

Legal Update

Parties' contractual information rights – a useful reminder in *Zedra Trust Company v The Hut Group Ltd*

Summary

The recent High Court decision in *Zedra Trust Company (Jersey) Ltd and anor v The Hut Group Ltd*¹ is a useful reminder of the benefits of explicit contractual drafting in relation to parties' information rights under commercial agreements.

The dispute arose in the context of a sale of the entire issued share capital of the target company, Cend Ltd, by Zedra to the Hut Group. The Sale and Purchase Agreement (the "SPA") contained a contractual review and adjustment mechanism regarding the consideration due to Zedra, and Zedra demanded sight of a subsequently prepared auditors' report which would be applicable to the operation of that mechanism. The Buyer – who had instructed the auditors, albeit at Zedra's request and expense – refused to disclose the complete report, providing Zedra only with short extracts.

Zedra challenged the Buyer's position, requesting sight of the auditors' work product as well as related correspondence and documents. Zedra asserted two principal arguments to support its position in a Part 8 claim seeking an order for disclosure:

- i. first, that the Buyer acted as Zedra's agent in engaging the auditors on Zedra's behalf to prepare the report; and
- ii. second, that there was an implied term entitling Zedra to the auditors' report, since Zedra could not meaningfully decide whether to invoke a further review of the report under the SPA mechanism without sight of the auditors' complete underlying work.

The Court was not persuaded by Zedra's agency argument, finding that the principal characteristics of an agency relationship were absent. However, the Court accepted that there was an implied term entitling Zedra to see the auditors' work product.

As such, the Buyer was required to provide a complete and unredacted copy of the auditors' report to Zedra. The Court found that Zedra's information rights did not extend to more wide-ranging correspondence and documents in relation to the specifics of the auditors' engagement and underlying calculations.

Key takeaways

The Zedra decision underlines two key points relating to parties' contractual information rights that should be kept in mind:

- i. the benefits of including express wording as to what information each party is entitled to see, to avoid the time and cost burdens of having to litigate the issue; and
- ii. the importance of considering limiting the potential costs of external work, for example by including qualifiers such as "reasonable expenses", particularly if the costs are to be borne by only one of the parties.

¹ [2019] EWHC 2191 (Comm).

Background

Under the terms of the SPA, Zedra could request that the Buyer engage, at Zedra's expense, auditors to determine whether there had been an over-provision for tax and related matters in the target company's accounts. The SPA was silent as to the extent of the auditors' work product that Zedra was entitled to see, and did not limit the costs that the auditors could incur.

The SPA also provided that the parties could request the auditors to review their findings and, by way of a dispute resolution mechanism, that the parties were entitled to refer any disputes relating to the auditors' findings to be finally determined by an independent accounting expert.

Pursuant to the SPA mechanism, Zedra requested that the Buyer engage auditors to determine whether further payments were due to Zedra. As such, the Buyer engaged EY – at Zedra's expense – to prepare such a determination. Subsequently, however, the Buyer chose to disclose only limited extracts from EY's report to Zedra. Zedra challenged the Buyer's refusal to disclose EY's complete report and related documents in a Part 8 claim on the grounds that the Buyer was acting as Zedra's agent in engaging EY; and that there was an implied term that Zedra was entitled to see the original version of EY's work product.

The Court's findings – agency

The Court highlighted that the starting point in establishing whether an agency relationship existed between Zedra and the Buyer was to look at the nature of the relationship created by the terms of the SPA. The "main characteristics" of an agency relationship were (i) authority to affect the principal's relationships with third parties, (ii) fiduciary duty, and (iii) control by the principal.

In the context of the present SPA, the Court held that the over-taxation determination provision should not be read as giving the Buyer authority to contract with EY on Zedra's behalf so as to create legal relations between Zedra and EY. There was no need for the provision to be interpreted in that way in order for it to operate effectively. Read

naturally, the provision envisaged the Buyer giving instructions to EY, with the resulting contractual relationship being between the Buyer and EY.

The Court also noted that there was no need to see the Buyer as having the obligations of a fiduciary. Indeed, the fact that the interests of Zedra and the Buyer were adverse (or at the very least that each side had potentially competing interests in respect of the auditors' determination) was a powerful factor militating against the finding of a fiduciary relationship. The SPA mechanism entitling Zedra to request a review the auditors' determination meant that "there was contractual protection" for Zedra's interests; there was "no need artificially to construct a fiduciary relationship".

The Court's findings – implied term

The Court referred to authority² for the proposition that, subject to meeting the requirements of reasonableness, equity, capability of clear expression, and compatibility with the express terms of the contract, a term may be implied into the contract only if it is either:

- i. necessary in the sense of being necessary for the contract to have business efficacy such that the contract lacks commercial or practical coherence without it; or
- ii. sufficiently obvious to go without saying.³

Taking these considerations into account, the Court found that the terms of the further review of the auditors' determination provided for in the SPA clearly envisaged a review in which a party informed the auditors of the circumstances which were said to warrant amendment of the determination. In order to engage effectively in that process a party would need to know the basis

² *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 and *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2.

³ Although necessity and obviousness were alternative grounds for implication, it would be a rare case where one was present without the other.

of the original determination. The Court accepted Zedra's argument that the process could not work effectively, and lacked commercial coherence, if a party had to operate on the basis of only part of the report in which the auditors set out their findings. That was particularly the case if the other party had access to the full report.

The Court was persuaded that both necessity and obviousness strongly supported the implication of a term to the effect that the Buyer was to provide Zedra with a full copy of the auditors' report or other document(s) containing their determination. However, it found that Zedra's information rights extended to the auditors' determination itself but not the supporting material and correspondence between the Buyer and EY.

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