Case No: BL/2019/001551

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Neutral Citation Number: [2019] EWHC 2577 (Ch)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Thursday, 29 August 2019

BEFORE:

MR JUSTICE NORRIS

BETWEEN:

SOGEXIA SARL

Claimant

- and -

R RAPHAEL & SONS PLC

Defendant

Saimi Hanif for the Claimant
Thomas Croxford QC the defendant

JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

No of words:
No of folios:

1. MR JUSTICE NORRIS: Domestic and cross-border card payments are deceptively simple from the perspective of the user, but they in fact involve a complex series of interlinking arrangements. The payer will direct his or her bank to make a payment to the payee. The payee will have a collecting bank which accepts the payment. These transactions will be executed under agreements relating to the recognition of card schemes, the recognition of paying and collecting banks and the operation of a clearing system reconciling debits and credits between banks on a frequent periodic basis.

2. This case concerns Sogexia SARL, a French company. It offers payment solutions to its clients utilising prepaid money cards. It does not have its own membership of the various payment and settlement schemes which are necessary for the payer to make a payment to an end customer. It utilises the payment services provided by the defendant, R Raphael & Sons Plc, a UK-based bank. Raphael offers Sogexia payment services and card provision services using its bank identification number and its membership of clearing schemes. In a sense, Sogexia is an extension of the bank, operating in France, providing services to French customers. The relationship between Sogexia and Raphael is governed by an amended and restated sponsorship and card services agreement dated 17 October 2017.

3. It is unnecessary to recite the detailed obligations of either Sogexia, which are very extensive, or Raphael, which are somewhat less extensive and provided on "a reasonable endeavour" basis. But it is necessary to draw attention to one or two provisions. Clause 9 of the agreement provides for how the agreement may be terminated before its effluxion in September of 2020. Raphael may terminate the agreement at any time in a number of circumstances, one of which is that it may terminate the agreement immediately upon written notice to the customer, i.e. Sogexia, if Sogexia commits a material breach of any provision in the agreement and fails to cure that breach within 30 days after written notice from the bank. Amongst the obligations of Sogexia is to comply with relevant legislation and regulations. Clause 9.3 sets out the effect of the termination. It says that the bank shall have no further obligation to provide services to Sogexia save as is provided under the agreement. The agreement provides that Sogexia shall immediately cease to offer and the bank shall immediately cease to issue new cards; but, as regards existing customers, under clause 9.5.9 Raphael must continue to provide sponsorship to Sogexia until the expiration of

all current cards, and the parties are under clause 9.5.1.2 obliged to implement a termination plan to achieve that. The termination plan is set out in the Eighth Schedule to the agreement. In essence, the parties are to cooperate in a winding down of the agreement and the continuation of services. Under clause 2 of the termination plan there is to be communication with the ultimate customers, and they are to be provided with at least two months' notification of any changes to their product offering (including closure).

4. In June of 2019 Raphael came to believe that French payment regulations applied to the product which it was offering to Sogexia and which Sogexia was offering to its French customers. In particular it came to believe that there was a payment cap on the amount that could be transferred under a credit transfer in the case of a business of 3,000 Euros. This was referred to in argument as "the business cap". Raphael raised the issue with Sogexia, which disagreed that the business cap applied to the agreement between itself and the bank and denied that it was in breach of the French regulation, which it said did not apply to the particular services that it was providing to its customers. After a short debate in correspondence, Raphael gave notice of its intention to terminate the agreement between itself and Sogexia unless Sogexia implemented the business cap in relation to relevant payments under its card services. That notice of termination is to take effect (according to Raphael) at noon today.

5. There is before me an application for injunctive relief preventing Raphael from implementing that termination notice. The relief originally sought was far broader. It was to the effect that Raphael must be compelled to perform the amended and restated sponsorship and card services agreement until trial of an issue as to whether the French regulation relating to the business cap applied to the sponsorship and card services agreement such that Sogexia was obliged to implement it. Sensibly that form of relief has now been reformulated, and what is sought is an injunction restraining Raphael (until final judgment upon a claim seeking declaratory relief as to the relevance of the business cap under the French regulations is given) from terminating or suspending the operation of the agreement pursuant to the termination notice it has given in its letter of 26 July 2019.

6. In seeking the injunctive relief, Sogexia has failed to comply with the timely service of the application notice. This is partly its own fault in the time taken to respond to the termination notice and partly its own fault in making mistakes in relation to the issue of the application. The matter therefore comes before me effectively on a "without notice" basis. But in fact, two days' notice has been given and the bank has been able to instruct Mr Croxford QC to appear and argue the opposition. I offered him the chance of an adjournment. He said he did not want an adjournment if I was going to refuse the application, but, if I was not going to refuse the application, then he wanted the application adjourned off with no order being made in the meanwhile. That of course would allow the bank to implement the termination notice and put in train the consequences of termination. That does not seem to me a fair or sensible way of approaching the matter. I could either adjourn the matter and consider the grant of relief in the meanwhile; or I could continue with the matter, reach a view on the material as it is before me and, if I decide on an injunction, give Mr Croxford QC's clients liberty to apply to discharge it in the event that they discover something which the short notice has prevented them from placing before the court at this hearing.

7. So I will consider whether I ought to grant injunctive relief. The first question is whether there is a serious issue to be tried. On that there is a difference of view between the French law experts as to whether the "business cap" has any application to the actual credits of payments made under the cards issued by Sogexia. The debate centres upon whether the French regulation applies to the cards as a whole (because they involve e-money) or whether it applies to the particular service provided under the card, namely the making of payments utilising the payment systems. It is the view of the claimant's (Sogexia's) French law experts, firstly, that the article of the French regulation does not apply in a cross-border context where bank services are provided from outside France to clients based in France under a contract governed by English law. It is their view, secondly, that credit transfers, namely that part of the total service package to which I have referred, fall outside the scope of the "business cap", and they support that view by a textual analysis of the French regulation.

8. I have been able to read the opinion of the both French lawyers, and it is readily apparent that the view taken by Raphael's expert, that the French regulation applies to the particular payment services it enables Sogexia to provide, is plainly open to

challenge. There is a real issue about whether Raphael can require Sogexia to implement the "business cap" in relation to those categories of payments apparently affected by it and can terminate the agreement in the event that Sogexia fails to comply with that requirement. Indeed, from the textual analysis undertaken by the French law experts, the proposition seems more than merely arguable, and, on the very limited view I have had of both that French opinion and the defendant's French opinion, Sogexia's expert opinion seems the stronger; but that can only be a provisional and very preliminary view formed after very limited consideration of the material.

9. The second question is: if there is a serious issue to be tried, would damages be an adequate remedy if unlawfully Raphael terminated the agreement. The implementation of the business cap pending the termination of the agreement under the termination plan would have to be effected by the giving of notice to customers. That would inform customers that services which had hitherto been provided by Sogexia, namely transfers in excess of the business cap, were imminently about to cease. It seems to me that such customers would be very likely to turn elsewhere to see if they could obtain from some other provider the services to be withdrawn. The implementation of the termination agreement would also mean that Sogexia could not take on any new customers.

10. Now, it is right that the evidence is less full than it might be about what the financial effect of a loss of customers and a failure to recruit new customers might be, but that is in part because the losses occasioned by those events are difficult to calculate. There is some material in the evidence of Mr Füg addressing the impact of termination. He overstates the position in which Sogexia finds itself by contemplating an immediate termination of all services at noon on 29 August, which is not a realistic possibility given the need to work out the termination plan in accordance with the card services and sponsorship agreement. But he points out that Sogexia's business model is heavily reliant upon providing 25,000 business clients with the ability to make payments exceeding 3,000 Euros and that the extent to which those clients use that service is evident from the fact that more than half of Sogexia's turnover is derived from such payments. If that functionality were threatened, it is plain that those clients would terminate their accounts and seek that provision elsewhere. Mr Croxford has done some analysis which suggests that the actual financial penalty to Sogexia would be

relatively small, but what I think is of greater concern is the reputational damage that would be suffered by Sogexia as a provider of such services. So I do not think that damages would be an adequate remedy because of the difficulty of their computation.

11. If I were to grant an injunction and it were to turn out at the end of the day that Raphael was right all along, that the French regulation applies, that it was entitled to require Sogexia to impose a business cap and (on the failure of Sogexia to do so) was entitled to terminate the agreement, what prejudice would it suffer? Well, for the continued provision of services it would of course be remunerated under the continuing agreement, but what is identified as the risk to Raphael is "heightened regulatory risk". It appears from the evidence that Raphael has already received a significant fine in relation to its operation, that it is in the course of a solvent winding up of this aspect of its business. So it is said that that kind of regulatory risk (which is not itself quantifiable in terms of damage unless a substantial fine is imposed) of itself means that an injunction ought not to be granted.

12. Secondly, it is said that an order restraining the putting into effect of the termination notice is the equivalent of the grant of a mandatory injunction requiring Raphael to carry on business, and in particular to take on new customers that it does not want, and that such an order would be contrary to the views expressed by the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] UKHL 17. In my judgment, whilst it is true that the effect of preventing the operation of the termination notice will be to oblige Raphael to take on new customers during the currency of the injunction, the effect of the injunction does not go beyond that. It does not require Raphael to carry on business in circumstances where it otherwise would close down and not carry on business, which was the position in *Argyll*. Nonetheless one has to accept that the heightened regulatory risk cannot be ignored.

13. Given that damages would not be an adequate remedy for Sogexia and that there is a risk that Raphael would suffer non-compensatable damage, where does the balance of convenience lie? Here Mr Croxford QC points out that on the evidence Sogexia is in the course of obtaining payment services by other means and will in fact migrate from Raphael, probably by the end of September 2019, according to the evidence of Mr Füg. In these circumstances Mr Croxford QC says that an injunction would in any event

have a very short life and that since under the termination provisions at least two months' notice would have to be given to the ultimate end users of the cards, in effect a transfer or migration of the business is likely to be carried out before any changes arising from the termination agreement could be implemented, and that the only real impact of an injunction is to prevent Sogexia from taking on new customers. In these circumstances, he says, the balance of convenience comes down in favour of allowing Raphael to implement its termination notice and allow the termination provisions to work themselves out.

14. I do not accept this submission. The fact is that once notice is given of the intention to implement the "business cap" pending the ultimate termination of the services agreement under the termination plan, customers will react on the giving of the notice, not upon its expiration. I think that notice of the termination will have immediate consequences, not consequences delayed for a couple of months. In the circumstances, I consider the balance of convenience comes down in favour of restraining the termination agreement notice taking effect, because that I think is the option that is least likely to cause injustice pending the final working out what the true position is in relation to the application of the French regulation. Given the options which Mr Croxford QC placed before me, I propose to grant an injunction up until 14 October but to give the bank liberty to apply to discharge it in the event of fresh material coming to light, so as not to disadvantage it by reason of the short notice upon which he has had to address the application.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk