

Case Law Spotlight

Luminar Lava Ignite Ltd v Mama Group plc & Anr [2010] CSIH 1.

The Inner House of the Court of Session has recently issued another decision concerned with the construction of commercial contracts. In this case, the dispute concerned the sale of a music venue in Lothian Road, Edinburgh by Luminar who wished to continue operating a discotheque venue at nearby Tollcross after the sale. In the sales particulars, Luminar indicated that it did not wish to sell to a nightclub or pub operator. However when Mama Group plc (“Mama”) showed an interest in purchasing the property, the parties entered into a contract of sale which included a clause intended to restrict the extent to which Mama could use the Lothian Road premises as a discotheque venue (i.e. a venue for dancing to recorded music) in competition with that being operated by Luminar a short distance away. Stated briefly, the germane part of the clause read as follows: “Mama and Purchaser jointly and severally undertake to Luminar not to use the [Lothian Road premises] for late night entertainment in *direct competition on a like for like basis with the discotheque business* of Luminar as carried out as at 1 March 2008.” Following sale, the Lothian road premises were operated as a live music venue but it was also subsequently advertised by the owners as being a nightclub/discotheque venue which Luminar considered to be in breach of the contractual restriction contained within the missives of sale. Accordingly, they obtained an interim interdict preventing the use of the Lothian Road premises as a discotheque venue while the Tollcross premises were so operated, that is, on a Wednesday, Friday and Saturday night between 10pm and 3pm. When the case came before a commercial judge for the hearing of evidence, he refused to allow evidence to be taken into account regarding the pre-contractual negotiations leading to the non-compete agreement. Thereafter, he recalled the interdict, finding on the basis of the remaining evidence led that the activities carried out at the two venues were not “like for like” and therefore there had been no breach of the agreement. Luminar appealed against that decision which was subsequently heard by three judges where the terms of the clause were scrutinised. At first blush, it would appear to have been a case for the application of the principles set out in the *Chartbrook v Persimmon Homes* case. That is to say, that an exclusionary rule applies, preventing the leading of evidence concerned with pre-contractual negotiations, except where they clarify the surrounding circumstances to the final

contract. Interestingly, however, in the leading judgment, Lord Hodge found himself struck by how little each party to the transaction seemed to have known about what the other party was doing or intended to do. Accordingly, the case was more akin to the circumstances of the *Forbo-Nairn v Murrayfield Properties* decision, viz, it is only where there is ambiguity in the terms of a contract that one must have regard to other canons of construction. In this case, Lord Hodge went on to remark that the clause in question was highly ambiguous and that “the phrase which the parties used seemed to me to be a recipe for litigation.” The difficulty was that that both interpretations urged by each party were capable of being commercially sensible. On balance, Lord Hodge decided that the interpretation contended by Luminar was closer to what would be understood by a reasonable businessman to be the commercial intention of the parties. Apart from the hesitancy of Lord Hodge in coming down on one side of the argument rather than the other, how close this case was is also demonstrated by the fact that the Lord President issued a dissenting decision in favour of Mama. The earlier decision was therefore only overturned on the narrowest of 2:1 majorities. As noted, how much easier it might have turned out if parties had stated the intention of the clause by prohibiting the use of the Lothian Road premises as a discotheque whenever the Tollcross premises were in use.

Maurice O’Carroll, Advocate, LARTPI

www.mauriceocarroll.co.uk