CONTRACTUAL TERMS RELATING TO PERFORMANCE AND BREACH: IMPLICATION, PRESUMPTION OR RULE OF LAW?

COMMENTARY BY JOANNE WICKS QC, 10 OCTOBER 2019

Our Victorian forbears liked rules. In particular, they had a habit of formulating rules about the meaning of contracts. Textbooks set out a series of statements about contracts, describing what was, and was not, a breach. Judges and lawyers liked it even better if they could apply a Latin name to the rule, like *contra proferentem* (construed against grantor) or *ejusdem generis* (general words limited by preceding specific words). Nowadays we approach the meaning of contracts as a question of ascertaining the objective intention of the parties from the words they chose to use, against the background of the facts known to them at the time. But vestiges of the rules-based approach still sometimes appear in the modern law, which has not developed in an entirely consistent way.

Take the proposition that a party to a contract must not disable themselves from performing their own obligations under it, even if those obligations are future or contingent. So, for example, where Mr Stone contracted to marry Miss Short within a reasonable time of her requesting him to do so, he breached his contract when he married Miss Collins instead. It was no defence to Miss Short's claim that she had never requested Mr Stone to marry her, since by marrying Miss Collins Mr Stone had put it out of his power to marry Miss Stone if the request was made: *Short v Stone*[1]. This is one of a number of well-established propositions relating to performance of the contract, which also include the proposition that one party will not prevent the other from performing their obligations, or that the parties will co-operate with each other in performing their obligations.

It is easy to find cases in which these propositions are expressed as "general principles", as if they are rules of law: so, for example, in *Ogdens Ltd v Nelson*[2] Lord Alverstone CJ said

> "*It is, I think, clearly established as a general proposition that where two persons have entered into a contract, the performance of which on one or both sides is to extend over a period of time, each contracting party is bound to abstain from doing anything which will prevent him from fulfilling the obligations which he has undertaken to discharge*".

Equally, it is possible to find cases in which it is stated that the proposition is an implied term which is automatically implied into every contract (which amounts to effectively the same thing as a rule of law): see e.g. *Barque Quilpué Ltd v Brown*[3]:

> "*…in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract…*"

But in the modern law these performance-related propositions are not treated as immutable rules. Rather they are seen as terms which may be implied, depending on the context and the express terms of the contract, and only if they satisfy the tests for implied terms restated in *Marks and Spencer Plc v BVP Paribas Securities Service Trust Co*[4] of being necessary for business efficacy or so obvious as to go without saying: see e.g. *Ali v Petroleum Co of Trinidad and Tobago*[5]; *Law Debenture Trust Corp Plc v Ukraine*[6]. Using an implied terms analysis allows the Courts to take a flexible approach, excluding the implication if

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[1] (1846) 8 QB 358
[2] [1903] 2 KB 287
[3] [1904] 2 KB 264 per Vaughan Williams LJ
[4] [2015] UKSC 72, [2016] AC 742
[5] [2017] UKPC 2, [2017] ICR 531
[6] [2018] EWCA Civ 2026; [2019] 2 WLR 655 at [196], [204]-[207]

it is not warranted (as in, for example, *Luxor (Eastbourne) Ltd v Cooper*[7]) or tailoring it to the particular terms of the contract under discussion.

Still, there remain occasional references to a "rule of law" approach. In 1940, Lord Atkin said in *Southern Foundries (1926) Ltd v Shirlaw*[8]:

> *"Personally I should not so much base the law on an implied term, as on a positive rule of the law of contract that conduct of either promisor or promisee which can be said to amount to himself "of his own motion" bringing about the impossibility of performance is itself a breach. If A promises to marry B and before performance of that contract marries C, A is not sued for breach of an implied contract not to marry anyone else, but for breach of his contract to marry B."*

Lord Atkin was the only one of the Law Lords in that case to suggest this was a rule of law rather than an implied term, but this passage was referred to last year by the Court of Appeal in *Duval v 11-13 Randolph Crescent Ltd*[9], with Lewison LJ remarking that if he was right, the principle may not have to satisfy the test laid down in *Marks and Spencer*[10].

Another closely allied proposition is the principle that no party shall take advantage of his own wrong. In *Rede v Farr*[11] a tenant who was in arrears of rent sought to get out of his lease by relying on a provision that if the rent should be unpaid for 40 days after falling due, the lease "*shall be void*". Lord Ellenborough CJ said:

> *"In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor".*

Here, too, the proposition was stated as a "*universal principle of law*". The idea that this was a rule of law applicable to all contracts persisted well into the 20th Century, coming strongly out of the speeches of the House of Lords in *New Zealand Shipping v Société des Ateliers*[12], decided in 1919.

Curiously, though, as the "rule of law" approach in this area was abandoned in favour of a more nuanced and context-specific approach, the Courts did not reach for the analysis of an implied term. Instead, they called it a "rule of construction", effectively a presumption that, unless the contract contains clear words to the contrary, the parties are to be taken to have intended that neither party should be able to rely upon his own breach: *Cheall v APEX*[13]; *Alghussein Establishment v Eton College*[14].

It is not obvious why the "no advantage of own wrong" concept should be treated differently from the performance obligations referred to earlier. In both cases the Courts are attempting to ascertain the parties' objective intentions, taking into account the express terms of the contract. A term that a party will not make it impossible to perform its contractual obligations is implicit in most contracts because most people enter into a contract on the basis that the obligations in it will be performed. The idea that a party should not benefit from a breach of it rests on the same conceptual foundation. But the result of the different approaches means that the burden of establishing these different propositions falls quite differently. Where a term of a contract is sought to be implied, it is for the person seeking to make the implication to show why it is necessary for business efficacy to insert it, or that its inclusion is so obvious as

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[7] [1941] AC 108
[8] [1940] AC 701 at 717
[9] [2018] EWCA Civ 2298; [2019] Ch 357 at [24]
[10] This case is going to the Supreme Court in October 2019
[11] (1817) 6 M & S 121, 105 ER 1188
[12] [1919] AC 1 (though the case is a difficult one, since the House of Lords seem to elide the "no party may take advantage of his own wrong" principle with the proposition that a party must not prevent performance of another party's obligations)
[13] [1983] 2 AC 180
[14] [1988] 1 WLR 587

to go without saying. On the other hand, the "rule of construction" approach has the consequence that the proposition is taken to be embedded in the contract unless it clearly says otherwise, with the person seeking to oust it having to do all the work.

In my view, time has come to ditch the idea that the meaning of contracts can be dictated by any rules, including "rules of construction". Our Victorian forbears may have liked rules about contracts, but they also liked capital punishment and only allowing men to vote. Enough said!

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