"Hindsight is a wonderful thing but foresight is better" – England & Wales Court of Appeal confirms that you cannot imply a term just because, in hindsight, it seems fair

Introduction

In *Robert Bou-Simon v BGC Brokers LP*[1] the Court of Appeal has confirmed that a contractual term cannot be implied into an agreement simply because in hindsight it makes sense to do so. In reaching that conclusion, the Court of Appeal reaffirmed the strict principles set out by the Supreme Court in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*[2] (**"Marks & Spencer"**), regarding the circumstances in which terms can be implied into contracts.

Background

BGC Brokers LP (**"BGC"**) was an inter-dealer brokerage firm. Mr Bou-Simon (**"Bou-Simon"**) had previously been an employee of BGC (between 2000 and 2005) and was subsequently reemployed by BGC in February 2012.

Upon agreeing to rejoin BGC, it was intended by both Bou-Simon and his employer that he would become a partner in BGC and it was acknowledged in the contractual documentation that he was eligible to receive a grant of "equity interests" in BGC, which was received by Bou-Simon in the form of a payment of £336,000 (the **"Loan"**). Notwithstanding the payment of the Loan, Bou-Simon did not in fact become a partner in BGC.

The contractual documentation contained two key provisions: the first concerning the payment of the Loan to Bou-Simon; and the second concerning the repayment of the Loan in the event Bou-Simon left the company (the **"Repayment Provision"**). In particular, the Repayment Provision stated that:

> *"[Bou-Simon] agrees that he will repay the Loan from the net partnership distributions on any of [Bou-Simon's] partnership units from BGC Holdings, LP. These repayments will continue until the Loan is repaid in full. In the event that [Bou-Simon] ceases to be a partner any unpaid amounts will be written off by [BGC] only if [Bou-Simon] served at least [four years]...".*

Bou-Simon subsequently left BGC within the four year period. The agreement was, however, silent as to whether or not the Loan was repayable in such circumstances and on what terms. BGC sought to recover the Loan in full from Bou-Simon.

First instance decision

At first instance, BGC argued that a term should be implied into the agreement which required repayment of the Loan in full where Bou-Simon failed to serve the full four year period. In response, Bou-Simon relied on the fact that during the negotiation of the agreement, he had deleted from one of the drafts an express provision which would have given rise to the repayment of the Loan in the event he ceased to be a partner within the four year period. This deletion was accepted by BGC and the draft wording did not form part of the final agreement.

The judge, however, agreed with BGC and, applying the test set out by the Court of Appeal in *Marks & Spencer*, held that:

> *"without the implied term, the contract would lack commercial or practical coherence, as the claimant firm would otherwise be parting with the gross sum of almost three-quarters of a million pounds in circumstances in which the Defendant might cease employment without having made any significant contribution to its business at all".*

1 [2018] EWCA Civ 1525
2 [2016] AC 742

The judge therefore concluded that the implied term (as pleaded) should be implied into the agreement – the consequence of which being that the Loan was repayable by Bou-Simon in full.

Bou-Simon appealed to the Court of Appeal.

Court of Appeal's decision

The Court of Appeal unanimously disagreed with the first instance finding and upheld the appeal.

Lady Justice Asplin (delivering the leading judgment on behalf of the Court of Appeal) held that although the judge had identified the correct legal test, it had been applied incorrectly.

In particular, Asplin LJ held that the first instance judge had succumbed to the temptation of implying a term to give effect to the merits of the situation as they appeared, rather than approaching the matter from the perspective of the reasonable reader of the agreement, taking into account all of the express terms of the agreement and the surrounding circumstances at the time it was executed and applying commercial common sense.

The Court of Appeal held that, in the circumstances, there was no "*lack of commercial or practical coherence in the Agreement in the terms which the judge describes*" and that there is "*nothing uncommercial or absurd about a limited recourse loan*", which is what the arrangement appeared to be akin to.

Consequently, had the judge applied the relevant test correctly, he would *not* have concluded that the implied term was either so obvious that it goes without saying or was necessary to give business efficacy to the agreement. It therefore follows that, had the judge applied the test correctly, he would not have found in BGC's favour.

Comment

Whilst the Court of Appeal's decision does not develop the law on implied terms, it serves as a useful reminder of the limited circumstances in which terms can be implied into agreements. In particular, the decision underscores the fact that a term will not be implied into an agreement simply because, with hindsight, it appears that it would be fair to do so.

The judgment also contained an interesting discussion regarding the circumstances in which words deleted from draft agreements are admissible in determining whether a term should be implied into a contract.

Although the consideration of this issue was *obiter*, Asplin LJ noted that deleted words from a draft agreement should only be admitted for the purpose of implication if they were part of the admissible background for the process of construing the express terms. Lord Justice Singh, however, suggested a wider approach may be justified but noted that the issue "*is not straightforward*" and should be left "*for authoritative decision in another case, in which it is necessary to decide the point*".

This issue will, therefore, no doubt be subject to more substantive judicial consideration at a later date.

For more information about any of the issues raised in this alert, please contact Susan Rosser and Jonathan Cohen.

Susan Rosser
Partner, London
srosser@mayerbrown.com
T: +44 20 3130 3358

Jonathan Cohen
Senior Associate, London
jcohen@mayerbrown.com
T: +44 20 3130 3536