Judgments

Bou-Simon v BGC Brokers LP

[2018] EWCA Civ 1525

Court of Appeal, Civil Division

Hickinbottom, Singh and Asplin LJJ

5 July 2018

Judgment

Luke Pearce and Mark Tushingham (instructed by **Woodfords Solicitors LLP)** for the **Appellant**

Schona Jolly QC and **Rachel Barrett** (instructed by in-house solicitors) for the **Respondent**

Hearing date: 14 June 2018

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Approved Judgment

Lady Justice Asplin:

1. The question on this appeal is whether HHJ Curran QC, sitting as a judge of the High Court, was right to imply a term into an agreement dated 21 December 2011 which was made between the Appellant, Mr Bou-Simon, and BGC Brokers LP ("BGC") (the "Agreement") and as a result by an order sealed on 30 May 2017, to give judgment in favour of BGC in the sum of £401,361.19 being £336,000 plus interest. Mr Pearce on behalf of Mr Bou-Simon contends that although the Judge set out the right test for the implication of contractual terms in his judgment of 10 February 2017, he did not apply it correctly and the term requiring monies paid to Mr Bou-Simon to be repaid where Mr Bou-Simon had failed to remain in BGC's employment for four years should not have been implied.

2. I take the essential facts from the judgment. BGC is an inter-dealer brokerage firm which specialises in facilitating transactions involving financial instruments such as interest and currency swaps. Mr Bou-Simon was employed by BGC as a broker from 1 February 2012. By an agreement dated 1 October 2012, his employment was transferred to BGC Services (Holdings) LLP. He reigned on 3 June 2013. He had previously worked for BGC from 2000 until 2005. During that period, HMRC had investigated BGC's bonus scheme and Mr Bou-Simon had fallen within the scope of the investigations. As a result, he had become very sensitive to tax issues. In any event, after negotiations in the autumn of 2011, Mr Bou-Simon signed the Agreement on 8 December 2011. It had been prepared by and revised by professional legal advisers on both sides. On the same date, Mr Bou-Simon signed an employment contract and a "side letter" concerning the grant of partnership units in BGC Holdings LP (the "Side Letter"). During the negotiations which led to the execution of the Agreement certain provisions were deleted on Mr Bou-Simon's behalf from a draft of the Agreement and it is said that those deletions are relevant to the process of the implication of terms. As it makes more sense to consider them in the light of the finalised wording of the Agreement itself, I will return to the deletions and their relevance below.

3. As I have already mentioned, Mr Bou-Simon commenced his second period of employment with BGC on 1 February 2012. It was intended by all that he would become a partner in BGC Holdings LP and it was acknowledged in the Side Letter that he was eligible to receive a grant of "equity interests" in BGC Holdings LP, known as "REUs" which were subject to the terms and conditions of the Partnership Agreement, as defined. In fact, prior to the commencement of the proceedings it was assumed that Mr Bou-Simon had become a partner, although it seems that the necessary documentation was never signed and he did not. Nevertheless, a sum of £336,000 was paid to Mr Bou-Simon on 21 February 2012 purportedly under the terms of the Agreement.

4. It was BGC's case that the £336,000 paid to Mr Bou-Simon pursuant to the Agreement was a loan and that if he left employment within four years it became repayable in full with interest. Mr Bou-Simon's resignation was within the four year period and therefore, it was alleged that the outstanding sum plus interest was due. At trial, BGC contended that the money was due either as a result of an express term of the Agreement or pursuant to a term which should be implied to that effect. The implied term as pleaded was that "the Loan [£336,000] would become repayable in full where the Maker [Mr Bou-Simon] failed to serve the full term of the Initial Period" (the "Implied Term"). The claim in relation to an express term was dismissed by the judge and there is no appeal in that regard.

5. Mr Bou-Simon contended that the payment was a "golden hello" and was never intended to be repaid. That was also rejected by the judge and his finding at [51] of the judgment that on the balance of probabilities it was known to Mr Bou-Simon before any negotiations began that golden hellos had not been known in the business for over ten years is not appealed. Belatedly, and for the first time at the commencement of the trial, it was also alleged that the monies were never due and payable to Mr Bou-Simon under the Agreement at all and therefore, were not repayable because the sum was only payable to him if he became a partner in BGC Holdings LP and was only repayable if he ceased to be so within the four year period and that did not occur. That was also rejected by the judge on the basis that both parties had proceeded on the basis that the £336,000 was paid in accordance with the Agreement which they regarded as binding.

The Agreement and deletions from a previous draft

6. The relevant terms of the Agreement are in the following form:

"LOAN AGREEMENT AND PROMISSORY NOTE

This agreement is between BGC Brokers L.P. . . . . ("the Lender") and yourself, Robert Bou-Simon (the "Maker"). The Maker hereby agrees with the Lender that Lender will lend Maker such principal sum in USD that is equal to GBP 336,000 as converted from GBP to USD using such currency exchange rates and terms as the Lender may reasonably determine in its sole and absolute discretion (the "Loan"), pursuant to the terms of this Agreement.

The Loan is payable by the Lender within thirty (30) days of the Maker becoming a partner in the Partnership (as defined below) or within thirty (30) days after the parties' execution of this Agreement whichever shall be the later, subject to the terms set out below.

. . .

1. Repayment of the Loan

The Maker agrees that he will repay the Loan from the net partnership distributions on any of Maker's partnership units from BGC Holdings, LP (the "Partnership"). These repayments will continue until the Loan is repaid in full. In the event that Maker ceases to be a partner any unpaid amounts will be written off by the Lender only if the Maker served at least the full Initial Period as defined in the Maker's employment contract with the Lender dated [21 December 2012] (the "Contract"). Maker hereby assigns all Partnership distributions to Lender so long as this Loan is outstanding, represents and warrants that he has not otherwise assigned them, and promises not to assign them during the term of this Loan Agreement and Promissory Note. Maker may prepay this Loan Agreement and Promissory Note at any time.

2. Circumstances causing the Loan to become immediately repayable in its entirety, on demand, to the Lender

Notwithstanding anything set out above the Loan shall become immediately due and payable to the Lender if at any time that a material impairment of Maker's creditworthiness occurs, such as Maker's becoming insolvent, that customarily permits lenders to accelerate payment.

3. Interest

Maker will pay interest on all sums due under this note at 3% per annum or such greater rate as applicable tax law would impute to this loan and note if that rate is not charged hereon."

The phrase "Initial Period" which appears in clause 1 of the Agreement is defined at clause 1(b) of the employment contract, as an initial period of four years from the Commencement Date which in the circumstances which occurred, was 1 February 2012.

7. The Agreement also contained some unnumbered provisions which where relevant,

provided as follows:

"THE PARTIES TO THIS AGREEMENT CONTEMPLATE THAT THERE MAY BE OTHER AGREEMENTS ENTERED INTO BETWEEN MAKER AND LENDER . . . This Agreement is independent of and not integrated with any such other agreement."

8. As I have already mentioned, a previous draft of the Agreement had contained terms which were deleted as a result of negotiation. The deletions were made on Mr Bou-Simon's behalf and were accepted on behalf of BGC. The earlier draft form of clause 2 of the Agreement had read as follows:

"2. Circumstances causing the Loan to become immediately repayable in its entirety, on demand, to the Lender

Notwithstanding anything set out above the Loan shall become immediately due and payable to the Lender on the occurrence of any of the following events:-

(a) if you do not receive any Partnership Units;

(b) if at any time prior to the expiry of the Initial Period, you cease to be a partner or

(c) at any time that a material impairment of Maker's creditworthiness occurs, such as Maker's becoming insolvent, that customarily permits lenders to accelerate payment."

As is immediately apparent, clause 2(a) and (b) did not appear in the Agreement in its executed form.

The relevant legal test

9. As I have already mentioned, the appeal is on the grounds that although the judge identified the correct test for the implication of contractual terms, to be found in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, he did not apply it properly. There is no dispute as to the test itself or the type of contractual implied term with which this case is concerned. It is a term to be implied into the Agreement "in the light of the express terms, commercial common sense, and the facts known to both the parties at the time the contact was made" as described by Lord Neuberger PSC in the *Marks & Spencer* case at [14]. Having begun the consideration of the many judicial observations as to the nature of the requirements which must be satisfied before a term can be implied in a detailed commercial contract, Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed, went on in the following terms:

"19. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, . . . Sir Thomas Bingham MR . . . went on to say this at p 482:
'The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term

which will reflect the merits of the situation as they then appear. Tempting, but wrong. . . . [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred . . . .

20. Bingham MR's approach in the *Philips* case was consistent with his reasoning as Bingham LJ in the earlier case *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep 37, 42 where he rejected the argument that a warranty, to the effect that the port declared was prospectively safe, could be implied into a voyage charterparty. His reasons for rejecting the implication were “because the omission of an express warranty may well have been deliberate, because such an implied term is not necessary for the business efficacy of the charter and because such an implied term would at best lie uneasily beside the express terms of the charter.”

21. In my judgment, the judicial observations so far considered represent a clear, consistent and principled approach. It could be dangerous to reformulate the principles, but I would add six comments on the summary given by Lord Simon in *BP Refinery* case 180 CLR 266, 283 as extended by Sir Thomas Bingham in the *Philips* case [1995] EMLR 472 and exemplified in *The APJ Priti* [1987] 2Lloyd's Rep 37. First, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459, Lord Steyn rightly observed that the implication of a term was 'not critically dependent on proof of an actual intention of the parties' when negotiating the contract. If one approaches the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time at which they were contracting. Secondly, a term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However, and thirdly, it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything: if a term satisfies the other requirements, it is hard to think that it would not be reasonable and equitable. Fourthly, as Lord Hoffmann I think suggested in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, para 27, although Lord Simon's requirements are otherwise cumulative, I would accept that business necessity and obviousness, his second and third requirements, can be alternatives in the sense that only one of them needs to be satisfied, although I suspect that in practice it would be a rare case where only one of those two requirements would be satisfied. Fifthly, if one approaches the issue by reference to the officious bystander, it is 'vital to formulate the question to be posed by [him] with the utmost care,' to quote from Lewison, *The Interpretation of Contracts* 5th ed (2011), para 6.09. Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of 'absolute necessity,' not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.”

. . .

23. First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would

understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in *Equitable Life Assurance Society v Hyman* [2002] I AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "The legal test for the implication of … a term is … strict necessity", which he described as a "stringent test".)"

10. Having made clear at [26] that despite Lord Hoffmann's analysis in the *Belize Telecom* case, construing the words used in a contract and implying additional words are different processes governed by different rules, Lord Neuberger went on at [29] as follows:

"29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips* at p 481:

"The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.'

At [39] and [40] Lord Neuberger went on to consider the express terms of the leases in question in that case and stated at [40] that the relevant express clauses: " . . . showed how carefully and fully the parties considered and identified their rights against each other in relation to clause 8 of the lease." He concluded that:

". . . There is force in the argument that these three provisions show that the parties had directed their minds to the specific question of what payments were to be made between them in connection with clause 8, and in particular what sums were to be paid if the right to break either as implemented or was not implemented, and that this renders it inappropriate for the court to step in and fill in what is no more than an arguable lacuna."

The Judge's reasoning

11. Having set out the test for the implication of terms, the judge reasoned as follows:

89. Any notional reasonable person would have regarded the contract as an agreement for the making of a repayable loan which would be forgiven only on completion of the full four years of the initial term of engagement, but which, if the initial period was not completed in the circumstances which actually occurred, was repayable in full. (*Pro rata* reductions were never agreed by the claimant firm or incorporated into the Loan Agreement, and the pleaded defence on that point was abandoned.)

90. The implication of the term is not a matter of simple fairness, in my view, although a term for repayment of the loan in the circumstances which transpired is entirely fair, and no point of substance was made to the contrary. Without repayment, the result is demonstrably unfair to the claimant firm.

91. The Defendant relies upon the deleted terms as evidence that it would not have been "obvious" that he would have agreed to such repayment had the question of termination in those circumstances been raised. As to that point, I have already considered the possibility that tax reasons were behind the deletions, but, given the commercial purpose of the loan, business necessity or efficacy would have demanded the inclusion of such a term. Only that requirement needs to be satisfied.

92. Without the implied term, the contract would lack commercial or practical coherence, as the claimant firm would otherwise be parting with the gross sum of almost three-quarters of a million pounds in circumstances in which the Defendant might cease employment without having made any significant contribution to its business at all. As the claimant firm puts it, without such an implied term there would be no way of compelling the Defendant to return money to the Claimant which the parties did not intend him to keep, and the Loan Agreement would lack commercial or practical coherence, as the Defendant would be able to pocket the money and leave as soon as he pleased after joining the Claimant firm. Neither of the points raised on behalf of the Defendant in answer,

(1) that there is nothing commercially absurd or incoherent about an agreement which provides for a loan to be repaid out of one source only (namely partnership distributions);

nor

(2) that there is nothing absurd about an agreement to pay an employee a "golden hello";

deals with this fundamental point.

93. An officious bystander would have had little difficulty in formulating a simple question –

"*What if the loan is made and the money received, but the Defendant never becomes a partner and he leaves only a week, a month, or a year after commencement?*"

He would in my view have received the same answer from each party (given perhaps with different degrees of enthusiasm):

"*Well, then, the money must be repaid on leaving*."

94. The submission that the implication of such a term would impermissibly contradict the agreed express circumstances for immediate repayment in Clause 2 does not answer the point that Clause 2 is neither expressed to be exhaustive, nor to be read as stipulating the only circumstances under which the Loan will become immediately repayable. The clause may not be drafted with consummate skill, but it begins with the words "*[n]otwithstanding anything set*

out above..." which, the claimant firm contends, suggests other circumstances giving rise to immediate repayment. Moreover, Clause 2 follows Clause 1, which is predicated upon partnership and contains the primary, if not fundamental, provision that an outstanding balance of the Loan will only be forgiven where the Defendant has served out the Initial Period. The point which is made, and which I accept, is that that is consistent with an immediate repayment requirement where the debt forgiveness exception in Clause 1 is not satisfied.

95. A submission is also made on behalf of the Defendant that it would not be reasonable and equitable to imply the suggested term, as it would "fundamentally alter the nature and effect of the Agreement as set out in the agreed document. ... nor would it be reasonable and equitable to imply a term which is contrary to the suggested term when the parties deliberately agreed to delete a very similar one from the Agreement." I do not accept this submission. The parties never addressed the circumstances which in fact occurred, and (no doubt as a consequence) no provision actually included in the Loan Agreement may be regarded as embracing it. Taking the words of Lord Bingham in the *Philips* case, the court in such circumstances cannot follow its
"... usual role in contractual interpretation ... by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, *ex hypothesi*, the parties themselves have made no provision."
Lord Bingham acknowledged that it was because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power. Those constraints are set out in the six tests referred to above."

Discussion and Conclusion

12. It seems to me that the judge succumbed to the temptation described by Bingham MR in the *Philips* case, referred to in *Marks & Spencer* at [20] and therefore, fell foul of the first proviso to what Lord Neuberger described as a "notion" at [23]. The judge implied a term in order to reflect the merits of the situation as they now appear. He did not approach the matter from the perspective of the reasonable reader of the Agreement, knowing all its provisions and the surrounding circumstances at the time the Agreement was made. It is not appropriate to apply hindsight and to 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. Those are necessary but not sufficient grounds for the implication of a term: see *Marks & Spencer* per Lord Neuberger at [21].

13. Furthermore, in my view, the judge began the task of determining whether a term should be implied from the wrong starting point. As Lord Neuberger pointed out at [28] of his judgment in the *Marks & Spencer* case, it is only after the process of construing the express words of a contract is complete that the issue of an implied term falls to be considered. Until one has determined what the parties have expressly agreed, it is difficult to decide whether a term should be implied and if so, what the term should be. The judge concluded at [89] of his judgment that: ". . . any notional reasonable person would have regarded the contract as an agreement for the making of a repayable loan which would be forgiven only on completion of the full four years of the initial term of engagement, by which, if the initial period was not completed in the circumstances which actually occurred, was repayable in full . . ." It seems to me that in doing so, he construed the Agreement in order to fit the Implied Term rather than begin with the express terms themselves.

14. The Agreement was drafted as a loan, the monies being payable within thirty days of the execution of the Agreement or Mr Bou-Simon becoming a partner, whichever was the later. It was to be paid off from net partnership distributions and any outstanding amount was to be written off only if the four year Initial Period had been served. The partnership distributions were to be assigned to BGC as long as the monies were outstanding. It bore, therefore, many of the hallmarks of a limited recourse loan. The monies were to become immediately repayable, however, if there was a material impairment in Mr Bou-Simon's creditworthiness in a way which satisfied clause 2 of the Agreement. Taking all of those matters into account, together with the surrounding circumstances including the fact that Mr Bou-Simon signed his employment contract and the Side Letter on the same day (but in the light of the fact that the Agreement was expressly stated to be independent of any other agreements reached between the parties) and that it was intended that he become a partner in BGC Holdings LP, it seems to me that the reasonable reader would consider that the Agreement was concerned with a loan to be made in the circumstances in which Mr Bou-Simon became a partner and either served the initial period of four years or ceased to be a partner within that time.

15. Such a conclusion is not wholly inconsistent with the judge's finding about the commercial purpose of the Agreement. I agree with him that the purpose included securing Mr Bou-Simon's services for the four year period, and that as the judge put it at [51] of the judgment “a condition involving retention was bound to be involved” and at [52], that “the balance of shared commitment and risk was clear.” However, it was Mr Bou-Simon's services as a partner with which the Agreement was concerned. Such an interpretation is also not inconsistent with the judge's rejection of the argument that the monies were never payable to Mr Bou-Simon and therefore, he could not be liable to repay them under the Agreement. At [9] – [15] of his judgment, the judge was addressing a different point which was whether it could be argued that in the circumstances that occurred, the £336,000 was not repayable “pursuant” to the Agreement at all. He was not seeking to interpret the express terms.

16. It follows, therefore, that I reject Ms Jolly's characterisation of the Agreement as “golden handcuffs” to keep Mr Bou-Simon working at the BGC swaps desk for four years whether as a partner or merely an employee. In this regard, she highlighted the third sentence of clause 1 and the use of the phrase “Initial Period” which is defined by reference to Mr Bou-Simon's employment contract. In my view, such a limited cross reference to the employment contract is much too slim a foundation upon which to base a construction of clause 1 which would lead the reasonable reader to construe the Agreement as a whole in such a way that it was of no relevance whether Mr Bou-Simon was a partner or merely an employee at the time he left and as a result to go on to conclude that in order to give the Agreement business efficacy and commercial coherence it is necessary to interpolate the Implied Term. In any event, as I have already mentioned, it is an express term of the Agreement that it is independent and not to be “integrated” with any other agreement between BGC and Mr Bou-Simon.

17. It also follows that I reject Ms Jolly's more general point as to the construction of clause 1. As Lord Justice Hickinbottom pointed out in the course of argument, Ms Jolly's interpretation requires one to conclude that the opening phrase of the third sentence of clause 1, “In the event that Maker ceases to be a partner”, is entirely otiose and to concentrate solely on the remainder of the sentence. That cannot be right. It is necessary to construe the sentence and the clause as a whole in the context of the entirety of the Agreement. The Agreement is about a loan to be made to a partner.

18. In my view, therefore, the reasonable reader, taking into account all of the express terms of the Agreement and the surrounding circumstances at the time it was executed and applying commercial common sense, would not consider the Implied Term either so obvious that it goes

without saying or to be necessary for business efficacy in the sense that the Agreement would lack commercial or practical coherence without it. It is not necessary to give business efficacy to such a contract to imply a term for repayment to deal with circumstances not just omitted from the express terms but which are outwith the scope of the agreement altogether. The Agreement lacked neither commercial nor practical coherence which the Implied Term was required to remedy.

19. To test the matter another way, if the judge were correct, it seems to me that it would be necessary not only to interpolate the Implied Term to require repayment in the circumstances which arose, but to re-write the Agreement altogether in order to make it apply where Mr Bou-Simon was employed but never a partner. It would have needed considerable re-drafting. That is a good indicator that the Implied Term is not necessary for the business efficacy of the Agreement as it stands, nor was it obvious. It seems to me that this is not a situation in which there was a lacuna in the Agreement which it was obvious should be filled by the Implied Term. On the contrary, there was no lacuna of the kind BGC contends for, at all.

20. It follows therefore, that I also disagree with the Judge's conclusions at [94] of his judgment. He concluded that the express provision for repayment contained in clause 2 of the Agreement which begins with the words “Notwithstanding anything set out above”, allows for the provision in the third sentence of clause 1 that any outstanding balance, will only be forgiven where the four year Initial Period has been served out and allows for an immediate repayment requirement where the debt forgiveness exception in clause 1 is not satisfied. That may well be the case. It does not lead to the conclusion reached by the judge. As he rightly pointed out at [94], clause 1 is predicated upon partnership. Although it is unnecessary to decide for the purposes of the issue on this appeal, it is possible that the third sentence of clause 1 is to be interpreted to include an express repayment requirement if Mr Bou-Simon, having become a partner, had left within the Initial Period. Such a construction may be consistent with the opening phrase of clause 2. In my view, however, such an interpretation does not lead to the judge's conclusion that the express terms of the Agreement and clause 2 in particular, are not inconsistent with the Implied Term. The Implied Term is concerned with wholly different circumstances and the opening phrase in clause 2 is not a gateway to its implication.

21. Furthermore, it seems to me that there is no lack of commercial or practical coherence in the Agreement in the terms which the judge describes at [92] of his judgment. He considered that Mr Bou-Simon would be able to pocket the money and leave as soon as he pleased. There is nothing uncommercial or absurd about a limited recourse loan. The Agreement was drafted on the basis that Mr Bou-Simon would become a partner. In those circumstances the loan was to be recouped from his partnership distributions and any remainder would be written off only if he had served the four year term as a partner. If he left BGC very quickly, the terms of clause 1 of the Agreement would have applied and any claim to recover outstanding sums would have been entirely different. The circumstances which did arise were not covered at all because they were not within the scope of the Agreement. As Mr Pearce submitted, they may give rise to a claim in restitution but that was never pleaded; it was not the subject of decision by the judge below and it is not before this Court on this appeal.

22. It follows that I do not consider the term which was implied to be obvious, if as a reasonable reader one construes the Agreement as it stood in the light of the surrounding circumstances. Further, I agree with Mr Pearce that, contrary to Lord Neuberger's warning, the judge failed to exercise the utmost care when formulating the question which one ought to pose to an officious bystander. The question posed at [93] of the judgment assumes the premise which it is intended to prove or support. It is not based upon the Agreement as drafted. As

Lord Neuberger pointed out, a term which is not necessary to give business efficacy to a contract is very unlikely to be so obvious that it goes without saying.

23. In this regard, Mr Pearce also submitted that it is impossible to reconcile the suggestion that the implied term is so obvious that it goes without saying with the fact that the parties had specifically deleted similar provisions from an earlier draft of the Agreement. He pointed to paragraphs [19] and [20] of Lord Neuberger's judgment in the *Marks & Spencer* case at which extracts from the *Philips* case and *The APJ Priti* are quoted with approval in which it is stated that it is difficult to imply a term where it is doubtful whether the omission was an oversight or a deliberate decision. Mr Pearce points to the deletion of clauses 2(a) and (b) in a previous draft of the Agreement which occurred at the specific behest of those instructed on behalf of Mr Bou-Simon.

24. Ms Jolly says that in any event: the deleted clauses are of no assistance because they make no reference to cessation of employment rather than ceasing to be a partner; that Mr Pearce's reasoning is contrary to the judge's factual finding at [64] of the judgment that it was a “clear possibility (at least) that one reason for their being made [the deletions that is] was the lurking concern that the Defendant [Mr Bou-Simon] harboured over partnership -related tax matters”; and that they are inadmissible as an aid to construction in any event.

25. Although in the light of the conclusions I have already reached, it is unnecessary to consider the deletions, for clarity's sake, I should add a few observations. The first is that it seems to me that the situation being considered by Bingham MR and as Bingham LJ in the cases referred to at [19] and [20] of the *Marks & Spencer* case, was different. The question of whether a term had been omitted by oversight or as a result of a deliberate decision was being evaluated by reference to the express terms of the contract under consideration. No account was being taken of a previous draft.

26. Secondly, and crucially, it seems to me even if the deletions were admissible, they were not sufficiently similar to the Implied Term to be the basis for the conclusion which Mr Pearce would have liked us to reach had it been necessary. The deleted clause 2(b) contained a trigger for repayment if Mr Bou-Simon ceased to be a partner within the four year period. It made no reference to the situation to which the Implied Term relates at all. Whilst the judge decided that one of the reasons for deletion may have been sensitivities about tax, another may have been that it was considered repetitive and unnecessary. Deleted clause 2(a) might be considered to be of more relevance. It contained a trigger for repayment if Partnership Units were never received. It makes no reference, however, to service for the entirety of or any part of the four year Initial Period. In addition to the judge's possible reason, it may have been omitted because it was inconsistent with the remainder of the draft of the Agreement, premised as it was on the basis that Mr Bou-Simon would become a partner. It is not possible to conclude therefore, that the parties intended to omit the very kind of provision which it was proposed should be implied.

27. It seems to me that the issue ends there and it is not necessary to analyse in any detail the authorities of *Mopani Copper Mines plc v Millennium Underwriting Ltd* [2008] All ER (Comm) 976 per Christopher Clarke J (as he then was) in particular at [120], *Narandas-Girdhar v Bardstock* [2016] 1 WLR 2366 per Briggs LJ at [19]-[20] and *Team Services plc v Kier Management and Design Ltd* (1993) 63 BLR 76 to which we were taken or the passage in Lewison, “*The Interpretation of Contracts*”, 6th edition at p.96 at which the learned author notes that “at best, the consideration of deleted words may negative the implication of a term in form of the deleted words” citing *Codelfa Construction Pty Ltd v State Rail Authority of New South*

Wales (1982) 149 CLR 337 at 352 per Mason J.

28. However, thirdly, I observe that the *Mopani* case was concerned with interpretation of a contract of insurance and not with the implication of terms at all. Christopher Clarke J took account of the fact that a condition contained in a slip had been pencilled out and "TBA" had been added. He decided at [124] that in the slip the parties had reached a concluded agreement which included the pencilling out of words and the addition of the notation "TBA". He also concluded at [124] that in those circumstances it was "legitimate to look at what by and in their contract of that date they agreed that they had not agreed." He came to this conclusion which is very far from the circumstances in this case, having reviewed the relevant case law including the *Team Services* case. At [120] he had distilled the principles in the following way:

"120. The diversity of authority, of which Diplock, J, spoke, renders it difficult for a judge of first instance to recognise when recourse to deleted words may properly be made. The tenor of the authorities appears to be that in general such recourse is illegitimate, save that (a) deleted words in a printed form may resolve the ambiguity of a neighbouring paragraph that remains; and (b) the deletion of words in a contractual document may be taken into account, for what (if anything) it is worth, if the fact of deletion shows what it is the parties agreed that they did not agree and there is ambiguity in the words that remain. This is classically the case in relation to printed forms (*Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's re 197*; Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1*; Jefco Mechanical Services Ltd v Lambeth London Borough Council* (1983) 24 BLR 1), or clauses derived from printed forms (*Team Service plc v Kier Management and Design Ltd* (1993) 63 BLR 76)*,* but can also apply where no printed form is involved (*Punjab National Bank Ltd v de Boinville* [1992] 1 WLR 1138)*.*"

29. This analysis was approved by Briggs LJ with whom Black and Ryder LJJ agreed in *Narandas-Girdhar & Anr v Bradstock* [2016] 1 WLR 2366 at [19]. In that case*,* the Court of Appeal held that when construing an IVA proposal it was legitimate to have regard to words deleted during its modification if the fact of deletion showed what it was the parties had agreed that they did not agree and there was ambiguity in the words that remained, albeit that the deleted words would have to be used with care. Although Briggs LJ appeared to consider that the potential for reliance upon deleted words was broader than appears from the *Mopani* case, once again, it was made clear that the deleted provisions were only relevant to construction where the express terms were ambiguous.

30. Fourthly, in the *Team Services* case, the Court of Appeal had held that when construing a construction contract which appeared to have been based on a precedent referred to as the "Green Form", it was permissible to consider the parts of the relevant clause which had been deleted and there was no difference between a deletion and an omission when retyping the standard clause, although it would be necessary to prove that the omission was deliberate. It is clear from Lloyd LJ's judgment at page 88 that the deletions which were being referred to were on the face of the contract. Lloyd LJ added in a single sentence at page 90 that he could see no reason for restoring by implication the very words which the parties had omitted by design. The report contains no reasoning to support his conclusion.

31. Fifthly, the consideration of the matter in the Australian case of *Codelfa* also arose in a different context and pre-dated the development or clarification of the law in this jurisdiction to the effect that there are different processes for the construction of contracts and the implication of terms: see the *Marks & Spencer* case at [26] and [27]. Mason J decided that in the circumstances of that case, it was appropriate to take into account evidence of discussions

between the parties when determining whether a term should be implied. In fact, the terms of the contract had already been determined before the discussions took place and they related to the question of price. Mason J held that the evidence revealed a matter which was in the common contemplation of the parties. See Mason J at [353] and [354].

32. Sixthly, in my view, even if the deleted clauses had been on all fours with the Implied Term and there were evidence that they had been omitted by common design, it would only have been appropriate to have taken them into account in the implication process if they could be characterised as part of the relevant surrounding circumstances and not merely part of the course of negotiations. As Lord Neuberger made abundantly clear when determining whether a term should be implied, it is necessary to consider the express terms of the contract in question from the viewpoint of the reasonable reader and not the parties themselves and a term should only be implied as a matter of strict necessity. It seems to me, therefore, that other than in very unusual circumstances like those in the *Codelfa* case, or where deletions have been relevant to the process of interpretation in the first place and therefore, have an influence upon what the reasonable reader would consider obvious or necessary for business efficacy, deletions are unlikely to be relevant to the process of implication.

33. For all the reasons set out above, I would allow the appeal.

Lord Justice Singh:

34. I agree that this appeal should be allowed for the reasons given by Asplin LJ. I would like to add a few words of my own only in respect of one issue because of its potentially wider importance. This concerns the admissibility of deletions from a previous draft of a contract. As Asplin LJ has explained this issue does not strictly arise for decision on the facts of the present case. We did not hear full argument on the point. I would prefer to leave open the question whether such deletions are admissible for decision in another case, in which the issue does squarely arise on the facts. At this stage I would make a few tentative observations.

35. First, I see force in the suggestion made in Lewison, The Interpretation of Contracts (6th ed.,) at p.96, that "the consideration of deleted words may negative the implication of a term in the form of deleted words". This is because what would be admitted in that scenario is the *fact* that the same words which it is now argued should be implied into a contract had been deleted by the parties. It seems to me that fact could well have a bearing on the question whether the test for implication of a term into a contract has been met. That fact would not be admitted in order to construe the express terms which eventually found their way into the final version of the contract.

36. Secondly, I would not necessarily accept that, in the context of implied terms, there is a threshold requirement that there must be an ambiguity in the contract before deleted words could be admissible. I can see that there is such a requirement when the court is engaged in the exercise of construction of a contract: see *Narandas-Girdhar & Anr v Bradstock* [2016] 1 WLR 2366 at [19] (Briggs LJ). However, as the Supreme Court has now made clear in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, restoring orthodoxy in this field, the exercise of construction and the exercise of implication of terms into a contract are different kinds of exercise. It is arguable that, when what the court has to do is consider whether a term should be implied into a contract, there is no threshold question of ambiguity in the terms of that contract before it may be proper to take account of the fact that the same term was deleted from an earlier draft of the contract. However, as I have

mentioned, the issue of when, if at all, deleted words are admissible in the context of implication of terms into a contract is one which is not straightforward and I would leave it for authoritative decision in another case, in which it is necessary to decide the point.

Lord Justice Hickinbottom:

37. I too agree that, for the reasons given by Asplin LJ, the appeal should be allowed. As a result, subject to any submissions as to the form of the order (including consequential matters), the Order of Judge Curran dated 26 May 2017 will be quashed, judgment will be entered for the Appellant/Defendant, and the claim will be dismissed.
