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INSIGHTS

IMPLIED TERMS: Fairness in hindsight is insufficient

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The Court of Appeal's judgment in *Bou-Simon v BGC Brokers LLP* ***[2018] EWCA Civ 1525*** reaffirms the law on implied terms. The Court also offered some interesting non-binding views on the circumstances in which words deleted from a draft contract may be admissible in determining whether a term should be implied into a contract.

The key points arising from the BGC decision are:

1. implied terms can be considered only after the process of construing the express terms of the contract is complete;

2. the English Courts will not imply a term into a contract simply because it appears, with hindsight, that it would be fair to do so;

3. the question is whether a reasonable person reading the express terms of the contract at the time it was made would consider the implied term so obvious as to go without saying, or to be necessary for business efficacy; and

4. (obiter dicta) words deleted from a previous draft of a contract may be relevant to the process of implication, but only in narrow circumstances.

CASE SUMMARY

Who were the parties?
BGC Brokers LLP ("BGC") is a global inter-dealer brokerage firm serving the financial services and real estate markets. Mr Robert Bou-Simon was a broker who was re-employed by BGC in February 2012. It was intended by both parties that Mr Bou-Simon would become a partner in the firm.

What was the dispute about?
Mr Bou-Simon entered into a loan agreement with BGC on 1 February 2012, prior to commencing his second period of employment. It was understood and, before proceedings commended, assumed that Mr Bou-Simon would become a partner in BGC. However, it turned out that he had not become a partner because the necessary documentation had not been signed.

The loan agreement contained the following two key provisions:-

Clause 1 provided that '*In the event that [Mr Bou-Simon] ceases to be a partner any unpaid amounts will be written off by [BGC] only if [Mr Bou-Simon] served at least the full Initial Period [four years from the 1 February 2012] as defined in [Mr Bou-Simon's] employment contract*'.

Clause 2 provided that the loan would become immediately due and payable if a material impairment of Mr Bou-Simon's creditworthiness occurred.

An earlier draft of clause 2 of the loan agreement contained wording that the loan would also become immediately due and payable if: (a) Mr Bou Simon did not receive any partnership units; or (b) at any time prior to the expiry of the '*Initial Period*', Mr Bou-Simon ceased to be a partner. These provisions were deleted on behalf of Mr Bou-Simon during negotiations and did not appear in the final loan agreement.

On 21 February 2012, Mr Bou-Simon received £336,000 pursuant to the loan agreement. Less than sixteen months later, Mr Bou-Simon resigned from BGC. BGC brought proceedings against Mr Bou-Simon for recovery of the loan on the basis (among other things)that there was an implied term in the loan agreement that '*the Loan would become repayable in full where [Mr Bou-Simon] failed to serve the full term of the Initial Period*.' Mr Bou-Simon contended that there was no such implied term, and, consequently, he was not obliged to repay the loan when he resigned. He argued instead that the loan was a '*golden hello*'.

Counsel for Mr Bou-Simon raised the fact that the parties had deleted provisions similar to the proposed implied term from an earlier draft of the loan agreement. Counsel for BGC argued that the deleted clauses were inadmissible, and in any event did not assist because they did not mention Mr Bou-Simon ceasing employment (as opposed to ceasing to be a partner).

What were the key issues for the Court to decide?

The judge at first instance had concluded that the proposed term should be implied into the loan agreement so that Mr Bou-Simon was required to repay the loan in circumstances where he had ceased to be an employee before the Initial Period had expired. The key issue in the Court of Appeal was whether he was correct to do so.

What was the result?

The Court of Appeal held, in a unanimous decision, that the judge at first instance had erred in his application of the principles laid down in *Marks & Spencer v BNP Paribas Securities* ***[2016] AC 742*** and upheld the appeal.

The judge had erred by not embarking on the process of determining whether to imply a contractual term in the correct order. Rather, he had "*implied a term in order to reflect the merits of the situation as they now appear*" rather than approaching the matter from the perspective of the reasonable reader of the express terms of the loan agreement at the time it was entered into. Consequently, had the first instance judge applied the test set out in *Marks & Spencer* correctly, he would *not* have concluded that the suggested implied term was a term of the loan agreement.

The Court of Appeal emphasised that it is not appropriate to apply hindsight and to imply a term in a commercial contract simply because it appears to be fair or because it seems likely

that the parties would have agreed to it had it been suggested at the time the contract was formed. The starting point should be to construe the express terms of the contract. In the Court of Appeal's view, a reasonable reader would consider that the loan agreement was concerned with a loan to be made in circumstances where Mr Bou-Simon became a partner and served *either* an initial four-year period or ceased to be a partner during that time. It was not within the scope of the loan agreement that Mr Bou-Simon would resign having never attained partnership status. As a result, such a reader would not consider the proposed implied term either to be so obvious that it goes without saying or necessary for business efficacy of the loan agreement.

Though these circumstances may have given rise to a claim in restitution, this had not been pleaded.

The Court of Appeal rejected the implied term without reference to the terms that had been proposed at the drafting stage but deleted. Therefore, it did not need to decide whether or not the deletions could be taken into account. However, Singh LJ's comments on the point indicate support for the idea that the deletion of words from a previous draft of the contract, which are the same as the term seeking to be implied, "*could well have a bearing on the question whether the test for implication of a term into a contract has been met*". In particular, if a term has been proposed but rejected at the drafting stage, it will make it more difficult subsequently to argue successfully that the same term should be implied into a contract.

WHAT CONCLUSIONS CAN BE DRAWN FROM THIS CASE?

Whilst the Court of Appeal decision does not develop the law on implied terms, the case is a reminder of the strict approach that the English Courts will adopt towards the implication of terms into a contract. In particular, a court will not imply a term into a contract simply because it appears, with hindsight, that it would be fair to do so. The true test is as laid down in the Marks & Spencer case – one must first objectively construe the express terms of the contract and consider whether the implication of an implied term is strictly necessary for commercial or practical coherence or so obvious that it goes without saying.

The comments by Singh LJ on the admissibility of deleted terms, though made obiter dicta and so not binding authority, offer an insight into the direction the courts may take on this area of law. If there is subsequent authority in which it is necessary for the point to be addressed in reaching the Court's decision and this approach is followed, deleted words in drafts discussed between the parties during negotiations may become relevant to questions regarding the implication of terms in certain circumstances. In those limited circumstances, the drafting history of the agreement may become important.