

Developments in Contract Law up to January 2021

Good faith

Implied terms of good faith and relational contracts

The facts in *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) concerned a 25-year contract for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant to process household waste. One question which arose was whether the contract was a so-called relational contract which contained an implied obligation of good faith. In addressing this question, Pepperall J referred (at [105]) to the non-exhaustive list of nine factors identified by Fraser J in *Bates v Post Office (No. 3)* [2019] EWHC 606 (QB) and explained (at [106]): ‘While this is a useful approach, it must be kept firmly in mind that these nine factors do not fall to be construed like the words of a statute, rather they are helpful indicia of a relational contract. Indeed, Fraser J no doubt had this very much in mind in his comments at [726]’.

The first factor identified by Fraser J relevant to whether a contract is a relational contract was that there must be no specific express terms in the contract that prevent an implied duty of good faith. To this Pepperall J explained (at [106]):

Further, for my part I would question whether the first factor identified by Fraser J is really a characteristic of a relational contract at all. As the judge rightly identified, an inconsistent express term will be fatal to the argument as to whether there is an implied term of good faith but it is at least arguable that that is not because the existence of such term fundamentally changes the nature of the relationship but rather because it is trite that a term cannot be implied so as to defeat an express term.

On the facts, Pepperall J held (at [107]-[111]) that none of the contract’s express terms did preclude the possibility of an implied term of good faith and also (at [112]) that other factors identified by Fraser J in *Bates* applied to the contract in question. The judge concluded (at [113]) that the contract was ‘a paradigm example of a relational contract in which the law implies a duty of good faith’.

Turning to the question of the *content* of the implied term, on a review of what was said by Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep. 526 and by Leggatt LJ in *Al Nehayan v Kent* [2018] EWHC 333 (Comm), Pepperall J held (at [116]):

116.1 Whether a party has not acted in good faith is an objective test.

116.2 Dishonest conduct will be a breach of the duty of good faith, but dishonesty is not of itself a necessary ingredient of an allegation of breach. Rather the question is whether the conduct would be regarded as ‘commercially unacceptable’ by reasonable and honest people.

116.3 What will be required in any individual case will depend upon the contractual and factual context.

Agreement

Subject to contract

In *Nautica Marine Ltd v Trafigura Trading LLC* [2020] EWHC 1986 (Comm), the court was required to consider the law relating to whether the parties' negotiations had "crossed the finish line" to the point of a binding agreement, in the context of whether the parties had concluded a binding charterparty. The judgment contains detailed analysis of the law relating to the position in "subject" cases, such as "subject to contract" (the judge holding on the facts that there was no contract reached by the parties).

The significance of "subject to contract" was also considered in *Joanne Properties Ltd v Moneything Capital Ltd* [2020] EWCA Civ 1541. That case concerned the question whether the parties had entered into a binding contract of compromise via written communications between their solicitors, where such communications had been stated to be "subject to contract". The Court of Appeal reinforced the significance of the "subject to contract" label. Lewison LJ explained (at [17]) that '[o]nce negotiations have begun "subject to contract", in the ordinary way that condition is carried all the way through the negotiations'; and held that the presence of the label "subject to contract" in the parties' negotiations on the facts meant no binding agreement had been formed. The court reversed the decision of the judge below, with Lewison LJ holding (at [33]):

In my judgment, the judge seriously undervalued the force of the "subject to contract" label on the legal effect of the negotiations. He also failed to separate the two distinct questions (a) whether the parties intended to enter into a legally binding arrangement at all and (b) whether the agreed terms were sufficiently complete to amount to an enforceable contract. Almost all the points that he mentioned went to that second question rather than to the first.

Consideration and variations

The judgment of the Supreme Court of Singapore in *Ma Hongjin v SCP Holdings Pte Ltd* [2020] SGCA 106 provides a detailed analysis of the doctrine of consideration as it applies to the variation (or modification) of contracts. After a review of the authorities, including relevant authorities under English law, the court affirmed the requirement of consideration in the context of contractual variations under the law of Singapore (and also held that there was no consideration in relation to the alleged variation on the facts).

Promissory estoppel

In *Umrish Ltd v Gill* [2020] EWHC 1513 (Ch), the court considered the question whether a promissory estoppel can arise in the absence of a pre-existing legal relationship between the parties. The judge emphasised the need for such a pre-existing relationship and held there was no promissory estoppel on the facts.

The requirement of a pre-existing legal relationship was also assumed, without any obvious doubt as to its correctness, in the judgment of Arnold LJ in *David Joseph v Deloitte Nse LLP* [2020] EWCA Civ 1457 at [32].¹

Contractual interpretation

A summary of the legal principles applicable to the interpretation of contracts was given by Carr LJ (at [30]-[36]) in *Apache North Sea Ltd v Euroil Exploration Ltd* [2020] EWCA Civ 1397 and *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 (at [17]-[20]). For another illustration of the modern approach to interpretation, see *AXA SA v Genworth Financial International Holdings* [2020] EWHC 2024 (Comm).

Rectification

In *Re Webster* [2020] EWHC 2275 (Ch) it was held that rectification was not available in relation to a claim for the rectification of an incorrect tax return.

Implied terms

For analysis of the principles relating to implied terms in contracts, see *Sea Master Shipping Inc v Arab Bank (Switzerland) Ltd* [2020] EWHC 2030 (Comm) at [13]-[14]. On the facts, the judge rejected the contention that there should be any implied terms relating to discharge and delivery of the cargo in question.

Analysis of the approach to implied terms is also contained in the decision of the Court of Appeal in *David Joseph v Deloitte Nse LLP* [2020] EWCA Civ 1457. The facts concerned the power of Deloitte to expel a partner by issuing a Notice of Retirement. Under the terms of the relevant agreement, a partner in receipt of a Notice of Retirement had a right to request that the decision to issue the Notice be reconsidered at a Board meeting. If, following that Board meeting, the notice was not withdrawn, the partner was entitled, by clause 16.2(b), ‘within seven days of the date of such Board meeting’ to require that the Board convene a special meeting of the full partnership to review its decision.

On the facts, a partner, Mr Joseph, had received a Notice of Retirement and requested that the Board reconsider the decision to issue it. He was told that his request would be considered at a Board meeting on 2 October, with the decision of that meeting to be communicated to him by no later than 9 October. On 10 October, having not been informed of the outcome of the meeting, the partner contacted Deloitte, stating that if the initial decision had been upheld, he wished for a partnership meeting to be convened pursuant to clause 16.2(b). Only on 11 October was he informed that the Board had, at the 2 October meeting, upheld its earlier decision. On 12 October, he again requested that a partnership meeting be convened. His request was refused on the basis he had not made the request within seven days of the 2 October Board meeting.

¹ The facts are explained more fully in the context of the discussion of implied terms, below.

The partner asserted that the agreement contained an implied term by which, if (as on the facts) communication of the outcome of the Board meeting had been delayed, the time period for requesting a partnership meeting would be extended to commence seven days from when that communication was read by the partner. The Court of Appeal rejected that contention, with Arnold and Lewison LJ (at [30] and at [45] respectively) emphasising the trite principle that any implied term must not conflict with the express terms of the contract. The members of the Court of Appeal nevertheless expressed their ‘regret’ (Arnold LJ at [38]), ‘sympathy’ (Nugee LJ at [42]), and ‘reluctance’ (Lewison LJ at [43]) in relation to the outcome.

Consumer Rights Act 2015

For consideration of the requirement that contract terms and notices be fair under section 62 of the Consumer Rights Act 2015, see *Weco Projects Aps v Loro Piana* [2020] EWHC 2150 (Comm).

Damages

Loss of chance

For analysis of the so-called *SAAMCO* principle, arising from the decision in *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191 (HL), and the principles relating to damages for the loss of a chance, see *AssetCo plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151.

The law relating to the loss of a chance was also considered in *Recorded Picture Co Ltd v Alfama Films Production* [2020] EWHC 3481 (Ch). On the facts, the judge held that the film producers were not successful in seeking damages representing the loss of a chance to make profits on a collapsed film project, in circumstances where they had never had more than a speculative chance of making the film in question.

Penalty rule

In *27 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, the Supreme Court of New Zealand considered and endorsed (especially at [43]-[58]) the ‘legitimate interest’ approach in *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67, [2016] A.C. 1172. In contrast, in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2020] SGCA 119, the Supreme Court of Singapore declined to follow (at [151]-[152]) the approach in *Makdessi*, instead endorsing that of Lord Dunedin in *Dunlop Pneumatic Tyre Company Ltd v New Garage and Motor Company Ltd* [1915] A.C. 79 (HL).

Privity of contract and third party rights

Transferred loss

For discussion of the transferred loss principle, and an unsuccessful attempt to invoke that principle on the facts, see *Palmali Shipping SA v Litasco SA* [2020] EWHC 2581 (Comm) at [44]-[56] and *Dr Jones Yeovil Ltd v Stepping Stone Group Ltd* [2020] EWHC 2308 (TCC) at [128]-[139] and [209]-[219].

Misrepresentation

For a summary of the principles relating to what amounts to a fraudulent misrepresentation, see *SK Shipping PLC v Capital VLCC 3 Corp* [2020] EWHC 3448 (Comm) at [113]-[117].

Exclusions of liability for misrepresentation

For an example of the approach to section 3 of the Misrepresentation Act 1967 following *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637, see *Fine Care Homes Ltd v National Westminster Bank PLC* [2020] EWHC 3233 (Ch) at [118]-[123]. There, the judge emphasised the distinction – explained in *First Tower* – between non-reliance clauses and clauses which set out the parties’ primary obligations (holding, on the facts, that the clauses in question fell within the latter category and were thus outside the scope of section 3).

Contractual estoppel was also considered in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) in a judgment of Cockerill J (from at [166]) which contains interesting observations on the relationship between *First Tower* and the earlier decision of the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 C.L.C. 705.

Illegality

The Supreme Court in *Stoffel & Co v Grondona* [2020] UKSC 42 considered, in the context of a mortgage fraud, the approach to illegality following *Patel v Mirza* [2016] UKSC42, [2017] A.C. 467. The facts concerned a claim for the negligent breach of a firm of conveyancing solicitors’ retainer, which was defended on the basis that the relevant transaction had been a fraudulent one. The judgment of the Supreme Court (from at [22]) contains detailed analysis of the approach to the issue of illegality, with the court concluding that the defence did not bar the claim on the facts.

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