Termination of Employment Contracts and Taking Advantage of One's Wrong

Micklefield v SAC Technology Ltd
[1990] 1 WLR 1002; [1991] 1 All ER 275 (Ch D)

O'Laoire v Jackel International Ltd
[1991] IRLR 170 (CA)

The recent decision by Mr John Mowbray QC in *Micklefield v SAC Technology Ltd* brings into focus the thorny problems inherent within, first, the continuing uncertainty

surrounding termination of employment contracts and, secondly, the much more general issue as to the status as well as application of the proposition that a contracting party ought not to be allowed to take advantage of his own wrong. There was a third issue taken in the case with regard to the applicability of the Unfair Contract Terms Act 1977 which will be briefly commented upon.

The facts were that the plaintiff employee (a director) was granted an option to purchase shares in the defendant company by the defendant's parent company on 19 February 1985. The option could only be exercised three years after its grant, i.e., on 19 February 1988. The plaintiff employee gave notice in writing on 3 February 1988 that he would be exercising the option on 19 February. After a meeting on 11 February, however, the chairman and managing director of the defendant wrote to the plaintiff, terminating his employment and paying him a sum of six months' salary in lieu of the notice required under the contract of employment. On 29 February, a director of the parent company wrote to the plaintiff, informing him that as his employment had been terminated, the option had lapsed in accordance with the relevant rules of the option scheme. The material provisions were, first, Rule 4(3)(b) which stated that '(i)f any Option Holder ceases to be employed within the SAC Technology Group [of which the defendant was a part] for any reason whatever, any Option granted to him shall . . . lapse and not be exercisable'; and, secondly, Rule 9 which stated that '(i)f any Option Holder ceases to be an Executive for any reason he shall not be entitled, and by applying for an Option an Executive shall be deemed irrevocably to have waived any entitlement, by way of compensation for loss of office or otherwise howsoever to any sum or other benefit to compensate him for the loss of any rights under the Scheme'. The plaintiff brought the present action for breach of the option agreement procured through an alleged wrongful termination of his employment contract. The instant case concerned a preliminary issue which was stated as follows: 'Whether, upon the true construction of the Plaintiff's contract of employment and of the share option scheme . . . and on the assumption (made for the purpose of the preliminary issue but not otherwise), that the plaintiff was dismissed wrongfully and in breach of contract . . . he is entitled to recover [certain damages referred to].' The learned judge held in favour of the defendant, holding that no damages could be claimed. Plaintiff's counsel raised three main arguments, two of which (as already mentioned) raise important issues of law.

First, it was argued that the plaintiff's rights under the option scheme had not lapsed because his employment had not been terminated, relying upon a passage in the judgment of Brightman LJ (as he then was) in *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448, 474–475. The judge held that the passage cited drew a distinction between the contract of employment on the one hand and the status or relationship of master and servant on the other, with only the latter being terminated forthwith; as Rule 4(3)(b) was premised on the *relationship* which was destroyed, the option scheme had lapsed in so far as the plaintiff was concerned. There are, however, difficulties with this interpretation. First, it is not at all clear from the literal language of Rule 4(3)(b) itself (reproduced above) that it was not premised on the *contract* of employment as such. Secondly, it is submitted that the distinction between contract and relationship is unpersuasive not only because only one of three judges in the *Gunton* case

referred to it but also because it is highly artificial to draw such a distinction; in *Dietman v Brent London Borough Council* [1987] ICR 737, 753, Hodgson J. found 'this [distinction] a little difficult to understand'. Thirdly, the ruling ignores an important observation by Buckley LJ in the *Gunton* case ([1981] Ch 448, 469):

> I do not think . . . that it is impossible that in some cases incidental or collateral terms might cause the injured party to want to keep the contract on foot.

Quite apart from the preservation of statutory employment rights (see *e.g.*, McMullen, [1981] CLJ 34, 35; [1982] CLJ 110, 122–123, and Thomson, (1981) 97 LQR 8, 8–9) and the restraint of breaches of various aspects of the duty of fidelity to the employer (see *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227), it is submitted that the fact situation in the *Micklefield* case also merits an invocation of Buckley LJ's exception simply because of the plaintiff's need to preserve rather significant rights obtaining under the option scheme. It is further submitted that it cannot be argued that by bringing the instant action, the plaintiff had accepted the defendant's repudiatory breach as this was a reasonable course of action to take (although the situation would, as pointed out in the *Gunton* case, be quite different where only damages were sought). It should also be noted that Buckley LJ's exception is not really an 'exception' as such, since it is entirely consistent with the general proposition that there is no automatic termination of the contract of employment as such (see, generally, McMullen, [1982] CLJ 110).

The second main argument tendered by plaintiff's counsel in the *Micklefield* case (in fact, the plaintiff's 'main plank': see [1990] 1 WLR 1002, p. 1006) was to the effect that the defendant was attempting to take a benefit from its own wrong (viz., the (assumed) wrongful dismissal; the word 'wrong' generally connotes a breach of duty: see *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, 189; and *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241, p. 266). Whilst Judge Mowbray twice acknowledged that this was 'in a sense' true (see [1990] 1 WLR 1002, 1006–1007), he held that the instant case was distinguishable from such cases as *Alghussein Establishment v Eton College* [1988] 1 WLR 587 on the ground that Rule 9 (reproduced above) was an exemption clause. The learned judge held, in the alternative, that, the principle that a person could not be allowed to take advantage of his own wrong was, in any event, a rule of construction only, which could thus be excluded by a clear contractual provision to the contrary (here, Rule 9). It is, however, respectfully submitted that there are difficulties with the approach taken.

The first difficulty pertains to the interpretation taken by the learned judge himself: even if Rule 9 were merely an exemption clause, this would not, it is submitted, serve adequately to distinguish the instant fact situation from that which obtained in the *Alghussein* case, because the fact would remain here that the defendant was seeking to rely on the wrongful termination of the plaintiff's employment contract in order to escape from contractual liability. This brings us to the second difficulty, *viz.*, the status of the principle that no person should be permitted to take advantage of his own wrong.

It is significant to note that Judge Mowbray relied on Lord Jauncey's view in the *Alghussein* case [1988] 1 WLR 587, p. 595, to the effect that the principle was merely one of construction. A close perusal of the learned Law Lord's observations will, however,

reveal that it was merely *obiter dicta* (the same observation may be applied to Judge Mowbray's reliance on Lord Diplock's views in *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180, 188–189: see, especially, at p. 189). More important is the fact that Lord Jauncey acknowledged that there *could* indeed be situations (such as self-induced frustration) where an *absolute* rule of law existed, thus precluding any exclusion by way of express contractual provision, (see [1988] 1 WLR 587, 595, following Lord Diplock in the *Cheall* case: see [1983] 2 AC 180, 189). It is difficult to discern the criteria by which situations can be classified as falling within either the category of construction or the category of an absolute rule. Indeed, it is suggested that the distinction between categories is an arbitrary attempt to prevent the concept of freedom of contract from being substantially or even wholly undermined by an absolute moral proposition. The positivism practised by English judges generally supports this interpretation. In the *Micklefield* case, for example, it is submitted that justice and fairness should have engendered the opposite result, but that the court came down firmly on the side of the technical contractual provision contained in Rule 9 of the option scheme. Admittedly, this submission is itself subjective, and merely underscores the fear concerning too liberal an application of the said principle. In summary, the distinction between categories appears to be no more than an attempt to provide some residuary flexibility where justice and fairness so warrant in a particular fact situation.

It is, however, equally clear that where, at least, express contractual provisions are present (as in the *Micklefield* case), the opportunity to *exercise* such flexibility would be few and far between indeed. The *Micklefield* case is, however, useful in bringing to the attention of all the rather neglected House of Lords decision in the *Alghussein* case which, in fact 'fleshed out' the principle that no person should be allowed to take advantage of his own wrong by applying it not only to a situation where the party in the wrong sought to avoid a contract but also to a situation where he sought to take advantage of a contractual benefit (see [1988] 1 WLR 587, 594). The *Alghussein* case also clarified the application of the principle by a clear demarcation of the abovementioned categories, thus avoiding problems with regard (especially) to implied terms that were raised in the judgment of Scott J in *Thompson v ASDA-MFI Group Plc* [1988] Ch 241 (which was very perceptively analysed by McLean in [1988] CLJ 343). Unless, however, the principle that no person is allowed to take advantage of his own wrong is accorded the general status of an absolute moral principle, it will, unfortunately, be of little practical utility. It is suggested that a compromise position might be for the courts to apply the principle as a rebuttable presumption, *but* without *necessarily* allowing the presumption to be rebutted by a more invocation of express contractual term(s) to the contrary. This would, of course, entail mere uncertainty, but it is submitted that the number of cases in which the principle will be invoked will be relatively few in number and that, in any event, few would take issue with the application of a principle that is generally in sync with our innate perceptions of justice and fairness. It is hoped that some clarification along these lines may be afforded, especially since the principle in the *Alghussein* case has not been shown to be wholly irrelevant and has, in fact, been recently canvassed in the Court of Appeal in *Cerium Investments Ltd v Evans, The Times* 14 February 1991.

Finally, Judge Mowbray rejected the plaintiff's third argument to the effect that Rule 9

was subject to the Unfair Contract Terms Act 1977, holding that the contract concerned, 'so far as it relates to the creation or transfer of securities', was excluded under the terms of Schedule 1, paragraph 1(e) of the Act. Whilst the wording seems clear, it is unfortunate that the language is unhappily phrased ('so far as it relates') and that there appears to be no other indication in the legislative history which would suggest that this was intended; indeed, the Law Commission's Second Report on Exemption Clauses (upon which the Act is, in the main, based) originally envisaged (subject to the specific provisions of the Act itself) an across the board application of the Act to all categories of contracts (see paragraphs 238–247).

Let us revert, however, to the principal question of taking advantage of one's own wrong. The principle might have been (but was not) raised in the very recently reported decision of the Court of Appeal in *O'Laoire v Jackel International Ltd.* The facts of the instant decision were similar to those that obtained in the *Micklefield* case. However, salient points of difference (to be elaborated upon shortly) account for the present writer's conclusion that the case for the *successful* invocation of the principle in *Alghussein* in *O'Laoire* is weaker, compared to the *Micklefield* case. It should be noted at this juncture that many interesting points arose in *O'Laoire* which are outside the purview of the present comment—*inter alia*, issues of jurisdiction, damages for mental distress, and set-off. To oversimplify the facts somewhat, the plaintiff (formerly deputy managing director of the defendants) brought several actions in order to recover damages for wrongful dismissal and compensation for unfair dismissal. The defendants conceded that the dismissal was wrongful. The crucial points of disagreement relevant to the instant note centred on two main issues: first, whether the plaintiff had a legally enforceable right to be appointed managing director of the defendant company on the retirement of the incumbent; and, secondly, whether the plaintiff could claim damages for the loss of stock options which he alleged to be entitled to as managing director. The Court of Appeal, reversing the High Court, held (on the first issue) that the plaintiff had a legally enforceable right to be appointed as managing director, premising its holding on the basis of issue estoppel, for this finding was made by the Industrial Tribunal during its determination of the claim for unfair dismissal. However, the learned Vice-Chancellor (with whom Stuart-Smith and Leggatt LJJ both agreed) observed that the plaintiff would have failed on this point if not for issue estoppel, for 'there was in fact no contractual entitlement to be made managing director: at best the contractual obligation would have been that, at the date of contract, the defendants had a bona fide intention to make the plaintiff managing director on the retirement of [the incumbent]' (see [1991] IRLR 170, 175). Despite finding for the plaintiff on the first issue, the court, however, proceeded to affirm the High Court on the second, holding that the plaintiff had no contractual right to the stock options, no point of issue estoppel having arisen in the plaintiff's favour; the court went on to hold that the plaintiff had, in the circumstances, no hope of obtaining and exercising the options, '[g]iven the attitude of the defendants toward [him]' ([1991] IRLR 170, 175), and thus could not be awarded any damages on that basis as well. One might ask, at this point, whether the principle in the *Alghussein* case should have been invoked in favour of the plaintiff. It is submitted that the situation in this case was quite different from that which existed in the *Micklefield* case and, therefore, invocation of the

principle just mentioned would have made no difference to the result. In the present case, the board of the holding company had a discretion as to whether or not to *grant* the options in the first place (it will be recalled that the plaintiff in the *Micklefield* case had *already* been granted the option concerned): quite apart from issues of remoteness and causation, it would have thus been rather difficult to have argued that the plaintiff had been wronged, not only because of the discretion just mentioned but also because his right to qualify for consideration for the grant of the options was dubious to begin with, the court having already been rather sceptical of the result on the first issue from the point of view of substantive law, as already mentioned above. It could also have been argued that, unlike the *Micklefield* case, there was no evidence that the defendants' *primary* intention was to deprive the plaintiff of his stock options. Had the plaintiff been appointed managing director *and* granted the stock options, it is submitted that the situation might have merited similar treatment to that advocated in the present note with regard to the *Micklefield* case. Even then, it would appear that the terms pertaining to the exercise of the options were far less stringent than the corresponding terms in *Micklefield*. It might, however, still be argued that the question, at bottom, is one of degree. This might well be so, but, as already stated above, a certain measure of uncertainty (and therefore subjectivity in decision) is inevitable.

ANDREW PHANG*

* Faculty of Law, National University of Singapore.