Express Terms: mind the gap!

SUMMARY

Where contracting parties had agreed expressly that A would pay B a specific sum if B met a target, no alternative sum was payable under the contract as B had missed the target. This was the case, even though B had come close to meeting the target and/or rendered valuable services to A.

This was the conclusion in two recent contract cases. They both concerned express terms that a seller would pay an intermediary a fee if a sale, or sale at a specified price, took place. These terms were, however, silent as to whether payment was due in other scenarios. Nevertheless, in each case, the court held that the express term was a 'complete statement' as to payment. The target not having been met in either case, the claimant in both cases was therefore not entitled to payment.

However, the two decisions will not necessarily be dispositive in all cases of this kind. Both arose in the context of commission contracts, and other cases will turn on their own facts. Moreover, there is scope for judicial disagreement in such cases, as demonstrated by dissenting judgments discussed below.

Nevertheless, both judgments are a salutary reminder of the importance of completeness in contractual drafting. Parties should not rely on the court implying terms to fill gaps in express terms as in certain circumstances the very existence of gaps can have the effect of excluding implied terms. Payment terms should therefore specify the amount due in each relevant circumstance.

DEEPER ANALYSIS

Express and implied terms – the basics

Express terms

The terms expressly stated by the parties can be written or oral (although the latter brings with it evidentiary problems if the contract comes before the courts for determination of exactly what the parties have agreed). Cases which turn on the express terms of a contract involve the courts interpreting (or 'construing') the terms to ascertain their meaning. There is an established body of case law on contractual interpretation which provides broad principles for ascertaining the parties' intention using an objective test, i.e. viewed through the eyes of a 'reasonable person': the parties' subjective intentions are irrelevant.

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Implied terms
There are several grounds on which the courts imply terms into contracts. These include, for the purposes of this article:

- Terms implied by fact to reflect the parties' intentions (see next paragraph for more detail);

- Terms implied by law which operate as 'general default rules'. These fall into two types:

  — Terms implied under the common law (sometimes referred to as 'characteristic terms') as a necessary part of a particular type of contract (e.g. under commission/introduction contracts, employment contracts, landlord and tenant contracts etc); and

  — Terms implied by statute (e.g. under the Supply of Goods and Services Act 1982) in relation to certain contracts (e.g. contracts for the supply of services). Standardised terms are implied into such contracts to reflect the commercial understanding that, for example, a supplier of services will be a paid a 'reasonable charge' if no consideration is fixed by the contract.

Terms implied by fact
Terms implied by fact are used, when necessary, as 'ad hoc gap-fillers' in the contract – not to make it fairer or more reasonable, but to reflect the parties' unexpressed intentions, as ascertained by the court. For this purpose, the court again adopts an objective test (what would a 'reasonable person' understand the parties' intentions to have been, given the background knowledge available to the parties when they entered into the contract?).

Having ascertained the parties' intentions, the courts will only imply a term either because it is needed to give business efficacy to the contract – without it, the contract would lack commercial coherence – or because it satisfies the so-called 'officious bystander' test according to which the term to be implied is so obvious to anyone that 'it goes without saying'.

Excluding implied terms
Where a term is implied in fact, it is necessary to overcome the assumption that the contract's silence on the point means nothing is to happen. By contrast, where a term is implied in law, it is automatically part of the contract unless it can be shown that it has been expressly excluded. The significance of contractual silence therefore differs greatly depending on the type of implied term.

Barton v Morris

Facts
The claimant, Mr Barton ('Barton'), a property dealer and developer, entered into an oral contract with Foxpace Ltd ('Foxpace') for the introduction of a buyer for a property ('the property') owned by Foxpace. At first instance, the trial judge established that the only express term of that oral contract was that if Barton introduced a buyer who would complete a purchase of the property for £6.5m or more, then Foxpace would pay Barton £1.2m. This represented the deposits and other expenses which Barton had already personally incurred in abortive attempts to buy the property himself. There was no discussion as to what if anything Barton would be paid if the property were sold for less than £6.5m. In the event, Barton introduced a buyer, Western (UK) Acton Ltd who originally agreed to buy the property for £6.5m, however the purchase price was ultimately reduced to £6m to reflect the fact that the property was located in an area likely to be affected by the high-speed rail link, HS2. As there was no express term in relation to a successful sale under £6.5m, Foxpace refused to pay Barton anything.

Earlier decisions
At first instance, it was held that Barton was not entitled to any payment for the service he had provided to Foxpace as this was not envisaged by the express term. The Court of Appeal held that Barton was entitled to a market value of £435k as restitution for the service he had rendered since Foxpace had been unjustly enriched at Barton's expense. Foxpace appealed arguing that it had no such payment obligation, whether by way of implied term or unjust enrichment (the latter is not discussed in this article).

Supreme Court decision
The Supreme Court, by a narrow majority of 3:2, decided that it was not necessary to imply a term (whether in fact or in law) into the contract that Barton would be paid a reasonable fee if the sale was for less than £6.5m.

On the 'officious bystander' test, the majority (Lady Rose giving the leading judgment), felt it was not possible to say that there was any particular fee for a sale under £6.5m to which the parties would have agreed, or which was so obvious that it 'goes without saying'. To hold that Foxpace was contractually bound to pay Barton an unspecified sum if the property sold for less than £6.5m would contradict the express terms of the contract, as identified by the trial judge, namely that Barton was *only* entitled to be paid 'if the event that they agreed would be the trigger for that payment occurred'.

Applying the business efficacy test to the contract, the Supreme Court did not accept the Court of Appeal's finding that if the agreement was limited to the express term identified by the judge, this created a 'bizarre' situation in which only a small reduction in the purchase

price would be enough to deprive Barton of his fee altogether. There was nothing uncommercial or 'bizarre' about a party agreeing to receive a higher payment than usual if a condition is fulfilled while taking the risk that he will receive nothing if that condition is not fulfilled.

No statutorily implied term
The court dismissed Barton's argument that s15 of the Supply of Goods and Services Act 1982 ('SGSA') applied so as to imply into the contract a term that he be paid a reasonable fee for his services. The contract dealt expressly with consideration for the introduction and so there was no need to imply a term under s15.

No implied term at common law – the estate agency cases
The court also rejected Barton's reliance on a series of commission cases dealing with estate agents' fees, in which the courts have implied a term that a reasonable fee will be paid to an estate agent for an introduction leading to a successful sale. This was mainly because Barton was not an estate agent.

The dissenting judgments
Both Lords Leggatt and Burrows considered there was a term implied by law that Barton was entitled to a reasonable remuneration if he successfully introduced a buyer to Foxpace.

Lord Leggatt relied on s15 SGSA which implies a term that a party providing a valuable service is entitled to reasonable remuneration for it, in accordance with 'ordinary commercial expectation', unless it can be shown that the parties expressly agreed otherwise. Even if s15 did not apply, such a term as to reasonable remuneration could also be implied under the common law as being necessary to the type of contract in question – in this case a commission, or introduction, contract. It did not matter that Mr Barton was not an estate agent: it was sufficient that he was introducing a prospective purchaser to Foxpace with a view to being paid for doing so.

Lord Leggatt considered that this implied term was not excluded or modified by the express term as to the obligation to pay £1.2 million if the property was sold for £6.5 million or more. While it was reasonable to infer that the parties did not intend that Mr Barton should receive £1.2 million whatever the sale price (since otherwise their express reference to £6.5 million would serve no purpose), it was not a reasonable inference that Mr Barton should receive nothing if the sale price was less than £6.5 million. An obligation for Foxpace to pay Barton £435,000, as assessed by the judge, would still leave Foxpace much better off than if the property had sold at £6.5m, 'but it averts the injustice of disregarding the basic norm of commerce and contract law that a party who requests and enjoys the benefit of a valuable commercial service must pay for it'.

For much the same reasons, Lord Burrows considered that a term for reasonable remuneration could be implied in law under the estate agency cases and that the express term did not exclude the implied term. The parties had never contemplated what should happen if the price fell below £6.5m, but silence on this point meant that the default rule as to reasonable remuneration applied: it was not ousted by the express terms of the contract.

Contra Holdings v Bamford

Facts
Contra Holdings Limited ('Contra') entered into a contract for the provision of consultancy services ('the contract') with Mark Bamford ('Bamford'), in relation to an envisaged sale of the JCB Group ('the Project'). The agreement provided for a success fee ('the success fee') to Contra on 'completion of [the Project]'. However, the sale did not take place and, consequently, the success fee was not paid to Contra.

Contra sued Bamford for breach of contract, arguing that the success fee was payable not only on the sale of the JCB Group, but also on any other type of restructuring of the same, either as an express or implied term ('the first implied term'). Alternatively, it submitted that it was an implied term ('the second implied term') that Contra would be 'made whole' in respect of the services rendered, irrespective of whether the business was sold, in which case it could charge an 'appropriate rate' for the work actually performed.

High Court decision
At first instance, the High Court dismissed Contra's claim on a summary basis: the express terms of the contract referred only to the proposed sale of the JCB Group, meaning that the success fee was only due on its sale. The first implied term was neither necessary for the operation of the contract nor so obvious that it 'went without saying'. The court also rejected the second implied term: if the trigger for the success fee (the sale of the JCB Group) did not happen, there was no basis for implying an entitlement to payment for services performed. Contra appealed, broadly, on the basis that the trial judge's approach to the interpretation of the agreement and implied terms had been incorrect.

Court of Appeal decision
The court unanimously upheld the first instance decision. It referred to the majority decision in *Barton*, and in particular the reasoning that the express term between the parties was a 'complete statement of the circumstances in which [Barton] was promised some reward under the agreement' such that there was no room for implying alternative terms providing for a lesser reward on a different basis.

In relation to the express terms, the court found (and Contra agreed) that, based purely on the text of the contract, reference to the Project could only mean the sale of the JCB Group, and Contra would only be entitled to the success fee in the event of that sale. Contra's argument that the success fee was due not only on the sale of the JCB Group but also on some other form of restructuring was rejected by the court: there was nothing in the 'factual matrix which [detracted] from the clear meaning of the language' of the contract. Contra also argued that the success fee was part payment for services already provided at the time of the contract, as well as payment for future services regarding any separation of interests/restructuring, so that it was simply a deferred payment clause. The court also rejected this argument as it was incompatible with the clear words of the contract. It would also be commercially absurd for Contra to have an 'absolute, albeit deferred', entitlement to the success fee, in circumstances where that fee was significantly higher than the value of the services provided. Conversely, it was not commercially absurd for such a significant fee to be paid upon an uncertain event, namely the sale of the JCB Group.

In relation to the first and second implied terms pleaded by Contra, the Court held that the trial judge's conclusion on implied terms was 'unimpeachable': the implied terms proposed by Contra were not 'sustainable either as a matter of obviousness or business efficacy'.

COMMENT

These cases serve as an important reminder that implied terms should not be relied on as a back-up where the drafting of express provisions is inadequate (however unreasonable/unfair the contract might seem), if the court concludes this is what the parties intended. Significantly, the majority in *Barton* considered it immaterial whether in their negotiations the parties said that payment was due 'if and only if' the condition was met. Therefore, when at the drafting stage, ensure that express provisions as to payment are a 'complete statement': i.e. that they consider all possibilities in terms of how a transaction might pan out and make it clear when payment is – and is not – payable. In the words of the Supreme Court in *Barton*: 'when 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'.

The case citations are as follows:

- *Barton & others v Morris & another* [2023] UKSC 3
- *Contra Holdings Ltd v Mark Joseph Cyril Bamford* [2023] EWCA Civ 374

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