



Lawspeak...

A monthly Legal English newsletter on contract and commercial matters

Vol 2, No. 9

September 2014

Augustin & Bugg

www.augustinbugg.com

lawspeak@augustinbugg.com



What does "success" mean?

In the recent case of *Edmond de Rothschild Securities (UK) Ltd v Exillon Energy Plc* in the Queen's Bench Division (Commercial Court) [2014] EWHC 2165 (Comm) the court had to deal with the interpretation (construction) of contract language for the purpose of deciding when a "success fee" was due.

The court held in this case that the correct construction of a contract for the provision of corporate advisory and strategy services meant that the service provider's right to a success fee was not dependent upon the service provider being an effective cause of the "success" as defined in the contract. As long as the "success" was achieved, the service provider was entitled to the success fee. The crucial clause read as follows:

"In consideration for the services set out herein, the Company agrees to pay to [Rothschild] a fee payable as follows:

- a) a retainer of \$50,000 per month...
- b) a success fee of \$500,000, net of the retainers paid under (a) if a resolution to the issues posed by Worldview's requisition has been achieved, such achievement being assessed because one or more of the following has occurred:
 - i. Worldview has indicated a willingness to cease hostilities;
 - ii. the prospect of future Worldview action is agreed between the Board and [Rothschild] to be remote;
 - iii. Worldview has reduced its shareholding in the Company to below 5%;
 - iv. a strategy has been developed that will be/can be implemented such that the negative impact of future Worldview action is agreed between the Board and [Rothschild] to be negligible; and
 - v. The Company has been able to successfully launch its proposed bond issue; ..."

The court decided that the above did not mean that the claimant had to be the effective cause of the listed events. This interpretation was supported by two main considerations. Firstly, it would have been very difficult, if not impossible, for the claimant to prove that its work was an effective cause of the sale of shares. Secondly, the reason for the sale did not matter to the other party: all that mattered was that the shares had been sold. The above was not regarded by the court as forming a contract of agency. In any event, the general principle that an agent's right to commission is dependent on its being an effective cause of the success is subject to any special terms or other indications in the contract.

The above construction, it was held, did not provide the claimant with an unfair "windfall" and it was not contrary to business common sense. Nor was there anything contrary to business common sense in entitling the claimant to a success fee in the circumstances. Thus, the court leaves open the door for such arguments preventing such a construction of the contract in other circumstances.

The lesson to be learnt: make it expressly clear. If you wish to provide for (additional) success fees ensure that the condition precedent is clearly defined in any agreement so as to make it clear whether the respective party must demonstrably cause that "success" event.

Bugg's Boilerplate

It is a common device (and incentive) in the business world to provide for success fees in the event of certain results occurring. But does the performing party have to demonstrably cause such events? Could we claim a success fee for the sun rising in the morning? A recent English High Court case approaches this matter as a question of contract interpretation in a business context.

Miscellaneous: Lawyers ask questions all the time. That is often what they get paid for. But the skill is in asking the right questions at the right time and knowing when not to ask a question at all. A convicted criminal in the United States finds this out the hard way on page 2.

Stuart Bugg

Nürnberg
September 2014

Lawspeak...

Miscellaneous



One question too many

It is an old maxim of barristers that you should not ask a witness a question in court to which you do not already know the answer. We are also told that we are our own worst lawyers. Both principles proved to be very true in the following record of a U.S. criminal case, much to the loss of the accused:

United States Court of Appeals District of Columbia Circuit.

*Joseph NANCE, Appellant,
v.
UNITED STATES of America, Appellee.*

Defendant was convicted of robbery. From the judgment of the United States District Court for the District of Columbia, Edward A. Tamm, J., the defendant appealed. The Court of Appeals, Bastian, Circuit Judge, held that evidence that the accused asked a witness at the preliminary hearing how the witness knew it was the accused when he had a handkerchief over his face was properly admitted at the trial as an admission, since there was no compulsion to ask the question, even though the accused was not a lawyer and may have been in unfamiliar surroundings, and that the evidence sustained the conviction.

Evidence that at preliminary hearing accused asked witness "How do you know it was me when I had a handkerchief over my face?" was properly admitted at trial for robbery as evidence and an admission of guilt.

299 F.2d 122, 112 U.S.App.D.C. 38

Upcoming Nürnberg Seminar Workshops 2014 and 2015

Places (participants limited to 14 per seminar) are still available in the following seminars:

1. **Update 2014: Masterclass on Developments in English Contract Law**
5-6 December 2014
Hotel Victoria Nürnberg
2. **Introduction to Working with Contracts**
23-24 January 2015
Hotel Victoria Nürnberg
3. **Sales and Distribution Contracts in English**
6-7 February 2015
Hotel Victoria Nürnberg
4. **Contract Management and Boilerplate Clauses**
17-18 April 2015
Hotel Victoria Nürnberg
5. **German Contracts in English**
17-18 July 2015
Hotel Victoria Nürnberg
6. **Introduction to Common Law and Legal English**
11-12 September 2015
Hotel Victoria Nürnberg
7. **Masterclass: Contract Law Update 2015**
4-5 December 2015
Hotel Victoria Nürnberg

REGISTRATION FORMS etc.: augustinbugg.com/en/we-do/seminars/

For further information on the above seminars and workshops please contact us by telephone +49 (0) 911 945 8867 or by email seminar@augustinbugg.com or see our homepage at augustinbugg.com/en/we-do/seminars/ for further details and seminar programmes. ▶

Legal

Augustin & Bugg GbR
Allersberger Str. 185
90461 Nürnberg
Tel. +49 (911) 945 88 88
Fax +49 (911) 945 88 90

lawspeak@augustinbugg.com
www.augustinbugg.com

