Neutral Citation Number: [2021] EWCA Civ 560

Case No: A4/2020/0795

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERICAL COURT (QBD)
MR CHRISTOPHER HANCOCK QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
CL-2018-000117

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2021

Before:

LADY JUSTICE KING
LORD JUSTICE COULSON
and
LADY JUSTICE CARR

- -

Between:

YOO DESIGN SERVICES LIMITED	**Appellant**
- and -	
ILIV REALTY PTE LIMITED	**Respondent**

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- -

Jamie Riley QC and James McWilliams (instructed by **Metis Law Ltd**) for the **Appellant**
Edmund Cullen QC (instructed by **Dentons**) for the **Respondent**

Hearing date: 18 March 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 20 April 2021."

LADY JUSTICE CARR DBE:

Introduction

1. The Appellant, Yoo Design Services Limited (formerly known as Yoo Inspired by Starck Limited) ("Yoo"), designs and markets luxury hotel and residential developments across the world. It is part of the "Yoo" branded interior design group founded in 1998 by Philippe Starck and John Hitchcox. Developments associated with the "Yoo" brand can command a significant associated premium (of anywhere between 5% and 40%) on the basis that Yoo is a recognised luxury designer highly regarded in the market place.

2. The Respondent, Iliv Realty Pte Limited ("Iliv"), is a property developer formerly known as Heeton Realty Pte Limited, a company incorporated under the laws of Singapore. It was the wholly owned subsidiary of Heeton Holdings Limited ("Heeton") until September 2016 when its entire shareholding was acquired by Grange Invesco Pte Limited ("Grange").

3. In July 2008 Yoo and Iliv entered into a Design Service Agreement ("the DSA") in relation to a large-scale high-value residential property development at 74 Grange Road, Singapore, a prime and prestigious residential enclave ("the Development"). The Development was to consist of a 16 storey building comprising 28 apartments ("the Apartments").

4. Completion of the Development (originally estimated for late 2010) was delayed but was achieved in late 2013. By then, following the global financial crisis of 2008, there had been a significant fall in the Singapore property market. Iliv's position is that, following completion, it made attempts to sell the Apartments (in 2013 and 2015) at values well below their originally anticipated value; however no sales were achieved. There was further marketing in 2016. None of the Apartments have been sold to date; they are currently rented out.

5. Although Yoo was contractually entitled to (and received) an initial one-third (US$480,000) tranche of its total retainer fee (of US$1.6 million) at the outset, the balance of its retainer fee (together with any incentive payment and potential commission) was and is only due upon the signing of sale and purchase agreements for the Apartments (or legal completion) (as set out more particularly below).

6. Against this background Yoo commenced the current proceedings (in February 2018), contending (amongst other things) that Iliv is in breach of implied obligations to market and sell the Apartments (as set out further below). Iliv's position is that it is under no such obligations; it has made reasonable efforts to sell but the financial crisis of 2008 and the subsequent collapse of the Singapore property market has made it impossible to sell at anything approaching an acceptable price.

7. Following a two-day hearing of four preliminary issues, in a judgment dated 7 May 2020[1], Christopher Hancock QC sitting as a Deputy High Court Judge ("the Judge") rejected Yoo's case as to the proper construction of the express terms of the DSA and

[1] [2020] EWHC 1077 (Comm)

further rejected the implication of three implied terms contended for by Yoo. The two findings material for present purposes were that under the DSA:

i) Iliv was not under an implied obligation to proceed with marketing of the Apartments for sale with due diligence and expedition at all times and to ensure that its sole marketing agent continued to use its best endeavours to complete the sale of the Apartments under Sale and Purchase agreements ("the marketing obligation");

ii) Iliv was not under an implied obligation to complete the sale of the Apartments within a reasonable time of the third quarter of 2008 and/or completion of the development of the Apartments ("the sale obligation").

It was common ground that, in the light of the Judge's findings on all four issues, the claim in its entirety fell to be dismissed.

8. Yoo's appeal is limited to a challenge to the Judge's findings as to the marketing and sale obligations. Iliv resists the appeal, contending that the Judge was right for the reasons that he gave. It complains that Yoo's claim is based on hindsight and that Yoo is in substance seeking a re-hearing, something which is wrong in principle.

Background to the DSA

9. As indicated, developments carrying the Yoo brand can command a significant price premium. This can advantage developers who use Yoo's design services and acquire the right to brand their development as having been designed by Yoo. Yoo would typically calculate its total charge for design and licensing services by reference to the gross development value ("GDV") of a project, rather than on the basis of time spent (or some other metric). On the basis of the GDV, in cases of intended sale, Yoo would then charge an initial amount on signature with the balance being paid by reference to sale of the units in the development. As will be seen, this was the model adopted in the DSA.

10. Discussions for the DSA began between Iliv (through Mr Danny Low ("Mr Low")) and Yoo (through its then managing director for Asia Pacific, Mr Tze On Andrew Pang ("Mr Pang")) in late 2007/early 2008 with a view to Yoo's branded designs being incorporated into the Development.

11. Yoo's total retainer fee of US$1.6million was fixed by reference to the Development's GDV of approximately S$158 million (the equivalent of approximately US$112.5 million at the time). The fee represented approximately 1.4% of the GDV.

12. As a Singaporean project, the Development was subject to an onerous statutory and regulatory regime contained within Singapore's Residential Property Act (Chapter 274, 2009 Revised Edition) ("the RPA") and the Housing Developer Rules made pursuant to s. 22 of the Housing Developers (Control and Licensing) Act (Chapter 130, 2008 Edition) ("the HDR") ("the Singaporean Property Regime"). Iliv was at all material times aware of this regime[2]. Mr Pang's evidence was that he was also aware

[2] And Yoo suggests that Heeton's sale in 2016 of the shares in Iliv (as opposed to sale of the Development) to a group of Singaporean investors (who would not be treated as a foreign housing developer) was motivated by the desire to avoid the penalties imposed by the regime (and also avoided triggering the payment obligation to Yoo).

of its salient features (as a result of a conversation with Mr Low in April or May 2008). By then Mr Pang had passed on responsibility for negotiating the terms of the DSA but suggested in the witness box that he might have discussed what he learned from Mr Low about the Singaporean Property Regime with the Yoo team in London.

13. As a foreign housing developer for the purposes of the RPA, Iliv was required to obtain an approval (or a qualifying certificate ("a QC")) from the Controller of Residential Property in Singapore ("the Controller"). QCs are subject to restrictions under s. 31 of the RPA, including:

    i) An obligation on the developer to provide security for its obligations under the QC and the RPA in the form of a banker's guarantee of at least 10% of the purchase price of the subject land ("the Security Deposit");

    ii) An obligation on the developer to complete the construction of the development and obtain a temporary occupation permit ("TOP") or certificate of statutory completion ("CSC") within a limited period of time from the date of the QC, normally six years;

    iii) An obligation to sell the properties within the development within two years of the date of issue of the TOP or the CSC, failing which it would risk forfeiture of the Security Deposit. (Developers can apply for an extension of the two year period for sale, but at a significant price (8% of the value of the land for the first year, 16% for the second and 24% for the third and subsequent years.))

14. Further, as a foreign housing developer for the purpose of the RPA, Iliv was prohibited (by s. 31(4) of the RPA) from retaining any of the Apartments within the Development (whether for rental purposes or otherwise) without applying to the Controller for permission (pursuant to s. 25 of the RPA).

The DSA

15. The DSA is dated[3] July 2008 and runs to 34 pages (including Appendices). Yoo agreed to grant to Iliv a non-exclusive sub-licence to apply Yoo's designs in the development of the Apartments ("the Licence") and to provide various services to Iliv as set out in Clause 3 and the Appendices ("the Services"). The Services were to be performed in London, subject to necessary site visits by Yoo representatives as agreed. Appendix B provided that the Construction Start Date was 4th Quarter 2008, Estimated Completion was 4th Quarter 2010, and the approximate date of the Marketing Launch was 3rd Quarter 2008.

16. The Recitals (which did not form part of the agreement itself) stated:

> "WHEREAS
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> A. Yoo possesses a licence (the "Licence") to design and market residential developments incorporating certain intellectual property and proprietary elements conceived by

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[3] No specific date in July is recorded.

> Yoo (the "Concept") and to use the name Yoo (the "Trademark") in connection therewith, in major cities all over the world.
>
> B. The Concept covers, in particular, the building, renovation and development of apartment buildings and the marketing thereof using the name and reputation of Yoo.
>
> C. Yoo is willing to grant sub-licences to third parties to enable the same to apply to the Concept.
>
> D. The Company wishes to obtain and Yoo wishes to grant a sub-licence of the Concept and the Trademark to apply it to a residential development to be named, located at 74 Grange Road, Singapore (the "Project") and to receive Services from Yoo to enable it to apply the Concept to the Project."

17. By Clause 2 Yoo granted Iliv a non-exclusive sub-licence to apply the Concept to the design, realisation and marketing of the Project. Clause 3 described the Services to be provided by Yoo by reference to Appendices A, C, D and E. Appendix E set out the marketing and PR services that Yoo was to provide "via assistance and co-ordination". At Clause 3.3 the parties agreed to agree a timetable for the delivery of the Services as soon as practicable following completion of the DSA. By Clause 3.4 Yoo was to provide design and consultancy services for the fitting up of a show flat (something also reflected in Appendix A).

18. Clause 4 addressed the extent of the Services. By Clause 4.2, Iliv was obliged to consult Yoo on all matters of design and aesthetics pertaining to the Apartments and Iliv was to comply with Yoo's reasonable instructions on such matters. However, any "tenant or purchaser" of the Apartments could make any and all changes without incurring liability to Iliv or Yoo.

19. Clause 5 set out Iliv's various warranties and obligations. By Clause 5.2, Iliv was to grant Yoo access to any of the Apartments at any time in order that Yoo could inspect the same and ensure that it complied with the requirements of the DSA. In the event of the discovery of non-compliance, Iliv was immediately to cease to market and sell the Apartment(s) in question. Non-compliant apartments were not to be "further used, marketed or sold" until Yoo (or an appointed representative) had re-inspected and confirmed its satisfaction.

20. By Clause 8.1, Iliv was to "proceed to develop the Project with all due diligence and expedition at all times and shall ensure that its Project Architects, and all other agents consultants contractors and advisers use their best endeavours to complete the Project within the anticipated development timetable".

21. By Clause 8.2, Iliv undertook "to provide to Yoo a quarterly written sales and site progress report on or before the last day of each quarter in which the following will be received in such detail as Yoo shall reasonably require …

> … 8.2.3 progress in the sales of the Units

8.2.4 progress of marketing and advertising the Units".

22. The payment provisions for the Licence and Services were contained in Clause 9 (modelled on Yoo's then standard payment terms) which stated:

"9. Fees - Schedule of Payments

9.1 In consideration for the sub licence of the Concept granted by Yoo and for the Services provided by Yoo, the Company shall pay to Yoo a Retainer fee ("the Retainer Fee") of One million six hundred thousand United States Dollars (US$1,600,000) based on an estimated gross development sales value of One hundred and fifty-eight million, seven hundred thousand Singapore Dollars (S$158,700,000).

9.2 The Company shall pay the Retainer Fee in advance of Four Hundred and eighty thousand United States dollars (US$480,000) in 24 equal instalments of twenty thousand United States dollars (US$20,000) per calendar month payable by electronic transfer within fourteen (14) days of the execution of this Agreement and on each calendar month thereafter. (For the avoidance of doubt all fees are non-refundable under any circumstance and may not be offset against any claims, invoices and payments etc of any kind).

9.3 The Company shall in addition, pay up to 50% of the Retainer Fee, less payments already made under Clause 9.2 above to Yoo upon the signing of the Sale and Purchase Agreements of 50% of the Apartments in the Property.

9.4 The balance of the Retainer Fee shall be paid to Yoo upon Legal Completion[4] of the Apartments.

9.5 In addition, Yoo shall receive an incentive fee (the "Incentive Fee") equal to 3% of the aggregate gross sales proceeds (as defined below) in excess of an average per square feet price of the saleable parts of the Project of Three thousand, six hundred Singapore dollars (S$3,600) per square foot … For the avoidance of doubt, Yoo shall be entitled to the Incentive Fee only if all the 28 Apartments in the Property are sold up to Legal Completion. The "Gross Sale Price" of a Yoo Apartment shall be gross sale price of the Apartment as sold to a bona fide arms length third party. It shall also exclude all furniture and fitting costs (if any) and shall be allocated on a good faith basis) (sic) levied in the sale of the Apartments.

[4] Legal Completion was defined in Clause 1.1 of the DSA as "the issuance of the certificate of subsidiary strata title by the relevant authorities to the owners of the Apartment and in the manner set out in the Housing Developer Rules".

> 9.6 The Incentive Fee shall be paid to Yoo within two (2) months of the signing of the last Sale and Purchase Agreement of all 28 Apartments.
>
> 9.7 In addition to the Retainer Fee and Incentive Fee stated above, the Company shall pay to Yoo a Commission of 1% of the Gross Sale Price for any Apartment, where Yoo introduces a purchaser, via its databank, website, or other means … Such Commission shall be payable two (2) months after the signing of the Sale and Purchase Agreement for each Apartment".

23. By Clause 9.11 Yoo was entitled to be paid or reimbursed for travel and accommodation costs, along with a daily fee per visiting employee, against production of appropriate receipts.

24. Under Clause 10 Iliv and Yoo were to keep and maintain complete and accurate records relating to all sales of the Apartments with reciprocal rights of inspection. By Clause 11 Iliv was entitled to use the Trade Mark and Concept and Yoo's brand in publicity destined "to the potential purchasers" of the Apartments.

25. Clause 12 provided:

> "12.1 Subject to the provisions of this clause, this Agreement shall remain in effect until completion of the Project, settlement of the sales of all Yoo Units and the full payment by the Company to Yoo of all the fees provided for in clause 9…"

26. Finally for present purposes, Clause 23 stated that the DSA embodied "the entire understanding between the parties and all prior agreements and statements, oral or written are merged into this Agreement". (There is no criticism of the Judge's conclusion that Clause 23 did not assist Iliv essentially because, as was held in *Axa Sun Life Services plc v Campbell Martin Ltd* [2012] Bus LR 203, implied terms are part of the agreement.)

27. Yoo's position is that it has performed all of its obligations under the DSA. Iliv has served a general denial in response to this contention but no particulars are given and there is no counterclaim.

28. As set out above, the originally anticipated GDV was S$158,700,000. Yoo's attempts to sell were at prices equivalent to GDVs of between S$128-134m (in August 2013) and S$110-120m (in April 2015), but no sales were achieved. It is said that there was further marketing of the Apartments in 2016. Heeton sold its shares in Iliv to Grange in September 2016 for S$95 million.

29. There is no suggestion that Yoo has introduced any purchasers for the purpose of Clauses 9.5 and 9.6 of the DSA. As for the possibility of receiving an incentive fee, Mr Pang's evidence in the witness box was that it was "fairly impossible" for Iliv to reach the price levels that would trigger Yoo's entitlement (although an email sent by him at the end of March 2008 suggests that at that stage he considered the overage bonus to be of at least some value).

The Judgment

30. The material parts of the Judge's reasoning are to be found in [87] to [93] of the Judgment. The Judge addressed the marketing and sale obligations together because, in his judgment, they were "inextricably interlinked". If there was in fact no obligation to sell within any particular time frame, it was difficult to see why there should be an obligation to market so as to achieve such sales.

31. The Judge gave the following five reasons for his conclusion that the sale obligation did not fall to be implied:

    i) The DSA included no express time frame for sale, although it did require Iliv to complete the actual building within a set time frame. It was perhaps unsurprising that Iliv was prepared to accept responsibility for finishing the building, something over which it had control, but not selling (which depended on third parties as well as Iliv);

    ii) It would have been possible for the parties to have included a long stop date in their agreement, at which point Yoo would have been entitled to its fee irrespective of sale. That is not how the parties chose to structure their agreement;

    iii) The parties made very disparate contributions to the project. The suggestion that Iliv should be obliged to sell against its wishes in a depressed climate in order to enable Yoo to earn the balance of its fee, a fee which was, in the grand scheme of things, a relatively small proportion of the overall cost of the project, seemed to the Judge to be "unlikely…and certainly not necessary to give business efficacy to the contract";

    iv) If the same term were to be implied, one would expect that both parties would share in the downside following a sale at a lesser value. However, the size of Yoo's entitlement would be in no way diminished in such a case; whilst a greater sale return did enure to Yoo's advantage. It was therefore unnecessary to imply a term that the units would be sold earlier rather than later to enable Yoo to earn its fee;

    v) It was highly unlikely that the officious bystander would have been "testily suppressed"[5] by both parties had the point been raised during contract negotiations. In fact, it seemed very likely to the Judge that there would have been "heated dissension between the parties".

32. The Judge then addressed *Sparks v Biden* [2017] EWHC 1994 (Ch) ("*Sparks*"), a case relied upon by Yoo. There it was held that there was an implied obligation to sell within a reasonable time. Every contract was different and the factual matrix in each case would be different. There were a number of points of clear distinction on the facts. It was not an authority of material assistance.

33. Having dismissed the sale obligation, the Judge turned to the marketing obligation. Absent an obligation to sell, the suggested marketing obligation made no real

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[5] A phrase taken from the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227.

commercial sense at all. Marketing the Apartments was the natural precursor to sale. It required expenditure by Iliv, the justification for which would in general be the realisation of the value of the Apartments via sale. If it was up to Iliv to decide when to sell, then it would also have to be up to Iliv to decide when and whether to incur the expense of marketing necessary to achieve such sales.

Grounds of challenge

34. Yoo does not contend that the Judge incorrectly identified the law. Rather, it is said that he misapplied it to the facts.

35. Yoo accepts that whether or not the marketing obligation exists stands or falls with the question of whether or not the sale obligation is established. The Judge made the same errors in relation to each. The Judge was wrong for four headline reasons:

    i) He failed to have proper regard to the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have. It was abundantly clear that the presumed intention of the parties was that the Apartments should be sold and sold within a reasonable time;

    ii) He failed to have proper regard to the question of business efficacy;

    iii) He failed to have regard to the fact that all of the other requirements for the implication of a term were met;

    iv) None of the matters relied upon by the Judge afforded any sound basis for his conclusion that the sale obligation should not be implied.

36. Yoo's arguments were developed in summary as follows: the presumed intention of the parties was clearly that the Apartments should be sold and sold within a reasonable time. The DSA envisaged and was directed entirely towards the sale of the Apartments. There was no mechanism by which Yoo might share in the benefit of renting out the Apartments. The Judge failed to pay proper regard to the Singaporean Property Regime which formed the relevant factual background known to both parties and against which the parties entered into the DSA. The Regime is plainly designed to ensure that foreign property developers such as Iliv complete property developments swiftly and, once completed, sell the properties within two years, failing which they will face "exceptionally stiff financial penalties". Yoo's retainer fee was not expressed as a function of the value of the sales but rather as a pre-determined fixed figure irrespective of sale price.

37. The Judge is also said to have failed to have proper regard to business efficacy. Without an obligation to sell there is no means by which Yoo can compel payment of its retainer fee. The result is the "absurd" situation where, some 12 years after provision of its services, Yoo has still not been paid that fee. Further, Yoo would be obliged to continue to provide the Services even if there was no prospect of payment in the foreseeable future because Iliv was not actively seeking to sell the Apartments. It would be deprived of the opportunity to earn the incentive fee and/or commission, the entitlement to which was predicated on the sale of all of the Apartments. If Iliv were permitted to sell several years after completion (and after renting out), it could

still deploy the Yoo brand even though the Apartments would by then be "used and antiquated".

38. Yoo submits that the sale obligation was clearly expressed and did not contradict any express term. Further it was reasonable and equitable: market conditions would be given due regard in deciding whether or not Iliv was in breach. The "reasonable time" in which the Apartments would have to be sold would reflect market conditions ("the market condition concession").

39. As for the matters relied on by the Judge in his reasoning, Yoo contends that the fact that there was no express provision for sale within a particular time frame was immaterial. The lack of express agreement on an issue is always the backdrop for a contention that an implied term exists. The Judge misunderstood the nature and significance of Yoo's contribution and in any event the market condition concession meant that any imbalance in contribution was immaterial. It is also suggested that Iliv would never be forced to sell the Apartments against its wishes: it could simply choose to pay Yoo the balance of its retainer fee. The fact that Yoo would not share in any downside following sale at a diminished value did not point against implication of the sale obligation. There was nothing objectionable in the parties agreeing that Yoo should be paid a fixed fee without regard to actual sale price.

40. There was every reason to conclude that the sale obligation was so obvious that it went without saying given i) the Singaporean Property Regime ii) the very purpose of a property development project and iii) the market condition concession.

41. Finally, Yoo contends that there was no proper basis on which to distinguish the facts or reasoning of HHJ Malcolm Davis-White QC (sitting as a Judge of the High Court) in *Sparks*.

Grounds of opposition

42. For Iliv it is said that Yoo is, in effect, seeking to introduce into the DSA a long-stop date for the payment of the balance of its retainer fee. Had the parties intended there to be any such long-stop, nothing would have been simpler than to provide for one. They did not do so because they did not intend for one. Yoo's position that Iliv was effectively ceding its freedom to choose how and when to realise its very significant investment to the tune of S$158,700,000 makes no commercial sense.

43. Iliv relies on the Judge's reasons and observes:

    i) The DSA was a detailed and comprehensive document negotiated and agreed over a period of months between senior representatives and with the benefit of legal advice on both sides;

    ii) Where the parties had concerns about timing, that was addressed by express provision (see for example Clause 8.1);

    iii) If the intention of the parties had been that the Apartments had to be sold, even if against Iliv's wishes, the natural expectation would be that Yoo should share the downside. That might well have been a demand made by Iliv, had the sale obligation been sought as an express term;

iv) The Development was costly, lengthy and complicated. The timing of any sale is a matter over which one would clearly expect Iliv to retain absolute control and discretion.

Thus the requirement that an implied term be "reasonable and equitable" is not satisfied.

44. As for business efficacy and obviousness, neither requirement is met. The DSA functions perfectly well without the sale and marketing obligations. Yoo was taking the risk of the Apartments taking some time to sell, as was Iliv (with far higher stakes). The idea that Iliv would have been dictated to in this way by the interior designer is "peculiar enough"; it is far from clear what the upshot of any discussion about the implied obligations would have been.

45. Further, the sale and marketing obligations are not capable of clear expression. They are vague and uncertain. The implications of the market condition concession (which is said to be at odds with its pleaded case) are "enormous". One is left wondering what the claim is about, given that it is common ground that the Singaporean property market has collapsed. And the implied terms suggested do not make that clear.

46. Finally, Iliv contends that the sale and marketing obligations contradict Clause 4.2 of the DSA (which expressly contemplates that the Apartments might be tenanted). The freedom to rent the Apartments is only consistent with Iliv having the power to choose when, how and at what price the Apartments were to be marketed and sold.

The law on implied terms

47. The implication of contractual terms involves a "different and altogether more ambitious undertaking" than the exercise of contractual interpretation which identifies the true meaning of the language in which the parties have expressed themselves: the interpolation of terms to deal with matters for which, ex hypothesi, the parties have themselves made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of the "extraordinary" power so to intervene (see *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 ("*Marks & Spencer*") at [29] (citing Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 481)).

48. Those constraints have been the subject of well-known scrutiny by the courts (see the classic statements in *The Moorcock* [1889] 14 PD 64 ("*The Moorcock*") at 68 per Bowen LJ; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at 605 per Scrutton LJ and *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 KB 206 at 227 per Mackinnon LJ). The later Privy Council decision in *BP Refinery (Westernport) Pty Ltd v The President Councillors and Ratepayers of the Shire of Hastings* ("*BP Refinery*") (1977) 180 CLR 266 deserves particular mention. There Lord Simon (delivering the majority judgment) stated (at 283):

> "…for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (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; (5) it must not contradict any express term of the contract".

49. The leading authority from recent times is *Marks & Spencer*, where the Supreme Court approved the remarks of Lord Simon in *BP Refinery*, albeit subject to qualification and observation. Amongst other things, (at [21]) Lord Neuberger questioned whether a requirement that the term to be implied had to be "reasonable and equitable" would 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. Lord Neuberger also commented that he suspected that, whilst the requirements of business efficacy and obviousness could be alternatives in the sense that only one need be satisfied, it would be a rare case where only one of those two requirements would be satisfied.

50. Since the analysis of Lord Neuberger in *Marks & Spencer* (at [15] to [31]) the Supreme Court and Privy Council have consistently made it clear that whether or not a term falls to be implied is to be judged by reference to the test of business efficacy and/or obviousness (see for example *Halllman Holding Ltd v Webster* [2016] UKPC 3 (at [14]); *Airtours Holiday Transport Ltd v HMRC* [2016] UKSC 21; [2016] 4 W.L.R. 87; [2016] 4 All ER 1 (at [38]) and *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* [2016] UKSC 57; [2016] 3 WLR 1422; [2017] AC 73 (at [31]). In *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2 at [7], Lord Hughes commented:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

51. In summary, the relevant principles can be drawn together as follows:

    i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;

ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;

iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;

iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;

v) A term will not be implied if it is inconsistent with an express term of the contract;

vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching 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;

vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it 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;

viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test.

52. Where a contract does not expressly, or by necessary implication, fix a time for performance of a contractual obligation, the law usually implies that it will be performed within a reasonable time (see Lewison on *The Interpretation of Contracts* (7th ed) at 6.153).

Discussion and analysis

53. As the parties agree and in line with the Judge’s approach, it is logical to address the sale obligation first. Yoo realistically accepts that if it cannot establish any obligation on Iliv to sell the Apartments within a reasonable time, neither will it be able to establish the marketing obligation.

54. At the heart of Yoo's appeal lies the submission that the Judge failed to give proper effect to "the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should

have" (relying on the words of Bowen LJ in *The Moorcock* (at 68)). This emphasis on the "presumed intention of the parties", however, does not reflect (and is certainly not the starting point for) the modern approach to the implication of contractual terms which, as set out above, is to focus on whether the twin tests of business efficacy and/or obviousness are met.

55. In any event, a presumed intention at the time of entry into the DSA to sell the Apartments is not to be equated with a presumed intention at the time of entry into the DSA that there should be an obligation on the part of Iliv to do so (and within a "reasonable" time). The proposition that the parties wanted (and intended) to sell the Apartments is very obviously correct from the face of the DSA itself. The timeline demonstrates that off-plan sales were anticipated. It is also not a matter in dispute: Iliv fully accepts that at the time that it entered the DSA it intended to sell the Apartments. But that is not the issue. The question is whether, as a matter of business efficacy and/or obviousness, Iliv is to be taken to have agreed to an *obligation* to complete the sale of the Apartments and within a "reasonable" time. The fact that (as Yoo put it) the DSA was "all about" selling the Apartments (and fast) does not answer that question; it begs it.

56. I turn then to consider business efficacy and obviousness. On the facts of a case like this, and as the parties agree, it is difficult to see that there is any scope for the sale obligation to satisfy the business efficacy test but not the obviousness test (or the obviousness test but not the business efficacy test). The considerations under each overlap to a large extent. It is nevertheless appropriate to address them separately as a matter of principle.

57. The DSA has practical and commercial coherence as it stands:

i) Yoo was to receive a third of its retainer fee "up front" on a non-refundable basis and be paid reasonable travel and accommodation expenses (together with a daily fee per visiting employee) upon production of receipts;

ii) Yoo was to receive the balance of the retainer fee (and any incentive payment or commission) at various stages upon sale of the Apartments.

58. Put simply, the DSA "works" without the need for implication of any term obliging Iliv to sell. Yoo, like Iliv, took the risk of late (or even no) sale of the Apartments. Its assessment at the time, rightly or wrongly, was that there would be early sales of the Apartments.[6] That was a commercially coherent judgment call that it was entitled to make at the time, when it had the comfort of the shared ambition to complete timeously alongside. There was, in addition, the obvious logic that Iliv would wish to market and sell the Apartments quickly and to best advantage if it could.

59. The fact that Yoo was (and agreed to be) at risk of having to wait for payment is not surprising: it had the opportunity to share in any "upside" (through the incentive fee). Although the retainer fee would not reduce in the event of the anticipated GDV not being achieved, it cannot be said to be commercially incoherent for Yoo to have

[6] The reference to "any tenant" in Clause 4.2 of the DSA may indicate that some renting out was envisaged at least as a possibility. But it is a fleeting and isolated phrase and I do not attach any significant weight to it.

agreed to wait for payment in order to allow Iliv to take whatever steps it deemed necessary to enhance the value of its investment.

60. Yoo chose to entrust the sale process to Iliv: it was entirely dependent on Iliv in terms of price (relevant to any entitlement on the part of Yoo to incentive payments), timing and completion of any sale (relevant to any entitlement on the part of Yoo to payment of the balance of the retainer fee). The extent of that dependence is clear from the terms of clause 9 - see for example Clause 9.3, where Iliv was to put up to 50% of the retainer fee, less the one-third advance payment, upon the signing of sale and purchase agreements of 50% of the Apartments.

61. That the parties chose to take on the commercial risks in the way that they did is in my judgment the answer to any concern about the prospect of Yoo never receiving the balance of the retainer fee (because the Apartments are never sold). Yoo may now regret its decision, but that is a position coloured by impermissible hindsight.

62. The enduring nature of the DSA (by virtue of Clause 12) does not persuade me that the introduction of further terms into the contract is necessary. First, Iliv has never said in terms that it will not attempt again to sell the Apartments in the future. Secondly, in practical terms, in the absence of such attempts, Yoo will not be called upon to provide any marketing support services. Thirdly and again, this was the risk that the parties are to be taken as having freely assumed.

63. In any event, if it were necessary to fill a gap in the DSA on grounds of business efficacy, the question then is how that gap might be filled. It is at this stage that Yoo's case runs into particular difficulty.

64. Yoo's position is that the sale obligation meant that Iliv had to complete the sale of the Apartments "within a reasonable time". I do not consider that the question of the meaning of "reasonable time" can simply be deferred to the second stage (of breach), as Yoo suggests. It may not be necessary to determine outright the meaning of "reasonable" at this stage but it is necessary to consider what it might encompass in order to decide whether the term to be implied is sufficiently clear (or obvious).

65. It is right that the concept of what is and is not "reasonable" is one with which the courts frequently grapple. They do so often by reference to objective standards or, for example, contractual requirements, or within a contained and readily established factual matrix. The DSA itself contains reference to, for example, a "reasonable construction timetable" and to the use of "reasonable endeavours" (to produce its design so as to come within Iliv's costs plan and to overcome delay or stoppage following a force majeure event).

66. The concept of sale of the Apartments “within a reasonable time” is, however, fraught with uncertainty.

67. Yoo's pleaded case as to the meaning of "reasonable time" does not provide a promising platform. In its Particulars of Claim, time for the period was said to run from the 3rd Quarter of 2008 "and/or" completion of the development of the Apartments. In its Reply Yoo contends:

> "It is averred that a reasonable period in which Iliv ought to have sold the Apartments was the period of the 3rd Quarter of 2008 until no later than the end of 2013, alternatively the end of 2015. In the further alternative, it is averred that the reasonable period for the sale of the Apartments was the period from 3rd Quarter 2008 to 14 February 2018 (being the date of the issue of these proceedings)."

68. Further, as noted above, although not expressly stated in its pleaded case[7], Yoo has made the market condition concession. It has done so for very understandable reasons - since without it, the sale obligation would on any view not be reasonable or equitable.

69. What is and is not a reasonable time on the facts of this case depends on a mass of variables, some of which are wholly out of Iliv's control - most obviously third party purchasers – and some of which are inherently subjective in nature. By way of example only, and as Mr Riley QC for Yoo fairly accepted, the following factors (at least) would be relevant:

    i) Current market conditions and predictions for the future;

    ii) The marketing history;

    iii) What would be a reasonable price;

    iv) What would be a reasonable profit level for Iliv (although Yoo contends that this could not be determinative or the driving feature);

    v) Iliv’s financial position at the time;

    vi) The circumstances of/strength of any covenant from any proposed purchaser(s).

70. Whether this fluidity is to be classed as a lack of clarity in expression or unacceptable vagueness does not matter. An obligation on Iliv to sell "within a reasonable time" does not in my judgment form a proper basis for an implied term on the facts of this case. Rather than providing practical or commercial coherence, it would open up a can of worms on what would have been the key issue for Iliv, namely when and at what price to sell the Apartments.

71. For these reasons, the Judge reached the right conclusion: the sale obligation is not necessary to bring practical or commercial coherence to the DSA.

72. The position is even clearer when one comes to consider the question of obviousness. The officious bystander would have asked the parties: “Is it agreed that Iliv must sell the Apartments within a reasonable time?”

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[7] For the avoidance of doubt, I reject Iliv’s suggestion that Yoo’s appeal should fail on the basis that the market condition concession is inconsistent with its pleaded case as to the nature of the implied term contended for. When read as a whole, Yoo’s pleaded case is not inconsistent with such a position either at all or at least not as clearly inconsistent as Iliv submits.

73. The Judge was correct to take the view that the parties would not simply have answered "Oh of course" and that it was "highly unlikely" that the officious bystander would have been "testily suppressed". As he commented, there would have been "heated dissension".

74. I do not repeat the difficulties involved in agreeing to sale within "a reasonable time" (and so the lack of "obviousness" in such a term being agreed). Beyond that, it is not for this court to second guess what, if any, discussions might have flowed from the officious bystander's question (assuming for present purposes in Yoo's favour that the parties would not simply have confirmed that sale of the Apartments was being left at large and entrusted to Iliv). It is enough to conclude that there was no clear and obvious single answer which would have met with both parties' approval. The question would have given rise to a host of alternative options and connected considerations:

    i) The agreement of a longstop, in which case Iliv would have wanted to re-consider/re-negotiate the size of Yoo's retainer fee (which was predicated on a specific GDV). The natural response would have been to require Yoo to share in any potential downside;

    ii) An agreement by Iliv to sell within a reasonable time. This would have been most unlikely for the reasons identified above. But even if it was deemed a possible solution, again it would have had knock-on consequences for Yoo's retainer fee;

    iii) Agreement of a different fee structure altogether for payment to Yoo, perhaps with payment not being contingent on sales. Again, that would have had implications for the level of Yoo's retainer fee.

75. This is therefore not a case where it can be shown that, had the parties foreseen an inability or failure on the part of Iliv to sell the Apartments, there was only one contractual solution or that one of several possible solutions would without doubt have been preferred. There were multiple potential contractual solutions. It cannot be said (even probably, let alone without doubt,) which of them (if any) would have been preferred.

76. For these reasons, again the Judge was right to conclude that the sale obligation did not fall to be implied as a matter of obviousness.

77. The Judge's conclusions are not undermined by the background of the Singaporean Property Regime. Given that it is common ground that the parties intended for the Apartments to sell and quickly, it is difficult to see what that context adds. In any event, the evidential position as to Yoo's knowledge of that regime is unsatisfactory and the Judge was not pressed to make any firm findings. But, whatever that awareness and whatever the potential financial penalties for Iliv in the event of delayed sale, the regime did not impose any obligation on Iliv to sell (either at all or within a specific time frame). Further, the period(s) of time said by Yoo to be "reasonable" do not appear to mirror the time limits imposed by the regime.

78. I am not attracted to the submission for Iliv that there is any inconsistency between the sale obligation and Clause 4.2 of the DSA – albeit that Clause 4.2 does appear to

admit of the possibility of the Apartments being rented out. However, my conclusion by reference to the tests of business efficacy and obviousness is confirmed by the following further considerations:

i) The DSA was a detailed lengthy agreement negotiated over a period of months between legally represented sophisticated parties. It is silent on the question of any obligation on the part of Iliv to sell the Apartments within a reasonable time in circumstances where elsewhere it is vocal on issues of timing (see for example Clauses 3.3. and 8.1). This gives rise to a strong presumption against implying the sale (or marketing) obligation. Yoo agreed to payment contingent upon an open-ended event;

ii) Iliv owns the Development and has invested vast sums in the development of the Apartments with a view to making a profit. It is commercially counter-intuitive for it to have anything other than absolute control over the timing and circumstances of sale;

iii) Added to that would be the oddity of forcing Iliv to sell at a particular point in time (potentially losing very large sums of money indeed) in order to trigger payment of Yoo's relatively small retainer fee.

79. Finally, there is nothing in the criticism of the Judge's approach to *Sparks*. The court's task is to assess each contract individually in light of its own peculiar terms and relevant factual context. Comparison with findings as to the existence (or non-existence) of implied terms in other bespoke contracts is unlikely to assist. The dangers of such an approach are well-demonstrated here. There are obvious material differences on the facts of *Sparks*, a case involving a dispute between two individuals. The vendor's imperative was to obtain the proceeds of sale to provide a retirement income. The sale of the properties represented the last stage in a series of steps; at each prior stage there was an express time limit, the entire point of which was *"to ensure that the ability to sell the houses and enable the seller to realise his right to overage would enure as rapidly as possible"*. There was no disparity in the contributions and interests of the two parties. The *"exercise smacked of a joint venture, in which one party would not expect to have an unfettered discretion"*.

80. The conclusion that the sale obligation does not fall to be implied leads to the allied conclusion that neither does the marketing obligation exist. Without an obligation to sell the Apartments within a reasonable time, the implication of the marketing obligation would certainly not be necessary to make the DSA practically or commercially coherent, nor would it be obvious.

Conclusion

81. For these reasons, I would dismiss the appeal.

Lord Justice Coulson:

82. I agree that, for the reasons given by Carr LJ, this appeal should be dismissed. In some ways, Yoo's best point was its reliance upon the decision in *Sparks*. But on analysis, both the relevant factual background and the contract in that case were very

different, the latter being a joint venture in all but name. That gave rise to conclusions as to business efficacy and obviousness which simply do not arise here.

Lady Justice King:

83. I agree.