Neutral Citation Number: [2010] EWHC 2078 (QB)

Case No: HQ08X04199

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

8 June 2010

B e f o r e :

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the Queen's Bench Division

TURNER & CO (GB) LTD	**Claimant/Respondent**
- and -	
FATAH ABI	**Defendant/Appellant**

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MS HELEN REID (instructed by CKFT Solicitors) appeared on behalf of the Claimant
MR FATAH ABI appeared in person

APPROVED JUDGMENT

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Mr Salter QC:

1. In this action, Turner and Co (GB) Ltd (whom I shall call "Turner") seeks to recover a fee which it claims is due under an agreement on Turner's standard terms, which was signed by the defendant on 14 December 2006. I shall call that document "the Agreement".

2. Turner is a selling agent for small to medium-sized businesses. The defendant, Mr Fatah Abi (who was referred to in the claim form as Mr Abi Fatah), used to be a working shareholder and director in a printing business known as London Colour (Sales) Ltd (which I shall call "London Colour Sales"). There were two other shareholder directors of that company: Mr David Ashworth and Mr Rhys Jones.

3. Turner's claim is that, under the Agreement, Mr Abi retained Turner to sell London Colour Sales. Thereafter, in late November or early December 2007, Mr Ashworth and Mr Jones resigned as directors and transferred the

majority, though not all, of their shareholdings to Mr Abi. Turner says that that was a "transaction" which, under the terms of the Agreement, triggered an obligation on Mr Abi to pay Turner a fee of 8.5% of the transaction value, with a minimum of £10,000.

4. Mr Abi disputes Turner's claim. He says that the Agreement was not with him personally, but with the company, London Colour Sales. Alternatively, he says that the commission terms of the Agreement are not binding on him because they are unfair under the Unfair Terms in Consumer Contracts Regulations 1999. Alternatively, he says that there was no "transaction" within the meaning of the Agreement because there was no sale to any third party purchaser, only a reconstructing of the management and shareholdings amongst the existing owners of the business. Finally, he says that, as no cash changed hands, the "transaction" - if there was one - had no value.

5. Turner has been represented by Ms Helen Reid of counsel. Turner called one witness, its managing director, Mr Shaun Sweeny. Having heard him give evidence to me, I have no doubt that his evidence to the court was entirely truthful. However, as he frankly admitted, he has no personal knowledge of the events with which this case is concerned. Contact with Mr Abi was entirely dealt with by employees who are no longer with Turner, principally a consultant called Terry Collett and another employee called Christine Murphy. Neither Terry Collett nor Christine Murphy was called to give evidence.

6. Mr Abi was formerly represented by lawyers and in December 2008 he served a Defence that had plainly been drafted with the assistance of a lawyer. However, his solicitors came off the record in 2009, and he has represented himself before me at this trial, aided by a representative from the support unit. If I may say so, he has done so very effectively

7. The evidence for Mr Abi came solely from Mr Abi himself. He put in a brief witness statement, which he amplified (with some assistance by way of questioning from the bench) in his evidence-in-chief. He was also cross-examined by Ms Reid on behalf of Turner. Mr Abi called no other witnesses. His evidence was, as I have indicated, uncontradicted by any relevant oral evidence from the claimant. However, having seen and heard Mr Abi in the witness box, it was clear to me that his recollection - and therefore his evidence to the court - has been coloured by subsequent events, and by his feeling of the unfairness of the position in which he now finds himself. I do not believe that Mr Abi was deliberately trying to deceive the court. On the contrary, I accept that he was doing his best to tell me the truth, as he now saw it. But because his recollection has been filtered in this way, I have found it necessary to test his evidence carefully by reference to the contemporary documents and the inherent probabilities. In just a few respects, I do not accept his evidence as a complete and accurate account of what actually happened.

8. The relevant history of this matter is as follows. Prior to the formation of London Colour Sales in 2005, Mr Abi and Mr Rhys Jones ran a printing business together. Mr David Ashworth had his own separate printing business, under the name London Drawing Office Furniture. At about that time, the printing trade was going a difficult period. The nature of the business was changing. So the three men - Mr Abi, Mr Ashworth, and Mr Jones - brought their two businesses together, to work co-operatively with each other. Mr Ashworth became a shareholder in and a director of London Colour Sales. Mr Abi and Mr Rhys Jones do not seem to have become shareholders in or directors of the London Drawing Office business. However, Mr Abi said (and I have no reason to doubt that this is true) that he thereafter had a significant management role in the London Drawing Office business.

9. In 2005, London Colour Sales was formed. At the relevant time the shareholdings in London Colour Sales were as follows. Mr Abi owned 6,135 of the 'A' ordinary shares. Mr Ashworth owned 3,033 of the 'A' ordinary shares. Mr Jones owned 3,033 of the 'A' ordinary shares. It was Mr Abi's evidence that the 'A' shares were voting shares but carried no right to dividend. As to the 'B' shares, which did carry a right to dividend, Mr Abi owned 40 of them, Mr Ashworth owned 31 of them and Mr Jones owned 28 of them.

10. Disagreements soon arose between the directors of London Colour Sales as to how the company should be run. Because all of the directors had given personal guarantees in respect of one or more of the company's liabilities, they were all financially exposed to significant risks, in a business which had to transform itself in order to

survive. They therefore decided to look for an exit by way of a sale of the business.

11. Mr Abi had seen a flyer sent out by fax by Turner. He made a telephone call to Turner. In response to that telephone call, Mr Terry Collett made an appointment and came to see Mr Abi on 14 December 2006. Mr Abi's account of that meeting was this. According to Mr Abi, he provided Terry Collett with details about the company and explained to Terry Collett that both businesses - London Colour Sales and London Drawing Office - were to be sold together. According to Mr Abi, at the end of what had been a shortish meeting, Mr Collett produced forms of agreement, under which Turner were to be retained in relation to both companies. He asked Mr Abi to sign both of those forms. Mr Abi refused to sign a form for London Drawing Office, saying that he was not a director. However, he did sign the form in relation to London Colour Sales. According to Mr Abi, he agreed with Terry Collett that a further meeting would be necessary, in order to get Mr Abi's fellow directors and shareholders to sign. According to Mr Abi, the form for London Colour Sales was blank when he signed it. He says that both his name and the name of the company were later filled in without his knowledge by someone at Turner, presumably Mr Collett. In support of that statement, Mr Abi has drawn attention to the fact that he is named in the agreement as Fatah Abi, not Abi Fatah, and to the fact that the brackets were missing from the name of London Colour Sales.

12. I largely accept Mr Abi's account of the meeting, and in particular accept that the form which he signed was blank when he signed it. Otherwise, Mr Abi would probably have asked Mr Collett to correct the errors both in Mr Abi's name and in the name of London Colour Sales. However, I do not accept that any further contract or meeting was arranged or contemplated, either in relation to London Colour Sales or London Drawing Office. In that respect, I reject Mr Abi's evidence as improbable.

13. I regard it as improbable that Mr Abi discussed a possible sale of London Drawing Office with Mr Collett. There is no written record of any such discussion: and the figures which Mr Abi provided to Mr Collett, and which were transcribed by Turner into the sales memorandum, related solely to London Colour Sales and not to London Drawing Office. This can be seen from a comparison of the figure of approximately £720,000 given in the sales memorandum which Turner prepared (and which appears at page 138 of the bundle), and the turnover figures for London Colour Sales of £723,867 for the 12 months to January 2006, i.e. the immediately preceding financial year (which are recorded in the company search at page 116 of the bundle). I also regard it as highly improbable that Mr Collett would have ignored the opportunity to get a contract to sell a further business, and thus generate additional income for his employer and probably a commission for himself.

14. As to the retainer of Turner to sell London Colour Sales, the actions of both Mr Collett and Mr Abi seem to be inconsistent with any understanding or arrangement that the whole matter of the retainer of Turner depended upon getting further signatures to the agreement. The form signed by Mr Abi was intended on both sides to be the contract governing the relationship with Turner. I will set out the terms of that Agreement later in this judgment, when I come to deal with the issues to which they are relevant.

15. That deals with the meeting on 14 December 2006. The history thereafter is recorded in an internal memo on Turner's computer, which appears at page 107 of the bundle. This was a record created entirely for internal, practical use. Its contents were therefore not coloured by any anticipation of litigation. I therefore accept it as the most accurate record of what thereafter happened. As that internal memo (and the computer record on page 111 of the bundle) show, on the following day, 15 December 2006, Christine Murphy prepared a marketing plan which was sent to Mr Abi. It is probable that Mr Abi received that marketing plan. He was certainly in the country at the time it was sent out.

16. Turner also produced a sales memorandum. That is a different document from the marketing plan. The sales memorandum was sent to Mr Abi on 4 January 2007. However, in relation to that document, I accept, as he told me, that he did not receive it, as he was in the Middle East. This is corroborated by a note on page 108 of the bundle, made on 25 January 2007, to the effect that the sales memorandum was re-sent on the basis that it had not previously been received.

17. Mr Abi told me in evidence that he telephoned Turner to chase for a further meeting to get his fellow directors'

signatures on the agreement. I find that, on the balance of probabilities, Mr Abi did telephone Turners, but only to find out where the sales memo was. It was that call which generated the further copy of the sales memo which was sent to him on 25 January 2007, and which he received after his return from the Middle East. However, I do not accept the evidence given in Mr Sweeny's witness statement that that memorandum was at any point actively approved by Mr Abi. Mr Sweeny had no personal knowledge of any such approval and Ms Reid was unable to point to any documentary evidence to support the assertion that there was any communication of approval of the memo from Mr Abi to Turner. On the contrary, the sales memorandum contained a number of errors. Most glaringly, there is an inconsistency between the turnover figure of £720,000, which is correctly stated on the front page of the memorandum, and the figure for turnover of £275,000 which is stated under "Financial Information" towards the end of the memo on page 141 of the bundle.

18. Turner's internal record (at page 111 of the bundle) shows an entry for the sales memo being sent for approval on 4 January 2007, but it shows no record of any approval being given. That internal memo (at page 108 of the bundle) suggests that this error in the financial figures in the memorandum remained uncorrected throughout the period of Turner's retainer, until the time when Mr Abi gave notice to terminate that retainer in December 2007.

19. To return to the chronology: starting in May 2007, Turner began to advertise the London Colour Sales business as for sale in newspapers and on websites, including its own website. The details of the business were anonymised for the purposes of advertisement, the details being given only to persons who expressed an interest. A Mr Michael Taylor of Rhodes Printing, and a Mr Luke Spooner of Freestyle Solutions both expressed interest in the business. Both signed non-disclosure agreements, and both telephoned Mr Abi expressing interest in the purchase of the business. Nothing came of these inquiries. Mr Abi accepted that he received those telephone calls, and it is plain from that evidence that he knew in the second half of 2007 that Turner were marketing the London Colour Sales business.

20. According to Mr Abi, two things thereafter happened, sometime about the autumn of 2007. First he told me that another firm of business sale agents approached him, told him that they had seen that London Colour Sales was for sale through Turner, and persuaded him that they could sell London Colour Sales more quickly than Turner. According to Mr Abi, they advised him to write a letter to Turner terminating Turner's retainer, which he did on 12 December 2007. I make no finding as to Mr Abi's real motivation in giving notice to Turner at this point. His evidence on the point was unsupported by any contemporary documents and it is unnecessary for me to make any concluded findings. However, Turner accepts that they received that letter, and that they responded to it on 12 December 2007, accepting it as a termination of their retainer. It is common ground that, under the terms of the Agreement (assuming them to be effective and enforceable), that letter would have had the effect of bringing Turner's retainer to an end with effect from 13 March 2008.

21. Secondly, again according to Mr Abi, Mr Abi and his co-directors decided at about this time that London Colour Sales needed to borrow a further £60,000 of finance under the Small Firms Loan Guarantee Scheme. However, according to Mr Abi, adverse credit information that the bank possessed about Mr Ashworth and Mr Jones meant that the bank required - or at least suggested strongly - that Mr Ashworth and Mr Jones should resign as directors of London Colour Sales. Mr Ashworth's home was already charged to the bank to secure London Colour Sales' overdraft, and he agreed (according to Mr Abi) that the limit should be increased to accommodate this new loan. Nevertheless (again, according to Mr Abi), both Mr Ashworth and Mr Jones agreed to resign as directors and to transfer some of their shares in the company to Mr Abi, on the understanding that he would be the one to do the work to turn the company round. Again, Mr Abi's evidence as to the motivations of himself and his co-directors is unsupported by any contemporary documentation, and neither Mr Ashworth nor Mr Jones has been called to support it.

22. However, by the end of Mr Abi's evidence, the following facts at least were common ground. Those facts are that, first, on about 30 November 2007, Mr Jones resigned as a director and at about the same time transferred 2,000 of his 'A' shares and 15 of his 'B' shares in London Colour Sales to Mr Abi. Secondly, on about 7 December 2007, Mr Jones resigned as a director, and at about the same time transferred about 2,000 of his 'A' shares and 13 of his 'B' shares to Mr Abi. The coincidence between the dates of those resignations and transfers, and the date of the letter of termination sent to Turner by Mr Abi, is striking.

23. Notice of the transfers of the shares from Mr Ashworth and Mr Jones to Mr Abi was not registered in the Companies Registry until 6 August 2008. However, Mr Abi's evidence was that this was simply because of an administrative delay in effecting the registration by the employee of London Colour Sales who dealt with the administration of the company. Mr Abi accepted that the transfers were completed at the latest by December 2007.

24. Stamp duty certificates on each transfer stated that the transfers were for no consideration. Mr Abi's explanation, in summary, was that Mr Ashworth and Mr Jones were prepared to make what was in effect a gift to him of their shares because they realised that the only way to save the company - and therefore to avoid their personal guarantees being called - was to put Mr Abi in charge. I do not find that explanation wholly convincing. However, Ms Reid has not put forward any alternative explanation: and, for reasons which I shall explain below, I do not find it necessary to reach any conclusion on this point, or as to the true value of the shares which were transferred.

25. Moving on in time, it was Mr Abi's evidence that a dispute with a paper supplier, which Mr Abi asserted had caused London Colour Sales to lose a valuable customer by making a paper delivery late, eventually led to a judgment against London Colour Sales and to the liquidation of London Colour Sales at the end of 2009.

26. Meanwhile Turner had learned from a company information website of the transfer of shares to Mr Abi. By a letter dated 17 September 2008 sent by its solicitors, Turner wrote requesting details of this transaction. Mr Abi did not provide the required explanation, and this claim was therefore begun. The Particulars of Claim were served on 21 October 2008. As I have already indicated, the Defence, which Mr Abi himself personally verified by a statement of truth, was served on 8 December 2008. This action has been tried before me over two days: yesterday, 7 June, and today, 8 June 2010.

27. That is the factual background. Against this factual background, there are three issues for me to resolve. First, did Mr Abi personally enter into an agreement with Turner on the terms set out in the signed document at pages 15 and 16 of the bundle, under which he himself was the seller? If not, this action must necessarily fail, as having been brought against the wrong party. Secondly, if Mr Abi did make a personal contract as seller with Turner, do the Unfair Terms in Consumer Contracts Regulations 1999 apply to that agreement, and if so, are the relevant terms unfair and so not binding on Mr Abi? Thirdly, if the terms are binding on Mr Abi, is any commission due to Turner in the events which have happened? I will deal with these issues in turn.

28. The first issue is: did Mr Abi personally enter into any agreement with Turner? In paragraph 4 of his Defence, which he verified by a statement of truth, Mr Abi admits that an agreement with Turner was concluded on 14 December 2006, under which Turner was appointed as sole selling agent. His only pleaded case on this point is that he entered into the Agreement only as agent for London Colour Sales and not as a principal to the Agreement.

29. In my judgment, by signing the Agreement Mr Abi contracted personally, and not on behalf of London Colour Sales. That is what he intended to do by signing the Agreement: and that is what the Agreement now says on its face. Mr Abi's pleaded defence - that he was only acting on behalf of the company as its company secretary - is inconsistent with his evidence that he agreed with Mr Collett that there would be a further meeting at which his fellow directors and shareholders would also sign up. If the contract was simply with the company, Mr Abi could have signed it on his own as the company secretary on behalf of the company. It would be wholly unnecessary to have had anyone else's signature on the Agreement.

30. Furthermore, the suggestion makes little commercial sense. If, as I find, the business to be sold was the company, London Colour Sales, it would be the shareholders who would do the selling. The company would not sell itself. An agreement of this kind would therefore normally be signed by the shareholders in their personal capacity, not as agents for the company. Mr Abi, of course, was only one of the three shareholders in London Colour Sales. However, he was plainly the moving force in the company. In the circumstances, he may perhaps have been given prior approval by his fellow shareholders to enter into this Agreement: or (as I think more likely) he may simply have taken it upon himself to take the matter of a sale forward, assuming that if a sale

eventually did take place, his fellow shareholders would not object, and any commission payable would come from the sale proceeds. I therefore reject this first ground of Mr Abi's defence.

31. The second issue is: do the Unfair Terms in Consumer Contracts Regulations 1999 apply to this agreement.

32. In relation to this issue, the first question which I have to consider is whether, in entering into this transaction, Mr Abi was acting as a "consumer" within the definition given to that expression in Article 2(b) of Council Directive 93/13 EEC and in Article 3 of the 1999 Regulations (which implement that Directive in United Kingdom law). Those Articles define "consumer" as "any natural person who .. is acting for purposes which are outside his trade, business or profession". Mr Abi is a natural person. He will therefore be a "consumer" for these purposes (and the Regulations will therefore apply) provided only that, in entering into the Agreement, he was, "acting for purposes which are outside his trade, business or profession".

33. Ms Reid, on behalf of Turner, submitted to me that this matter was conclusively determined against Mr Abi and in favour of her submissions by the decision of the European Court of Justice in *France v Di Pinto* (Case C-361/89 [1991] ECR I-1189). That was a reference for a preliminary ruling from the Court of Appeal in Paris in a case concerning the definition of "consumer" in Article 2 of the Distance Selling Directive (Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31). It did not directly involve a consideration of Directive 93/13 EEC. However, the definition of "consumer" in both directives is identical, and both are concerned with the overall community policy of protection of the consumer. It is therefore likely that a consistent definition of the expression "consumer" will be adopted in relation to both.

34. Ms Reid referred me to a passage in the judgment of the Court referring to the definition of "consumer" in Article 2, which states as follows:

"**Article 2, which is drafted in general terms, does not make it possible with regard to acts performed in the context of such a trade or profession to draw a distinction between normal acts and those which are exceptional in nature. Acts which are preparatory to the sale of a business, such as the conclusion of a contract for the publication of an advertisement in a periodical, are connected with the professional activity of the trader. Although such acts may bring the running of the business to an end, they are managerial acts performed for the purpose of satisfying requirements other than family or personal requirements of the trader.**"

35. On that basis, Ms Reid submitted that it is clear that acts preparatory to the sale of a business must be regarded as acts done in the course of a trade or business for the purposes of the definition of "consumer" in Directive 93/13 EEC and the 1999 Regulations.

36. In my judgment, the matter is not as simple as that. The situation expressly dealt with in Di Pinto was that of a sole trader, who was contemplating selling his own business. The present case, by contrast, involves a shareholder of a company which carries on a business, contemplating selling his shares in that company. Under English law, it is trite that the business of company is not, without more, the business of the shareholders of that company, even where there is only one controlling shareholder: see *Salomon v Salomon & Co Ltd* [1897] AC 22.

37. I therefore invited Ms Reid to direct my attention to any other authorities which might bear on this point: and she has put before me the passage which discusses this issue in Chitty on Contracts (30th ed) at paragraphs 15-28 and 15-29. I have also considered the two further decisions of the European Court of Justice which are referred to in that passage: *Benincasa v Dentalkit* (Case C-269/95 [1997] ECR I-3767); and *Gruber v Bay Wa AG* (Case C-464/01 [2005] ECR I-439). Both of these were cases concerning Article 13 of the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters of September 27, 1968 (itself replaced, as from March 1 2002, by Council Regulation 44/2001 of 2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ Ll2/1). However, both nevertheless involved the Court in a consideration of the Community concept of "consumer".

38. It is clear from those authorities (as the editors of Chitty state) that, while the European Court of Justice has not had occasion to explain the notion of "consumer" for the purposes of Directive 93/13 EEC, it has made clear that the concept must be given an autonomous interpretation. By "autonomous interpretation", I mean an interpretation not grounded in any national law, but which is of general application across the community.

39. It is also clear from those cases that the European Court of Justice has given strong indications that, for the purposes of European consumer protection legislation such as Directive 93/13 EEC:

    "**A person will not be acting as a consumer unless they are contracting primarily for their family or personal needs. On that basis, it may be said that only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption, come under the provisions of community law designed to protect the consumer as the party deemed to be the weaker party economically.**"

    (Benincasa at paragraph 17).

40. I have also had my attention drawn to a decision of HH Judge Toulmin QC in *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), (a decision in the Technology and Construction Court on the applicability of the 1999 Regulations to an arbitration agreement entered into by a company for the purposes of providing a family home to the owners of that company); to the judgment of Field J in *Barclays Bank v Kufner* [2009] 1 All ER (Comm) 1 (in which it was held that the individual guarantor of a business loan to a company was not "acting as consumer" for the purposes of the 1999 Regulations); and to the decision of Longmore J in *Standard Bank London v Apostolakis* [2001] EWHC 493 (Comm).

41. Each of these 3 English cases was, to a large extent, a decision on its own facts. I nevertheless respectfully adopt Longmore J's observation in Apostolakis that the European Court of Justice cannot be taken to have intended, in laying stress upon family and personal requirements, to introduce a new and different test for what is a "consumer", or to replace with its own words the definition of that expression that appears in Directive 93/13 EEC. It is, of course, my task to apply the words of the Directive and of the 1999 Regulations to the facts before me. However, in doing so, it seems to me that I must be guided by the spirit of the approach of the European Court to the autonomous interpretation of this Community concept.

42. Adopting that approach, I am satisfied that, on the facts of this case, Mr Abi was, in making the Agreement, acting for a business purpose within the meaning of Directive 93/13 EEC and the 1999 Regulations. Owning and running printing companies was his business. It was how he made his living. This contract was made for the purposes of that business. This was not, to use the words of the European Court of Justice, something for his family or personal use. It was a business decision made in the course of running the business through which he earned his living. I do not think it right to import into that factual analysis concepts of English company law differentiating the business of the company from the business of its owners. I therefore reject Mr Abi's second ground of defence.

43. In case this case should go further, I should say that, had it been necessary, I would have held without hesitation that the relevant terms were unfair. Regulation 5(1) of the 1999 Regulations, which implements Article 3(1) of the 1993 Directive, sets out the test by which the fairness of a contractual term is to be assessed:

    > . . **A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer**...

    Regulation 6(1), which implements Article 4(1) of the 1993 Directive, sets out how the assessment of fairness is to be conducted:

    > .. **Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract**

on which it is dependent ..

44. As Lord Bingham explained in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52 at [17]:

    "**The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole.**

    The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, and unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

45. These observations were recently applied by Mann J in the case of *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch). Applying those principles to the facts before me, it is plain that the terms with which I am concerned cause a significant imbalance in the parties' rights to the detriment of the party other than Turner. It is also clear that, in their very complicated language, their very small print and their surprisingly broad scope, these terms constitute a trap for the unwary. If this were a consumer contract, Turner would not be dealing in good faith with a consumer by subjecting him to such wide and unexpected liabilities without the clearest possible explanation of the scope of what the consumer was letting himself in for. However, since I have held that the 1999 Regulations do not apply, those issues do not presently arise.

46. That brings me therefore to the third issue that I have to decide, which is this: was there a "transaction"? For the

    purposes of resolving this issue, it is necessary for me to quote the relevant provisions of the Agreement in full. Clause 4 of the agreement provides for remuneration and payment. Clause 4.1 provides as follows:

    "**Turner Butler' s remuneration shall be eight and one half percent of the Transaction Value plus VAT subject to a minimum of £10,000 plus VAT. The Seller shall pay Turner Butler's remuneration in full without any set off, withholding or any other deduction.**

    4.2 The remuneration shall be payable by the Seller in accordance with the Sole agency and

    Sole selling rights and also in any of the following circumstances:

    4.2.1 on completion of a Transaction during Turner Butler's appointment and

    4.2.2 . on completion of a Transaction after the end of Turner Butler's appointment to any Purchaser:

    4.2.2.1 who became aware by any means whatsoever at any time prior to the termination of Turner Butler's appointment for the Business of the sale or

4.2.2 who became aware of the availability of the Business by Turner Butler's marketing.

4.3 The Seller shall pay Turner Butler's remuneration within two days of completion of a Transaction irrespective of the date on which all or any of the Transaction Value is received or due to be received and, in the event that the Transaction Value increases for any reason at any time after completion of a Transaction, within two days of such increase being agreed by the Seller irrespective of the date on which all or any of such increase is received or due to be received.

4.4 If the Seller does not pay the remuneration on the due date for payment the Seller shall pay and fully indemnify Turner Butler in respect of all costs which Turner Butler incurs in the collection of the remuneration including all legal costs and expenses and the costs of any form of enforcement proceedings.

4.5 Interest shall be due on the remuneration (including VAT) at the rate payable under the Late Payment of Commercial Debts (Interest) Act 1998 from the due date for payment until the date of actual payment in full."

47. Those terms use a number of concepts which are themselves defined in clause 7 of the agreement. I should refer first to the definition of "transaction" in clause 7.11:

"**'Transaction' means the transfer or any other disposition of the Business or any of the Assets (whether from the Seller to a Purchaser or vice versa or from or to any Affiliate of either party) and whether by sale merger trade conveyance option transfer lease licence or otherwise and shall include a company buy-back of its own shares or management buy-out or earn-out or any other form of merger, demerger or reorganisation or reconstruction of the Business (including the transfer of one or more Assets from one owner to another prior to transfer to a Purchaser) and any liquidation winding-up dissolution or any other form of amalgamation or reconstruction of the Business or where the Seller and Purchaser or any Affiliate of either party enters into any other relationship whatsoever together including any financing arrangement subscription for shares or securities of any description any employment arrangement consultancy joint venture and any combination of any of the above and whether the consideration for the same is in cash or in some other form (either wholly or partly) and whether payable in whole or in part on completion or at any other date or dates.**"

48. That definition of "transaction" refers to a disposition of the "business". "Business" is defined as:

"**The business of the person or firm trading under the name set out in the Schedule or (if applicable) the company trading under the name set out in the Schedule and shall include all or any of the Assets and any other business or businesses, assets or shares (whether or not owned by third parties) Turner Butler are instructed to sell directly or indirectly under these Terms."**

The definition of "transaction" also makes reference to the transfer of or other disposition of any of the "assets". "Assets" are defined in clause 7.2 as meaning:

"All the property assets and rights used in or for the conduct of the Business or which are sold to a Purchaser or are reserved as part of a Transaction including any land buildings fixtures and fittings goodwill raw materials stock work in progress plant, machinery and equipment intellectual property rights franchises leasing and hiring agreements and any other contracts whatsoever cash book debts at completion of a Transaction and where the Business is a company the shares or ownership interests or other receivables in that company and any other shares or ownership interests sold or retained together with the shares or ownership interests of any other business which is sold or retained as the result of a Transaction."

49. The definition of "assets" in turn references the definition of "purchaser". That is in clause 7.5, and states that "'Purchaser' means any person or business who completes a transaction". "Sale" is defined in clause 7.6 as having the same meaning as "transaction".

50. Clause 3.7 provides that the "Seller" is the person who will pay Turner's remuneration. "Seller" is defined as meaning: "The person(s) named in the Schedule and shall also include any Affiliate and the owner of any Asset that is sold or transferred to a Purchaser or that is retained or reserved as part of or as a consequence of a Transaction..."

    The "Seller" in the schedule is named as Mr Abi Fatah.

51. What Ms Reid says, weaving her way through this thicket of impenetrable cross-referring definitions, is that the resignation of Mr Ashworth and Mr Jones and their transfer of their shares to Mr Abi occurred, as is common ground, in December 2007, which was during the period of Turner's appointment. Those resignations and share transfers therefore amounted, she says, to "completion of a transaction" within that period. She argues that they amounted to a "transaction" within the meaning of clause 7.11 because they involved either the "transfer of any of the assets" (the definition of "assets" in 7.2 including, where the business is a company, the shares or other ownership interests in that company) or a "reorganisation or reconstruction of the Business". She points to the fact that Mr Abi, in evidence, admitted that this was, in effect, a reorganisation or reconstruction of the business.

52. Mr Abi, on the other hand, argues that I should give a purposive construction (though he does not use that phrase) to the Agreement. He says that for commission to be payable in these events would be a surprising result. The natural understanding of mankind is that a commission is payable when a business is sold to some outsider by its owners, not when the owners merely reorganise amongst themselves the proportions in which they own the business.

53. I find that an attractive argument. However, it is not, when properly construed, what the words of the Agreement say on their plain meaning, once one has teased out from the thicket of definitions in this forest of words what is actually meant. Once one has done the exercise of following the definitions through, it is plain that the sale of shares by one owner to another is a "transfer of assets" within the meaning of clauses 7.11 and 7.2, and that such a transfer of assets is a "transaction".

54. I remind myself of what Patten LJ said recently in the Court of Appeal in the case of *Rainy Sky SA v Kookmin Bank* [2010] EWCA Civ 582 at paragraphs 36 and 42 of his judgment. Patten LJ, with whom Thorpe LJ agreed, there said:

    > **"The circumstances in which the court can confidently declare that one or other possible meaning of the words used is uncommercial needs to be defined with some care. In commercial contract (like any other contract) the parties have chosen to define the limits of the obligations which they have undertaken by the language they have used. The purpose of the contract is to provide an objective record of what has been agreed so as to regulate the legal relationship between them. The court's function is to give effect to those obligations by respecting the terms in which they are cast. When a dispute arises as to the meaning and scope of the contract the court can only resolve it by construing the words used in a way which gives them the meaning which the document would convey to a reasonable person knowing all the background knowledge which would have been available to the parties in the situation they were in at the time of contract: see *ICS Ltd v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffman at 912H and going on to paragraph 42). Unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the court has no alternative but to give effect it its terms. To do otherwise would be to risk imposing obligations on one or other party which they were never willing to assume and in circumstances which amount to no more than guesswork on the part of the court.**"

55. The natural meaning of the words here is not so extreme as to suggest that it was unintended. On the contrary, I can see (if only from Turner's point of view) very good commercial sense why Turner should have its contracts

worded as widely (though not as impenetrably) as in this Agreement. In those circumstances (and in a case which does not involve a consumer contract, and so where the statutory provisions for striking down unfair terms do not apply), it seems that that the function of the court is to give effect to the terms of the contract according to their natural meaning. It therefore seems to me that Ms Reid's submission that there was a transaction during the currency of Turner's appointment is correct, and that Turner is therefore entitled to its commission.

56. I have not added as a fourth issue the question of how much Turner would be entitled to. That would be an extremely difficult issue to resolve, having regard to the fact that there is no evidence that any value was attributed to these shares at the time of the transaction. Matters are also complicated by the fact that, by the time of the relevant transaction, the dispute which ultimately led to the failure of the company had already arisen. The company's future was therefore not perhaps as rosy as it was (quite understandably) painted by Mr Abi, when he was attempting to sell the business and to pass the problems on to somebody else.

57. Fortunately, I do not have to resolve this issue, because Ms Reid has realistically accepted on instructions that the most sensible course is for Turner to seek no more than the minimum sum of £10,000 plus value-added tax which is provided for in clause 4.1 of their agreement.

58. There will therefore be judgment for Turner, the claimant, in the amount of £10,000 plus value-added tax.