Case No: A3/2006/1537

Neutral Citation Number: [2007] EWCA Civ 399
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(MR JUSTICE HART)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 14 March 2007

Before:

LORD JUSTICE AULD
LORD JUSTICE MAY
and
LADY JUSTICE ARDEN

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Between:

KHAN	**Appellant/ Defendant**
- and -	
KHAN	**Respondent /Claimant**

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(DAR Transcript of
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MR D FOSKETT QC (instructed by Messrs Stanniford Wallace) appeared on behalf of the Appellant.

MR J EVANS (instructed by Messrs Batt Broadbent) appeared on behalf of the Respondent.

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Judgment

(As Approved by the Court)

Lady Justice Arden:

36. I agree with both judgments. There are three points that I would l like to add. First, there can be no difference in principle between the rules which apply to the interpretation of contractual documents and those which apply to oral contracts. Those rules were laid down by Lord Hoffmann (with whose speech the remainder of the House agreed) in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 898, 912-3. The passage is well known and I need not therefore set it out in full but the first three points which Lord Hoffmann made are relevant in this case:

> "My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact,' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal

> interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

37. Accordingly, evidence as to the circumstances surrounding the making of a contract is, subject to the exceptions noted in para (3) of the above extract from Lord Hoffmann's speech in the ICS case, always admissible on questions of interpretation. This is so even in a case where the contract, if interpreted on a textual basis and in isolation from its surrounding circumstances, would not be said to be uncertain or ambiguous. However, that basic rule is subject to a number of exceptions. In particular evidence as to a party's subjective intent, and evidence as to pre-contractual negotiations, is not admissible on questions of interpretation of a contract.

38. Mr David Foskett QC, for the appellant, placed at the forefront of his argument the submission that it was the objective of various members of the family that the dispute between Mr Ashraf Khan and Mr Afzal Khan arising out of their business affairs should be resolved. Mr Foskett submitted that the objective of the parties was part of the factual matrix which the court could take into account. However, it is clear from the ICS case that declarations of subjective intent cannot be taken into account and the same applies to statements made in the course of pre-contractual negotiations. I would accept that the boundaries of what constitutes pre-contractual negotiations for this purpose are not always clear. In a recent case, <u>The Square Mile Partnership v Fitzmaurice McCall Ltd</u> [2006] EWCA Civ 1690, I held that:

> "Lord Hoffmann recognises that the boundaries of this exception of pre-contractual negotiations from the factual matrix are not clear. It may be very difficult to distinguish whether something that was stated in the course of pre-contractual negotiations is or is not admissible. For instance it may be evidence of the fact which forms part of the matrix which is admissible on interpretation, or alternatively it may amount to an agreement as to the way a provision under the agreement is to be interpreted."

39. The Master of the Rolls and Jonathan Parker LJ agreed with my judgment.

40. In this case Mr Foskett relies upon two matters. First, he relies upon the offer which was made by Mr Afzal Khan in May 2001 to divide the business of Khan and Co on a 50/50 basis. Secondly, he relies on the fact that in the period April to August 2002 Mr Afzal Khan stated that he was looking to take out of the settlement some six shops. He ultimately ended up with only three shops. Mr Foskett came close to submitting that these matters were relevant to interpretation. On his submission, they showed a reduction in Mr Afzal Khan's claims. In Mr Foskett's words, Mr Afzal Khan was:

> "setting out a stall and that has got smaller and smaller as we have gone along".

41. In my judgment, these communications were part of the sequence of events leading up to the agreement, and thus formed part of the pre-contractual negotiations that led to the agreement which was made in 2002. The parties were going through a process of bargaining. Accordingly evidence of these communications is not admissible on a question of the interpretation of the agreement.

42. In relation to the parties' aim of the agreement, Mr Foskett took the court to the evidence of the two sisters of Mr Afzal Khan and to the evidence of the third brother, Mr Aslam Khan, who had attended the meeting at which the agreement was made. The judge expressly accepted his evidence. Significantly, Mr Ashraf Khan gave evidence that he expressly said at the meeting that the agreement was not to be final. The judge did not accept this evidence but he accepted that Mr Ashraf Khan had attended the meeting hoping to reach an agreement on particular issues and without intending to abandon claims that he might have had in relation at least to other properties which had been purchased wholly or partly by the partnership Khan & Co and which were made in joint names and where the holding of the properties in joint names did not reflect beneficial ownership: see the passage from paragraph 35 of the judge's judgment already quoted by Auld LJ at paragraph 11 of his judgment.

43. This means that there was no agreement between the parties as to the objective of the agreement. There was no aim that they shared as to the objective to be achieved. So their individual intentions as to the purposes of the agreement are not admissible on the question of the interpretation of the agreement (see per Lord Hoffmann in the ICS case above). Nonetheless, the fact that the parties owned other properties in common was an objective fact that formed part of the matrix of fact. That was a fact known to both parties. Accordingly, the judge was entitled to treat this fact as admissible on a question as to the interpretation of the oral agreement to which the parties had come, as indeed the judge did in paragraph 36 of his judgment (set out by Auld LJ in paragraph 13 of his judgment).

44. The second point that I wish to make arises out of a submission by Mr Foskett about the failure of the parties to the agreement to include in their agreement the formula that the terms agreed were in full and final settlement. He submits that the judge attached some significance to this point in paragraph 36 of his judgment. I agree that the absence of this formula cannot be ignored, but the weight to be given to its absence must depend upon the particular circumstances of the case. In this case the judge attached some significance to it as appears from paragraph 36 of his judgment, but it is clear from paragraph 36 of his judgment that he did not attach great significance to it.

45. The third point that I wish to make relates to another submission of Mr Foskett. He places some reliance on the fact that the meeting between the brothers, at which they made their agreement, took place as part of a family gathering within the Muslim culture, or at least within the culture of that part of the Muslim community to which the parties in this action belong. I should add at this point that, although this fact does not appear from the judgment of the judge, we were told that the parties had made their agreement in Punjabi, and so (and this is a separate point from that made by Mr Foskett in the submission in question) this is not a case where the court can attach particular significance to the actual words (in English) which we

were told represented their agreement. The meeting, be it noted, was convened not by any of the brothers but by their sisters, although they played no part in the making of the agreement. The explanation for this appears to have been that the two sisters were unhappy that their brothers were in dispute and wanted all matters between them to be resolved. Mr Foskett relies on the fact that the making of the agreement was marked immediately after it was made by a shaking of hands and embrace between the brothers, and other members of the family. He also relies on the fact that, within the culture of the community to which the parties belonged, matters would be resolved without litigation. Mr Foskett did not suggest that this evidence was determinative. However he points out (correctly) that the judge did not in fact refer to these matters in his judgment. Even though these events took place after the agreement was made, and so are not in a strict sense part of the "background" to the making of the agreement ("background" being the word used by Lord Hoffmann in para (2) of the extract of his speech from the ICS case set out above), they were very much part and parcel of the making of the agreement and in my judgment evidence as to these matters is admissible under the principles in the ICS case.

46. As I have said, when interpreting an agreement, whether written or oral, the court must look at the matrix of fact as described by Lord Hoffmann. This matrix of fact would no doubt include evidence as to the conduct that the parties regularly adopted. Where the parties are members of a particular community, then in my judgment the court must bear in mind that they may observe different traditions and practices from those of the majority of the population. That must be expected and respected in the jurisdiction that has received the European Convention on Human Rights. One of the fundamental values of the Convention is that of pluralism: see Kokkinakis v Greece [1994] 17 EHRR 397. Pluralism is inherent in the values in the Convention. Pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups. In turn, the court must pay appropriate regard to these differences.

47. The different practices to which I have referred may in an appropriate case form part of the matrix of fact that is admissible on a question as to the interpretation of an agreement. However, in point of fact in this case, the evidence did not establish that the form of celebration to which I have referred would only occur if the parties had reached a final agreement on every matter that could possibly be in dispute between them at that time. The parties might similarly have conducted themselves if an agreement had been reached which was only partial, for example if it was sufficient to resolve the most pressing matters in dispute between the parties. This agreement was clearly capable of doing that. The agreement on both parties' cases enabled the parties to know how they stood as regards the future management of each of the three businesses in which they were both involved, and that must have been important for the purpose of resolving the immediate problems of both a family and business nature. Accordingly, the evidence was not sufficient in this case to lead the court to the conclusion that the agreement must have been in full and final settlement of all the claims that they had against each other. The shortcomings in the evidence on this point may well account for the fact that the judge made no reference to it. In a word, this particular evidence as to the factual matrix was, on examination, equivocal.

48. However, the important points remain, firstly, that, if the evidence had been clear enough, it could have been significant, and, secondly, that it was evidence which, given the principles to which I have referred, the court must pay regard. Indeed, this may be one of the first cases in which the court has had to consider a submission about the admissibility, on a question as to the interpretation of a contract, of evidence as to the cultural tradition of the parties to a contract.

49. Finally, we were told that this is the last judgment that the late Hart J handed down before he was diagnosed with the terminal illness from which he has since passed away, and I join with counsel in paying tribute to the depth of his analysis in this complex case.

Lord Justice Auld:

50. Accordingly, the appeal is dismissed.

Order: Appeal dismissed.