



Neutral Citation Number: [2023] EWCA Civ 374

Case No: CA-2022-002030

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Mr Justice Jacobs
[2022] EWHC 1857 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE NEWEY
and
LADY JUSTICE CARR

Between :

CONTRA HOLDINGS LIMITED

**Claimant/
Appellant**

- and -

MARK JOSEPH CYRIL BAMFORD

**Defendant/
Respondent**

Paul McGrath KC and Andrew Legg (instructed by **Stephenson Harwood LLP**) for the
Appellant
Laurence Rabinowitz KC and Alexander Polley KC (instructed by **Slaughter and May**) for
the **Respondent**

Hearing date : 29 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LADY JUSTICE CARR :

Introduction

1. This short appeal arises out of another dispute between members of the Bamford family following the death in 2001 of Joseph Cyril Bamford, the founder of the well-known JCB group of companies (“the JCB Group”). Joseph Bamford had two sons: the elder son, Lord Anthony Bamford DL, and Mark Bamford, the younger. Richard Bamford, a chartered accountant, is their second cousin and the chief executive officer of the Appellant (“Contra”), formerly named Touch Worldwide Holdings Limited. For ease of reference and without meaning any disrespect, I identify Anthony, Mark and Richard in this judgment by their first names.
2. In May 2021 Contra issued proceedings against Mark for breach of a written agreement said to have been entered into by the parties in June/July 2011 (“the Touch Agreement”). Particulars of Claim were served on 9 September 2021. Mark’s response (on 11 October 2021) was to issue an application under CPR Part 3.4(2)(a) and CPR Part 24.2 to strike out the claim and/or for reverse summary judgment (“the Application”).
3. By judgment dated 18 July 2022 Jacobs J (“the Judge”) granted the Application. In doing so, he adopted the approach endorsed in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 (at [12]). He considered that he had before him all the evidence necessary for the proper determination of the relevant issues of contractual interpretation and accordingly “grasped the nettle”, deciding those issues outright. If the case was bad in law, the sooner that it was determined, the better. He ruled in favour of Mark, with the result that Contra had no real prospect of succeeding on its claim.
4. On appeal Contra alleges that the Judge made errors of law which require correction, and contends that there are evidential matters which demand that the case should proceed to trial. In particular, very shortly before the hearing of the Application, Mark denied key facts leading to the formation of the Touch Agreement; this development is said to suggest that Mark has something to hide from a trial and that the true facts would materially affect the outcome of the claim.
5. Mark contends that what is in reality Contra’s central argument, namely that the Touch Agreement entitles Contra absolutely to a “deferred payment”, does not survive contact with the words of the agreement (and would produce a commercially absurd result). The relevant text clearly distinguishes between Contra’s past work for Mark and intended future work in respect of a quite different transaction. Contra seeks to complicate the analysis by leaning heavily on the background to the transaction, but none of the matters relied on, taken at their highest, make out the case being advanced.

The core facts

6. The Judge summarised the core facts and background to the Touch Agreement up to 17 June 2011 at [7] to [22], essentially by reference to the Particulars of Claim (or documents referred to therein). It is not necessary for me to repeat those paragraphs here, which are to be taken as read, and I adopt where necessary the same definitions

as selected by the Judge. It was common ground that, for the purpose of the Application, the material facts pleaded in the Particulars of Claim, including all admissible matters of factual matrix there set out, were true (or were at least to be assumed to be true).

The Touch Agreement

7. The Touch Agreement was drafted by Richard and entered into by both parties without the assistance of external (legal or other) advisors. It referred to Mark as "MB", to Anthony as "AB" and to Richard as "RB". Bermuda Trust Company Limited, the trustee of the AB and MB Trusts (identified by the Judge at [9] and [10]), was referred to as "BTCL".
8. It provided materially as follows:

"Agreement for the services of RB

STRICTLY PRIVATE AND CONFIDENTIAL

1) MB will now authorise BTCL to pay from the MB1 trust to Touch a success fee of £2,600,000 for the services of RB up to and including the settlement reached between MB and AB on 17 June 2011.

2) RB will now step back from advising MB as he works directly with Macfarlanes to document and implement the terms of the 17 June settlement, which is expected to be completed by 31 December 2011.

3) MB will continue to privately brief RB on progress towards that completion, and in addition the steps being taken to prepare the JCB Group for sale in 2012 ("Project Crakemarsh"). MB will also, whenever he feels it is appropriate, give assurances to AB regarding MB having used RB as a commercial advisor.

4) AB has accepted that MB will have to have his own advisors for Project Crakemarsh in due course. MB has not and will not give any form of commitment to AB that he will not appoint RB, through Touch, to be his commercial advisor for Project Crakemarsh, and at the appropriate time MB wants to do so. MB expects this to be when either an investment bank is due to be formally appointed to handle the sale of the JCB Group, or when the beneficiaries of the trusts are first consulted on the Project Crakemarsh plan, and may themselves appoint their own advisors.

5) When MB appoints RB, Touch will ensure that RB is available to MB on an exclusive basis to advise on all of MB's interests in the development, negotiation, implementation and completion of Project Crakemarsh.

6) In consideration of these services, MB will take all necessary steps to authorise BTCL (or if applicable any replacement trustee of the MB1 trust) to pay to Touch a success fee on the completion of Project Crakemarsh equal to 2% of the value attributed to the 50% shareholding in the JCB Group held by the MB1 trust and the MB2 trust, less the sum paid under paragraph 1) above.

Signed 1 July 2011”

9. Although, as set out above, the Touch Agreement stated that it was signed on 1 July 2011, it does not appear in fact to have been signed by or on behalf of either party. Although there is a dispute as to whether any agreement was concluded, the assumption for the purpose of the Application was that the Touch Agreement was a legally binding document.
10. The first payment envisaged under Clause 1 was paid (in tranches), but there has been no payment under Clause 6. It was common ground that no sale of the JCB Group took place in 2012 or subsequently. (There was a dispute as to whether or not some other form of restructuring has taken place such as to trigger a right to payment under clause 6; but, as the Judge noted, this debate would only be relevant if Contra’s case on the proper interpretation of the Touch Agreement were to succeed.)
11. The principal issue before the Judge was whether any payment under Clause 6 was due. In this regard, Contra’s case was as follows:
 - i) The 2% fee in Clause 6 was also payable if the divestment of the assets or the separation of the interests of Mark in the MB Trusts took a different form than the anticipated sale of the JCB Group, for example if Anthony or the AB Trusts acquired the assets of the MB Trusts, or if some other form of restructuring took place;
 - ii) Alternatively, a term to the same effect was to be implied (“the first implied term”);
 - iii) In the further alternative, a term was to be implied that, if no sale of the JCB Group did or was to take place, Contra would in any event be “made whole” in respect of the services rendered by Richard. On this basis, Contra could charge an appropriate rate for the work actually performed (after 17 June 2011) (“the second implied term”).

The relevant legal principles

12. The Judge set out the relevant law:
 - i) On contractual interpretation at [46] to [51];
 - ii) On the implication of terms at [52];
 - iii) On the applicable tests for strike-out and summary judgment at [53].

13. Again, it is not necessary for me to repeat the Judge’s summary of what are well-established and non-contentious principles.
14. All that needs to be added is a reference to the recent majority decision of the Supreme Court in *Barton v Gwyn-Jones* [2023] UKSC 3; [2023] 2 WLR 269 (“*Barton*”). On the premise that the express term orally agreed between the parties was a “complete statement of the circumstances in which [Mr Barton] was promised some reward under the agreement” (see [107]), the majority concluded that there was no room for the implication of a term providing for a lesser reward on a different basis:
 - i) Whether or not the words “if, and only if” were used by the parties in their negotiations, the effect of the contract as found by the first-instance judge was that Mr Barton was only entitled to be paid if the event that they agreed would be the trigger for that payment occurred. To imply a term that there was an obligation to pay without that trigger would go “directly against what the judge found the parties had agreed” (see [24] to [26]). Where 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 (see [96]);
 - ii) Further, an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition, and was prepared to take the commensurate risk of getting nothing if the condition was not fulfilled, was not “bizarre or uncommercial” (see [35]);
 - iii) Nor was there room for implication of a term as matter of law by reference to s. 15 of the Supply of Goods and Services Act 1982, since (amongst other things) the agreement was not silent as to remuneration (see [41]).

The Judgment

15. The Judge first interpreted the express terms of the Touch Agreement. He started with a consideration of the text. As a matter of textual analysis, there could in his view be no doubt that “Project Crakemarsh” referred, and referred only, to the proposed sale of the JCB Group. As for the relevant factual matrix, the Judge stated that there was no significant factual dispute. The Judge accepted that the information passed by Mark to Richard as to the nature of the settlement reached between Mark and Anthony formed part of the (admissible) relevant factual matrix. However, none of the matters relied on by Contra pointed to an interpretation against the natural and ordinary meaning of the words used. The Judge also considered that Contra’s argument based on factual matrix sought to give a meaning to the language of the Touch Agreement that it could not reasonably bear, and there was no reason to believe that the parties had used the wrong words or syntax. Nor was there anything uncommercial about the interpretation for which Mark contended.
16. The Judge went on to find that the first implied term was neither necessary to make the contract work nor so obvious that it went without saying. He also rejected the second implied term. The payment in Clause 6 was a “success fee on the completion of Project Crakemarsh”. The concept of the success fee was straightforward. If the

agreed trigger for the success fee did not happen, there was no basis for implying the term suggested.

The challenge on appeal

17. Contra's overarching challenge is that, in circumstances where the clear commercial purpose of the (informal) Touch Agreement was to reward Contra for achieving Mark's long-held intention to separate his interests in JCB, the Judge misdirected himself as to the correct approach to contractual interpretation and implication of terms. Further, there were compelling reasons for the matter to proceed to trial.
18. Contra complains at the outset that the Judge's summary of the background facts leading up to the Touch Agreement did not capture adequately relevant factors giving rise to complexity in resolving the disputes between Mark and Anthony. Contra also, and more centrally, complains that the Judge failed to record Mark's evidence, served very shortly before the hearing of the Application, to the effect that the only deal that he had done with Anthony in June 2011 did not refer to any separation of interests or a sale of the JCB Group. It is said that there is ample basis to doubt this evidence, with the result that Mark's approach to the Touch Agreement and the Application as a whole is unreliable.
19. Against this background, four specific grounds of appeal are raised in Contra's written submissions. They can be summarised briefly for present purposes as follows.
20. First, it is said that the Judge took an erroneous approach to the interpretation of informal contracts where circumstances have changed in a manner not anticipated by the parties. He was wrong to conclude that Contra was inviting him to rewrite the Touch Agreement, as opposed to interpret it. Secondly, it is said that the Judge misinterpreted the relevant factual matrix. Given what Richard was told by Mark at the time, namely that Mark had agreed a settlement with Anthony premised on the separation of their interests and sale of the JCB Group, the phrase "Project Crakemarsh", properly interpreted, encompassed the separation of Mark's interest in the Trusts. Thirdly, it is said that the Judge erred in his interpretation of "success fee". In context, Contra contends that it is clear that the phrase meant payment of an uplifted sum on completion. Clause 6, properly interpreted, provided for a deferred payment to Contra once the separation of Mark's interests had taken place as agreed with Anthony, which was expected to take place by way of a sale of the JCB Group. The fourth ground takes up the refrain that the Judge should have found that there was a compelling reason for the matter to proceed to trial, given Mark's "attempt to whitewash history". A trial is needed to establish the truth of the background to the Touch Agreement which is said to impact on its correct interpretation.
21. Mr McGrath KC's oral submissions for Contra focussed on the following aspects in particular:
 - i) Properly interpreted against the relevant factual matrix, "Project Crakemarsh" in Clause 6 was not to be read as limited to the sale of the JCB Group (or steps to prepare the JCB Group for sale). Rather, it was to be treated as referring to a separation of the brothers' interests in the Trusts. It was such separation that was agreed to be the benchmark of "success". Separation of interests (by whatever route) was the key target. Reliance was placed on the discussions

between Richard and Mark on 14, 17 and 19 June 2011 (as recorded by Richard in notes), alongside the contents of a note prepared by Richard and discussed with Mark on 16 June 2011. There was also always a common understanding that the separation of interests would be a complex matter, and that there were a number of possible routes to achieving it. The sale of the JCB Group was only one such option;

- ii) Contra's interpretation was supported by the fact that the "success fee" in Clause 6 could not be considered to be a traditional success fee. It was linked to the payment under Clause 1 which was for Richard's services leading up to the June 2011 settlement (and not sale of the JCB Group); payment had been described as a "down payment" at a meeting between Richard and Mark on 29 June 2011. The Judge was wrong to separate the two payments out. Further, the 2% fee did not incentivise Richard to bring about the sale of the JCB Group, since Richard was not to be involved directly in the sale; nor was the 2% fee in Clause 6 to be calculated by reference to the sale price.

Discussion

22. The first three grounds of appeal raise common issues. I propose to deal with them compositely, first addressing whether the Judge was right to interpret the express terms of the Touch Agreement as he did, and then whether he was right to conclude that neither the first nor second implied terms were sustainable.
23. It is to be noted at the outset, as the Judge emphasised, that Contra's claim was for breach of contract and nothing else. There was no claim for rectification or by reference to any form of estoppel. As Mr Rabinowitz KC cautioned, any purely subjective understandings of the parties are thus irrelevant, given that the exercise is one of objective contractual interpretation in the context of the relevant factual matrix.
24. There was some debate at the commencement of the appeal hearing as to whether Contra's case was based on a series of agreements (with variations along the way), or on an alleged agreement by conduct. However, Mr McGrath confirmed that, consistent with the pleaded case, Contra's claim was based (exclusively) on the Touch Agreement. The Touch Agreement was referred to in the Particulars of Claim as a "brief record of the key terms agreed". Significantly, however, it was not said to be materially incomplete; indeed, Contra pleaded in terms that there was never any express discussion, let alone express agreement, between Mark and Richard that the 2% success fee in Clause 6 would apply to any arrangement other than sale of the JCB Group (see [22] of the Particulars of Claim).
25. Whilst not lengthy or drafted by lawyers, the Touch Agreement is nevertheless a logically structured and (largely) clear document. The ordinary rules of contractual interpretation apply to it. It is right that context may have greater than usual weight when interpreting a more informal document, something which the Judge had well in mind (see for example [56] of the Judgment). But informality is not a trump card that can overturn a text that carries an obvious and clear meaning. There are also degrees of informality, and the Touch Agreement was a careful, albeit brief, document, drafted by a qualified accountant.

26. Further, in terms of the correct approach to interpretation, this is not a “change of circumstances” case, as Contra suggests. It was Contra’s own pleaded case that the sale of the JCB Group was never a certainty (something that must have been self-evident in any event); it was one of a number of “forms of divestment/restructuring”, all of which remained “possibilities”. It is difficult in any case to see why the approach to interpretation identified in “change of circumstances” cases would make a difference: the exercise remains a search for the objective (albeit then putative) intention of the parties.
27. I turn then to the text and structure of the Touch Agreement:
- i) By Clause 1 a fee was payable for the (past) successful services provided by Richard in relation to the (earlier) June 2011 settlement;
 - ii) Clause 2 records that Richard is to step back from advising Mark, as Mark was to work with solicitors towards implementation of the June 2011 settlement. The significance of Clause 2 for present purposes is that it records that that process was expected to be completed by 31 December 2011. This is a clear indication that implementation of the June 2011 settlement is not to be equated with sale of the JCB Group in 2012 (ie Project Crakemarsh);
 - iii) Clause 3 states that Mark will continue to brief Richard privately on progress towards completion of the June 2011 settlement (by 31 December 2011) and “in addition the steps being taken to prepare the JCB Group for sale in 2012”, defined as “Project Crakemarsh”. Again, it is clear that completion of the June 2011 settlement is something separate from and different to the proposed sale of the JCB Group in 2012;
 - iv) Clause 4 seeks to allow for Mark to appoint Richard in the future as his “commercial advisor for Project Crakemarsh”, which Mark stated he wished to do “at the appropriate time”;
 - v) Clause 5 deals with that potential appointment: Richard was to be made available by Contra to Mark on an exclusive basis to advise on all of Mark’s interests in the “development, negotiation, implementation and completion of Project Crakemarsh”;
 - vi) Clause 6 records that in consideration of “these services” (ie Richard’s services under Clause 5 in respect of Project Crakemarsh), Mark was to procure the payment to Contra of a success fee on the completion of Project Crakemarsh equal to 2% of the value attributed to Mark’s 50% shareholding in the JCB Group (less the payment under Clause 1).
28. Thus, Clause 1 is backward-looking. Clause 3 pivots from the past (June 2011 settlement) to the future (sale of the JCB Group in 2012). Clauses 4 to 6 deal exclusively with that future prospect.
29. It follows from the above, looking at the wording and structure of the Touch Agreement alone, i) that “Project Crakemarsh” meant (and could only mean) sale of the JCB Group; and ii) that in terms of remuneration under Clause 6, the parties’ agreement was that Contra would be entitled to payment of 2% of the value attributed

to the 50% shareholding in the JCB Group in the event of a sale of the JCB Group (and not otherwise).

30. Contra's skeleton argument expressly accepts that this must be the position "as a matter of textual analysis alone". So Contra's position depends on being able to demonstrate that the relevant factual matrix and/or commercial context lead to a different interpretation.
31. It is common ground that the exercise of interpretation must be carried out against the relevant factual matrix. However, it must also be remembered that it is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear. The background should be used to elucidate the contract, and not to contradict it (see for example *Lewison: The Interpretation of Contracts* (7th edition) (at 3.167 – 3.168)).
32. Like the Judge (at [69] to [78]), I do not consider that there is anything in the relevant factual matrix which detracts from the clear meaning of the language of the Touch Agreement, and in particular the clear meaning of the language in Clause 6. As for the matters emphasised for Contra on appeal:
 - i) Whether or not Mark used the phrase "Project Crakemarsh" generically with Richard to refer to an exit of his interests, even if such evidence were admissible, that could not overcome the express wording of the contemporaneous and other documents, including the Touch Agreement itself;
 - ii) That sale of the JCB Group was known by Mark and Richard to be only one of several possible (complex) exit strategies does not advance an interpretation that success in Clause 6 is to be gauged by reference to the June 2011 settlement, but rather lends weight to the importance to be attached to the parties' decision to choose only the sale of the JCB Group as the trigger for payment of the success fee in Clause 6.
33. Although not a matter pleaded in the Particulars of Claim, Contra also sought to rely on an entry in Richard's notes referring to a draft agreement which he handed to Mark on 29 June 2011. The notes refer to one draft having a "down payment" of £4million (which was the sum negotiated down to the £2.6million payment in Clause 1). This is an obvious example of evidence of pre-contractual negotiations which the Judge ignored as inadmissible (without objection from Contra). It is, in any event, by no means clear that the phrase "down payment" was actually used in discussion between Mark and Richard; Richard's witness statements in opposition to the Application did not state that it was. Even if the phrase was used, such a reference could not, given the clear wording of Clause 6, reasonably lead to a conclusion that success there was to be measured not by reference to a sale of the JCB Group, but rather by reference to completion of the June 2011 settlement.
34. Nor is there any difficulty in treating the payment in Clause 6 as a "success fee" because of any lack of incentivisation. Lack of incentivisation is not a barrier to an entitlement to a "success fee" and in any event, as reflected in Clause 5, it was anticipated that Contra was to have at least some involvement in the events leading up to a sale of the JCB Group.

35. It is in this context that Contra seeks to argue that the phrase “success fee” in Clause 6 is to be interpreted as meaning “payment of an uplifted sum upon completion”. It is said that, on its proper interpretation, Clause 6 was a deferred payment clause, with payment to be made once the brothers’ separation of interests had taken place. The payment in Clause 1 is said to be “part payment of services rendered, with the 2% fee being part payment for past services rendered and for future services rendered, uplifted from hourly rates in recognition of the successful outcome”. That outcome would “logically apply whatever means of separation were employed”.
36. Contra’s submission depends on a number of flawed building blocks, namely that the sale of the JCB Group was a certainty, and that “success” in the Touch Agreement referred only to the past and not the future. As set out above, sale could never be a certainty and, as a matter of contractual structure, Clause 6 looks to future, and not past, “success”. Beyond that, and in addition, the suggestion that the success fee would be payable “whatever means of separation were employed” cannot be reconciled as a matter of interpretation with the words used by the parties. The parties chose to agree for payment to take place on the occurrence of a specific event.
37. Further, there is an obvious commercial absurdity to the suggestion that Clause 6 was in reality a deferred payment clause. Based on Contra’s pleaded valuation of the JCB Group in June 2011 at around £3billion, the 2% fee in Clause 6 would amount to around £30million (less £2.6million paid under Clause 1). According to the Particulars of Claim, Richard valued his services to Mark between 2006 and 2011 at no more than £4.5million. Even taking into account the potential provision of further services to Mark in 2012 in connection with a sale of the JCB Group, the notion that Contra had an absolute, albeit deferred, entitlement to some £27million would be remarkable. The scale of the 2% fee is far more consistent with a conventional “success fee”, being an abnormally large reward for success with no reward in the event of failure. As the Judge identified at [82] to [84], there is nothing uncommercial about the proposition that Contra would be entitled to a success fee upon the happening of a contingency such as the sale of the JCB Group.
38. Thus the matters of factual matrix (or commerciality) relied on by Contra, whether admissible or not and taken at their highest, do not advance its cause. This is then not the forum in which to debate what could be said to be Contra’s ambitious submission (not advanced below or addressed at all by Mr McGrath on appeal) that, for the purpose of ascertaining the existence of implied terms in a written agreement (as opposed to construing the express terms of that agreement), evidence of pre-contractual negotiations is admissible.
39. Moving on to the question of implied terms, the Judge’s conclusions at [85] to [91] that neither proposed implied term is sustainable either as a matter of obviousness or business efficacy are unimpeachable. The subsequent majority decision of the Supreme Court in *Barton* further confirms their correctness: the implied terms contended for are inconsistent with the express (and complete) terms of agreement reached by the parties.
40. Finally, as set out above, Contra argues that the Judge was wrong to strike out the claim and/or to grant summary judgment because there was a compelling reason to proceed to trial. Specifically, it is said that Mark’s credibility needs to be tested and/or further facts need to be explored at trial in order to illuminate the exercise of

contractual interpretation and whether or not terms are properly to be implied, the latter being a fact-sensitive exercise. Given that the Application proceeded on the basis that Contra's pleaded allegations were true, or were to be assumed to be true, this submission does not get off the ground. Nor is there any merit in the suggestion that the Judge in some way failed to grasp any relevant detail as to the complexity of the brothers' arrangements and their dispute, or the facts more generally. Contra had (and took) the opportunity fully to plead out its factual case, and the Judge was right to treat the matters identified in the Particulars of Claim as the central focus of his analysis.

41. In these circumstances, the "timing" issue raised by way of Respondent's Notice, namely that, in any event, the trigger event for payment under Clause 6 had to occur in 2012 (or within a reasonable time of making the Touch Agreement), does not arise for consideration.

Conclusion

42. For these reasons, which are essentially the same as those identified by the Judge in his impressive judgment, I would dismiss the appeal on all grounds. The Judge was right to dismiss the claim on a summary basis. It was bad in law, and no useful purpose would be served by allowing the matter to proceed to trial.

LORD JUSTICE NEWEY :

43. I agree.

SIR GEOFFREY VOS, MASTER OF THE ROLLS :

44. I also agree.