Phones 4U Limited (in administration) -v- EE Limited

[2018] EWHC 49 (Comm)

If a party terminates a contract in express and exclusive reliance on a contractual right to do so without breach by the other party, it could not then claim loss of bargain damages on the basis that it had terminated for repudiatory breach.

Phones 4U was a well-known retailer of mobile phone contracts. EE is a UK mobile network operator. Under the terms of the agreement between the parties ("the Trading Agreement"), Phones 4U acted as an intermediary through which EE's network services were distributed and for which EE would pay commission on connections sold. On 15 September 2014, Phones 4U appointed administrators. Clause 14.1.2. of the Trading Agreement entitled EE to terminate the agreement upon that event. Two days later, on 17 September 2014, EE wrote to Phones 4U in the following terms: "*In accordance with clause 14.1.2 of the [Trading] Agreement, we hereby terminate the Agreement with immediate effect. As a result, we hereby terminate with immediately [sic.] effect your authority to sell and promote all EE products and services contemplated by the Agreement."* ("the Termination Letter"). Under the terms of the Trading Agreement, EE's liability to Phones 4U for commission (in respect of connections sold during the life of the Trading Agreement) survived termination. Such liability would continue to fall due until 2021 in the aggregate amount of £120 million.

Phones 4U issued proceedings to recover those commissions. EE counterclaimed with a claim for damages of over £200 million for repudiatory breach/renunciation of the Trading Agreement. Around the time that Phones 4 U appointed administrators it also suspended trading. EE relied on this failure to engage in normal trading activities as a repudiatory breach/renunciation of the Trading Agreement entitling EE to treat the contract as at an end and to sue for loss of bargain.

Phones 4U made an application for summary judgment under CPR Part 24 seeking dismissal of EE's main counterclaim on the basis that i) there was no breach/renunciation, ii) even if there was a breach it did not give rise to the right to treat the contract as at an end, and that iii) in any event terms of the Termination Letter defeated EE's claim for repudiatory breach/renunciation. Baker J held that i) EE had a real prospect of establishing that Phones 4U's failure to engage in its normal trading activities amounted to a breach of its obligations under the Trading Agreement and ii) such breach entitled EE to treat the contract as at an end and to sue for loss of bargain. However, Baker J granted Phones 4U's application for summary judgment on the basis that iii) the terms of the Termination Letter defeated EE's claim.

Baker J highlighted the distinction between the contractual right to terminate under clause 14.1.2 (which arose as a result of the appointment of an administrator) and the common law right to terminate for repudiatory breach/renunciation (which arose as a result of Phones 4U's failure to engage in its ordinary trading activities) and noted that the Termination Letter was an exercise of the former which made no mention of the latter. Baker J carried out a review of the authorities and concluded that there was no "*precise precedent for the situation in this case*". Ultimately, Baker J relied on the obiter remarks of Christopher Clarke LJ in *Dalkia Utilities Services plc v Celtech International Ltd* [2006] EWHC 63 (Comm) [2006] 1 Lloyd's Rep 599 at [144] as establishing the principle that it is a pre-requisite for the loss of bargain claim that the claimant show that it terminated in exercise of its common law right to do so for

repudiatory breach/renunciation. Baker J construed the Termination Letter as communicating "*unequivocally that EE was terminating in exercise of, and only of, its right to do so under clause 14.1.2*". The Termination Letter contained a reservation of EE's rights. However, Baker J said, "*a right merely reserved is a right not exercised*".