

Insights

DRAFTERS BEWARE! COURT OF APPEAL ON THE SIGNIFICANCE OF EXPRESS TERMS

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SUMMARY

Every so often the Court will reaffirm the primacy of express terms while re-stating the rule that implied terms can only be relied on to the extent they are (i) so obvious as to go without saying, or (ii) necessary to give an agreement business efficacy. The latest is *Contra Holdings Ltd v Bamford* [2023] EWCA Civ 374, handed down by the Court of Appeal last month.

This commentary will come as no surprise to practitioners, and yet it serves as an important reminder that implied terms should not be relied upon as a fall-back where express drafting falls short.

THE FACTS

Contra Holdings Limited (the claimant) had entered into a contract for provision of consultancy services with the defendant, Mark Bamford, in relation to an envisaged sale of a corporate group in 2012 (“**Project**”). The agreement provided for a success fee to Contra on completion of the Project. The sale did not take place and, consequently, the success fee was not paid to Contra.

Contra issued proceedings against Mark Bamford, claiming breach of contract and arguing that pursuant to the agreement, the success fee was payable not only on the sale of the group in question, but also on any other type of restructuring of the same, either as an express or implied term. Alternatively, it submitted that it was an implied term of the contract that Contra would be “made-whole” in respect of the services rendered, irrespective of whether the business was sold.

In response, Mr Bamford applied for the claim to be struck out or, alternatively, for summary judgment to be handed down.

HIGH COURT JUDGMENT

Upon textual analysis of the agreement, the High Court concluded that there could be no doubt that the Project “*refers and refers only*” to the proposed sale of the Group, and not to any other possible transaction.

The court also dealt with the implied terms claimed by Contra (following the test set out in a 2015 case against a well-established banking institution), and decided in both cases that the implied term is neither so obvious that it goes without saying, nor is it necessary to give the contract business efficacy. Consequently, the success fee was not payable to Contra.

COURT OF APPEAL JUDGMENT

Contra appealed the High Court judgment, claiming that the judge adopted an erroneous approach to the interpretation of the agreement and implied terms.

This argument did not fly. Instead, the Court of Appeal described the High Court’s rationale as relying on “*well-established and non-contentious principles*”, referring in particular to the Supreme Court’s decision in *Barton v Gwyn-Jones* [2023] UKSC 3; [2023] 2 WLR 269 where it was held that where parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances.

Accordingly, the appeal was dismissed and the High Court’s judge’s decision re-affirmed. Importantly, the Court of Appeal confirmed that, while interpretation must be carried out against the relevant factual matrix, it is not permissible to construct a meaning from the background that the words of the contract will not legitimately bear.

CONCLUSION

The Court of Appeal’s judgment follows the Supreme Court’s decision in *Barton*. It emphasises the need to ensure that express contractual terms are comprehensive and canvass all potential scenarios in order to ensure protection of your client’s rights. This is because when all is said and done, the court will not come to the aid of wanting contractual terms to cover the parties’ claimed intentions. Its role is solely to interpret the agreement and not to re-write it. That role lies solely with the draftsman/woman.

It is not hard to see why so many cases of this nature come before the Court. While the facts can vary widely, the theme tends to be the same. In complex negotiations, context is everything, and yet it usually won’t be considered in the face of a provision which is clear on its face.

The simplicity of the principles conveyed in judgments such as this belies their true importance. When drafting, it’s essential to consider all of the foreseeable directions in which a transaction might travel and to ensure a client’s intended outcome is provided for in all events.

This article was co-written with Trainee Solicitor Agnieszka Bidzinska

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