelligenda ut res magis valeat quam pereat. That maxim however does not mean that the court is to make a contract for the parties or to go outside the words they have used except insofar as there are appropriate implications of law, as for instance the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail… Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted."

15. In the House of Lords' decision in ***Scammell v Ouston*** [1940] AC 251 Lord Wright sought to limit or define the circumstances in which a court ought to intervene and hold that what appears to be a contract is not. He did so in these terms:

"The first is that the language used was so obscure. and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found."

The second reason, he went on to explain, was where the agreement was inchoate, i.e. the parties have never in fact completed their agreement, in that case by settling what the terms of the hire purchase agreement integral to the sale of the vehicle were to be.

16. As I have said, the issue for me is what is presumed to be the common intention of these parties according to the words they used and set against the background of the relevant and admissible background evidence or factual matrix, having always in mind the court's powers to imply such terms as are necessary to give effect to that intent but stopping short of rewriting the agreement for the parties.

17. Going back to the contract the terms of which I have set out, the features of it that the claimant stresses are really these. It is a contract of retainer. The word "retained" is used. Read literally, and certainly read broadly, it does not require there to have been some act of service before the contractual sums become payable. Conversely, if any service was provided that exceeded the *de minimis* level, one day or one hour, the entirety of the fee would certainly and unarguably have been due and payable. So here one meets, first of all, the curious feature that the remuneration of the consultant is not fixed by reference to an hourly rate or an annual rate or a *quantum valebat* rate but is simply fixed, and that is a characteristic, says the claimant, of a retainer, where one party holds himself open in return for payment to be used by another party if the other party wants to use him. That I have called an unusual form of agreement and so it is, but the background to it goes some way to explaining why these parties may have found it appropriate or attractive, given the embarrassment that the purchasers were quite plainly under due to their inability to complete within anything like a normal timescale and due to the fact that they were being allowed into this hotel having paid merely a deposit.

18. The wording, argues Miss Frazer, is consistent with all of that as a construction. What the consultant is to do is to provide such services as "may be agreed between the parties from time to time". The converse of that is that they may never agree or, as was the case here, the claimant may never be asked to provide any services. If they did not agree, then it would be for the court to resolve that disagreement, she says, implying into the bare words of the agreement such other words as may be necessary, namely that the services should be reasonable services at reasonable times and of a reasonable nature.

19. The third Schedule plainly, she says, envisages the trigger for the payment – this is the first sum, the £147,500 – as being either completion or the first anniversary of the agreement. If by that time no service had been asked for and none had been provided, then that does not mean that the sum was not envisaged and agreed to be due on that date.

20. My judgment is that, overall, this is indeed a contract which has many of the features of the familiar type of consultancy agreement, the mere agreement of the consultant to be available to provide services being considered by the parties as something of sufficient value to qualify for remuneration.

21. Going to the Master's judgment, the key part is his finding at paragraph 17(2), where he said:

> *"The contention that the consideration for the payment of £147,000 [he meant £147,500] failed because services were not provided is plainly unsustainable since the services could not be provided without the defendant's cooperation which it withheld.*
>
> *(3) However, that apart, it cannot be said that the defendant's contentions have no real prospects of success and the defendant ought not to be precluded from defending the action."*

The defendant's contentions he was there referring to plainly were the contention that the contract must be regarded as being void for uncertainty, because he dismissed the alternative argument that there was a total failure of consideration.

22. The first finding, that it was plainly unsustainable as an argument that there had been a total failure of consideration, is one which the claimant supports in this court, albeit the Master may have gone further in finding it than he needed to. He appears to have found as a fact that there had been a positive act of obstruction of the contract by the defendant in locking one of the key claimant personnel out of the hotel. Miss Frazer says she does not have to go that far. Her argument is that the defendant cannot complain of the vagueness of the obligation on the claimant to provide services when the defendant itself denied the claimant the opportunity to earn such services, if they had to be earned, by its failure to call on the claimant at any time to do so, to make any request for that provision, or even to seek its agreement as to the scope of the services that were to be provided. It is not suggested that the claimant ever avoided any obligation; it is not suggested that the defendant ever asked it to do anything which it did not do; and it will of course be obvious that the agreement contains no express provision for non payment in the event of no services being rendered and no express provision, for that matter, for the claimant to complain of under payment if services were sought which it thought unduly onerous. It would have to respond to such a request on a different basis. But the claimant says that, the Master having so found, he ought therefore also to have found that there was no real prospect of the defendant successfully running the defence of uncertainty and that if this was the Master's view, and it was or should have been made because the intended beneficiary of the services never sought to receive them under the contract by requesting them, or to define the scope of the obligation, then he should have found against the defendant on both heads.

23. This principle is helpfully summarised in Chitty on Contracts at paragraph 13-011 of the 29th Edition in these terms:

> *"The court may be willing to imply a term that the parties shall cooperate to ensure the performance of their bargain, thus 'where in a written contract it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'"*

24. Authority for that is to be found in the case of ***Mackay v Dick*** [1881] 6 AC 251 at 263 and also in ***New Zealand Shipping v Société des Ateliers et Chantiers de France*** [1919] 2 AC at 86-88.

25. An attempt was made by Mr Twigger to narrow this principle. Miss Frazer's proposition is that where performance by A of a contractual term depends on some action by B, B cannot be heard to complain of non performance if he does not carry out his action. Mr Twigger's response is effectively to say that that is to be confined to circumstances where B himself is in breach of contract, where he accepts that the principle applies. In my judgment, that is unduly restricting this principle. It would not have been a breach and it was not a breach of contract (as I read this contract) for the defendant not to seek services, but it would be entirely wrong for him, to rely on the fact that he had not done so as a reason for non payment.

26. So in terms of the meaning of this contract, the claimant argues, in my view rightly, that this is in the nature of a contract of retainer, as particularly clause 3.1 envisages, in respect of which services may or may not be rendered but for which the consideration was to be paid whatever happened. Where an agreement is capable of being construed as a business document within its factual matrix and if necessary by resort to the implication of terms required to give it the legal effect, the parties are presumed to have intended that the court should seek to give effect to it and not to knock it down and destroy it, and that is the approach that attracts me.

27. So the defendant's argument that this is all too vague as to the terms of what is to be provided, what these services were and what their extent and scope was does not at the end of the day succeed.

28. The best analogy I have found in the cases put before me was ***Foley v Classique Coaches*** [1934] 2 KB 1. The obligation in this case, expanded by a not very remarkable or far fetched implied term, was to provide reasonable professional services relating to the completion of the business between these parties, which was the sale of the hotel. As a matter of fact, that is just how the defendant's witness Mr Morgan said he understood it to be, and though that is not in any way conclusive of the issue it is reassuring to note. If disputes had arisen as to whether a request was or was not reasonable and within the four corners of the contract, the court could relatively easily have resolved those issues. It is an unusual agreement, but its unusual nature is understandable in the context in which it was made. It was plainly intended to be of legal effect and binding and it is not one of those exceptional cases where the court should intervene in a bargain between businessmen and say that it will tear down the agreement as being void for uncertainty.

29. The defendants also include in their argument the proposition that it is properly analysed it is no more than an agreement to agree and, if that is the case, it is in only rare cases that such an agreement would be enforceable at law. A modern example of this that Mr Twigger cites is ***Willis Management v Cable & Wireless*** [2005] 2 LR 597, which is really authority for the proposition that the court cannot make for the parties an agreement which the parties have not been able to make for themselves. In my judgment, that is not the case here. The parties had plainly reached the point, unlike the position in ***Willis,*** where they understood each to be contractually bound to the other, and I do not regard the contrary as arguable. All that remained was for the defendant to decide whether it wanted to exercise its right to trigger the obligation to provide services by asking for them, and in what was quite probably a deteriorating commercial relationship it chose not to do so. That was the defendant's right under the contract, but if it had chosen otherwise there was no further agreement needed between the parties as to its entitlement to do so. The only agreement that was needed was the extent and scope of the request, if you like the auxiliary machinery to put the basic agreement into practice. So the parties could have been at loggerheads as to whether a particular demand or whether the claimant's response to a demand was reasonable in the circumstances and, as I have said, I do not envisage the court having great problems in resolving such differences.

30. It is therefore my judgment that there is and was before the Master no real prospect of the defendant successfully defending this claim. I find the meaning of the contract plain. These sums were due whether or not services were provided. The terms are not void for uncertainty. There can be no question of a total failure of consideration. As the Master really gave no reasons for his finding, and that is acknowledged by the fact that the respondents sought to repair that by their respondent's notice, I really have no other course to take but to reconsider the matter myself and I have done so in the terms above, and those are the conclusions I have reached. For those reasons this appeal must be allowed, the Master's decision reversed, and the default judgment as a result will stand.

MISS FRAZER appeared on behalf of the Claimant/Appellant.
MR A TWIGGER appeared on behalf of the Defendant/Respondent.