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Legal Update
August 2018

Interest in oral loan agreement could not be implied, England & Wales Court of Appeal finds

Introduction

The Court of Appeal recently handed down its judgment in *Sheikh Mohamed Bin Issa Al Jaber and MBI & Partners UK Limited v Sheikh Walid Ibrahim Al Ibrahim and Sheikh Majid Bin Ibrahim Al Ibrahim*[1], finding that the submission that an oral loan agreement should have an implied term for interest because the lender expected "*some benefit*" from the loan, was unarguable and should be rejected.

Background

In December 2001, the Second Defendant spoke to the First Claimant (Mr Al Jaber) by telephone and asked for a personal loan of US$30 million. The purpose of the loan was to help progress a business plan to create an Arabic language 24-hour satellite news broadcasting service called Al-Arabiya. Mr Al Jaber orally agreed to lend the Defendants the full amount, and subsequently had the funds transferred. Nothing was said about whether the loan agreement would bear interest. On 21 September 2015, a claim form and particulars of claim were issued claiming repayment of the principal sum, together with interest "*at a reasonable business rate*".

First instance

Burton J considered that the Claimants were making two separate claims; the first for US$30 million in debt and the second for damages for breach of an implied term as to interest. Burton J found that there was a good arguable case that there was a loan, but not one that provided for interest. As such, while service out of the jurisdiction against the Second Defendant was allowed (the material application before the Judge was the Claimants' application for permission to serve the Second Defendant out of the jurisdiction), the Court would not permit service out of the jurisdiction in respect of the claim for interest.

1 [2018] EWCA Civ 1690

Court of Appeal

The Court of Appeal first considered Burton J's decision that there were two divisible claims. In *Elder v Northcott*[2], the circumstances were that the principal sum was time-barred and the claimant advanced a claim for interest on the principal. Clauson J held that it would be "*paradoxical*" for interest accruing before the time at which the principal became barred to be recoverable when the principal was not. Following that decision, the Court of Appeal found that the claim for interest was "*accessory*" to the claim for principal and those claims could not be separated or "*bifurcated*".

The Court of Appeal then considered whether it was possible to imply in a loan agreement a term for the payment of interest. Citing Lord Neuberger's judgment in *Marks & Spencer plc v BNP Paribas Securities Services Co (Jersey) Ltd*[3], Simon LJ stated that the question was whether there was a serious question to be tried that the obligation to pay interest was either "*necessary to give business efficacy to the loan agreement or such that the obligation would have been obvious to the parties, although unstated, at the time the agreement was made*". Following an assessment of the factual background, the Court of Appeal found that the loan could have operated in several ways to the parties' mutual benefit without provision for interest, and as such an implied term for interest was neither necessary to give business effect to the agreement, nor so obvious that it "*went without saying*".

Taking into consideration the overriding objective (namely that cases are dealt with justly and at proportionate cost), the Court of Appeal took the unusual step of determining the issue relating to the obligation to pay interest. In doing so, it recognised

2 [1930] 2 Ch 422
3 [2016] AC 742

that the usual practice would have been for the second defendant to apply for strike out and/or summary judgment, after the jurisdictional issue had been resolved and an acknowledgment of service had been filed. In finding for the Second Defendant, the Court of Appeal considered that there was "*no serious issue to be tried as to the Claimants' claim for interest on the loan, prior to demand, based on the existence of an implied term*".

Further thoughts

While it is always advisable that contracts are in writing, or at the very least evidenced in writing, there will nevertheless continue to be disputes over the implication of terms. This case helpfully summarises the position per Lord Neuberger in *Marks & Spencer v BNP Paribas*[4] that "*the term that is to be implied must either be necessary in order to give business effect to the contract or it must be obvious in the sense that 'it goes without saying'*". Further, a claim for interest will not be entertained where to claim for the principal is time-barred; the common law is clear that a claim for interest is "*accessory*" to a claim for principal and they will not be treated as separate causes of action.

4 [2016] AC 742

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