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Case No: CR-2020-004040

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 April 2022

Before :

RICHARD FARNHILL
(sitting as a Deputy Judge of the Chancery Division)

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IN THE MATTER OF FORCE INDIA FORMULA ONE TEAM LIMITED
(IN CREDITORS' VOLUNTARY LIQUIDATION
AND IN THE MATTER OF THE INSOLVENCY ACT 1986)

Between :

STICHD SPORTMERCHANDSING BV — **Applicant**

- and –

(1) GEOFFREY PAUL ROWLEY

(2) JASON DANIEL BAKER

(as joint liquidators of Force India Formula One Team Limited (in Creditors' Voluntary Liquidation)) — **Respondents**

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Mr Jamie Muir Wood (instructed by **Willans LLP**) for the **Applicant**
Ms Lottie Pyper (instructed by **Mishcon de Reya LLP**) for the **Respondents**

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APPROVED JUDGMENT

Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division):

Background

1. This dispute concerns the implication of a term into an agreement dated 22 October 2014 (the **Agreement**), originally between Brandon AB (**Brandon**) and Force India Formula One Team Limited (**Force India**). On 28 August 2017 the rights and obligations under the Agreement were transferred to the Applicant (**Stichd**).

2. At the time the Agreement was entered into and at the time it was transferred to Stichd, Force India owned and operated the Force India Formula One Team (the **Team**). Under the Agreement Brandon, and subsequently Stichd, were required to produce the Team Uniform and had the exclusive right to manufacture Products branded with Trade Marks (all as defined in the Agreement) connected with the Team.

3. The term of the Agreement was from 22 October 2014 to 31 December 2019. However, during the Term Force India encountered financial difficulties that rendered it both cash flow and balance sheet insolvent. The Joint Administrators (who in due course became the Joint Liquidators) were appointed on 27 July 2018.

4. Following a tender process the Joint Administrators received five offers to purchase the Team. Four were to purchase Force India's business and assets; the fifth, from Racing Point UK Ltd (**Racing Point**), was an offer to purchase the shares in Force India provided completion could be achieved within a specified timeframe, with a fall back of purchasing the business and assets of the Team if completion could not be so achieved.

5. The Joint Administrators accepted Racing Point's offer on the basis that it was the only one that allowed the possibility of Force India surviving as a going concern. In fact, necessary shareholder consents were not obtained in time and so the asset sale went ahead, completing on 16 August 2018. Racing Point paid cash consideration of £90 million and assumed certain pension liabilities of around £2 million. No attempt was made by Force India to novate the Agreement to Racing Point.

6. Stichd contends that the sale to Racing Point breached an implied term of the Agreement. At the hearing before me Mr Muir Wood confirmed that Stichd based its case on the form of implied term first put forward in the proof of debt filed on 6 August 2019:

> [Force India] would continue to operate [the Team] in respect of which the counter-party (initially Brandon AB and subsequently BSM [now Stichd]) was granted rights under the Agreement and would not transfer the right to operate [the Team] to any entity other than one within the Force India Group (as defined in the Agreement).

7. Mr Muir Wood suggested in his written submissions that this could be further refined by adding "*without seeking the agreement of Stichd to assign the*

Agreement to such an entity." That suggestion was ultimately abandoned in the course of oral argument, however.

8. Similarly, Stichd did not maintain the alternative formulation of its claim that it had advanced in correspondence with the Joint Liquidators and in evidence. This was first put forward in a letter of 28 September 2020 from Stichd's solicitors, Willans LLP, to Mishcon de Reya LLP, who were acting for the Joint Liquidators. It was repeated in the witness statement of Mr Harkess, Stichd's Managing Director, in the following form:

> For the term of the Agreement, as defined in the Agreement [Force India] would not take any steps to affect its entitlement to license the Trade Marks to [Stichd].

9. Mr Muir Wood noted that the version of the implied term set out in the proof of debt had never been formally amended or abandoned and argued that I should view the alternative formulation as an attempt, by Stichd, to persuade the Joint Liquidators to accept the proof of debt. I reject that submission. The alternative formulation was plainly set out as, and intended to be understood as, a term to be implied into the Agreement. Mr Harkess, in his first witness statement, could not have been clearer on that point. Moreover, the alternative formulation is different in substance from the term proposed in the proof of debt. That provision dealt with the ownership of the Team; the alternative formulation dealt with the exploitation of the associated intellectual property rights. Like the refinement advanced in Mr Muir Wood's written submissions, the alternative term was abandoned.

10. The Joint Liquidators' primary position was that no implied term was required in the agreement. In the course of oral argument Ms Pyper accepted, however, that certain provisions of the Agreement concerning Stichd's access to the Team facilities for marketing purposes and at race weekends (clauses 17 – 20 described below) could not be performed following disposal of the Team. To address that she proposed the following implied term:

> Clauses 17 – 20 only operate insofar as Force India continues to operate a Formula One team.

11. She also advanced an alternative case on the term I should imply were I to reject the Joint Liquidators' primary case and conclude that some further term was necessary for the operation of the Agreement as a whole. Effectively this would involve Stichd's proposed term subject to a caveat:

> [Force India] would continue to operate [the Team] in respect of which the counter-party (initially Brandon AB and subsequently BSM [now Stichd]) was granted rights under the Agreement and would not transfer the right to operate [the Team] to any entity other than one within the Force India Group (as defined in the Agreement) <u>insofar as Force India is not prevented from operating a Formula One team due to circumstances outside its control</u>.

12. The purpose of this trial was to determine whether a term or terms should be implied into the Agreement and, if so, whether there was a breach. To the extent that a term is implied and was breached, quantum will be determined at a future hearing.

The witnesses

13. I heard, quite briefly, from two witnesses. As I have noted, Mr Harkess is the Managing Director of Stichd, a position he has held since 1 June 2016. He was therefore involved during the operation of the Agreement and the events that led to this claim, but was not involved in the negotiation or entering into of the Agreement. Mr Rowley is one of the Joint Liquidators of Force India and leads on most matters in the liquidation. Again, he was not involved in the negotiation of the Agreement.

14. I was grateful to Mr Harkess and Mr Rowley. Both gave clear, concise, straightforward answers and were obviously trying to help the court. However, this aspect of the parties' dispute is focussed on the time of formation of the Agreement, when neither Mr Harkess nor Mr Rowley were involved. Inevitably, therefore, their evidence was not central to the analysis, which turns on the legal test for implication and the express terms of the Agreement.

The test for the implication of terms

15. In all cases regarding the implication of terms it is necessary to analyse the relevant express terms of the contract. In this case, however, there was some dispute between the parties over the nature of the Agreement and which terms of it were relevant. It is therefore helpful to start with the legal test, from which the identification of the relevant terms can then follow.

16. Both parties recognised that the leading case on implication is the judgment of Lord Neuberger in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] A.C. 742. Both framed their submissions by reference to the distillation of Lord Neuberger's analysis set out by Carr LJ in *Yoo Design Services Limited v Iliv Realty Pte Limited* [2021] EWCA Civ 560 at [51]:

> i) A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii) The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii) The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv) The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that

> a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v) A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi) The implication of a term is not critically dependent on proof of an actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii) The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue that has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred, they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii) The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed it if it had been suggested to them. The test is one of necessity, not reasonableness. That is a stringent test.

17. It was also recognised by both parties that the burden was on Stichd to persuade me of the need to imply a term, and they equally both agreed with the observation of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988 at [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 of the other of the parties, the loss lies where it falls.

18. For obvious reasons, given that Stichd has advanced different potential implied terms, Ms Pyper relied on decisions such as *Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd* [2009] EWCA Civ 16; [2009] 1 Lloyd's Rep 391, to the effect that where an implied term could take a variety of forms that is an indication that it is neither obvious nor necessary. Mr Muir Wood challenged the application of those decisions to this case, but I did not understand him to challenge the principle.

19. Finally, as regards the general principles on implication, it seemed to me in the course of the hearing that, at least on Stichd's case, there was an issue as to reasonable expectations. I therefore asked that the parties address me on the decision of the House of Lords in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, in particular the approach adopted by Lord Steyn at 459E-H:

> The inquiry is entirely constructional in nature: proceeding from the express terms of article 65, viewed against its objective setting, the question is whether the implication is strictly necessary. My Lords, as counsel for the GAR policyholders observed, final bonuses are not bounty. They are a significant part of the consideration for the premiums paid. And the directors' discretions as to the amount and distribution of bonuses are conferred for the benefit of policyholders. In this context the self-evident commercial object of the inclusion of guaranteed rates in the policy is to protect the policyholder against a fall in market annuity rates by ensuring that if the fall occurs he will be better off than he would have been with market rates. The choice is given to the GAR policyholder and not to the Society. It cannot be seriously doubted that the provision for guaranteed annuity rates was a good selling point in the marketing by the society of the GAR policies. It is also obvious that it would have been a significant attraction for the purchasers of GAR policies. The Society points out that no special charge was made for the inclusion in the policy of GAR provisions. So be it. This factor does not alter the reasonable expectations of the parties. The supposition of the parties must be presumed to have been that the directors would not exercise their discretion in conflict with contractual rights. These are the circumstances in which the directors of the Society resolved upon a differential policy which was designed to deprive the relevant guarantees of any substantial value. In my judgment an implication precluding the use of the directors' discretion in this way is strictly necessary. The implication is essential to give effect to the reasonable expectations of the parties. The stringent test applicable to the implication of terms is satisfied.

20. Mr Muir Wood adopted the reasonable expectations test as further supporting the implication of his proposed term alongside the prevention principle and the general business efficacy and obviousness of such a term. I do not agree with that analysis, which seems to me at odds with the way that Lord Neuberger treated reasonable expectations in *Marks & Spencer* at [23]:

> First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.) The first proviso emphasises that the question whether a term is implied is to be judged at the date the contract is made. The second proviso is important because otherwise Lord

> Hoffmann's formulation may be interpreted as suggesting that reasonableness is a sufficient ground for implying a term. (For the same reason, it would be wrong to treat Lord Steyn's statement in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 that a term will be implied if it is "essential to give effect to the reasonable expectations of the parties" as diluting the test of necessity. That is clear from what Lord Steyn said earlier on the same page, namely that "[t]he legal test for the implication of … a term is … strict necessity", which he described as a "stringent test".)

21. Ms Pyper submitted that the question of reasonable expectations was part of the broader test for implication, rather than a free-standing ground in its own right, and that to the extent the reasonable expectations of the parties were relevant, they arose at stage (vi) of the test in *Yoo Design*: the question was not the subjective intention of the parties but the intention of notional reasonable people in the position of the parties at the time.

22. I agree with Ms Pyper's approach, although in light of Lord Neuberger's analysis the issue of reasonable expectations must also be potentially relevant to points (i) – (iv) of the *Yoo Design* test. The reasonable expectations of the parties do not form a separate ground for implication; they are one of a number of routes by which the hurdles of obviousness and necessity can be approached. In my view, the approach to be derived from the authorities, so far as is relevant to this case, involves two steps. First, I analyse whether a reasonable expectation arises from the express terms of the contract viewed against its objective setting. Second, I must then consider if the protection of that expectation was so obvious as to go without saying or was necessary to give the contract practical or commercial coherence.

23. Ms Pyper emphasised that the facts of *Equitable* were distinct from this case. That, of course, is true, but they were also distinct from the facts of *Marks & Spencer* and *Yoo Design*. What matters is the approach that is to be taken in light of those decisions.

24. There was significant disagreement as to the application of what both parties described as the prevention principle. Indeed, Ms Pyper challenged whether it could properly be described as a principle at all. Each side pointed to specific instances in the authorities where a term had or had not been implied into a contract requiring one party in some way to facilitate the performance of the other party and sought to highlight the particular facts of those decisions that they considered resembled this case.

25. As Carnwath LJ noted in *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716; [2004] 1 Lloyd's LR 381 at [25] there is a real risk in this field of descending into a morass of caselaw, each party pointing to a particular aspect of their preferred authorities that they say is similar to the instant case, and sinking into an apparent mire of single instances that offers no real guidance to the case at hand. I agree with Carnwath LJ that the better approach is to identify the precise principle, whether from the leading authorities or the leading texts, test that principle by reference to any other significant cases and apply it.

26. In analysing the cases I start with the judgment of Devlin J in *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014. There, he observed at 1017D:

> In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give to him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it is not necessarily the most important, and it is certainly not the only matter. There are many decided cases in which it has not prevailed.

27. He went on to draw a distinction between two different categories of cases: those where a term is implied barring a party from preventing performance; and those where the term goes further and requires active cooperation from a party in facilitating performance. On the facts of a particular case they may overlap, but conceptually they are distinct. That distinction is recognised in the leading texts, for example Chitty on Contracts 34th Ed at 16-026 – 16-027 and Lewison's Interpretation of Contracts 7th Ed at 6.125 – 6.142.

28. Finally, Devlin J noted at 1017B that no implied term was needed where the alleged wrongful act was itself a breach of contract: "*There is no advantage in alleging an implied term not to break another term.*"

29. The approach to be adopted in determining whether a term is to be implied and, if so, what it is was addressed by Cooke J in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17]:

> It is self-evident that any implied term of co-operation or prevention from performance can only be given shape in light of the express terms which set out the obligations of the parties – see *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014, 1018, *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 and *Mckay v Dick* (1881) 6 App Cas 251. A duty to co-operate in, or not prevent, fulfilment of performance of a contract only has content by virtue of the express terms of the contract and the law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself.

30. That statement was endorsed by the Court of Appeal in *The Law Debenture Trust Corporation plc v Ukraine* [2018] EWCA Civ 2026; [2019] 2 WLR 717 at [207]. Plainly, it is fundamental to determining this case.

31. In applying the principle in *McCabe* to the current facts I make two observations. First, where Cooke J referred to the obligations imposed upon

each party by the agreement he might equally have referenced the obligations assumed by each party under the agreement, contracts being voluntarily assumed obligations. Secondly, I agree with the point that Cooke J makes in the final sentence about reasonableness: the fact that a duty of co-operation or prevention/inhibition of performance appears reasonable is not in itself a ground to imply such a term into the Agreement. By contrast, however, there is a basis for implication if the express obligations assumed by the parties under the Agreement would give rise to an expectation in the mind of the reasonable reader of the Agreement and the protection of that expectation satisfies the tests of obviousness or necessity.

32. As I have noted, a number of cases were cited to me and it is only right to consider whether they alter the position as a matter of principle.

33. *French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451 was one of what is referred to as the agency cases. Shipbrokers secured an 18 month charter of a vessel. They were to receive a commission of 2.5% of the hire paid. After four months the owner sold the vessel to the charterers and the charterparty was cancelled by agreement between the parties. The House of Lords refused to imply a term that the owners would not, of their own volition, determine the charter or prevent the payment of hire.

34. *French* was considered by the Court of Appeal in *Marcan Shipping (London) Ltd v Polish Steamship Co* [1989] 2 Lloyd's LR 138 at 143. Bingham LJ found the ratio to be that "*a term will not be implied into the agency contract between P and A that P will not, in a manner involving no breach of contract, make a further agreement with TP which will prevent the first contract running its full course and so deprive A of the commission he would otherwise have received.*" He contrasted the position with that in *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] QB 290: "*it may be proper to imply a term that P will not break his contract with TP and thus deprive A of the commission A would otherwise have received.*"

35. That distinction is entirely consistent with what a reasonable party would view as the expectations of the principal and agent arising from the express terms of the agency agreement, certainly where the agent acted within the scope of its actual authority. The agent has secured for the principal the contract that the agent was asked to secure. Given that the contract is what the principal asked for, notional reasonable people in the position of the parties would expect that the principal would not breach the terms of that contract. Unless that expectation is protected the principal could ignore it, however. That would deprive the agent, who has acted wholly on the principal's instructions, of its remuneration. The protection of the agent's expectations in such circumstances does seem to me both obvious and necessary if the contract is to have any commercial coherence.

36. By contrast, if the principal is entitled to terminate the agreement that the agent has negotiated, whether unilaterally or by further agreement with the other party, there is no reason for the reasonable person in the position of the parties to assume that the principal had fettered that right unless it has spelt out such a restriction in its contract with the agent. From the agent's perspective

the contract on which it has based its remuneration is a somewhat fragile asset, but the agent knows that, and can be taken to have accepted that, when it negotiated such a contract on behalf of its principal.

37. *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 was also an agency case. The principal wished to sell two cinemas and engaged the agent to find a buyer with the commission to be paid on completion of the sale. The agent found a buyer but the principal elected not to sell the cinemas, with the transaction instead being structured as a sale of the shares of the principal. That did not trigger a commission payment under the express terms of the contract and so the agent argued for the implication of a term that once it had introduced an appropriate buyer the principal was bound to proceed with the sale in the absence of "just excuse". The implied term was rejected.

38. In reaching that conclusion, their Lordships highlighted a number of aspects of the arrangement: it was not a sole or exclusive agency, such that it was always apparent that there may be other channels through which the disposal could have taken place (*per* Viscount Simon at 116, Lord Wright at 139 and 150); it was inconsistent with the express term that the commission was only payable on completion (*per* Viscount Simon at 118, Lord Wight at 139); the agent would secure a very high reward for only limited work, but was taking the risk that one of the parties to the sale would pull out (*per* Lord Russell at 124 and 125-126); that could happen for any reason or want of reason, however capricious or selfish (*per* Lord Wright at 138 and 150); the contract imposed no obligations on the agent (*per* Lord Russell at 128, Lord Romer at 153).

39. Again, this seems to me wholly consistent with an approach based on the expectations of the notional reasonable party derived from the express terms of the contract. Given the terms of the agreement no party in the agent's position could have had a reasonable (or indeed any) expectation that the contract would offer protection in the absence of an express term. It was obliged to do limited (or if it chose no) work and if it identified a purchaser and the transaction went ahead, which was practically the likely outcome, it would secure a very high reward. It was well known that such agreements could be on an exclusive or non-exclusive basis; any agent engaged on a non-exclusive basis took the risk that the transaction might not proceed with its identified purchaser.

40. Finally, in terms of cases where no term was implied, there is the decision in *Law Debenture v Ukraine*. Ukraine had issued debt obligations in the form of tradeable Eurobonds traded on the Irish Stock Exchange. The notes were at all times held by Russia. Ukraine sought to imply a series of terms into the notes to the effect that Russia should not take steps to hinder or prevent Ukraine's ability to repay them.

41. The Court of Appeal rejected the proposed terms. The debt was in the form of tradeable notes, but the suggested implied terms would make repayment subject to the actions of a non-party to the trust deed embodying the notes, which would have the effect of rendering them unworkable and effectively untradeable. The terms were "*incompatible with the commercial purpose of the agreements*"; no sensible person would agree to them (at [209]).

42. These were factors considered separately, by the Court of Appeal, from the tests of necessity and obviousness. The various factors overlapped, however, and drove to the same conclusion. The nature of the transaction meant that the contract did not lack commercial or practical coherence in the absence of the term: Ukraine simply had to repay the sums due. Given the nature and complexity of the transaction the terms could not be said to be obvious.

43. Again, the outcome seems to me consistent with the expectations of the notional reasonable party considering the express terms of their agreement. If the proposed term, which is not expressed in the contract, is not compatible with the commercial purpose of the agreement and is one to which no sensible party would agree due to the nature of that contract, it is equally not one that could give rise to any reasonable expectation capable of protection.

44. Turning to the cases where a term was implied that a party would not prevent performance, the leading authority for the principle is *Stirling v Maitland* (1864) 5 B&S 840 *per* Cockburn CJ at 852. Mr Muir Wood placed some weight on it, but although it is a clear statement of the principle, it offers a much less clear analysis of its rationale. The reasoning runs to three substantive paragraphs, only Cockburn CJ and Crompton J gave substantive judgments, and Crompton J decided the issue as a matter of interpretation rather than implication. It is obvious from the subsequent decisions set out above that there are cases where *Stirling* does not apply, and the decision offers no real guidance in deciding where the line should be drawn.

45. Similar issues arise in analysing *Inchbald v The Western Neilgherry Coffee, Tea, and Cinchona Plantation Company Ltd* 17 CB (NS) 733. The judgments are short and state the principle in broad terms that the House of Lords in *Luxor* was careful to limit (*per* Lord Wright at 147-148). Ultimately I found it to be of limited assistance in determining when a term can be implied requiring co-operation.

46. The judgment of the Court of Appeal in *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2004] 1 Lloyd's LR; [2003] EWCA Civ 1716 offers greater guidance. CEL operated a container road haulage business. Nedlloyd was a shipping line. For a number of years the two had operated a joint venture to undertake Nedlloyd's haulage requirements in Great Britain using subcontractors. In 1996 they entered a three year agreement under which Nedlloyd granted CEL the exclusive right to provide overland haulage and transportation services to it within Great Britain and CEL agreed to provide a dedicated fleet, supplemented by an owner driver fleet, in turn supplemented by a sub-contractor base. At the end of 1996 Nedlloyd's parent group merged with the P&O group, which had its own road haulage business. There ceased to be any discrete Nedlloyd business and CEL were not offered exclusive rights to any aspect of the merged business. The work CEL carried out for the merged business kept the dedicated fleet busy but not the owner-driver and sub-contractor vehicles, which had been the more profitable part of the operation.

47. Hale LJ, giving the leading judgment, adopted the approach used by Donaldson LJ in *Bournemouth v Boscombe AFC v Manchester United*, The Times 22 May 1980, of asking what declaratory clause would need to be

framed to provide that the parties were not subject to the obligations flowing from the proposed implied term. She concluded, at [21]:

> Adopting that approach in this case, one might add into the termination clause, cl. 9, "provided also that NLL are at liberty to dispose of their business as a going concern to whomsoever they please whenever they please during the period of this contract." Such a declaration would have rendered the exclusive right to provide for their transport requirements similarly inefficacious, futile and absurd.

48. That result is entirely consistent with an approach focussed on the expectations of the reasonable reader based on the express terms of the contract. An exclusive distribution agreement with limited termination rights would have provided reasonable parties with an expectation that Nedlloyd would not be able to bypass those exclusivity rights by its own deliberate actions. Failure to protect that expectation would render those rights inefficacious, futile and absurd. A clause protecting them was both obvious and plainly necessary to protect the practical and commercial coherence of the contract.

The relevant express terms of the agreement

49. In the course of submissions I was referred to numerous terms of the Agreement. Only a limited number of them seem to me relevant, however.

50. The Recitals record that:

> Force India operates a Formula One team competing in the World Championship.
>
> [Stichd] is engaged in the business of manufacturing, sourcing, marketing, selling and distributing Formula One and other sports fan merchandise.

51. Clause 2 deals with the term of the Agreement: "*This Agreement takes effect on the Commencement Date and subsists, unless terminated in accordance with the provisions of this Agreement, for the Term.*" The Term is defined in Schedule 1 as "*the period from the Commencement Date to 31 December 2019 or the Termination Date whichever is earlier.*" The Termination Date is "*the actual date termination of this Agreement takes effect in accordance with its terms.*"

52. Clause 3.1 is the grant of licence rights from Force India.

> Subject to the terms and conditions of this Agreement, Force India hereby grants to [Stichd] during the Term the exclusive right and license to design, manufacture, market, sell and distribute the Products in the Territory.

53. The Products were "*The Team Uniform and the Licensed Team Merchandise and Leisure Wear.*" The Team Uniform was set out in detail in Schedule 2. Licensed Team Merchandise and Leisure Wear were set out in Schedule 3 and

were products to which Trade Marks were applied. Team was defined as "*the Sahara Force India Formula One motor racing team owned and managed by Force India*." Trade Marks were set out at Schedule 5 and were the trademarks of the Team and it sponsors. They could be amended to cover "*such other marks as Force India may authorise* [Stichd] *in writing to use from time to time.*"

54. Clauses 3.2 and 3.3 dealt with rights reserved to Force India; clause 3.4 prevented Force India from granting further licences to manufacture or sell the Products without Stichd's consent. Clause 3.6 dealt with distribution. Clause 3.9 allowed Stichd to enter into similar deals with other Formula One teams.

55. Clause 4.2 was a warranty from Force India that it had the right to license the Trade Marks. Clause 6.3 gave Stichd the right to set the price of the products, subject to the consent of Force India. Clauses 11 and 12 were a further reservation of rights and goodwill by Force India.

56. Clause 7 required Stichd to ensure that the Products were available for purchase through the E-shop. The definition of E-shop was "*the e-commerce shop to be operated by* [Stichd]". Clause 7 also provided for a 50% discount to be granted to Force India staff and a 25% discount to be granted to defined Force India partners.

57. Clause 13 provided for the payment of royalties to Force India to the extent that sales exceeded a certain level set by reference to the Team Uniform Costs.

58. Clauses 17 to 20 provide Stichd with specified access to the Team facilities and its drivers for each year during the Term. The precise details seem to me less relevant than the fact that these rights are by reference to the Team as defined and arose every year during the Term. Taken together, those two factors mean that these obligations could never be satisfied following the acquisition by Racing Point because the Team as defined was owned and operated by Force India and so ceased to exist following the acquisition.

59. Clause 21 dealt with termination. There was a right to terminate without cause at around the mid-point of the Term but that was never exercised. Either party had the option to terminate in the event of default by or the insolvency of the other party. It is important to stress that this was an option that vested exclusively in the non-defaulting or non-insolvent party. There was no automatic termination, nor did the defaulting or insolvent party have a right to terminate.

60. Finally, clause 24 deals with force majeure. It provides:

> Neither party is to be liable to the other for failure to perform any obligation under this Agreement if and so long as the failure is caused by, without limitation, war, insurrection, riot, fire, explosion, flood, strike, lockout, third party injunction, national defence requirements, acts or regulations of national or local governments, act of God or where the following are beyond the control of the parties: inability to obtain fuel, power, raw materials, labour, containers or transportation, accident,

malfunction of machinery or apparatus, denial of export or import licences or any other cause beyond the control of the parties.

61. Mr Muir Wood focussed on the obligation of Stichd to produce Team Uniforms: if there were no Team there could be no Team Uniforms and so Force India would have prevented Stichd from performing its contractual obligations. The difficulty with that argument is that the issue Mr Muir Wood has identified does not support the term he seeks to imply.

62. The first issue is one of construction. Force India's right is limited to having Stichd provide a Team Uniform, which is, quite obviously, a uniform for the Team. By selling its assets to Racing Point, Force India caused the Team, as defined by the Agreement, to cease to exist. Force India could not require the provision of a Team Uniform for anything other than the Team. It accordingly lost the right to require the production of a Team Uniform. No implication is necessary to give the Agreement practical and commercial coherence if the obligation is read in this way.

63. If that is wrong, and if an implied term could properly be implied to address the situation, it would still not be the term that Stichd seeks. In connection with clauses 17 – 20 Ms Pyper proposed a more limited term, to the effect that they only operated while Force India owned the Team. For the reasons I give below I reject the term in that context; I consider that it would apply as regards the Team Uniform obligation, however. Since that addresses the issue identified by Mr Muir Wood, the wider term he proposed is unnecessary.

64. The next question is whether Stichd's right to earn revenues through the sale of Licensed Team Merchandise and Leisurewear offers a basis for the implication of Stichd's proposed term. In my view the following features of the Agreement are relevant in this respect:

    i) It was obviously important to the parties that Force India owned the Team. It is recorded in the very limited recitals and specified in the definition of Team.

    ii) This was an arm's length transaction between commercial parties, such that it can be assumed that Stichd intended to make a profit from it. Mr Harkess' unchallenged evidence is that the Agreement had been profitable prior to the disposal. The only way that Stichd could make profits under the Agreement was through the sale of Licensed Team Merchandise and Leisurewear.

    iii) The contemplated Term, during which Stichd could make those profits, was just over five years. Both parties had a right unilaterally to terminate the Agreement on 31 December 2017 by giving written notice on or before 31 March 2017. Neither party did so. Otherwise, the termination rights were limited as described above. Again, they were never exercised.

iv) Stichd's ability to make profits was further protected by an exclusivity right within the Territory. In that sense the situation is more akin to cases like *Nedlloyd* than to cases like *Luxor*.

v) It was not suggested to me that the level of profit was excessive or unusually high. This was therefore not the sort of high risk – high reward agreement addressed in *Luxor*.

vi) Stichd was required to undertake work in return for the licence of rights. Although there was no evidence before me as to the likely cost of the Team Uniforms when the Agreement was entered into, it was apparent from the definition of Team Uniform Costs that the parties contemplated that they could exceed €125,000, since that would be the only reason for imposing a cap. Stichd was also required to operate the E-shop, which would have involved some upfront investment. Again, therefore, the Agreement had more in common with the situation in *Nedlloyd* than that in *Luxor*.

65. In considering the question of implication I must set against those points the issues with the proposed clause raised by Ms Pyper:

i) She submitted that the Agreement was a trademark licence, and as such there was no need for any implication to make the licence work. She pointed to section 28 of the Trademarks Act 1994 as demonstrating that the licence survived the transfer of assets to Racing Point. I agree, and indeed I think Stichd agrees, that any licence created pursuant to the Agreement could survive, but that is not the point. In the absence of the Team there was no way for Stichd to profit from the manufacture and sale of Licensed Team Merchandise and Leisurewear. The licences were a means to an end, not an end in themselves.

ii) It was open to Force India, under the definition of Trade Marks, to authorise other marks from time to time. That granted Force India a right to refuse to authorise the use of any marks. To the extent that is an argument that Force India could elect to withdraw the right to use trade marks which it either owned or was licensed to use and sub-licence, I reject it. Such an outcome would require clear language; the definition of Trade Marks on which Ms Pyper relies does not come close to supporting it.

iii) She submitted that there was limited upfront investment and no upfront payment by Stichd to Force India. As I have noted, there was no evidence as to what investment needed to be made, but the provision of Team Uniforms involved a commitment of substance and the opration of the E-shop would also involve some work by Stichd. Mr Harkess accepted, in his second witness statement, that there was no payment to be made upfront. That is relevant but, weighed against other factors, not determinative.

iv) The proposed term was onerous and would represent "the tail wagging the dog" because it would compel Force India to retain the Team in all

circumstances and restrict its ability to change sponsors in exchange for a relatively limited benefit. I do not accept that analysis. If the proposed term is implied it represents an undertaking by Force India to retain ownership of the Team for a period of a little over five years with a break clause half way through. That is not, in itself, an obviously onerous obligation. Nor is it the case that an injunction or specific performance would necessarily be ordered to enforce it. Stichd's losses are financial, such that the most likely outcome was the one in this case – that it would seek damages to compensate it for the losses it suffered. Nothing impinges on the ability to change sponsors, which is provided for in the express terms of the Agreement.

v) The clause would unduly limit the directors' obligation to consider the interests of creditors in the event that insolvency became a real possibility. All contracts fetter the discretion of the parties to them, and this one is no different. Ms Pyper agreed that if the directors had entered into a version of the Agreement that expressly included the proposed term it would be binding on them. Ultimately, therefore, this became a different iteration of the onerous term argument discussed above and I reject it for the same reasons.

66. In the circumstances I consider that the notional reasonable party, looking at the Agreement and in particular the terms I highlight above, would expect that Force India would be required to own the Team throughout the Term of the Agreement. Such ownership was sufficiently important that it appeared twice in the Agreement, Force India had granted exclusive rights tied to the existence of the Team and had only limited rights of its own to terminate the Agreement.

67. Moreover, a term protecting that expectation seems to be both necessary and obvious. The disposal of the Team by Force India robbed the Agreement of its entire commercial rationale from Stichd's perspective. It could no longer profit from the rights it had negotiated, rendering the exclusivity and the five year term worthless. In the absence of the implied term the Agreement provides none of the security provided by those express terms. Similarly, had the officious bystander asked the parties, in 2014, if Force India could sell the team and walk away from its obligations I consider that both parties would have responded that it obviously could not.

68. That conclusion is reinforced by considering the declaratory clause that would be needed under Donaldson LJ's approach in *Bournemouth and Boscombe AFC*. In my view it would be almost identical to the clause identified by Hale LJ in *CEL v Nedlloyd*: one would add to the termination clause "*provided also that* [Force India] *are at liberty to dispose of* [the Team] *to whomsoever they please whenever they please during the period of this contract.*" Just as in *Nedlloyd*, such a provision robs the exclusivity and the fixed term of much if not all of their value.

69. I do not accept Ms Pyper's reliance on the decision in *Port of Tilbury*. The Court of Appeal emphasised that it was a sign that a term was either not

obvious or was unnecessary. It is a factor to be considered; it is not conclusive.

70. Nor do I consider that Ms Pyper's proposed caveat limiting the term to circumstances beyond Force India's control properly protects the expectation that I have identified. The implied term is needed to protect the exclusive right granted by Force India to Stichd for a fixed term. It makes no difference to Stichd how that right is prejudiced or lost.

71. I also consider the caveat to be unworkable alongside the force majeure clause. That already applies to circumstances beyond the parties' control that prevent performance. Ms Pyper accepted that I would need to read both references to "beyond the parties' control" in the same way. If the implied term were triggered by the same events as the express term but had a different effect it would be inconsistent with an express term. That inconsistency alone would defeat the implied term. If, on the other hand, it is triggered by the same events and has the same effect as the force majeure clause then it would be redundant and so neither necessary nor obvious.

72. Even if Ms Pyper's caveat were implied it would not help Force India because I do not consider that what happened to Force India can properly be classed as events beyond its control as that term is understood under the Agreement. The transfer of the Team to Racing Point was brought about by the administration of Force India. Administration is a defined Insolvency Event and gives rise to a right to terminate in favour of the other party (here Stichd). It was plainly intended by the parties that insolvency would be caught by clause 21 rather than clause 24 and so they clearly considered that it was not an event beyond the control of the insolvent party. As such, even if Ms Pyper's proposed language were adopted it would not change the outcome. The transfer to Racing Point would not have been or have resulted from an event beyond Force India's control.

73. Accordingly, the term I consider is to be implied into the Agreement is largely that proposed in the Proof of Debt subject to being limited to the Term of the Agreement.

74. Finally, I should address the relevance of clauses 17 – 20. These are also for the benefit of Stichd and plainly contemplate that access will be granted to the facilities of the Team for each year that the Agreement remains in force. Following Force India's disposal of the Team it is difficult, if not impossible, to see how Force India could comply with those obligations.

75. Ms Pyper argued that these were in some way subsidiary or ancillary rights to the principal licence right. I do not accept that submission. Nothing in the language of those terms supports it. These were free standing obligations of Force India that could have been granted independently of the grant of the licence and had value in their own right. Nor can I accept Ms Pyper's proposed implied term that these rights were only to subsist while Force India owned the Team. Far from making clauses 17 – 20 work, such an implication would significantly devalue them.

76. That does not mean that there is a basis to imply a term, however. This is the type of situation considered by Devlin J in *Mona Oil*: if the disposal of the Team caused Force India to breach clauses 17 – 20 then Stichd will have a claim for damages arising from such breaches. It does not need the implication of a further term.

Breach

77. Ms Pyper accepted, rightly I think, that if I implied Stichd's proposed term into the Agreement there had been a breach of it. I have somewhat narrowed that proposed term by reference to its temporal scope, but I do not see that in any way alters the concession made by Ms Pyper. Force India was required to own the Team during the Term; it did not do so and was accordingly in breach of the Agreement.

Conclusion

78. For the reasons given above I consider that Force India was required by the Agreement to own the Team throughout the Term, both because that was obvious from the Agreement's other terms and because it is necessary to give business efficacy to them. It has breached that obligation.

79. I will hear further on the parties regarding costs and the directions needed for the quantum phase of these proceedings.