Hawkswell | Kilvington

CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Contract Interpretation: Terms Will Not Be Implied Simply Because It May Appear Fair To Do So

The test for implying contractual terms was set out by the Supreme Court in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd. Whilst that case settled what the test is, the application of that test is not always straightforward. The recent case of Robert Bou-Simon v BGC Brokers LP ("BGC") provides a useful example of the difficulties which can be encountered in relation to implied terms.

Background

BGC employed Mr Bou-Simon as a broker with the intention that he would become a partner. As part of their agreement, BGC loaned £336,000 to Mr Bou-Simon which was to be repaid from any partnership distributions which were made to him. If he ceased to be a partner, any unpaid amounts would be written off provided he had served at least four years. A previous draft of the agreement provided that the loan would become immediately due and payable to BGC if Mr Bou-Simon did not receive any partnership units or if he ceased to be partner within four years. However, these terms were deleted from the final agreement. Mr Bou-Simon resigned within four years and BGC claimed the full amount of the loan.

Was there an implied term?

At first instance, it was held that there was an implied term to the effect that the money would have to be repaid immediately if Mr Bou-Simon did not become a partner and left within the four years. However, the Court of Appeal held that judge had implied this term to reflect the merits of the situation as they appeared at trial and had not approached the issue from the perspective of the reasonable reader of the agreement, knowing all its provisions and the surrounding circumstances at the time it was made. The Court of Appeal held:

"*It is not appropriate to apply hindsight and seek to imply a term in a commercial contract merely because it appears to be fair or because one considers that the parties would have agreed it if it had been suggested to them.*"

The correct process was to construe the express terms of the contract and determine what the parties had agreed and then assess whether a term should be implied into the agreement. The Court of Appeal found that reasonable reader would have concluded that the agreement concerned a loan to be made in circumstances in which Mr Bou-Simon became a partner and either served the period of four years or ceased to be director within that time. Further, it found that the reasonable reader would not have considered the implied term either so obvious that it goes without saying or to be necessary for business efficacy as the agreement would lack commercial or practical coherence without it. As such, there was no basis on which to imply a term into the agreement.

The importance of the previous drafts

Mr Bou-Simon's case was that the implied term could not be so obvious as to go without saying if the parties had specifically deleted a similar provision from an earlier draft of their agreement. As a result of its finding in relation to the implied term, the Court of Appeal did not need to consider the relevance, if any, of the terms deleted from previous drafts. However, the judge did not accept that the deleted terms were sufficiently similar to the proposed implied term to justify Mr Bou-Simon's position and nor did she think it was possible to conclude why the parties had omitted the words. She concluded that whilst deletions might be relevant to the construction of a contract in showing what the parties had not agreed, deletions would only be relevant to the process of implication in very rare circumstances. On the other hand, another judge said that he could see force in the suggestion that deleted words may negative the implication of a term in the

form of the deleted word but preferred to leave the issue open to be decided in a case where it was necessary to decide it.

Analysis

Although not setting down any new law, the case shows the nuances involved in implying terms into a contract. In particular, the court stressed the need to construe the express terms of the agreement first and to assess the need for an implied term at the time the contract was made, as opposed to falling into the trap of assessing whether it appears fair with the benefit of hindsight. This is another case which demonstrates the reluctance of the courts to interfere with the bargain that the parties have reached and the high threshold a party will have to overcome to convince the court that it is necessary to imply a term into the contract. Although, it may appear unfair that BGC could not recover the loan, it was accepted by the Court of Appeal that the circumstances could have given rise to a claim in restitution. However, as this was not pleaded, it was not for the court to consider.

We are often asked to look at construction contracts retrospectively in order to seek to determine the meaning or interpretation of a certain provision. This case highlights the robust approach the courts can take to such an exercise.