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No implied limit on a contractual right to terminate co-production agreement (Portobello Productions v SunnyMarch)

This analysis was first published on Lexis®PSL on 3 January 2023 and can be found here (subscription required):

TMT analysis: In this case, the court granted summary judgment against an argument that a contractual right to terminate a co-production agreement was subject to an implied term not to exercise the right in an arbitrary, capricious or irrational manner. The case contains analysis of the bases on which such a term may be implied, and when it is appropriate to isolate a particular aspect of a claim or defence for summary judgment. Written by Narinder Jhittay, barrister at Maitland Chambers.

Portobello Productions Ltd v SunnyMarch Ltd [2022] EWHC 3014 (Ch)

What are the practical implications of this case?

For practitioners advising on the drafting and interpretation of contracts, this case reinforces that where a provision on its face confers an absolute right to terminate there is usually no room to imply a term that it will not be exercised in an arbitrary, capricious or irrational manner. Here such a term did not clear the hurdles of necessity or obviousness under the general principles governing implication of terms, and the court confirmed that the *Socimer*/*Braganza* principles do not apply to an absolute right.

For practitioners concerned with litigation strategy and case management, the case shows the court is amenable to resolving points of this nature summarily. The court found it could determine whether the provision was susceptible to the implication of such a term without trespassing on any developing areas of law or issues of fact. It was also satisfied that this aspect of the proceedings (advanced as part of an alternative defence) could properly be isolated for summary judgment–highlighting that it would be concerned if points about the scope of the court's jurisdiction under CPR 24.2 were regularly argued in an attempt to prevent the exercise of this salutary case management power.

What was the background?

The claimant (a film production company) and defendant (a vehicle of Adam Ackland and Benedict Cumberbatch) had entered into a co-production agreement to create a film. Clause 11.3 provided that '[the claimant] may forthwith terminate the Agreement if [Mr Cumberbatch] and [Mr Ackland] ceased to have control of [the defendant] or [the defendant's holding company]' (the control condition) 'or if either of their services are no longer exclusively available to either of those companies' (the exclusivity condition).

The claimant served two notices under clause 11.3 and brought a claim seeking declarations that it had validly terminated the agreement. The defendant's main defence was that neither condition was met as a matter of construction. In the alternative, it pleaded that clause 11.3 granted the claimant a discretion which was subject to an implied term that it would be exercised rationally and consistently with the parties' reasonable expectations (and contended that the notices did not comply with that term).

The claimant applied for summary judgment under CPR 24.2 (alternatively, strike out under CPR 3.4(2)(a)) in relation to the defendant's contention that clause 11.3 was subject to an implied term.

What did the court decide?

Jurisdiction

The court decided the matter was appropriate for summary judgment. It rejected an argument that the application did not properly concern an 'issue' of the kind referred to in Part 24 (as the defendant's pleading of an implied term could properly be analysed as both a severable part of the proceedings and a component of a single claim); and held that in any event the application gave rise to a point of law or construction that was proper to determine summarily.

Implied term

The court held that clause 11.3 was not subject to the implied term advanced by the defendant.

Applying the general principles in *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72, there was nothing in the agreement or its context that made such a term necessary to give the agreement business efficacy or so obvious it went without saying. Further, it was noted that a term premised on parties' (undefined) reasonable expectations would give rise to practical difficulties.

Clause 11.3 was not susceptible to the implication of such a term under the *Socimer International Bank Ltd v Standard London Ltd* [2008] EWCA Civ 116 and *Braganza v BP Shipping Ltd* [2015] UKSC 17 line of authority–since the provision conferred a unilateral right of termination, not a power to make an assessment or choose from a range of options taking into account both parties' interests.

It was not necessary to consider whether the contract was 'relational' and consequently subject to a term as to good faith (so the court did not go on to consider cases such as *Yam Sen Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB)). The defendant had not expressly pleaded a duty of good faith (something a claimant should not be left to surmise); and in any event such a provision could only fill a gap, not remove a right to terminate.

Case details

- Court: Chancery Division
- Judge: Deputy Master Marsh
- Date of judgment: 7 November 2022

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