Neutral Citation Number: [2020] EWCA Civ 1457

Case No: A2/2019/3136

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Whipple J
[2019] EWHC 3354 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2020

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

- -

Between :

DAVID JOSEPH	**Appellant**
- and -	
DELOITTE NSE LLP	**Respondent**

- -
- -

Jonathan Cohen QC and **Alexander Robson** (instructed by **Farrer & Co LLP**) for the **Appellant**
Paul Goulding QC and **George Molyneaux** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Respondent**

Hearing date : 29 October 2020

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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 at 10:30am on 5 November 2020

Lord Justice Arnold:

Introduction

1. David Joseph was an equity partner in Deloitte NSE LLP ("Deloitte") pursuant to the terms of a limited liability partnership agreement dated 1 June 2017 ("the LLP Agreement"). Clause 16.2 of the LLP Agreement confers a power on the Board of Deloitte ("the Board") to expel a partner by issuing a Notice of Retirement. The partner has a right to ask the Board to reconsider the decision to issue a Notice of Retirement. The partner also has a right to put their case to a special meeting of the full partnership of Deloitte numbering around 1,700 partners in 13 countries ("a partners' meeting"). On 23 July 2019 the Board issued a Notice of Retirement to Mr Joseph with effect from 31 January 2020. The Board's reasons for taking this step are not relevant for present purposes. On 1 August 2019 Mr Joseph asked the Board to reconsider the decision to issue a Notice of Retirement. On 18 September 2019 Deloitte's General Counsel and Managing Director, Caryl Longley, sent Mr Joseph an email to inform him that his request would be considered by the Board at its meeting on 2 October 2019, that he would have the opportunity to attend and that "[t]he final Board decision following this meeting will be communicated to you by no later than 9 October 2019". Mr Joseph did not attend the Board meeting, but submitted written representations. On 10 October 2019 Mr Joseph sent Deloitte an email noting that he had not yet been informed of the Board's decision and requesting that, if it was adverse to him, a partners' meeting be convened. The Board's decision on its reconsideration was communicated to Mr Joseph on 11 October 2019. The Board decided not to withdraw the Notice of Retirement. On 12 October 2019 Mr Joseph repeated his request for a partners' meeting to be convened. On 17 October 2019 Deloitte's solicitors wrote to Mr Joseph's solicitors declining this request on the ground that Mr Joseph's email dated 10 October 2019 was out of time since clause 16.2 requires that any such request be made within seven days of the Board meeting i.e. on or before 9 October 2019.

2. On 25 October 2019 Mr Joseph issued proceedings seeking an order for specific performance of the obligation to convene a partners' meeting. Mr Joseph contended that, on the true construction of clause 16.2, alternatively by virtue of an implied term, his request was in time, alternatively that Deloitte was estopped from denying that it was in time by virtue of Ms Longley's email dated 18 September 2019 and Mr Joseph's reliance thereon. After an expedited trial on 27 November 2019 Whipple J dismissed Mr Joseph's claim for the reasons given in her judgment dated 5 December 2019 [2019] EWHC 3354 (QB). Mr Joseph now appeals with permission granted by Males LJ on two grounds, namely that (i) the judge should have held there was an implied term, alternatively (ii) Deloitte was estopped. Mr Joseph no longer seeks an order for specific performance, but damages for breach of contract.

Clause 16.2

3. Clause 16.2 provides as follows:

> "Notice from the Board
>
> Subject to Clause 7.6(f), and this Clause 16.2, the Board may at any time give to an Equity Partner written notice of retirement

(a ***Notice of Retirement***). The Board shall give such period of notice as the National Practice of which the relevant Equity Partner is a National Member would be obliged to give to such Equity Partner or, where none is specified, not less than six (6) months' notice (unless the NSE CEO, the Geography CEO of the relevant National Practice and the Equity Partner concerned shall together agree a shorter notice period) and such Equity Partner's retirement from the Firm shall become effective on the expiration of such notice period (or such shorter notice period as may have been agreed). Any Equity Partner to whom the Board gives notice under this Clause 16.2 shall automatically be treated as also having been given notice of retirement from any National Practice of which he or she is a National Member.

(a) Where any Equity Partner feels aggrieved in respect of any decision of the Board to give him or her a Notice of Retirement, such Equity Partner shall have the right within seven (7) days after receipt of such notice:

(i) to make known his or her point of view to the NSE Chairman; and

(ii) if such Equity Partner so wishes, to present his or her case either by way of written memorandum or personal presentation to a meeting of the Board of which not less than seven (7) days' notice shall have been given to such Equity Partner.

(b) If following the meeting of the Board referred to in Clause 16.2(a)(ii), the Board has not withdrawn the Notice of Retirement and such Equity Partner is still aggrieved, that Equity Partner may within seven (7) days of the date of such Board meeting notify the NSE Chairman that he or she wishes the Board to convene a special meeting of all the Equity Partners pursuant to Clause 3.1 to review the Board's decision to issue a Notice of Retirement to such Equity Partner under this Clause 16.2, in which case the Board shall by notice to the Equity Partners convene such special meeting within fourteen (14) days of the date of such notification to the NSE Chairman.

(c) The notice to the Equity Partners shall be in writing and shall contain sufficient detail of the matter to be discussed, including any written representations submitted by the aggrieved Equity Partner together with a draft of any resolution to be put to the Equity Partners in respect of such Equity Partner's retirement.

(d) If a special meeting of the Equity Partners is convened pursuant to this Clause 16.2, such meeting shall consider and, if thought fit, adopt (with or without amendment) any such resolution as a Resolution of the Equity Partners.

(e) If the decision of the Board to issue the Notice of Retirement is upheld (with or without amendment) by the Equity Partners in special meeting in accordance with this Clause 16.2 or the rights of such Equity Partner to challenge such Notice of Retirement under this Clause 16.2 are exhausted, such Equity Partner's retirement shall take effect on the later of (i) the date of retirement approved by the Equity Partners in the special meeting (if any); and (ii) the date specified in the Notice of Retirement (which shall not be earlier than the date of such notice).

(f) If a special meeting of the Equity Partners is convened pursuant to this Clause 16.2 and the decision of the Board to issue the Notice of Retirement is not upheld by the Equity Partners in such special meeting, the Notice of Retirement shall be automatically withdrawn with effect from the date of such special meeting. For the avoidance of doubt any withdrawal of a Notice of Retirement in these circumstances shall also result in any notice given to the Equity Partner by the National Practice of which he or she is a National Member being withdrawn with effect from the same date."

Other relevant provisions of the LLP Agreement

4. In addition to clause 16.2, the following provisions are relevant:

"3.1 Meetings Called by the Board

The Board may convene a meeting of the Equity Partners at any time and for any purpose.

3.2 Requisitioned Meetings

Any group of Equity Partners which represents at least five (5) per cent of all the Equity Partners by number may by notice requisition a special meeting of the Equity Partners to consider any matter. The notice shall:

(a) be in writing and shall contain sufficient detail of the matter to be discussed, including a draft of any resolution to be put to the Equity Partners; and

(b) be addressed to the Secretary and be signed by all of the Equity Partners requisitioning the meeting.

The Board shall convene a special meeting of the Equity Partners within sixty (60) days of the notice being delivered to the Secretary and such meeting shall consider and, if thought fit, adopt (with or without amendment) any such resolution as a Resolution of the Equity Partners.

7.2 Powers and Responsibilities of the Board

In order to fulfil its role as described in Clause 7.1, the Board shall have such powers and other responsibilities as are given to it under the terms of this Agreement and shall have, in particular, the responsibilities and powers to discharge them under the headings set out below:

(a) The Business of the Firm

…

(x) to communicate to the Equity Partners in a timely and effective manner on matters addressed by the Board including its policies, procedures and decisions;

…

8.2 Notification of Board Decisions

The Board shall ensure, so far as practicable and appropriate, that all Equity Partners are advised subsequent to each meeting of the Board of the matters discussed and the decisions reached. Minutes of meetings of the Board (which shall, except to the extent that the Board determine that it is necessary to keep any matter confidential, be sent to all Equity Partners) will state clearly the points discussed, give an indication of the scope of the discussion and set out the decisions reached, giving, where appropriate, the reasons.

14.1 General Duties of Equity Partners

Each Equity Partner shall at all times:

(a) act in good faith towards the NSE Group and the other Equity Partners in order to promote the success of the NSE Group, having regard to the public interest;

…

17.2 Suspension by the Board

In such circumstances as the Board may determine the Board may suspend any Equity Partner from some or all of such Equity Partner's activities within the Firm and/or impose on such Equity Partner such restrictions, conditions and stipulations as the Board may determine (including but not limited to any of the requirements listed in (a) to (d) (inclusive) in the definition of 'Garden Leave'), in either case with effect from such date and for such initial period not exceeding twelve months as the Board may specify. The Board may extend such period of suspension so that it takes effect for such further period as the Board may in its absolute discretion consider necessary to protect the legitimate interests of the Firm. The Board may at any time vary, revoke or terminate any such suspension. The Board may also direct the National Practice of which such Equity Partner is a National Member that he or she should be suspended from some or all of such Equity Partner's activities within the National Practice in the manner contemplated by this Clause 17.2.

Any suspension by the Board under this Clause 17.2 shall only be effected by the Board by a two-thirds majority.

Any Equity Partner suspended by the Board under this Clause 17.2 shall be given an opportunity to make representations in writing to the Board within seven (7) days of any determination by the Board to suspend such Equity Partner and to address any meeting of the Board at which the terms of such Equity Partner's suspension are to be reviewed or (as the case may be) its variation or extension is to be considered.

…

27.6 Notices

Any notice to be given by an Equity Partner to the other Equity Partners pursuant to Clause 16.1 shall be given in writing (which for the purposes of this Clause 27.6 shall include email) in English, addressed to the NSE CEO and:

(a) delivered by hand, registered post or courier to the registered office of the Firm; or

(b) sent by email to the NSE CEO's Deloitte email address from a Deloitte email address.

A notice shall be effective upon receipt and shall be deemed to have been received:

(a) in the case of delivery by hand, at the time of delivery; or

> (b) in the case of delivery by registered post or courier, at the time the notice was signed for; or
>
> (c) in the case of delivery by email, at the time the email was recorded as having been sent provided that if the email was sent after 5.30pm UK time it shall be deemed to have been received at 9.30am on the following Business Day."

Interpretation of clause 16.2

5. Before considering whether clause 16.2 contains an implied term, it is first necessary to construe the express terms.

6. Three points concerning the interpretation of clause 16.2 are now common ground (and in the case of the first and third points, always have been). First, clause 16.2 specifies a three-stage procedure: stage 1 is the Board's decision to issue a Notice of Retirement; stage 2 is the Equity Partner's right to make their point of view known to the Chairman and to present their case to the Board orally or in writing; and stage 3 is the Equity Partner's right to demand that the Board convenes a partners' meeting. Secondly, the seven-day period specified in clause 16.2(b) for demanding that a partners' meeting be convened runs from the date of the Board meeting (subject to the implied term contended for by Mr Joseph). Thirdly, the purpose for which the partners' meeting may be convened is to review the Board's original decision to issue a Notice of Retirement, not the Board's decision following the Board meeting to consider the Equity Partner's representations.

7. Nevertheless, there remain disputes as to the interpretation of clause 16.2, and in particular the words "the Board has not withdrawn the Notice of Retirement and such Equity Partner is still aggrieved" in clause 16.2(b). Deloitte contends, and the judge accepted at [27(i) and (ii)], that withdrawal of the Notice of Retirement requires (a) a decision of the Board to withdraw the Notice and (b) communication of that decision to the Equity Partner, and hence that the Equity Partner may be still aggrieved if the Board has decided to withdraw the Notice, but has not communicated that decision to the Partner. Mr Joseph disputes this. There are a number of aspects to this issue which I will consider in turn.

8. The first point is that, as is common ground, the Board is obliged to notify the Equity Partners of their decisions (clause 8.2) and to do so in a timely and effective manner (clause 7.2(a)(x)). Clause 16.2(b) does not, however, specify any time limit within which the Board is required to communicate its decision whether or not to withdraw the Notice of Retirement to the Equity Partner. What amounts to timely communication will inevitably depend on the circumstances, and in particular the time it takes the Board to make its decision and the time it takes the Board to communicate that decision to the Equity Partner.

9. Although clause 16.2 appears to proceed on the assumption that the Board will take its decision at the meeting at which the Equity Partner presents their case, it is manifest that it may not always be possible for the Board to do so. Even if the Equity Partner presents no new information, the Board may need time to consider their submissions and to reach a decision. If the Equity Partner does present new

information, the Board may need time in which to investigate the new information. Indeed, this may be required by the obligation of good faith (clause 14.1(a)). Either way, the Board may wish to take legal advice before taking its decision.

10. Similarly, although clause 16.2 appears to proceed on the assumption that the Board will be able to communicate its decision to the Equity Partner as soon as it has been taken, this is not necessarily so. Even once the Board has taken its decision, it may wish to obtain legal advice as to the form and content of the communication conveying that decision to the Equity Partner.

11. It can be seen from clause 16.2(a)(ii) that the Equity Partner may or may not be present at the Board meeting. If the Equity Partner is not present, then the Board's decision will have to be communicated to them subsequently even if the Board is able to make a decision during the meeting. The speed of this will depend on the method of communication adopted. Clause 16.2 does not specify any method of communication for the steps to be taken at the various stages, clause 27.6 does not apply (because it only applies to notices pursuant to clause 16.1) and the LLP Agreement contains no general notice provision (and in particular no provision deeming notice to have been given at any specific point in time). Even if the communication is sent by, say, email, several hours may elapse between it being sent and it being read by the Equity Partner (e.g. because the Equity Partner is asleep at the time it is sent because they are located in a different time zone).

12. It follows that, as both parties acknowledged in argument, an uncertain period of time may elapse between the Board meeting and the communication of the Board's decision to the Equity Partner, and that period may exceed seven days.

13. The second question is what is meant by "has not withdrawn". Counsel for Mr Joseph submitted that this did not include doing nothing, it meant making a positive decision to maintain the Notice of Retirement. I do not accept this. The words plainly encompass a failure to withdraw the Notice because no decision has been taken.

14. The third question is what is required for an effective withdrawal of the Notice. Deloitte contends that this requires a decision to withdraw and communication of that decision to the Equity Partner, but no more than that. Although counsel for Mr Joseph initially appeared to accept this, subsequently he submitted that this was not sufficient and that withdrawal of the Notice was not effective unless and until it was agreed to by the Equity Partner. In my view this is an impossible submission. Withdrawal will be a response to the Partner's request that the Notice be withdrawn. It will be effective once communicated to the Partner. No acceptance or agreement by the Partner is required to make it effective (unless, of course, the withdrawal is conditional, in which case it may be necessary for the Partner to accept the condition).

15. The fourth question is what is meant by "still aggrieved". As is common ground, this must refer back to "feels aggrieved" in clause 16.2(a). In that context, the grievance is occasioned by the "decision of the Board to give him or her a Notice of Retirement". Counsel for Mr Joseph submitted that the Equity Partner could not be "still aggrieved" where they were awaiting the outcome of the Board meeting and did not know whether or not the Board had decided to withdraw the Notice. I do not accept this. The words plainly include grievance which persists because the Board has issued

a Notice of Retirement to the Equity Partner and has not communicated a withdrawal of the Notice to the Partner.

16. The fifth question is whether the Equity Partner is, as counsel for Mr Joseph submitted, precluded from exercising their right to demand that a partners' meeting be convened until they have been informed of the Board's decision not to withdraw the Notice of Retirement. In my judgment there is nothing in the wording of clause 16.2(b) to support this contention. I accept, however, that this potentially leads to some odd consequences. Clause 16.2 does not empower the Board to cancel the partners' meeting once it has been convened even if the Board has decided in the meantime to withdraw the Notice of Retirement. Although the Board has a general power to convene partners' meetings (clause 3.1), it has no express power to cancel such meetings even if they subsequently turn out not to be necessary. No doubt such a power is to be implied; but as counsel for Mr Joseph pointed out, damage may already have been done by the time the meeting is cancelled. The notice convening the partners' meeting must contain details of the matter to be discussed, together with any written representations submitted by the aggrieved Equity Partner (clause 16.2(c)). Thus if the Equity Partner demands that a partners' meeting be convened prior to knowing what the Board had decided, the full partnership may be informed of the details of the dispute, only for the partners' meeting to be cancelled. That may well be damaging to the Equity Partner's reputation, and burdensome and disruptive for the partnership as a whole. Moreover, the partners' meeting may be required by virtue of the 14-day notice period to take place before the Board has decided whether or not to withdraw the Notice of Retirement (unless, perhaps, there is an implied requirement that the Board's decision be communicated prior to the date of the partners' meeting).

17. A related point concerns the function of the partners' meeting. As noted above, it is common ground that the function of the partners' meeting is to consider the Board's original decision to issue the Notice of Retirement (as is clear not just from the wording of clause 16.2(b), but also from clause 16.2(e) and (f)). But what happens if a large number of partners conclude that the Board's original decision to issue the Notice of Retirement was correct, and disagree with its decision to withdraw the Notice? If the partners' meeting has not been cancelled in time, can the partners countermand the withdrawal of the Notice of Retirement? If the partners' meeting has been cancelled, can the partners call a meeting for this purpose pursuant to clause 3.2? It is not necessary to try to answer these questions for the purposes of the appeal; it is sufficient to note that they potentially arise.

18. Despite these oddities, I am unable to accept that clause 16.2(b) should be interpreted in the manner contended for by Mr Joseph.

19. The final point is that counsel for Mr Joseph relied upon clause 17.2 as supporting Mr Joseph's interpretation of clause 16.2. In my view it is not necessary to explore the interpretation of clause 17.2. It suffices to say that, particularly given that it is a different clause with a different purpose, albeit with some similarities in wording, nothing in clause 17.2 compels a different interpretation of clause 16.2 to that set out above.

The purpose of the seven-day period in clause 16.2(b)

20. In addition to the disputes as to the interpretation of clause 16.2 discussed above, there is a dispute as to the purpose of the seven-day period for the Equity Partner to exercise their right to demand that a partners' meeting be convened.

21. Counsel for Deloitte submitted that the purpose was to provide certainty as to when the right had to be exercised by, whereas counsel for Mr Joseph submitted that the purpose was to give the Equity Partner time in which to decide what to do. I consider that both parties are right; but that, to the extent that the two purposes conflict, the former predominates, because time runs from the date of the Board meeting and not from the date on which the Board's decision is communicated to the Equity Partner. Although it may, for the reasons explored above, be uncertain at the expiry of the seven-day period whether the Equity Partner needs to exercise the right to demand that a partners' meeting be convened, and although it may have adverse consequences for both parties if the Equity Partner is forced to exercise the right when it subsequently turns out that they need not have done, I do not consider that either of these considerations detracts from the conclusion that the deadline provides certainty.

22. The judge held at [27(iii) and (iv)] that the deadline had two other effects. First, it afforded the Equity Partner protection against the Board delaying its decision as to whether or not to withdraw the Notice of Retirement. Secondly, it gave the Equity Partner "leverage" to press for the Board's decision to be reached and communicated swiftly. These seem to me to be different ways of making the same point, rather than different points. More importantly, it appears that the judge's attention was not drawn to clause 7.2(a)(x), which as noted above requires the Board's decision to be communicated in a timely and effective manner. Thus it is not necessary for clause 16.2(b) to require this. Furthermore, as discussed above, there may be perfectly good reasons why the Board cannot make and communicate its decision swiftly.

23. The upshot is that clause 16.2(b) imposes a strict deadline. That has the advantage of certainty. As is often the case with strict deadlines, however, the price of certainty is the potential for complications and unfairness. Moreover, it is not clear that this potential was foreseen by the drafter of clause 16.2.

Implied term

24. The implied term for which Mr Joseph contends has been expressed in different ways over the course of the proceedings. On this appeal Mr Joseph's case is that it is implied that, where either (i) the Equity Partner is told that the Board's resolution will be communicated to them on a date later than that of the Board meeting or (ii) communication of the Board's resolution is delayed beyond the date of the Board meeting, the time period for demanding that a partners' meeting be convened will be extended so as to be seven days from the date of communication. Counsel for Mr Joseph clarified that "the date of communication" in this formulation referred to the date when the communication was read by the Equity Partner.

25. Even as now formulated, limb (i) of the suggested implied term is redundant both because it is unnecessary if the Equity Partner is told that the Board's resolution will be communicated after the Board meeting but in fact it is communicated on the same

day, and because it adds nothing to limb (ii) when limb (ii) bites. I will therefore focus on limb (ii).

26. In order for a term to be implied into a contract, it must (i) be reasonable and equitable, (ii) be necessary to give business efficacy to the contract or so obvious that it goes without saying, (iii) be capable of clear expression and (iv) not contradict any express term of the contract. A term should not be implied into a commercial contract merely because it appears fair or because one considers that the parties would have agreed to it if it had been suggested to them. A term is less likely to be implied if the contract is a detailed document which has been entered into by experienced parties and which has been professionally drafted. The question must be considered as at the date of the contract. See *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [18], [21], [23] and [38] (Lord Neuberger of Abbotsbury).

27. The judge held at [32] that it was neither necessary to imply the term contended for by Mr Joseph nor obvious that it was intended by the parties, and that it would conflict with the express words of clause 16.2(b). She also held that the fact that the LLP Agreement was "a carefully drafted document for a sophisticated group of signatories" supported the conclusion that the term should not be implied.

28. It is convenient to begin with the last point. The LLP Agreement is undoubtedly a long and detailed document: it runs to 95 pages and has 28 clauses and seven schedules. It is not apparent on its face that it has been drafted by lawyers, although it may have been. Nor is it apparent that it has been carefully negotiated: it is an agreement between Deloitte and the Equity Partners, and may have been presented by Deloitte to the bulk of the Equity Partners on a "take it or leave it" basis. Most importantly, however, it can be seen from the discussion above that clause 16.2 is not a well-thought through clause. Accordingly, I disagree with the judge's reliance upon this factor.

29. I am also less convinced than the judge that, as she put it at [32(i)], "the clause works fine, in fact … it works rather better, if the time runs from the date of the Board meeting regardless of when the outcome is communicated". This does provide certainty, but it may be questioned whether it works well. On the other hand, the test for an implied term is one of necessity or obviousness, not how well the express terms work.

30. It is not necessary to reach a conclusion on this point, however, because I agree with the judge that the implied term propounded by Mr Joseph conflicts with the express words of clause 16.2(b). These provide that the Equity Partner may call for a partners' meeting "within seven (7) days of the date of such Board meeting". To add "or (if later) within seven days of the date when the decision of the Board at or following such meeting is communicated to the Equity Partner" is not merely, as counsel for Mr Joseph argued, to qualify or limit the express words, but to re-write clause 16.2(b) to provide a different rule. This is particularly so given that clause 16.2(a) specifies a time limit of "seven (7) days after receipt of such Notice": as the judge noted, this highlights the fact that it would have been easy for clause 16.2(b) to specify that the time limit was seven days from receipt of the Board's decision as to whether or not to withdraw the Notice of Retirement, but that is not what it says. The difference is well illustrated by an example postulated by Nugee LJ in the course of argument. Suppose

the Board meets from 5pm to 6pm on a Friday afternoon, and its decision not to withdraw the Notice of Retirement is communicated to the Equity Partner at 9am on the following Monday: why should time run from the Monday rather than the Friday, which is the effect of Mr Joseph's implied term?

Estoppel

31. Before the judge Mr Joseph put his case in the alternative on the bases of promissory estoppel, estoppel by representation and estoppel by convention. Before this Court he only relies upon the first two bases. Neither party suggested that it made any real difference whether Mr Joseph's case was analysed in terms of promissory estoppel or estoppel by representation. I agree with counsel for Deloitte, however, that it is in truth one of promissory estoppel.

32. In order for promissory estoppel to arise, there must be: (i) a legal relationship giving rise to rights and duties between the parties; (ii) a clear and unequivocal promise or representation by one party that they will not enforce their strict legal rights arising out of that relationship against the other party; (iii) an intention (actual or as reasonably understood) on the part of the first party that the second party will rely on the promise or representation; and (iv) the second party must have altered his position in reliance on the promise or representation such that it would be inequitable to allow the first party to act inconsistently with it. See *Chitty on Contracts* (33rd ed) at 4-086 to 4-096.

33. It is common ground that the promise or representation need not be express, but may be implied. There was some debate between counsel concerning the requirement that the promise or representation be "clear and unequivocal". I shall assume that counsel for Mr Joseph is correct that this requirement is satisfied if the promise or representation is "sufficiently clear and unequivocal" or "clear enough" to the second party: compare *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [15] (Lord Scott of Foscote), [26] (Lord Rodger of Earlsferry), [56] (Lord Walker of Gestingthorpe) and [84]-[86] (Lord Neuberger).

34. For the purposes of this issue, it is necessary to set out Ms Longley's email dated 18 September 2019 more fully:

> "Further to my email below, this email is to confirm the practical details for the upcoming board meeting in Oslo, as well as to provide you with the relevant documentation.
>
> The meeting of the NSE Board will be held on **2 October 2019** at **5:30pm** (local Oslo time) at the Deloitte offices in Oslo, Norway (please note that this date has been amended since my email to you below).
>
> …
>
> The Board Meeting will commence at 5:30pm and I would be grateful if you were available outside the meeting room before this time. Please note that the time allocated to you is expected to be from 5.50pm to 6.10pm. The final Board decision

> following this meeting will be communicated to you by no later than 9 October 2019.
>
> …
>
> I am copying your representatives at Quinn Emanuel as requested. Please do let me know if you or your representatives have any queries regarding the upcoming Board meeting."

35. Mr Joseph contends that, read against the background of clause 16.2 of the LLP Agreement, this email impliedly represented that the seven-day period for Mr Joseph to exercise his right to demand that a partners' meeting be convened would only start to run once the Board's decision had been communicated to him, and that he relied upon that representation.

36. The judge held at [38]-[42] that there was no such clear and unequivocal representation; and that, even if there was and Mr Joseph had relied upon it (as to which she made no finding), his reliance was unreasonable.

37. Despite counsel for Mr Joseph's valiant attempt to argue to the contrary, I agree with the judge that the 18 September 2019 email does not make the representation alleged. The only representation made is that Mr Joseph will be informed of the Board's decision by 9 October 2019. Nothing is said or implied about the time within which Mr Joseph has to exercise his right to demand that a partners' meeting be convened. If Mr Joseph was in doubt about that, he could and should have sought clarification as Ms Longley invited him to do.

Conclusion

38. Mr Joseph was one day late in exercising his right to demand that a partners' meeting be convened. It is entirely understandable that he waited for the Board's decision before doing so. He was assured that he would be informed of the Board's decision by 9 October 2019, but the Board did not comply with that self-imposed deadline. The day after the deadline passed without Mr Joseph having been informed of the Board's decision, he attempted to exercise his right only to be met by Deloitte taking the point that he was out of time. In my view Mr Joseph is entitled to feel harshly treated, but I regret that I am forced to conclude that Deloitte acted within its legal rights. I would therefore dismiss this appeal.

Lord Justice Nugee:

39. I agree and am grateful to Arnold LJ for his lucid judgment.

40. In the course of his submissions Mr Cohen made two particularly telling points. One was that for all its length and detailed provisions, the LLP Agreement was not, on analysis, a well crafted document but contained a number of practical difficulties which showed, as Arnold LJ has demonstrated, that it was very far from being well thought through. The second was that one would naturally expect a partner, such as Mr Joseph, who had exercised their stage 2 right to ask the Board to reconsider the decision, to know what the outcome of that exercise was before being required to choose whether to take the step, potentially damaging to themselves and undoubtedly

disruptive to the partnership as a whole, of invoking the stage 3 right to require the convening of a special meeting of all the Equity Partners. In those circumstances it is tempting to try and fashion a remedy for Mr Joseph. But as Sir Thomas Bingham MR said in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 482: "Tempting, but wrong". The role of the Court, whether in interpreting the terms the parties have expressly agreed, or considering what they have impliedly agreed, is not to make a better contract for the parties but to ascertain what their contract is. Here the parties agreed that Mr Joseph should have 7 days from the date of the Board meeting to invoke his stage 3 right, and no amount of implication can convert that into 7 days from his being told the outcome of such meeting.

41. Nor can there be spelt out of Ms Longley's e-mail of 18 September 2019 any clear enough statement – or indeed any statement at all – estopping Deloitte from taking the point.

42. I too have sympathy for Mr Joseph, but I agree that Whipple J came to the right conclusions and that this appeal must be dismissed.

Lord Justice Lewison

43. I agree with my colleagues, with some reluctance, that the appeal must be dismissed. Like Arnold LJ, I consider that Mr Joseph has been harshly treated in that Deloitte have chosen to stand on their strict legal rights.

44. It may seem heretical these days, but it is worth recalling what Lord Hoffmann said in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988:

> "[16] … The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.
>
> [17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls."

45. Although the judge thought that the agreement worked well as it stood, I agree with both my colleagues that it does not. But that is not enough to enable the court to imply a term to the effect for which Mr Cohen QC contended. First, any implied term along the lines that he suggested would conflict with the express term in clause 16.2 (b). Second, as the court probed the contents of the suggested implied term, it became clear that it would take a good deal of thought to formulate. In his ultimate formulation, Mr Cohen argued that time for the stage 3 process should not begin to

run until Mr Joseph had actually read the board's communication of its decision. If he were away on holiday or a business trip, there might be an indefinite time lag between the decision and the start of the period within which stage 3 rights could be exercised. It is certainly not obvious that a bystander proposing such a term would have been suppressed with a testy "of course".

46. It is, no doubt, possible to think of a term that would give a more even balance to the interests of an individual equity partner on the one hand, and the efficient running of the LLP on the other. But that is not the function of the court when called upon to interpret a written agreement, even where the implication of terms is the main area of debate. As Morgan J put it in *Chantry Estates (South East) Ltd v Anderson* [2008] EWHC 2457 (Ch), affirmed [2010] EWCA Civ 316:

> "The court is not here to re-write the contract and select from an à la carte menu of possibilities the one which the court thinks might have been more even-handed for the parties to have agreed."

47. It is also important to note what is not alleged. It is not alleged that the board was in breach of its obligation to communicate its decisions in a "timely and effective manner". Nor is it alleged that there was a breach of the duty of good faith, either in failing to communicate its decision within the promised time or in taking a stand upon its strict legal rights.

48. I agree, therefore, that the attempt to imply a term must fail.

49. On the question of estoppel I agree with the reasons that Arnold LJ has given for rejecting this argument.