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Overage and Implied Terms – Another Curtain Call and More Bad News for Developers

The courts have often refused to intervene to imply a term into a contract that would "save the day" for the claimant, irrespective of the perceived injustice which may follow. Sometimes, however, they are more inclined to agree with the "wronged" party. So, what factors govern a court's decision and why in *Sparks v Biden*[1] did the court agree to imply a term that triggered an overage payment, rather than let the developer off the hook for lack of appropriate drafting? And, more importantly, why does it matter?

Setting the Scene

Overage provisions are no strangers to our courts and it hardly comes as a surprise that, where they can, developers will avoid paying if it is at all possible to do so legitimately – after all, overage payments eat into profit.

The results of recent claims to imply terms generally have indicated a trend away from supporting arguments which would result in improving a bad bargain. When it comes to overage, however, the courts have shown themselves to be more willing to imply terms to ensure developers honour the spirit of their contractual overage obligations.

To cut a long story short, the parties to this dispute entered an option agreement by virtue of which Mr Biden would purchase land from Mr Sparks and, subsequently, make an overage payment on the sale of newly constructed dwellings. Mr Biden, rather cleverly, however, proceeded to let the majority of the dwellings on the basis of assured shorthold tenancy agreements, arguing that no overage was due as there had been no sale. He occupied the remaining property himself – again, no sale. On Mr Biden's reasoning, the overage payment might never be triggered.

Mr Sparks, understandably, argued that the court should imply a term requiring Mr Biden to market and sell each of the properties either "as soon as reasonably practicable" or "within a reasonable period of time" to give practical effect to the agreement between them. So, in light of two recent and very high profile cases, *Marks & Spencer v BNP Paribas*[2] and *Arnold v Britton*[3], in which the Supreme Court refused to imply the clauses requested, how did the dice fall this time?

1 [2017] EWHC 1944 (Ch).

2 *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72; [2016] AC 742.

3 *Arnold v Britton and others* [2015] UKSC 36.

The Main Event

The judge made short work of the opposing arguments to find that a clause should be implied to the effect that Mr Biden should be under an obligation to market and sell the properties within a reasonable time of the option being exercised.

The judge agreed that the buyer's contractual obligations – to apply for planning permission and to proceed to construction and pay overage – made little sense if there was no intention to realise the value of the development and, from the seller's perspective, the entitlement to overage.

The (implied) clause, he said, "is one that is necessary as a matter of business efficacy and without it the Option Agreement lacks practical or commercial coherence". The clause was so obvious, the judge said, that it went without saying. Without the obligation to market and sell the properties, the contract simply did not work. With regard to the timescale, it is well established that, where a contract is silent or indefinite as to the time of performance, the law implies an obligation to comply with its terms within a reasonable time.

This was not a question of trying to imply a clause which would put right what was, for one of the parties, a bad bargain and this is a factor which distinguishes the decision from some of those preceding it.

Curtains

When it comes to overage, the courts have demonstrated a willingness to imply terms which will prevent frustration of the payment. However, it is critical to remember that a term will not be implied into a commercial contract "merely because it appears fair or merely because the judge considers the parties would have agreed it if it had been suggested to them". The test is one of necessity, not reasonableness"[4] – and it is a strict one. Whilst this case appears to have interrupted a trend away from implying clauses into contracts, the rationale upon which this has been done is clear.

This case is good news for sellers, but it is always dangerous (as well as expensive) to rely on a court to help you out – far better to ensure the drafting reflects the intention.

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4 *Sparks v Biden*, paragraph 35 with reference to *Marks & Spencer plc v BNP Paribas Securities Services* [2015] UKSC 72; [2016] AC 742.

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