Case No: HQ11X01013

Neutral Citation Number: [2012] EWHC 1192 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 19 April 2012

BEFORE:

HIS HONOUR JUDGE SEYMOUR QC

BETWEEN:

KUDOS CATERING (UK) LIMITED

Applicant/Claimant

- and -

MANCHESTER CENTRAL CONVENTION

Respondent/Defendant

MR J STUART (instructed by Crown Group Solicitors) appeared on behalf of the Claimant

MR A KRAMER (instructed by Pannone Solicitors) appeared on behalf of the Defendant

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Approved Judgment

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1. JUDGE SEYMOUR: The claimant in this action, Kudos Catering (UK) Limited, entered into an agreement in writing in April 2007 with the defendant, Manchester Central Convention Complex Limited.

2. As I understand it the defendant is a company the shares in which are beneficially owned by Manchester City Council and it operates two venues in Manchester, one called Gmex and the other called Manchester International Convention Centre.

3. The claimant carries on business as a company providing catering and hospitality services.

4. The agreement which was made between the defendant and the claimant, at that time called Kudos Hospitality Limited, provided for the claimant to provide catering and hospitality services at the venues which I have mentioned for a term starting on 1 April 2007 and continuing until 31 March 2012, subject to the possibility of termination under clause 28 of the agreement.

5. It is convenient to notice at once the provisions of clause 28. Clause 28.1 is concerned with the potentially serious situation in which the making of the agreement had been induced by bribery but the other detail of it is not presently material.

6. In clause 28.2 there were these provisions:

> "If the Contractor or the Company;-
> 28.2.1. commits a material breach of any of its obligations under this Agreement and such breach if remediable is not remedied within ten (10) business days of written notice by the non-defaulting party to the other;
> 28.2.2. commits a persistent breach of any of its obligations under this Agreement;
> 28.2.3. becomes bankrupt, or makes a composition or arrangement with its creditors, or has a proposal in respect of its company for voluntary arrangement for a composition of debts, or scheme or arrangement approved in accordance with the Insolvency Act 1986;
> 28.2.4. has an application made under the Insolvency Act 1986 to the Court for the appointment of an administrative receiver;
> 28.2.5. has a winding-up order made, or (except for the purposes of amalgamation or reconstruction) a resolution for voluntary winding-up passed;
> 28.2.6. has a provisional liquidator, receiver, or manager of its business or undertaking duly appointed;
> 28.2.7. has an administrative receiver, as defined in the Insolvency Act 1986, appointed;
> 28.2.8. has possession taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in, or subject, to the floating charge;
> 28.2.9. is in circumstances which entitle the court or a creditor to appoint, or have appointed, a receiver, a manager, or administrative receiver, or which entitle the court to make a winding up order;

then in such circumstances the other may, without prejudice to its accrued rights or remedies under this Agreement, terminate this Agreement by notice in writing having immediate effect."

7. Then, 28.3, was in these terms:

> "If the contractor fails to provide the services or any part thereof in accordance with the contract standard then without prejudice to any other right or remedy which the company may possess in respect of such failure, the company may require the contractor to remedy such default within such time as may be specified by the authorised officer by providing or providing again as the case may be without further charge to the company such part of the services to the contract standard.
> 28.4 In the event that the contractor ceases to provide the services or a portion of the services covered by this agreement and the company wishes to procure the provision of the same by other means then the company shall be permitted to use therefore any of the food, beverages or supplies of the contractor which are available and in a suitable condition, having regard to all relevant legislation for sale to the public provided that the company shall account to the contractor for such food, beverages and supplies used at the actual cost thereof to the contractor.
> 28.5 If the contractor makes an operating loss in respect of the provision of the services throughout any financial year then in such circumstances the contractor may terminate this agreement by giving the company six months prior written notice provided that if required by the company at any time the contractor will provide to the company on demand a report of an independent chartered accountant and auditor certifying that the contractor has made such an operating loss."

8. For the purposes of the agreement between the parties the expression "the contractor" was used to refer to the claimant and the expression "the company" was used to refer to the defendant. Various of the expressions which are set out in the passages which I have cited from clause 28, in particular "services", and "contract standard" were also defined expressions.

9. There were no other provisions in clause 28 apart from those to which I have referred. In particular, there were no other provisions which dealt specifically with the consequences of termination, however it came about, of the agreement between the parties. However, it is immediately clear that, although the anticipated term of the agreement was the five-year period which I have mentioned, there were a considerable number of circumstances in which the agreement could be terminated before the end of the term had been reached.

10. It is also fair to say that from clause 28 it is clear that certain consequences adverse to the claimant were contemplated as likely to follow in the event of termination, specifically I have in mind clause 28.4.

11. What has actually happened in the present case is that by a letter dated 1 July 2010, purportedly pursuant to the provisions of clause 28, the defendant has terminated the agreement.

12. The letter of termination is pleaded at paragraph 6 of the particulars of claim in this action. At paragraph 7 of the particulars of claim it is pleaded that the claimants have accepted the said repudiation as terminating the contract unlawfully with effect on 31 July 2010. Consequently the position of the claimant is that the despatch of the letter dated 1 July 2010 by the defendant was not a letter terminating the contract in accordance with the provisions of clause 28 but rather a manifestation of an intention to repudiate the agreement which the claimant has chosen to accept.

13. At paragraph 10 of the particulars of claim appears this:

> "Further, by reason of the Defendant's repudiatory breach of the Agreement, the Claimants have suffered substantial financial losses in respect of lost profits anticipated over the course of the remaining 20 months of the Term of the Agreement. The Claimants hereby claim damages equivalent to the relevant net profits which they have lost as a result of the unlawful early termination of the Agreement."

14. There follow, in paragraph 10 of the particulars of claim, particulars of the alleged losses of profit, which are totalled at £1,297,231.

15. The agreement between the parties included a clause 18. Clause 18 followed the rubric "indemnity and insurance". However, that rubric, for present purposes, is wholly immaterial because it was provided by clause 1.52 that "in the interpretation of the contract, unless the contrary intention appears", and the relevant one is 1.52.6, "condition headings are for ease of reference only and shall not affect the construction of this agreement".

16. That said, the rubric, with one fairly conspicuous exception, does appear accurately to describe what is to be found in clause 18.

17. Clause 18.1 provided for the contractor, that is to say the claimant, to indemnify the defendant "against all actions, claims, demands, proceedings, damages, costs, charges and expenses in respect of or in any way arising out of the provision of the services",

> (that expression, as I have indicated, is defined): "In relation to the injury to, or death of, any person, and/or loss of, or damage to, any property including without limitation property belonging to the Company except and to the extent that it may arise out of the negligence of the Company its employees or agents."

18. Clause 18.2 provided for the claimant to effect insurance in respect of its liabilities under the clause 18.1.

19. Clause 18.3 provided for the claimant to provide evidence to the defendant that it had complied with its obligations in respect of insurance under clause 18.2.

20. Clause 18.4 was in these terms:

> "The Company [that is to say the defendant] shall indemnify and keep indemnified the Contractor against all actions, claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect of or in any way arising out of the provision of, or damage to, any property including property belonging to the Contractor to the extent that it may arise out of the negligence of the Company, its employees or agents."

21. Clause 18.5 provided, in effect, for the defendant to arrange any insurance which the claimant was bound by the contract to arrange but failed to arrange.

22. Clause 18.6 was in these terms:

> "The Contractor hereby acknowledges and agrees that the Company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor or any third party in relation to this Agreement and the limitations set out in this Condition 18.5 [is what it actually says but it is common ground that that is a mistyping for 18.6] shall be read and construed and shall have effect subject to any limitation imposed by any applicable law, including without limitation that this Condition shall not apply to personal injury or death due to the negligence of the Company."

23. The final provision in clause 18 was clause 18.7, which imposed upon the defendant an obligation to maintain comprehensive buildings insurance and third party occupiers' liability insurance. There were no other provisions in clause 18.

24. In answer to the claim for damages in respect of loss of profits it was pleaded at paragraph 23 of the defence and counterclaim as follows, "Further, clause 18.6 of the agreement provides ..." and the relevant part of it was set out in these terms:

> "The contractor hereby acknowledges and agrees that the Company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits."

25. Then, after the citation, paragraph 23 went on, "Accordingly, all liability for the claimant's loss of profits is excluded by the agreement".

26. I shall come in a moment to the reply and defence to counterclaim and what was said in answer to that plea in the defence. But, in the light of the terms of paragraph 23 of the defence and the responses in the reply and defence to counterclaim and in a reply to a request under part 18 of the Civil Procedure Rules, Master Eyre was persuaded to make an order, on 9 February of this year, directing the trial of a preliminary issue in these terms:

> "(a) On the proper construction of Clause 18.6 of the Agreement, (and ignoring any allegation of rectification) is any or all liability for the Claimant's loss of profits (claimed and particularised in paragraph 10 of the Particulars of Claim) excluded."

27. The preliminary issue directed by Master Eyre is that which has come on before me today for hearing. I have not been concerned with any allegation of rectification. It is quite clear that, although the form of words adopted by the learned master in his order, "... any or all liability for the claimant's loss of profits claimed and particularised in paragraph 10 of the particulars of claim ..." might have suggested that there was more than one basis of a claim for loss of profits, actually there was only one.

28. The basis for the claim was that, as a result of the alleged repudiation of the agreement between the parties and the alleged acceptance of that repudiation, the defendant was liable to pay damages to the claimant including damages assessed by reference to loss of profits over the period of the agreement until its expiry by effluxion of time if it had not been terminated in the circumstances which I have already explained.

29. In the reply and defence to counterclaim it was pleaded at paragraph 23, in response to paragraph 23 of the defence, as follows:

> "As to Paragraph 23 of the Defence, it is denied that Clause 18.6 of the Agreement applies to exclude liability for **breach** [emphasised in the original] of the Agreement or for matters arising from **termination** [again emphasised in the original] of the Agreement. Such clause (which is expressly part of the 'Indemnity and Insurance' section of the Agreement - and not part of the Agreement relating to consequences upon termination), if and insofar as it applies at all (which is denied - since the parties in fact agreed to delete such clause during the pre-contractual drafting negotiations - so that the Agreement requires rectifying if necessary by the deletion of the entire clause), [I interpose that that allegation I am not concerned with but it appears in paragraph 23 of the reply and defence to counterclaim. I return to paragraph 23 of the reply and defence to counterclaim] relates only to loss of goodwill, business profits, indirect or consequential loss arising from performance of the Agreement. It is denied that the parties ever agreed or intended that the Defendant would not be liable for breach of the Agreement (including for premature or unlawful termination of the Agreement)."

30. There was, as I have already indicated, a request for further information in relation to, in effect, those pleas. The reply to that request was in the following terms:

> "1. Sub-Clause 18.6 is part of Clause 18 of the Agreement. Its meaning, effect and ambit is properly construed by reference to the entirety of Clause 18 of the Agreement, of which sub-clause 18.6 forms part. Clause 18 contains reciprocal obligations on each of the parties in respect of liabilities arising from the provision of the services under the Agreement (there being no reference to liabilities arising from repudiatory breach (or premature or wrongful termination) of the agreement by either party). Specifically:

- By Clause 18.1 of the Agreement Kudos agreed to indemnify MCCC against claims (**in respect of, or in any way arising out of the provision of the Services**) in relation to injury to any person or damage to any property **except to the extent that it may arise out of the negligence of MCCC** or its employees or agents. Thus by Clause 18.1 MCCC remains liable for its own negligence (or the negligence of its employees or agents) in respect of or in any way arising out of the provision of the Services under the Agreement.
- By clause 18.2 of the Agreement Kudos agreed to effect insurance against liabilities **arising out of the Services**, and by Clause 18.3 of the Agreement Kudos agreed to supply a copy of such insurance to MCCC and to procure that the interests of MCCC was noted.
- By Clause 18.4 of the Agreement **MCCC agreed to indemnify Kudos** against all actions, claims, demands, proceedings, damages, costs, charges and expenses whatsoever **in respect of or in any way arising out of the provision, of or damage to, any property** including any property belonging to the Contractor **to the extent that it may arise out of the negligence of MCCC, its employees or agents.** Thus by Clause 18.4 MCCC remains liable for its own negligence (or the negligence of its employees or agents) in respect of or in any way arising out of the provision of any property under the Agreement.
- Clause 18.5 entitles MCCC to arrange the insurance cover (referred to in Clause 18.2 and 18.3).
- Clause 18.7 of the Agreement obliges MCCC to arrange buildings and other insurance.

Clause 18.6 (which appears from its wording (and the erroneous internal reference to it being numbered 18.5) to have followed on immediately after Clause 18.4 in some original draft of Clause 18) of the Agreement is thus to be read in such context, namely the context of the parties agreeing to indemnify each other in respect of actions, claims, costs, expenses etc **arising from the manner of performance** of the Agreement (there being no mention of claims arising from fundamental or repudiatory breach or premature or wrongful termination of the Agreement). Clause 18.6 does **not** state '*... the Company shall have no liability whatsoever in contract tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits, anticipated savings or wasted expenditure (whether reasonably foreseeable or not) or indirect or consequential loss suffered by the Contractor ... [the following words are emphasised] **caused by the Company's unlawful termination (or repudiatory breach) of this Agreement** ...*" [The words which I am now about to read are not emphasised.] If the Defendant had sought to include such an exclusion of liability within the Agreement, then the grant of a 5 year term including the exclusive right to provide the services (for which the Claimant paid a substantial price in terms of financial and resource investment) would have been

meaningless and valueless to the Claimant, since the Defendant would be at liberty to repudiate the Agreement or terminate it prematurely without any meaningful recourse for the Claimant. That was never the intention of the parties and the Claimant would not have agreed to any such exclusion of liability for wrongful termination/repudiatory breach of the Agreement. Thus in answer to the Defendant's specific requests:

(a) The Defendant (by Clauses 18.1 and 18.4 as explained above) was contractually liable to indemnify the Claimant for all actions, claims, demands, proceedings, damages, costs, charges and expenses whatsoever (which must implicitly include losses suffered by the Claimant itself or losses suffered by third parties but claimed or demanded against the Claimant by such third party) arising from the negligence (that includes both the contractual and tortious negligence) of the Defendant or its employees or agents (clause 18.4). Further the Claimant (or a third party sub-contractor for example) might, as a result either of

[a] the negligent or contractually wrongful manner in which the Defendant performs its obligations under the Agreement (which might otherwise give rise to a cause of action against the Defendant) or

[b] some contractual requirement or demand made by the Defendant during the course of the performance of the Agreement by the parties (which might or might not give rise to a 'cause of action' against the Defendant),

suffer loss of its (i.e. the Claimant's or the third party's) goodwill, loss of business (i.e. business conducted under the Agreement or for other clients) loss of revenue or profits (i.e. revenue or profits earned from business conducted under the Agreement or for other clients), loss of anticipated savings (i.e. savings achieved by bulk purchasing or similar) or wasted expenditure (eg expenditure wasted by the Claimant or such third party in remedying the Defendant's said negligence, or contractually improper performance of the Defendant's obligations or by reason of the requirements or demands made by the Defendant).

By Clause 18.6 the Claimant agreed that the Defendant would not be liable to the Claimant for such specified losses (akin to consequential losses or otherwise unquantifiable losses) arising from the Defendant's said negligent or wrongful performance of its contractual obligations or from any such contractual demands or requirements made by the Defendant during the course of performance of the Agreement (whether or not such matters might otherwise give rise to a 'cause of action' against the Defendant). The Clause does not contain any such limitation on liability in respect of the wholesale repudiation or premature or wrongful termination of the Agreement by the Defendant.

(b) The Claimant contends that the clause applies (to exclude liability for the stated losses arising) in respect of the Defendant's negligent or contractually wrongful performance of its obligations under the Agreement (which might otherwise be considered non-repudiatory breaches of the Agreement) and in circumstances (for example demands or requirements made by the Defendant of the Claimant purportedly under the Agreement) where the Defendant might or might not necessarily be in breach of the Agreement at all. The Clause applies to

> the losses stated in the clause. The Clause does not apply (and was never understood by the parties to apply) in circumstances where the Defendant has repudiated or wrongfully or prematurely terminated the Agreement.
> (c) It is accepted that the Clause purports to exclude liability for loss of profits (etc) suffered by the Claimant (Kudos) when they are not suffered by a third party. The exclusion applies to Kudos's lost profits (etc) arising only in the circumstances specified above.
> 2. The Claimant does not pursue the rectification argument at present [and consequently I need not read on in the replies to the request for further information]."

31. There were passages in the way in which the case was put in the reply to the request under part 18 of the Civil Procedure Rules which perhaps suggested that it was desired on behalf of the claimant to raise at the trial of this action and, as matters have turned out, at the trial of the preliminary issue, contentions which were dispelled by the House of Lords as long ago as 1980 in Photo Productions Limited v Securicor Transport Limited, reported in 1980 Appeal Cases, page 827.

32. The lurking suggestion perhaps was capable of being interpreted as suggesting that in cases of a total failure of consideration or a repudiatory breach of contract, the alleged guilty party was not to be permitted to rely upon any exemption or limitation clause. That, as I have indicated, was a contention which flourished for a while under the aegis of Lord Denning, then Master of the Rolls, in the 1970s. That was ultimately dispelled by the decision of the House of Lords in the Photo Production case which I have mentioned.

33. Mr James Stuart, who appears on behalf of the claimant on this trial of a preliminary issue, accepted that the law as expounded by Lord Diplock in Photo Production was the law which this court had to apply and he was not seeking to revisit the suggestion that it was not open to a party who is alleged to be guilty of a repudiatory breach of contract to rely upon an excluding or limiting term in the contract simply because of the alleged circumstances of the repudiation.

34. It is convenient now to turn to the principles which are to be applied in construing a clause such as that with which this judgment is concerned. The modern exposition of the proper approach to questions of construction began with the principles formulated by Lord Hoffman in Investors Compensation Scheme Limited v West Bromwich Building Society reported in 1998, 1WLR, page 896 in a passage beginning at page 912 in the report. Lord Hoffman identified these principles:

> "(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.
(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945
(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera SA v Salen Rederierna AB [1985] 1 AC 191, 201:
'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

35. Notwithstanding that firm and clear expression of principles, the House of Lords has revisited the approach which ought to be adopted to construction in two cases since. One is Chartbrook Limited v Persimmon Homes Limited, reported in 2009, 1 Appeal Cases at page 1101, and the second is the very recent case, in fact in the Supreme Court, Rainy Sky SA v Kookmin Bank, reported in 2011, 1WLR at page 2900.

36. For present purposes I think it is not necessary to refer to the speech of Lord Hoffman in the Chartbrook case where Lord Hoffman expanded to some extent upon what he had said in the Investors Compensation Scheme case. It is enough, I think, to go to Rainy Sky SA v Kookmin Bank. In that case the only judgment was that of Lord Clarke of Stone-cum-Ebony with which all of the other members of the Supreme Court agreed. At paragraph 14 of his judgment Lord Clarke said this:

> "For the most part, the correct approach to construction of the Bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, as Lord Neuberger MR said in Pink Floyd Music Ltd v EMI Records Ltd [2010] EWCA Civ

1429; [2011] 1 WLR 770 at para 17, by Lord Hoffmann in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, passim, in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912F-913G [which is the passage which I have just read] and in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, paras 21-26. I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case at page 912H, the relevant reasonable person is one who has 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."

37. Paragraph 15:

> "The issue between the parties in this appeal is the role to be played by considerations of business common sense in determining what the parties meant. Sir Simon Tuckey said at para 19 of his judgment that there was no dispute about the principles of construction and the Bank so submitted in its skeleton argument. However, I do not think that is quite correct."

38. Lord Clarke then went on to explain the reasons for his view. I can pick up his judgment at paragraph 21.

> "The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

39. I go to paragraph 23: "Where the parties have used unambiguous language the court must apply it. This can be seen from the decision of the Court of Appeal in Co-operative Wholesale Society Limited v National Westminster Bank Plc 1995 1 The Estates Gazette Law Reports 97. The court was considering the true construction of rent review clauses in a number of different cases. The underlying result which the landlord sought in each case was the same. The court regarded it as a most improbable commercial result. Where the result, though improbable, flowed from the unambiguous language of the clause, the landlord succeeded whereas where it did not

they failed. The court held that ordinary principles of construction applied to rent review clauses and applied the principles in Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios (No. 2)) 1985 Appeal Cases 191. After quoting the passage from the speech of Lord Diplock cited above, Lord Justice Hoffman said at page 99:

> "This robust declaration does not however mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement."

40. For the purposes of the present trial of the preliminary issue, it is necessary to emphasise a number of features identified in the passages which I have read from the relevant decisions of the House of Lords and the Supreme Court. The first is that for there to be any sensible question of construction for the court to consider there must be at least two possible interpretations of the words which have been used. If there is only one possible interpretation of the words which have been used then the court's function is to apply the clause in the only possible meaning, whatever its actual effect.

41. If there are at least two possible constructions of the words which have been used then that which the court should adopt is that which is the most commercially sensible. In determining what construction is commercially sensible the court must have regard to the relevant surrounding circumstances.

42. What are the relevant surrounding circumstances in the present case? They are uncontroversial and fairly straightforward. The defendant owns and operates two venues which are used for conferences, exhibitions, and, no doubt, concerts of one kind or another. As part of the facilities offered at the relevant venues the defendant has wished to offer the facility to patrons of acquiring food and drink. In the period with which I am concerned the defendant took the view that the appropriate means of offering those facilities was by entering into appropriate contracts with persons in a position to offer those facilities, such as the claimant.

43. The business of the claimant, as I have said, is the provision of catering and hospitality services. The way in which the contract between the parties was supposed to operate was essentially this, that the defendant would provide the claimant with the opportunity of offering to those visiting the relevant venues food and drink for which the claimant would charge those to whom the food and drink were provided, but out of which the claimant would pay a percentage to the defendant.

44. This was a commercial arrangement. Obviously it was entered into because each of the parties anticipated that entering into it would be to its benefit. So far as the claimant was concerned, it is obvious that the benefit that the claimant anticipated was generating income in excess of its costs, in other words, making profits.

45. More than that it is not necessary to notice for the purposes of this judgment. This was essentially an ordinary commercial contract.

46. We come then to the issue of what clause 18.6 means. Any process of construction has to start somewhere, and the obvious point at which to start is by reading the words in which the clause to be construed have been expressed. That is the beginning of the exercise; it is not the end of the exercise necessarily because of the features of the approach to construction of a document or part of a document which have been explained in the judgments to which I have referred. But nonetheless the words used, so far as relevant, are those quoted in paragraph 23 of the defence and counterclaim and are:

> "The Contractor hereby acknowledges and agrees that the Company shall have no liability whatsoever in contract, tort (including negligence) or otherwise for any loss of goodwill, business, revenue or profits ..."

47. What does that mean simply as a matter of English? In deciding what it means as a matter of English it is necessary to have regard to the fact that this is a form of words which appears in a contract which is a legal document. In other words, it is necessary to construe these words against a legal background.

48. That is important because of the use of the word "liability" in the passage which I have just read. As a matter of English law liability connotes a responsibility in law arising as a result of an obligation or a breach of some obligation. The obligation may be contractual in origin, it may be tortious in origin, there are other possible origins for a liability but the nature of a liability in my judgment is clear.

49. What, in English law, a contract is again is tolerably clear for present purposes. How a liability in contract may arise is tolerably clear as a matter of English law. A liability in contract can arise potentially in one or other of two ways. It can arise because there is a provision in a contract which imposes an obligation on someone to do something or, more usually in the sort of context with which one is presently concerned, to pay something.

50. The other way in which it can arise is for breach of a contractual obligation. So the expression "liability in contract" as a matter of ordinary English interpreted against a legal background means a liability for breach of contract or a liability to perform some obligation under a contract.

51. It has not been suggested to me that there is any ambiguity about the expression "loss of profits". I think it is accepted that loss of profits is an appropriate description of what it is that the claimant is seeking to claim under paragraph 10 of the particulars of claim in this action. However, Mr Stuart has submitted that the words "liability in contract" are not apt to describe a liability arising as a result of a breach of contract, but are apt only to describe an obligation to do something under a contract, to perform the contract. That submission mirrors the way in which the claimant's case was pleaded at paragraph 23 of the reply and defence to counterclaim.

52. Broadly speaking, what Mr Stuart submitted was this; whatever the words might appear to mean, because the word "damages" does not appear, because the word "breach" does not appear in the context of contract, because the word "termination"

does not appear in the context of contract, the relevant part of clause 18.6 should be interpreted as not applying to the claim for loss of profits in the present case.

53. That submission takes one only so far. As I have explained, the issue of construction only arises if there are at least two alternative interpretations of the form of words used. In order to give rise to a question of construction it is therefore necessary to identify a meaning of the form of words different from the meaning for which the opposite party contents. Here the claimant ran into great difficulty.

54. There seemed to be little problem in identifying in submission what it was that the clause should not apply to, but very great difficulty in identifying what it should apply to. In my judgment this is because these words are actually perfectly clear. They mean what the defendant contends they mean. Their effect is that in any case in which there might otherwise be a liability in contract to pay damages in respect of loss of profits there is not one. It is as simple as that.

55. Mr Stuart submitted that could not possibly be what the parties had intended. As I have explained, it is not necessary or appropriate for the court to consider what the parties could possibly have intended if what they have actually stated is clear and unambiguous. However, that said, I am not persuaded that it is obvious that the parties could not possibly have intended to include in their contract clause 18.6 interpreted in the way in which I have construed it.

56. There are a number of reasons for that. One is that it was not actually possible for the defendant alone to bring about the situation in which Mr Stuart submitted the parties could not have contemplated the claimant not having a claim for substantial damages for loss of profits.

57. All the defendant alone could do, on the best case of the claimant, is to repudiate the contract. What the defendant could not do by repudiating the contract was terminate it. The only way in which the contract could be terminated, having been repudiated by the defendant, if that is what happened (and I should emphasise that there is a vigorous dispute in this action as to whether that is actually what happened or not and that perhaps is going to be the subject of a further trial), but if that is what happened the termination could only come about because of the free choice of the claimant to accept the repudiation.

58. The claimant was not bound to accept the repudiation. The claimant had potentially other remedies available to seek to enforce the contract, if the claimant took the view that the attempted termination by service of notice by the defendant was not justified and it, the claimant, desired to continue its performance, and continue to secure the performance by the defendant, of the contract.

59. The contract is a lengthy document to which is annexed at least one other document. It contains many, many provisions to which my attention has not been drawn. One of the provisions to which my attention has been drawn is a provision about which there may be some dispute as to construction but which at any rate seems to deal, at least in certain circumstances, with a reimbursement of the claimant by the defendant of expense incurred in preparation for the performance of the contract.

60. It may well be, therefore, that this is one of those cases to which Lord Clarke adverted Lord Hoffman had contemplated in which what may appear to be a disadvantageous part of a lengthy contract viewed from the perspective of one of the parties is counterbalanced by other benefits to be found in other parts of the contract.

61. At all events, for the reasons which I have explained, I have reached the firm conclusion that the relevant words are susceptible of only one possible interpretation and that is the interpretation for which the defendant contends. Consequently I will make a declaration that on proper construction of clause 18.6 of the agreement, and ignoring any allegation of rectification, any or all liability for the claimant's loss of profits is excluded.