Neutral Citation Number: [2022] EWHC 3014 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

DEPUTY MASTER MARSH

CASE NUMBER BL-2022-000207

BETWEEN:

PORTOBELLO PRODUCTIONS LIMITED

Claimant

-v-

SUNNYMARCH LIMITED

Defendant

Edmund Cullen KC (Instructed by **RPC**) appeared on behalf of the Claimant
Gwilym Harbottle (Instructed by **Simkins)** appeared on behalf of the Defendant

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JUDGMENT
Delivered remotely on
7 November 2022 at 2pm
(hearing 2 November 2022)

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DEPUTY MASTER MARSH:

1. This is my judgment on hearing the claimant's application dated 6 July 2022 seeking judgment under CPR rule 24(2) of an issue deriving from paragraph 14 of the defence. The issue concerns whether a term is to be implied in clause 11.3 of an agreement made between the parties on 21 December 2019. The application seeks, in the alternative, an order that paragraphs 14 to 18 of the defence are struck out pursuant to CPR Rule 3.4(2)(a).

2. At the hearing on 2 November 2022 Edmund Cullen KC appeared for the claimant and Gwilym Harbottle appeared for the defendant. I am grateful to them both for their clear and helpful submissions.

3. I am delivering this judgment as speedily as possible after the hearing because there is a costs and case management conference listed for hearing on 18 December 2022 and the parties need to know the basis upon which they should prepare for it.

Background

4. The claimant is a film production company owned and controlled by Eric Abraham which held film rights to the Roald Dahl book *Danny the Champion of the World* ("the Book"). The defendant is a production vehicle of Benedict Cumberbatch and Adam Ackland (in the agreement they are referred to respectively as BC and AA). SunnyMarch Holdings Limited is the defendant's holding company.

5. In December 2019 the claimant and defendant entered into a Co-Production Agreement for the development and production of a film of the Book ("the Film"). The Agreement included provisions for its termination in clause 11 on various grounds. Clause 11.3 provided that:

> "Portobello [the claimant] may forthwith terminate the Agreement if BC and AA ceased to have control of SunnyMarch [the defendant] or SunnyMarch Holdings Limited or if either of their services are no longer exclusively available to either of those companies."

6. There are two points to note at this stage. First, clause 11.3 gives only the claimant an entitlement to terminate the Agreement. Secondly, notice may be given if one or both of the two conditions are met. Subject to meeting those conditions, the claimant is, on the face of the Agreement, entitled to serve notice on an unrestricted and unqualified basis. I will refer to the conditions where necessary as "the Control Condition" and "the Exclusivity Condition" or merely as "the Conditions".

7. It is accepted by the claimant that issues of construction concerning the circumstances in which the Conditions are met arise but they are not of direct concern to the application I am dealing with.

8. By a notice dated 23 December 2021, the claimant gave notice of termination of the Agreement pursuant to clause 11.3. This notice referred to the Exclusivity Condition and was served on the basis that the services of Mr Cumberbatch and Mr Ackland were not being made exclusively available to the defendant or to SunnyMarch Holdings Limited. The claimant relied on the fact that both Mr Cumberbatch and Mr Ackland had entered into service agreements with other entities.

9. By a further notice, given on 14 June 2022, and served without prejudice to the validity of the original notice, the claimant gave notice of termination of the Agreement pursuant to clause 11.3, this time referring to the Control Condition. The notice was based on an allegation that Mr Cumberbatch and Mr Ackland had ceased to have control of the defendant and SunnyMarch Holdings Limited, by reason of having entered into a Shareholders' Agreement with a third party, Anton Capital Entertainment SCA ("Anton"). Under the Shareholders' Agreement, Anton is given certain rights in relation to the management and direction of SunnyMarch Holdings Limited. The claimant's case, relying upon a failure to comply with the Control Condition, was added by amendment after the defendant had provided -- the claimant would say belatedly -- a redacted copy of the Shareholders' Agreement.

10. The claimant seeks declarations that it has validly terminated the Agreement and that the defendant has no continuing rights in relation to the Film that were or are the subject of the Agreement.

11. The main defence put forward by the defendant is based upon the construction of the Agreement and, in particular, that neither the Control nor the Exclusivity Conditions were met. The defendant advances various arguments as to why, on a proper construction of the Agreement Mr Cumberbatch's and Mr Ackland's services were exclusively available to the defendant and SunnyMarch Holdings Limited and that they retain control of the defendant and the holding company.

12. These arguments, which are largely dependent on various alternative formulations of what the defendant says is the proper meaning of services and control in clause 11.3, do not matter for the purposes of this application. This is because the application concerns the alternative defence put forward in paragraph 14 by the defendant in relation to both conditions. That defence proceeds on the basis that "… if the defendant was in breach of clause 11.3 of the Co-Production Agreement the Defendant will contend that the clause grants the Claimant a discretion." In other words, the defence pleaded in paragraph 14 is based upon the premise that the conditions for service of a notice as set out in clause 11.3 were satisfied.

13. The defendant goes on to say in paragraph 14:

> "The purpose of the Co-Production Agreement was to provide a contractual framework for the Claimant and the Defendant to work together to develop, produce and exploit the Film and thus to obtain mutual benefits including remuneration, copyrights which they could own in common pursuant to clause 6.1 of the Co-Production Agreement and credits in accordance with clause 10 of the Co-Production Agreement. In the premises, it was an implied term of the Co-Production Agreement that the Claimant would exercise its said discretion rationally and in a manner which was consistent with the reasonable expectations of the parties arising from their agreement."

14. Paragraph 14 then provides further details of what the reasonable expectations of the parties are said to be in relation to the two conditions. With regard to the exclusivity condition, it is said:

> "Having regard to the fact that at the date of the Co-Production Agreement all parties knew that Messrs Cumberbatch and Ackland had extensive other commitments, those reasonable expectations included that the Claimant would only seek to invoke clause 11.3 on the grounds that those other commitments were such as to make it impossible to complete the Film in a reasonable time."

15. With regard to the control condition, paragraph 14(b), which was added by amendment, the parties' reasonable expectations are said to include that:

> "…the Claimant would only seek to invoke clause 11.3 on the grounds that Messrs Cumberbatch and Ackland had ceased to have control of the Defendant or its holding company in the event that such loss of control affected the Defendant's ability to complete the Film in a reasonable time."

16. Paragraphs 15 to 18 of the Amended Defence then go on to assert that the implied term was breached because the reasons underlying Portobello's termination notice were inconsistent with it and that as a consequence the termination notices were invalid.

17. The defendant pursues a counterclaim seeking declaratory relief concerning sums due under the agreement and other matters on the basis that the notices to terminate were of no effect.

18. The defence does not aver that the Co-Production Agreement was a relational agreement or that clause 11.3 was subject to a duty of good faith. There are, as we will see, specific clauses in the agreement in which a duty of good faith is expressly included.

The Agreement

19. I now turn to deal with the contractual terms. It is necessary to set out some parts of the agreement in full.

> Recital A:

"Portobello and SunnyMarch … have agreed to work together to develop, produce and exploit a feature film, provisionally called *Danny the Champion of the World* … based on a novel by Roald Dahl also entitled *Danny the Champion of the World*."

"Clause 1: Co-production and acting services.

1.1: Portobello and SunnyMarch shall jointly co-develop and co-produce the Film in accordance with the terms and conditions of this Co-Production Agreement and the terms of any agreements with a Financier (as defined below).

1.2: Portobello shall provide the services of Eric Abraham and Jack Sidey (the Portobello Producers) and SunnyMarch shall provide the services of Benedict Cumberbatch (BC), Leah Clarke and Adam Ackland (AA) (the SunnyMarch Producers), as individual producers for the Film, all on terms and conditions in accordance with industry standard terms and, if applicable, to be negotiated in good faith with a third party studio and/or financier and/or other source of finance for the Film (each a financier).

1.3: It is the intention of the parties that SunnyMarch shall also provide the acting services of BC in the role of "Father" in the Film, subject always to his availability and to his approval of the Screenplay. If for any reason BC does not take the role of Father, then the Co-Production Agreement shall continue notwithstanding.

1.4: Portobello and SunnyMarch shall jointly (ie either through an SPV that they mutually create or, if no SPV has been created, then one mutually agreed party shall apply on behalf of both terms, but both parties shall be fully responsible for all mutually agreed obligations) apply for development and production finance from various sources.

1.5: Subject to the agreements entered into by Portobello and SunnyMarch, and the Financier if applicable, Portobello and SunnyMarch shall mutually agree in good faith the roles that they shall respectively undertake on the Film and shall

record such roles in writing which shall be deemed to be a schedule to this Co-Production Agreement.

2. Term:

Subject to the agreements entered into by Portobello and SunnyMarch and the Financier, if applicable, Portobello and SunnyMarch shall be entitled to at least one of the Portobello Producers' and the SunnyMarch Producers' non-exclusive services throughout the period from signature of this Co-Production Agreement until delivery of the Film ('Delivery'). The parties shall negotiate in good faith the scope of their respective services."

20. There are three points of note arising from clause 1. First, it can be seen that the parties to the agreement agreed to provide named individuals to provide services on terms to be negotiated in good faith. Secondly, acting services are dealt with in a different way to production services. The stated intention was that the defendant would provide Mr Cumberbatch's acting services but this was made expressly subject to his availability and his approval of the Screenplay. Thirdly, the parties envisaged involving a third party financier (on terms to be negotiated).

21. Clause 3.1 deals with creative decision-making in relation to which the parties must act jointly acting reasonably and without delay. Clause 3.2 deals with financial and commercial decision-making in relation to which the claimant has the final say.

22. Clause 4 is headed "Progress to production". The two subclauses concern the production of a screenplay and funding and set out the timescale for these stages to progress. I need only note that only the claimant, not the defendant, has the right to terminate if the conditions in clause 4.1 or 4.2 arise. They provide cut off time limits for the approval of the Screenplay and Finance beyond which the claimant may terminate the agreement. Clauses 4.3 and 4.4 set out the consequences if termination by the claimant takes place.

23. Clause 5 deals with remuneration and participation. Clause 5.4 includes an express provision concerning the exercise of good faith in relation to matters that are covered by that clause.

24. Clause 7 contains warranties given by each party and clauses 7.1.2 and 7.2.2 are warranties which are the mirror image of each other. Clause 7.2.2 provides a warranty by the defendant that it has not entered and will not enter into any professional or other commitment which would or might conflict with the full and due rendering of obligations under the Agreement.

25. Clause 11 contains the termination provisions. I have already set out clause 11.3. It is necessary, however, to refer to the other termination provisions that are provided for in the agreement. Clause 11.1.1 entitles either party to give notice to terminate for breach of a material provision where the breach has not been remedied if the breach is capable of remedy. Clauses 11.1.2, 11.1.3 and 11.1.4 give either party the right to terminate if one of the named insolvency events has occurred. Clause 11.4 sets out the consequences that follow if notice of termination is given.

26. Clause 14.1 contains a standard entire agreement clause. Clause 14.5 provides that nothing in the agreement shall be deemed to constitute or create a partnership.

27. The Agreement contains express obligations in certain instances placed upon the parties to act or to negotiate in good faith particular clauses which arise in clauses 1.2, 1.5, 2 and 5.4.

28. I should also add it is common ground that the Agreement falls to be considered on the basis that there is no significant inequality of bargaining power between the parties and that it was drafted with the benefit of legal advice and legal expertise.

The Application

29. The application is made principally under CPR rule 24.2. This rule gives the court power to give summary judgment where the defendant has no real prospect of successfully defending the claim or an issue and there is no other compelling reason

why the case or issue should be disposed of at a trial. The rule does not define “claim or issue”. However, Practice Direction 24 is of some assistance. Paragraph 1.2 explains that in the Practice Direction the term "claim" includes, where the context so admits: “(1) a part of a claim, and (2) an issue on which the claim in whole or in part depends.”

30. Furthermore, paragraph 1.3 states that an application for summary judgment under rule 24.2 may be based on (1) a point of law (including a question of construction of a document), (2) the evidence which can reasonably be expected to be available at trial, or the lack of it, or (3) a combination of these.

31. It is not entirely clear why the definition of a claim in paragraph 1.2 appears to relate only to the use of the term in the Practice Direction, and not the rule, whereas if paragraph 1.3 serves any purpose it must give guidance about the scope of the rule. Paragraph 1.3 states in clear terms that an application under rule 24.2 may be based on a point of law.

32. Paragraph 5.1 states that the powers of the court hearing an application under Part 24.2 include judgment on the claim, striking out or dismissal of the claim.

33. The general approach to an application under Part 24.2 is well understood. The principles are summarised by Lewison J in *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch). I do not need to cite these principles because they are well known. They have been approved by the Court of Appeal and indeed relied upon in countless cases. I would just record, however, the principle that it is open to the court to resolve under CPR rule 24.2 a short point of law or construction, where the court is satisfied that it has before it all the necessary material and the parties have had an adequate opportunity to address the point in argument. On the other hand, if the material before the court is open to challenge and it would be better if fully explored at a trial, the court should generally decline to deal with the application on a summary basis, and certainly where to do so would involve conducting a mini-trial by making findings about issues of fact that are genuinely in dispute.

34. In this case the court has the contract itself, which fully explains its purposes, and evidence filed from the claimant's solicitor and from Mr Ackland for the defendant. None of the evidence in those witness statements is controversial, or if there are any points of controversy, the claimant is content to proceed on the basis that is most favourable to the defendant. Indeed, it was agreed at the hearing that the court should proceed on the basis that the facts pleaded by the defendant are true and that clause 11.3 would be construed in a way that is most favourable to the defendant.

35. The court is entitled to assume for the purposes of the hearing that the defendant was in breach of one or both of the conditions and that the claimant opted to serve the notice in pursuant of its own commercial interests regardless of those of the defendant or the joint interests of the parties under the Co-Production Agreement.

36. I heard submissions about an issue of jurisdiction arising from the terms of CPR rule 24.2. If the application in this case does not, properly understood, concern an "issue", there is no jurisdiction for the court to deal with the application. This point is relied upon by the defendant, based upon the analysis of Fancourt J about what amounts to an issue in *Anan Kasei Co Limited v Neo Chemicals & Oxides (Europe) Limited* [2021] EWHC 1035 (Ch) [79] – [83]. I need only cite paragraphs [82]-[83].

> "82. The "issue" to which rule 24.2 ("the claimant has no real prospect of defending the claim or issue") and PD 24 is a part of a claim, whether a severable part of proceedings (e.g. a claim for damages caused by particular acts or infringement or non-payment of several debts), or a component of a single claim (e.g. a question of infringement, existence of a duty, breach of a duty, causation, loss). It is not any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim. If the determination of an issue before trial has no consequences except that there is one fewer issue for trial then the court has not given summary judgment and the application was not for summary judgment. If it were otherwise, parties would be able to pick and choose the issues on which they thought their cases were strong and seek to have them determined in isolation, in an attempt to achieve a tactical victory and cause the respondent to incur heavy costs liability at an early stage.

> 83. The fact that the summary judgment application raises for determination issues of law does not make a relevant difference. Legal issues are often the only relevantly disputed question in a claim or part of a claim. Where the issue of law is relatively straightforward, the court is satisfied that it has before it all the relevant material and that the trial judge would be in no better position to decide it, the court generally decides the issue of law finally on a balance of probabilities and not merely on the basis of whether the respondent has a realistically arguable case (see per Mr Justice Lewison in Easyair v Opal Telecom). That does not mean that any issue of law will properly be the subject of a summary judgment application."

37. The decision in *Anan Kasei* has been cited with approval in three first instance decisions; Steyn J in *Vardy v Rooney* [2021] EWHC 888 KB, Sir Nigel Teare in *ADL Advanced Contractors TEL* [2021] EWHC 2200 (Comm) and Foxton J in *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm). Given this weight of first instance authority, it is plainly right that I should follow it, albeit that the decision comes as a surprise and I would respectfully question whether all of Fancourt J's remarks are correct. In particular, as I have pointed out CPR rule 24.2 and Practice Direction 24 taken together appear to expressly contemplate, as a matter of jurisdiction, that an application under the rule may be based only on a point of law. I would add that I do not find the guidance provided by Fancourt J easy to apply in this case.

38. It is perhaps of passing interest that the Civil Procedure Rules were introduced in 1999, some 23 years ago, and the relevant provisions have been applied in countless cases without any seeming jurisdictional difficulty until recently. It has always been clear that a party does not have an entitlement to judgment and the grant of a relief is discretionary. Furthermore, the second limb of Rule 24.2 provides a useful safety valve, albeit that it is very rarely relied upon. There must have been thousands of decisions, indeed many tens of thousands of decisions, under CPR rule 24.2 without, it seems, judges being aware of the apparent limitations to the scope of the jurisdiction being exercised.

39. The power under Rule 24.2 is a salutary one and is an important part of the court's case management powers. Weak claims or weak elements of claims should not be permitted

to go to trial. Judicial resources are scarce and trials absorb a great deal of such resources. The court is of course required to deal with cases justly and at proportionate costs pursuant to the overriding objective, as its requirements are fleshed out in CPR rule 1.1(2). It will often be just for the court to ensure that the only elements of a claim that are tried are ones that have a real prospect of success. That said, it is plainly right that an applicant should not be able to ask the court to resolve issues that will not affect -- or only have a very limited effect upon disclosure, evidence and the trial. As it seems to me, the court already has power to decline to grant judgment as a matter of discretion without having to grapple with fine points about jurisdiction.

40. I would also be concerned if points about jurisdiction are regularly argued on Part 24 hearings by respondents as a basis for seeking to prevent the court exercising what would otherwise be an effective case-management tool. If nothing else, the decision in *Anan Kasei* highlights the importance of the case-management powers under CPR Rule 3.4(2)(a), which is not subject to the same jurisdictional limitations as CPR rule 24.2. Practice Direction 24 provides, the court already has power under CPR rule 24.2 to strike out the whole or part of a claim.

41. Under CPR rule 3.4(2) the only issue is whether the statement of case discloses reasonable grounds bringing or defending the claim. Practice Direction 3A paragraph 1.2 makes it clear that the court may strike out part of a statement of case. That power of course is subject to the gloss to be derived from the Court of Appeal's decision in *Hughes v Colin Richards & Co* [2004] EWCA Civ 266 per Lord Justice Peter Gibson [22]. The claim must be bound to fail before the court will strike out whole or part of a statement of case and even if the claim would otherwise fall at that fence, where the claim involves a developing area of law and the claim would be better determined at a trial at which findings of fact will be made, the statement of case should not be struck out.

42. So far as *Anan Kasei* is concerned, the explanation about the scope of CPR rule 24.2 derives from the circumstances of and the procedural state in the case before the court. Paragraphs [82] and [83] should not be construed as if they derive from statute. What is an issue will to some extent be a matter of impression and be dependent upon the precise nature of the claim before the court. For example, what an issue may be in

a claim in which declaratory relief is sought may well be different from an issue in a claim that is based upon the elements of a cause of action being established; and the analysis of what is an issue in claim may be less obvious if the issue is said to derive from the defence.

43. It may not be easy to see whether a point that is put forward for determination under CPR rule 24.2 is a severable part of the proceedings or a component of a single claim. The examples provided by Mr Justice Fancourt are focused on the claim rather than the defence. It is difficult to conceive, however, that it would not be open to a claimant to seek judgment under CPR rule 24.2 on, say, a point of limitation pleaded in the defence. However, such a point would not obviously arise from or fall within either limb of the test set out in paragraph 82 of the judgment in *Anan Kasei*. I would also question whether it is right that an application for summary judgment may not include any point of law (or construction) arising from the claim or the defence when Practice Direction paragraph 1.3 expressly permits such an application to be made. I do not see why CPR rule 24.2 needs to be, or should be, construed more narrowly than Practice Direction 24.

44. Paragraph 14 in the defence in this case is responsive to the claim put forward in the amended Particulars of Claim. Importantly, paragraph 14 makes a positive case. It asserts that the Agreement is subject to an implied term. The issue in the claim put forward by the claimant is that valid notices have been served and a declaration to that effect is sought. Paragraph 14 clearly gives rise to an issue the court must decide in dealing with the claim. It is not an issue of fact, though there may be some issues of fact within it. The issue for the court is whether the Agreement should be understood and applied on the basis that the term relied upon by the defendant forms part of it.

45. As it seems to me, whether part of the claim involves an issue for the purposes of CPR rule 24.2 does not need to be resolved by reference to the relief sought or necessarily by an analysis of the cause or causes of action. The validity of the notices in this case does not involve a cause of action as such. There are, however, elements of the claim and defence that will need to be resolved.

46. It also seems to me that there is nothing wrong with a party seeking to achieve a tactical victory by asking the court to determine a particular point on a summary basis. The tactical victory may chime precisely with the proper exercise of the court's case-management powers. The manner in which a party conducts the claim or defence will entirely properly be informed by tactical considerations. No doubt the claimant has, in this case, pursued the application for tactical reasons and has cherry-picked paragraph 14 of the defence. I can see nothing wrong in that approach. If the claimant is right, the scope of the further stages of the claim will be reduced and costs will be reduced. That is in everyone's interests, including the interests of the court.

47. My conclusions on the issue of jurisdiction can be stated briefly. It seems to me that paragraph 14 and the issues that arise from it can be seen as both a severable part of the proceedings and a component of a single claim. The proceedings concern validity of the notices. The defence seeks to put forward a positive case about the terms of the agreement, that clause 11.3 is subject to an implied term. The defence is part of the proceedings and paragraph 14 is a severable element of it. Alternatively, the single claim in this case is validity of the notices and the existence or otherwise of the implied term is a component of the claim that arises from the defence. Finally, if it were to be necessary to do so I consider that there is jurisdiction under rule 24.2 because the application gives rise to a point of law or construction that it is proper for the court to determine under the power given under the rule as understood in light of the provisions in Practice Direction 24A.

48. I conclude, therefore, that I have jurisdiction to deal with the application under CPR Rule 24.2.

49. Even if that is wrong, it is not in dispute that I have power to deal with the application under CPR Rule 3.4.2(a), albeit that the test is different.

The Implied Term

50. The defendant invites the court to consider the proposed implied term by adopting a three-pronged approach in a similar way and in the same order as John Kimbell KC, sitting as a Deputy Judge of the Chancery Division, in *Cathay Pacific*

Airways v Lufthansa Technik AG [2020] EWHC 1789 (Ch). The approach he adopted was to ask first whether the term could be implied applying the general principles set out in *Marks & Spencer Plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72 by considering whether the term meets the obviousness and/or the business efficacy test; secondly, to consider whether the same or a different conclusion might be reached after considering the cases in which the *Socimer* and *Braganza* principles have been considered; and, thirdly, then to consider whether the contract is properly regarded as being 'relational' with the consequence that an implied term as to good faith could be incorporated.

51. Although Mr Cullen and Mr Harbottle made submissions about this third limb, I do not consider it is necessary to deal with it other than quite shortly as it is not a point that the defendant has relied upon in its defence. The defendant neither pleads that the contract is relational nor that as a consequence an implied term of good faith should be imported. The implied term that is relied upon in paragraph 14 is a *Socimer* term that the power to serve notice had to be exercised rationally and in accordance with the reasonable expectations of the parties.

52. I accept that the absence of an express assertion about the agreement being relational might not be fatal if it is clear from the facts pleaded in the defence that the defendant was seeking to describe the contract in that way. Indeed, the defence in this case goes some way to doing this. If the only point were to be that there is no express pleading that the agreement is a relational one, I could, for the purposes of this application, conclude that the defendant has a real prospect of establishing that fact at a trial. The agreement is described as a Co-Production Agreement for a project that required a high degree of co-operation between the parties over an extended period of time and a close alignment of their respective interests. However, it is fatal that the defendant is not expressly relying upon duty of good faith. The claimant should not be left to make that surmise without it being stated. It is of course trite that the defendant must set out the case upon which it seeks to rely.

53. In any event, even if a duty of good faith were to be implied, it simply would not help the defendant because such a provision can only fill gaps in a contract. It cannot remove a right to terminate. This is clear from the remarks made by Akenhead J in

TSG Building Services Plc v South Anglia Housing [2013] ELR 484 at paragraph 51. I respectfully agree with his observation there.

54. Having dealt with the third prong, there are two prongs that remain. I can see that as a matter of analysis and a review of authorities it is helpful to separate them, but some caution is needed. The common law principles about the implication of terms are not different if the term sought to be implied is a *Socimer* type term. Whether or not a term is to be implied will involve applying the principles that have been developed and refined in *Marks & Spencer Plc v BNP Paribas*. *Socimer* implied terms are merely a particular type of implied term. They can only be implied if they satisfy the business one or both of the efficacy and obviousness tests.

55. I will summarise first the law under these two remaining headings and then apply it to the term referred to in paragraph 14 of the defence.

56. The essential principles concerning implied terms have been helpfully digested recently by Carr LJ in *Yoo Design Services Limited v Iliv Realty PTE Ltd* [2021] EWCA Civ 560 at [47] – [52] and in particular at [52]. Carr LJ sets out eight principles that are derived from the authorities. They are not controversial and it is unnecessary to set them out in this judgment.

57. In paragraph 50 of her judgment Carr LJ refers to the judgment of Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 in which Lord Hughes emphasises that a term will only be implied if it is necessary to make the contract work. He says that the notion of necessity must not be, as he put it, 'watered down' and that necessity is not established by showing that the contract would be improved by the addition.

58. As to *Socimer* implied terms, it is necessary for me to review a number of authorities which were cited to me. I will do so, in the interests of brevity, without setting out long extracts from the majority of these cases. A full review can be found in the judgment of John Kimbell KC in *Cathay Pacific Airways*.

59. The starting point is the *Socimer* decision itself. *Socimer International Bank Limited v Standard London Limited* [2008] EWCA Civ 116 concerned a valuation clause in a contract under which one party was entitled to value assets. Rix LJ identified at [60] – [68] the context in which the court may impose obligations on a decision-maker under a contract where one party was a decision maker. He deals with the authorities in relation to contracts that allocate only to one party power to make decisions which may have an effect on both parties. It might be thought that a provision in a contract giving one party a unilateral and apparently unfettered right to serve notice to terminate was not the type of contractual provision Rix LJ had in mind at [66]-[67] in his judgment.

60. *Braganza v BP Shipping Limited* [2015] UKSC 17 concerned a contract of employment. The claimant's husband had been an employee of the defendant. After his death, the defendant employer was required to decide whether the claimant was entitled to a death in service payment. The widow could be deprived of that payment if, in the opinion of the employer, the husband's death resulted from his wilful act, default or misconduct. Following a similar line to Rix LJ in *Socimer*, Lady Hale pointed out at [18]:

> "Where, under the terms of the contract, a party is charged with making decisions which affect the rights of both parties to the contract, that party has a clear conflict of interest."

61. In *Braganza* the power given to the employer was, on its face, unlimited, but clearly had to be subject to some limitations given that, amongst other factors, it involved the employer making findings of fact as to which the employer had a material interest in the outcome.

62. The decision of the Court of Appeal in *Compass Group UK v Ireland Limited v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 was not referred to or cited in argument in the Supreme Court in *Braganza*. It is, however, a decision of considerable significance. In a judgment with which Lewison and Bateson LJs agreed, Jackson LJ noted at [83] that in each authority where the court had been willing to apply a term akin to a fetter:

> "… the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, though I would not say it is impossible to do so."

63. Lewison LJ reached the same conclusion as Jackson LJ saying at [138]:

> "I can see no reason to depart from the language of entitlement in which clause 5.8 and part C were expressed. Thus in my judgment it is up to the Trust to decide whether or not to levy payment deductions; and whether or not to award SFPs."

64. It seems to me that that decision is a powerful one. Jackson LJ pointed out that none of the cases up to 2013 where a *Socimer* fetter had been imposed involved a simple decision whether or not to exercise an absolute contractual right.

65. There have been a number of first instance decisions in which an unsuccessful attempt has been made to water down what would otherwise have been on its face an absolute contractual right. I deal with them briefly.

66. The first is *Monk v Largo Foods Limited* [2016] EWHC 1837 (Comm) which is a decision of Mr David Foxton QC (as he then was). The case did not concern a contractual right to terminate but rather what one party to a consultancy agreement described as an unfettered right not to continue the consultancy agreement after one year. In discussing the authorities, the Deputy Judge said at [54]:

> "However, it is not every decision which a party to a contract makes which can properly be characterised as a contractual discretion and to which the principles identified in Socimer and Braganza apply. Where, for example,

a commercial contract gives one party a right to terminate in certain circumstances, it will not ordinarily be appropriate to subject the exercise of that right to obligations of procedural substantive fairness akin to the public law duties which apply to the decisions of the executive. In Lomas & Ors v JFB Firth Rixson [2012] EWCA Civ 419 at [46] the Court of Appeal noted:

"the right to terminate is no more than an exercise of a discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as repudiation of a contract."

67. *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2018] EWCA Civ 355 concerned an apparently unfettered power given to the Bank to require a valuer to prepare a valuation of each property over which it held property and to recover the cost of the valuation from PAG. At first instance the trial judge held that RBS had an absolute right to call for the valuation and no term could be implied to affect or limit the exercise of the power. The Court of Appeal took a different approach and whilst accepting that RBS must have been free to ask in its own interests:

"… it was under o duty to attempt to balance its interests against those of PAG. It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than, say, to vex PAG maliciously."

68. Mr Harbottle relied upon the decision in PAG v RBS. However, I do not consider it is of any real assistance to the defendant's case. First, a power to require a valuation of properties in a lending portfolio is some considerable distance from a unilateral power to terminate an agreement. Secondly, the scope of the term the Court of Appeal was willing to imply was of very limited scope.

69. In *UBS AG v Rose Capital Ventures Limited* [2018] EWHC 3137 (Ch) (a case I decided) UBS's right to give notice to call in a loan under the terms of the loan agreement was an unqualified right and I struck out part of the defence in which the defendant sought to impose a restriction on the exercise of the power. At [49] in a

passage that was later approved in *Cathay Pacific* I suggested certain principles could be derived from the authorities:

> "(1) It is not every contractual power or discretion that will be subject to a Braganza limitation. The language of the contract will be an important factor.
>
> (2) The types of contractual decisions that are amenable to the implication of a Braganza term are decisions which affect the rights of both parties to the contract where the decision-maker has a clear conflict of interest. In one sense all decisions made under a contract affect both parties, but it is clear that Baroness Hale had in mind the type of decision where one party is given a role in the on-going performance of the contract; such as where an assessment has to be made. This can be contrasted with a unilateral right given to one party to act in a particular way, such as right to terminate a contract without cause.
>
> (3) The nature of the contractual relationship, including the balance of power between the parties is a factor to be taken into account: per Braganza per Baroness Hale. Thus, it is more likely for a Braganza term to be implied in, say, a contract of employment than in other less 'relational' contracts such as mortgages.
>
> (4) The scope of the term to be implied will vary according to the circumstances and the terms of the contract."

70. In *TAQA Bratani Limited v RockRose UKCS8 LLC* [2020] 2 Lloyd's Rep 64, His Honour Judge Pelling QC was concerned with a termination notice which he construed as providing an unqualified and absolute right to discharge the contract. He went on to consider whether the notice provision was subject to *Socimer* type limitations. After reviewing the authorities at [44] – [48], he said at [49]:

> "In my judgment these authorities speak with a single voice. Where the parties choose to include within their agreement a provision that entitles one or more of the parties to terminate the agreement between them, that clause takes effect in accordance with its terms."

71. In *Cathay Pacific* the Deputy Judge was concerned with what was described as an option under a clause in the agreement which gave the claimant the option to remove engines from a Flight Hours Services Programme prior to completion of the term. He concluded, after a very thorough review of the law, that the option was far closer in nature and type with the sort of clauses which had been held not to be the subject of a *Socimer* clause, and declined to find it was subject to an implied term.

72. Lastly, in *Essex County Council v UBB Waste Essex Limited* [2020] EWHC 1581 (TCC) Pepperall J at [97] stated that there is no scope for implying a Socimer term where a contract gives one party an absolute contractual right.

73. Mr Harbottle relied upon the decision in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 as demonstrating that the court will in certain circumstances qualify what would otherwise appear to be an absolute right. *Equitable Life v Hyman* concerned powers given to the directors of the society under its Articles of Association to apportion a surplus by way of bonuses "… on such principles, and by such methods, as they from time to time determine …". The House of Lords was able to imply restrictions on the powers of the directors.

74. Although the Articles can be seen as a contract between the Society and its circa 425,000 members, it cannot readily be set alongside a contract that has been negotiated between two parties of equal bargaining power represented by lawyers. A power given to the directors to apportion a surplus by way of bonuses under the Articles of a mutual society is of a rather lesser nature than a power to terminate a contract made between two commercial parties. Although the context is different the power is more obviously within the sort of right or power that the courts had in mind in both *Socimer* and *Braganza*. The directors were acting as a decision maker in relation to an issue affecting members and the society.

Nature of the contract and relevant provisions

75. The following two points can fairly be made about the agreement. (1) As its title indicates, the contract concerns the development of the Film and this necessitated a high degree of co-operation between the parties. They were required to work

together to develop, produce and exploit the Film. (2) The relationship was envisaged to be a long-term one, with long-term benefits for each of them.

76. It is notable that there are contractual provisions which expressly require the parties to act in good faith in particular circumstances. This suggests strongly that where a term is unqualified it is likely to have been drafted in that form intentionally; in other words, where qualifications to obligations are considered to be necessary, the parties have included them. Although the agreement was intended to be a long-term one, the claimant is given rights to terminate under clauses 4.1 and 4.2 if key stages had not been reached by the end of specified periods and in each case the right is not expressly qualified.

77. Furthermore, clause 7.2.2 provides a warranty by the defendant that it has not entered "… and will not enter into any professional commitment which would or might conflict with the full and due rendering of its obligations hereunder." There is clearly a relationship with this unqualified warranty and the right of termination under clause 11.3 which was given only to the claimant.

78. It seems to me that clause 11, when looked at as a whole, creates real difficulty for the defendant's case. Under clause 11.1.1 there is a standard right given to both parties to terminate for breach where there has been a failure to remedy the breach or the breach is incapable of remedy. Clauses 11.1.2, 11.1.3 and 11.1.4 give a right to terminate to both parties in case of a specified insolvency event occurring. All the rights under clause 11.1 are on their face absolute rights, subject, in the case of clause 11.1.1, to there being a breach and it being remedied. It is difficult to see that the parties intended other than that these provisions should be read in accordance with their natural meaning. Although this is not a necessary part of the defendant's case, if the defendant were to be right about clause 11.3, it is difficult to see why the position should be different in relation to all the other rights to serve notice under clause 11.1. A more obvious reading of the provisions in clause 11 is that all the rights to terminate are absolute rights subject to being operated in the prescribed circumstances.

79. As to clause 11.3, although there are issues of construction about the two Conditions, the remaining language is unqualified. The parties gave the claimant an entitlement to

serve notice if one or both of the conditions were met. Mr Harbottle submitted that there are issues of fact about the reasonable expectations of the parties. That may be right. However, I do not see that as being an impediment to the disposal of the application because the correct starting point is whether the words of clause 11.3 provide an unrestricted right to terminate, not how the implied term might operate if it is implied.

80. It seems to me that the meaning of clause 11.3, leaving aside issues of construction relating to the Conditions, is clear, and it is safe for this court to reach a conclusion hearing of an application for summary judgment. I have all the relevant context and there are no material disputes of fact.

81. I conclude as a starting point, subject to the court's ability to imply a term, that the claimant was given an unrestricted, unfettered right to serve notice if one or both of the Conditions were met.

Implied term

82. I have to consider whether the defendant is able, on the balance of probabilities, to establish that clause 11.3 is subject to the rationality provision set out in paragraph 14 of the defence. I start by considering the conventional approach to implication.

83. The notion of necessity creates a fundamental problem for the defendant. It is an essential feature of the business efficacy test. The defence does not set out any case about necessity and it is not clear why or how the defendant says that it is necessary to imply a term into clause 11.3. It is common for contracts to include a right of termination, either as an unrestricted right or, as here, subject to certain preconditions being met. Such a provision is a feature of many well-drawn contracts. In addition to showing necessity, the defendant has to demonstrate that without the implied term the contract lacks commercial practical coherence.

84. It seems to me that the defendant is wholly unable to meet these essential criteria for implying a term on the basis of business efficacy As I have said, unilateral termination clauses are a normal feature of business agreements. There is nothing in this

agreement, looked at in its context, that would make implication necessary to give the agreement business efficacy. There is no indication in the contract that clause 11.3 without the implied term lacks commercial practical coherence.

85. As to obviousness, the defendant has to show that this is one of the rare cases in which a term can be implied for obviousness when it is not implied due to business efficacy. This is a hurdle the defendant is unable to clear. Indeed, if the obviousness test is taken in isolation, an implied term of the type put forward by the defendant is not obvious at all. As I have said, the termination provision in clause 11.3 is a conventional one. There is nothing that can be derived from looking at the contract as a whole in its context which might make the implied term so obvious that it goes without saying.

86. I would add, although it is not strictly necessary to do so, that the term the defendant seeks to imply is not without its difficulty. The defendant puts its case on the basis that the claimant is required to exercise the power to terminate in accordance with the reasonable expectations of the parties. These included that the claimant would not exercise the power unless either Mr Cumberbatch's and Mr Ackland's other commitments or the loss of control were to affect the defendant's ability to complete the Film. Two points can be made. First, it is impossible for the claimant to know at any time, as they are not stated in the contract, what the reasonable expectations of the parties might be. This would make it impractical for the claimant to rely upon the right to terminate under clause 11.3. Secondly, the defendant provides only one example of how the reasonable expectations of the parties might affect the claimant's ability to terminate the contract under clause 11.3, namely whether the defendant’s ability to complete the Film is affected. In considering that requirement, the claimant will be forced to speculate, without any basis or entitlement to obtain relevant information, about the defendant's ability to complete the Film. It would be quite impossible for the claimant to reach an informed view about this.

87. Adopting, therefore, a conventional approach to implication, I conclude that the defendant fails to demonstrate that the term it relies upon should be implied in accordance with the business efficacy and/or business tests. Furthermore, it seems to me that the term itself is simply not workable in the context of this contract.

88. I turn to look at the *Socimer* jurisdiction to see if it might point to a different conclusion. The fact that there is no case in which a termination clause in a film development agreement has been considered does not prevent the court from applying the principles that have been developed in what is now a substantial body of authority. The principles are sufficiently clear for the court to reach a conclusion without the need to refer paragraph 14 of the defence to a trial. The court has all the information it needs to determine the point.

89. It is settled that not every contractual power or discretion will be subject to a *Socimer* limitation. On the contrary, the authorities suggest that the sort of right or power that may be amenable to such a limitation will be where one party is given a role in the ongoing performance of a contract. As Lord Justice Jackson put it in *Compass Group UK*, cases where a Socimer term have been implied involve making an assessment or choosing from a range of options, taking into account the interests of both parties.

90. On the facts of *Braganza* it was certainly necessary to imply limitations on the employer's part in order to give the contract of employment business efficacy. It was obvious the company's power to deprive the widow of a death and service payment was subject to a qualification.

91. In this case the position is very different. It concerns a business agreement that gives one party an unrestricted right of termination. All the authorities point firmly in the direction of termination provisions that give an unqualified right as not being susceptible to the implication of a *Socimer* limitation. As his Honour Judge Pelling KC put it in *Taqa Bratani*, the authorities speak with one voice on this subject.

Conclusion

92. I am satisfied that I should grant summary judgment to the claimant in respect of the issue arising from paragraph 14 of the defence. The defendant has no real prospect of success at trial on this issue and there is no other compelling reason why it should be dealt with at a trial. It has not been suggested on behalf of the defendant that the second limb of CPR rule 24.2 is engaged. However, for the sake of completeness, I do not consider that the law in relation to implied terms, whether based upon the *Socimer* line

of authorities, or otherwise, is in a state of development so far as relates to the facts in this case or, even if it is, that there is a compelling reason to leave the issue to be determined at a trial.

93. I would add that the outcome of the application would have been exactly the same had it been dealt with under CPR rule 3.4(2)(a). I am satisfied that paragraph 14 of the defence shows no reasonable grounds and that the issue it raises is bound to fail. Furthermore, the issue is not one that arises in a developing area of law, such as was the case in *Hughes* such that a determination is best made after findings of fact have been made at a trial.

94. I will consider the terms of the order to be made after hearing submissions from counsel. However, I can indicate that it may well be right for the order to provide that the consequences of finding in favour of the claimant on this application are that paragraphs 15 to 18 of the defence are struck out. In proposing that order I have in mind paragraph 5 of Practice Direction 24.

95. **Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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