



SHERIFF APPEAL COURT

**[2024] SAC (Civ) 47
PAI-A273-20**

Sheriff Principal D C W Pyle
Appeal Sheriff G K Murray
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by APPEAL SHERIFF GREGOR MURRAY

in the appeal in the cause

GERARD DAVIS

Pursuer and Appellant

against

JAMES DAVIS

Defender and Respondent

**Pursuer and Appellant: D M Thomson KC; Levy & McRae Solicitors LLP
Defender and Respondent: Crawford KC; Dentons UK and Middle East LLP**

15 October 2024

Background

[1] For over thirty years, the appellant and his father, the respondent, managed James Davis (Insurance Brokers) Ltd and G.L. James Davis (Holdings) Limited (respectively “Brokers”, “Holdings” and, together, “the Business”).

[2] The appellant avers that in August 2010, the parties verbally agreed terms by which he would acquire ownership of the Business in what they regarded as a tax efficient manner: the appellant would transfer his 49.99% shareholding in Brokers to the respondent;

Holdings and Brokers would become group companies and the respondent would make testamentary provision for the appellant to inherit the Business.

[3] In consequence, the appellant avers, he transferred his shareholding to the respondent, Holdings acquired 100% of Brokers' shares and the respondent executed a codicil to his Will, in which he bequeathed to the appellant "...all of my shares, of whatever kind, in (Holdings) and (Brokers)." Though the appellant continued almost exclusively to manage Brokers, the respondent controlled the Business as he solely owned Holdings' issued shares.

[4] However, the appellant then avers, in November 2019 the respondent unilaterally removed him as a director of Holdings, appointed his sister in his place, arranged for administrators to be appointed to Holdings and had Brokers wound up by the court.

[5] Those events led to these proceedings, in which the appellant seeks damages as he avers that the respondent's actions in 2019 breached an implied term of the 2010 contract that he:

"would take no steps to prevent the pursuer from inheriting the Business, and thus from enjoying the value of the Business, on (the defender's) death. That implied term necessarily had effect such that the defender was obliged not to seek to wind up or dissolve the Business, or otherwise to harm it and the value of the Business, or to cause the Business itself to take such steps, without proper cause. Such a term was necessary to give to the parties' contract such business efficacy as they, as reasonable persons circumstanced as they were when they entered into the agreement, intended it to have".

Procedure before the sheriff

[6] After debate, the sheriff sustained the respondent's preliminary pleas and dismissed the action, against which decision appeal is now taken.

[7] The sheriff considered that the proposed term failed to meet the second, third and fourth conditions narrated by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co* [2016] AC 742 at para [18]:

“for a term to be implied, the following conditions (which may overlap) must be satisfied... (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression...”

[8] The sheriff considered that the alleged contract was effective without the proposed term as the appellant’s averments demonstrated it had been fulfilled. That the appellant had not derived the benefit he had hoped for was an insufficient basis for the term to be implied.

[9] Separately, the proposed term was not so obvious that it went without saying. It was not sufficient for the appellant to show that had the parties foreseen the eventuality, they would have wished to make provision for it; it also had to be shown either that there was only one contractual solution or that one of several possible solutions would doubtless have been preferred.

[10] The implied term was not capable of clear expression as it raised questions about how and on what date the “value of the Business” could be ascertained and what “proper cause” might cause the Business to be wound up or dissolved.

[11] Finally, the sheriff considered the appellant’s averments of loss were irrelevant. The appellant averred that his plan was to retire in December 2025, to sell the Business and to continue to work part-time for a further two years. However, as the respondent remained alive, the appellant had not incurred any loss.

[12] Standing those reasons, the sheriff considered it unnecessary to address the relevancy and specification of the defences, parts of which the appellant argued were irrelevant and lacking in specification.

Appellant's submissions

[13] The sheriff's decision should be recalled, certain of the respondent's averments excluded from probation and parties allowed a proof before answer of their averments.

[14] While the sheriff considered the correct tests, he had erred in his application of them.

[15] A verbal contract fell to be assessed as a matter of evidence after proof (*Barton v Morris* [2023] AC 684 at [184]; *Muirhead & Turnbull v Dickson* (1905) 7F 686). The parties' subjective understandings were admissible as evidence of what, as a matter of fact, they did agree, as the court did not require to ascertain the meaning of an agreed written text.

[16] The core of the proposed implied term was that the respondent "would take no steps to prevent the pursuer from inheriting the business". That was fundamental, as a party could not take advantage of its own wrong (*Crimond Estates Ltd v Mile End Developments Ltd* 2022 SLT 570 at para [20]; *Reliance (AB) Limited v Quantum Claims Compensation Specialists Limited* [2024] SAC (Civ) 9 at para [39]). Contextually, the meaning of the words "not to wind up or dissolve the business without proper cause" was clear and straightforward.

[17] The sheriff's focus on the "value of the Business" was misplaced. The appellant's case was that he contracted to inherit the Business upon the respondent's death. He offered to prove that the Business was successful and profitable without the respondent's involvement. Whether or not it later encountered difficult trading conditions was irrelevant, as he did not suggest the Business would have a particular value on any particular date. Instead, he offered to prove that the defender was obliged not to harm it.

[18] The sheriff neither explained why the proposed term was not "obvious", nor identified any other which might have been under consideration. The proposed term was

founded upon the prevention principle: it was “obvious”, such that it went without saying, that the parties would have agreed the respondent would not, without proper cause, wind up the very business which they agreed the appellant would inherit.

[19] To contract to bequeath a company to someone in exchange for valuable consideration and then to wind it up without proper reason exemplified the sort of “dirty trick” which required the implication of a term to combat it (*Barton* at para [29]).

[20] The appellant’s averments of loss were not bound to fail. Assessment of loss was a jury question, to be determined with a broad axe at proof before answer (*Duke of Portland v Wood’s Trs* (No.2) 1926 SC 640 at pp 651-652; *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* (A Firm) 1914 SC (HL) 18 at pp 29 - 30). Any loss fell to be assessed at the date of breach - in this instance, November 2019. The respondent could challenge any later events which might alter its extent by averment - for example his survival to the date of proof - which the sheriff could then relevantly take into account (*Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426; *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at [11] - [12]).

[21] The appellant sought to recover the loss of a value of a business, not loss of a chance. Loss of a chance of the type generally envisaged required the involvement of a third party (*Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602).

[22] Finally, the sheriff erred by neither addressing nor excluding from probations the respondent’s averments which the appellant submitted in his note of basis of preliminary plea were irrelevant and/or materially lacking in specification.

Respondent's submissions

[23] Whether a term fell to be implied should be approached in the same way, whether a contract was written or oral (*Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at para [17]).

[24] No amount of evidence about the circumstances in which the Business was transferred to the respondent could show the parties intended that the respondent should not wind it up. That the appellant did not derive the outcome he hoped for was irrelevant to the question of whether business efficacy required that the respondent should not wind up the Business. The appellant fell into the trap of using hindsight to fashion an implied term to deal with the situation in which he found himself. Such an approach had been expressly disapproved (*Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at p 481).

[25] Even in the context of an oral contract, the proposed implied term was neither the only contractual solution nor one of several which the parties would have preferred to ensure that the appellant should benefit from the value of the Business.

[26] The reference in *Barton* to playing a dirty trick was another way of expressing the *Marks & Spencer* business efficacy condition. Even if there were relevant averments to that effect, it would be an example of a term necessarily implied to ensure that the contract was effective. Even assuming it was necessary to achieve business efficacy, the appellant made no averments from which it could be held, after proof, that the proposed implied term was the least onerous (*Barton* at para [32]).

[27] In any event, it was incapable of clear expression. The sheriff correctly noted the appellant's averments did not answer three issues: the "value of the Business"; how and at what date such value fell to be ascertained; and what would amount to "proper cause". In

addition, the sheriff was entitled to note that as the respondent was still alive, the implied term was irrelevant.

[28] If, as the sheriff also noted, the appellant's loss was dependent on his intention to retire in December 2025 and then to realise the value of the Business, it amounted to loss of the chance that the respondent would then not be alive. However, the appellant made no relevant averments to quantify such a loss. That was not simply a jury question to be assessed in light of all of the circumstances; a basis for it needed to be pled.

[29] It followed that there was no requirement for the sheriff to address the defences. In any event, the averments complained of afforded a proper context to assess whether there was a contract at all and, if so, whether the proposed term was implied. If established after proof, those averments would both demonstrate that any "dirty trick" was in fact played by the appellant and add relevant context to the circumstances in which the Business was wound up, to show that was done with "proper cause".

Decision

[30] The thrust of the appellant's case is, firstly, that he and the respondent contracted in 2010 for him to inherit the Business then, secondly, that the respondent later deliberately engineered the insolvencies of Holdings and Brokers to deprive the appellant of his contractual right. At this stage, of course, that case must be accepted as true.

[31] The appellant's remaining averments need to be considered in light of the respondent's response.

[32] While he denies any contract was formed, the respondent admits that the appellant transferred his 49.99% shareholding in Brokers to him, that Brokers became grouped with Holdings and as a result, that the latter came to wholly own the former and that he came to

wholly own and control the Business. While he does not admit he executed a codicil in the appellant's favour, he accepts that in November 2019, he wished to leave his son his interest in Brokers on his death. He also admits that in 2019, he removed the appellant as a director of Holdings, appointed his daughter in the appellant's place and that they then resolved administrators be appointed to Holdings and Brokers be wound up by the court.

[33] The respondent also provides explanations for those admissions. He avers that the appellant transferred his shares in Brokers to him as the appellant feared personal insolvency following the failure of a separate company in which he had invested. The respondent explains in detail that over time, he became concerned about the appellant's conduct as a director of Brokers, his management of it and the failure of investments he made on its behalf. In consequence, the respondent concluded that the appellant was unable to manage Brokers and that the parties were no longer able to agree a trading strategy for the Business. After taking legal and insolvency practitioner advice, he then arranged for Brokers to be wound up and, as it provided Holdings with its sole source of income, for it to be placed in administration.

[34] The appellant's remaining averments, which must also be accepted as true, both address and contradict the respondent's explanations. There was no question of any possible personal insolvency at the time his Brokers shares were transferred. His management of Brokers was entirely successful, which it recognised by entering into a Service Agreement with him. During the period to 2019 when he managed Brokers, it was in rude health. It was profitable, he substantially increased both its turnover and the amount of funds under its management, arranged for its premises to be expanded and for related costs to be met.

[35] It is against that background that parties' submissions, the agreed legal principles and their application in this case, as summarised above, fall to be considered. In our opinion, for the following reasons, it cannot be said at this stage that the appellant's case will necessarily fail. Instead, it can only be resolved after evidence is heard.

[36] We accept the appellant's primary submission that the sheriff erred by holding his averments did not meet the second, third and fourth conditions narrated in *Marks & Spencer*.

[37] As regards the second condition, the appellant's case, taken at its highest, avers the proposed implied term was necessary to give efficacy to a business contract. After the parties expressly agreed a mechanism by which he was to inherit the respondent's interest in the Business, a mechanism which entailed him transferring his Brokers shares to the respondent, the respondent deliberately and without proper cause took steps which were designed to ensure there would no longer be any interest to inherit. In that context, as the proposed term seeks to give effect to the parties' express contractual intention, its implication is necessary to give efficacy to the contract.

[38] Separately, the contract was not wholly fulfilled. While the parties may have fulfilled their obligations under it, fulfilment of the contract was conditional on the respondent's death, the event which the parties agreed would trigger transfer of his interest in the Business to the appellant.

[39] In relation to the third condition, the sheriff held that the proposed term was not so obvious that it went without saying. Instead, he considered that after a crisis arose, the appellant was asking the court to fashion a term to address an issue he failed to foresee at the time the contract was formed. However, in reaching that conclusion, the sheriff ignored the same context. We accept the appellant's submission that, if proved, the respondent's conduct would exemplify the type of "dirty trick" described in *Barton*, one which obviously

requires the implication of a term designed to prevent it. In that context, an implied term of the type proposed would be the only solution to the difficulty the respondent created for the appellant.

[40] On the fourth condition, the sheriff concluded that the proposed term was incapable of clear expression as it raised issues over the meanings of “the value of the Business” and “proper cause”. In addition, it did not clearly express how the value of the Business would be ascertained and at what date. On those points, we also accept the appellant’s submissions. The value of the Business is a jury question, to be determined with a broad axe at the date of the alleged breach after evidence is heard. Its meaning is sufficiently clear.

[41] The inclusion of “proper cause” is a necessary proviso, the meaning of which is also clear in context. As the person who controlled the Business, the respondent had title and interest to take certain steps in relation to it, in this instance to competently wind up or place in administration its constituent parts before his death. The inclusion of “proper cause” affords him an opportunity to justify any such actions, as of course he seeks to do in his answers.

[42] For these reasons, we shall recall the interlocutor dismissing the action and allow parties a proof before answer. On the issue of the scope of the proof, as the reasons above explain, the averments which both parties seek to exclude from probation largely bear upon the disputed issues of whether the parties contracted and the circumstances which led the respondent to wind up Brokers and appoint administrators to Holdings. In those circumstances, we have reserved parties’ preliminary pleas and allowed a proof before answer at large.

[43] We shall find the respondent liable in the expenses of the debate before the sheriff and the expenses of the appeal. Parties were also agreed that the appeal was suitable for the employment of senior counsel. We also agree.