‘No set-off’ clauses in Venson Automotive Solutions Ltd v Morrison's Facilities Services Ltd

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Commercial analysis: In the case of Venson Automotive Solutions Ltd v Morrison's Facilities Services Ltd, the High Court considered the interpretation and purpose of ‘no set-off’ clauses and how they impact on parties’ rights and remedies. Written by Neil Fawcett, specialist business and property barrister, at 3 Paper Buildings.

Venson Automotive Solutions Ltd v Morrison's Facilities Services Ltd and others [2019] EWHC 3089 (Comm) (9 October 2019)

What are the practical implications of this case?

This was a Commercial Court case heard by Julia Dias QC relating to an application for summary judgment to recover the amounts due under unpaid invoices. The defendant claimed to have been significantly over-charged in relation to past invoices and sought to set off or ‘re-allocate’ any historic overpayments. The court underlined the importance of no-set-off provisions and their commercial purpose in ensuring cash flow in circumstances where a contracting party might very well have important obligations to meet in order to comply with their side of a particular contract. It is a decision relevant to all types of contracts, but particularly where parties are engaged in longer-term commercial relationships, such as in this case, vehicle hire.

What was the background?

The claimant brought an application for summary judgment pursuant to CPR 24. The claimant was a vehicle leasing and fleet management company which had leased a fleet of vehicles to the defendants and provided management services in relation to those vehicles further to two agreements—a Contract Hire Master Agreement (the Hire Agreement) and a Fleet Management Agreement (the Management Agreement).

The Hire Agreement set out the higher-level terms upon which each vehicle would be leased to the defendants. In this case, each vehicle would be subject to an Order Confirmation Schedule which contained the specific terms applicable to each vehicle, such as the date of delivery and the length of the hire period. The Management Agreement provided that the claimant undertook various management services in relation to all vehicles used pursuant to the Hire Agreement. Those services included things like maintenance, servicing, MOT reminders and breakdown and accident management.

Around 1000 vehicles were leased to the defendants over the lifetimes of the contracts. In May 2014 the defendants gave notice to terminate the contracts but continued to pay invoices in respect of vehicles which had already been leased by that date. The last invoice was dated May 2017. In April 2016, however, the defendants raised a concern that they had been historically overcharged and in late 2016 they cancelled the direct debit and stopped making any further payments. The claimant protested but continued to provide services in relation to the vehicles for the run-off period of the contracts.

The claimant commenced proceedings to recover the amounts of the unpaid invoices and the defendants pleaded a counter-claim for restitution and damages relating to the historic overcharging which they sought to set off against the sums said to be owing under the claim. The claimant applied for summary judgment for the unpaid invoices to compel payment to be made by the defendants before the substantive issues at trial would be resolved.

The judge summarised the claimant’s position as follows:

> ‘[…]the claimant made clear, it is not the claimant's case that the defendants are precluded altogether from raising their grounds of defence and counterclaim. The claimant's case is simply that the effect of the clauses was to give the defendants a limited time under clause 5.6 to dispute any invoices, and that if they failed to do so, they were bound to ‘pay now, and argue later.’

What did the court decide?

Paragraph 20 of the judgment summarised the purpose of no-set-off clauses. Crucially, they do not deprive a party of their underlying rights and do not prevent substantive defences being raised at trial, but they do, for a specific commercial purpose, provide some security of cash-flow:

> ‘20. There is ample authority as to the effect of such no-set-off clauses. The claimant referred me to *Rohlig (UK) Limited v Rock Unique Limited* [2011] 2 All ER (Comm) 1161—*Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd Rep 498—and to *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600. The courts have repeatedly emphasised that the purpose of these no-set-off provisions is to ensure that there is no interruption to the claimant's cashflow, but that these clauses do not affect the underlying obligations of the parties. These are to be finally determined at trial in the usual way. As such, a no-set-off provision is effectively a procedural mechanism which creates an entitlement to provisional payment pending ultimate and final determination of the rights of the parties. However, as pointed out in Stewart Gill, to achieve this end, the rights under a no-set-off provision must be capable of enforcement at the summary judgment stage, or by way of preliminary issue. If they had to wait determination at trial, the clause would be rendered nugatory.’

It was key to the judge’s decision in *Venson* that the no-set-off clause in this case was read along-side clause 5.6 of the Management Agreement which provided a mechanism for direct debits to be made, and for disputes to be raised within a limited time. The judge made clear at para [30] of the judgment that she had ‘no hesitation’ in preferring the claimant’s case given that in the context of this type of agreement, maintenance of cash-flow was of the utmost importance to a supplier of vehicles who might have their own expenses to meet in order to fulfil the contract.

The court concluded that the interpretation of the time-limiting requirement under clause 5.6 and the no-set-off provision imposed a system of paying invoices on a provisional basis, but always without prejudice to the hirer’s right to subsequently argue that amounts paid had been wrongly charged by paying first, and then claiming later.

Conclusion

Although no-set-off clauses might well serve the commercial purpose of protecting cash-flow, the court made clear that that was not their only purpose and each individual case had to be considered in its own context:

> ‘32. However, just because the purpose of such clauses can in general terms be described as one of protecting cashflow does not, in my judgment, mean that every no-set-off provision must necessarily be limited to the protection of cashflow. Every contract must be construed as a whole in its own factual matrix, and on the basis if its own wording, and in the present case, the no-set-off provision has to be read alongside clause 5.6 of the Fleet Management Agreement, which expressly addressed the question of disputed invoices.’

In this case it was clear that clause 5.6 informed the court as to the commercial purpose of the no-set-off provision, however, it might well be that such provisions are either open to a looser interpretation based on the surrounding contractual provisions, or indeed might be more harshly enforceable if it can be demonstrated that something other than cash-flow militated in favour of such a construction.

Case details

- Court: High Court, Commercial Court
- Judge: Julia Dias QC
- Date of judgment: 09/10/2019

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