IN THE HIGH COURT OF JUSTICE [2020] EWHC 2608 (QB)

QB-2019-002255

QUEEN'S BENCH DIVISION

BETWEEN

Mr Venu Parmeshwaran Nair

Claimant

And

Lagardère Sports and Entertainment UK Ltd

Defendant

JUDGMENT

Keywords – contract law – employment law - implied terms – trust and confidence – scope of term – financial wellbeing – corporate structure – bonus payments

Authorities referred to in judgment:

Malik v Bank of Credit and Commerce International SA [1998] AC 20

Hagen and others v ICI and others [2001] EWHC 548 (QB)

Crossley v Faithful & Gould Holdings Ltd [2004] EWCA Civ 293

Greenway and others v Johnson Matthey Plc [2016] EWCA Civ 408

James-Bowen v Chief Commissioner of the Metropolitan Police [2018] UKSC 40

Authorities referred to in submissions but not referred to in judgment:

BP Refinery v Shire of Hasting (1977) CLR 266, 283

Philips Electronique Grand Public SA v British Shy Broadcasting Ltd (1995) EMLR 472, 481

Swain v Hillman [2001] 1 All ER 91

Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550

Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1

ED&F Man Liquid Products v Patel [2003] EWCA Civ 472

Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63

ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725

Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)

AC Ward & Sons v Catlin (Five) Ltd (2009) EWCA Civ 1098

Dellal v Dellal [2015] EWHC 907 (Fam)

Bournemouth University v Buckland (2010) EWCA Civ 121, (2011) QB 323

Marks and Spencer plc v BNP Paribas [2016] AC 742

Representation:

Mr Ian Mill QC for the claimant (C) instructed by Mishcon de Reya LLP, Solicitors

Mr Andrew Hunter QC for the defendant (D) instructed by Squire Patton Boggs (UK) LLP, Solicitors

1. This judgment relates to the applicability of the 'implied term as to trust and confidence' ('ITTC') in contracts of employment, and in particular where the alleged context is a breach of that term by way of the conduct of an employer which (depending on how one looks at the facts) consisted of a failure to secure payment of bonuses due from other companies in the broad group of companies in which C was employed and over which it is argued D had sufficient de facto control, or where the conduct is a positive 'stringing along' and avoiding honouring the bonus payment, leading to a breakdown in trust and confidence. Among other things the question is whether the claim must fail on the basis that appellate courts have in the past rejected the notion of an implied duty on an employer to take steps to protect the financial welfare of employees. In this instance the sum involved is enormous, being a bonus of at least $25 million USD.

2. The claimant's case is that for 11 years or so from 2006 until he resigned from D in 2017, he was employed within the World Sport Group of companies, (WSG) and in particular latterly from October 2015 by the defendant, Lagardère Sports and Entertainment UK Ltd (LSE). He alleges that in 2008 he was a part of a team which was instrumental in securing the media rights to the Indian Premier League (IPL), which at that time was a new league created by the relevant cricket board of control (the Board of Cricket Control for India, or BCCI). He alleges that due to various acts and omissions of WSG, the BCCI and a broadcasting partner of WSG terminated contracts and that WSG was exposed to investigation by Indian authorities, causing him personally a loss of reputation and other losses.

3. His former employer is LSE, pleaded as a member of the WSG group to which he transferred by mutual agreement in 2015, is said to be liable to pay damages for breach of the ITTC based on what he says is a failure by it to respect his express contractual bonus entitlement and compensation for the loss to his reputation while at WSG; he also says that it has failed to reimburse some contractually due expenses of £125,000.

4. I use the nontechnical term 'respect' at this stage since there is argument over how the case was put – said to differ as between the Particulars of Claim and the skeleton argument of C, and hence over the legal basis for claiming against D albeit that on any basis D's position was that no claim against D is sustainable.

5. LSE's parent company (actually a partnership limited by shares under French law) is pleaded to be LSE SCA in France but the claimant worked at the LSE division headquarters in London, for the UK company, and did so since a reorganisation of the company management in September 2015. I will not set out in detail the corporate structure about which I had some information notably in the form of a chart provided by an HR officer on behalf of D, but there is no agreement between the parties as to the extent of control which D had or has over other companies in the broad corporate framework. This application takes place before disclosure or exchange of evidence and hence material was limited to the evidence put in for the application and in response to it.

6. In 2015 D acquired a corporate services role (at the London HQ, where D 'transferred' in a general contractual sense rather than a formal TUPE sense) as part of a reorganisation of the various related companies within and connected with the WSG group. The POC pleads that at the time of employment of C by D ('2015 UK agreement') there were termination agreements with two of the WSG companies for which C worked (WSG Hong Kong and WSG Singapore which I refer to as WSG HK and WSG SG). The termination agreements are said not to have ended those companies' obligations to pay him bonuses due, or to terminate WSG SG's alleged liability to compensate C for certain other claims also.

7. The employment contract between C and D was an 'executive services agreement', and by clause 3.1 the employment began 1/10/15 and continued to 2018. It was a 3 year contract. Remuneration was provided for (at cl. 6), there being no mention of liability for historical bonuses, there was provision at cl. 7.1 to pay expenses upon production of satisfactory proofs of incurring the expenses, cl. 20 included a grievance procedure (it was not claimed that this was ever used) and cl. 23 was an entire agreement clause.

8. The employment contract with the Singapore company subsisted until December 2018 and hence existed for a period alongside the contract with D, and indeed continued ultimately for longer than did the contract with D.

9. It was pleaded by C that it was an implied term (the ITTC) of the 2015 UK agreement by which D employed C that D would not conduct itself so as to 'destroy or seriously damage the relationship of trust and confidence' between it and C, and that the ITTC operated so as to require D to take reasonable steps to secure that the two WSG companies paid bonuses and compensation due from them to C. In other words the pleaded obligation to take reasonable steps to secure payments was not said to be a separate contractual term but rather that fulfilling that obligation was part and parcel of adhering to the ITTC in the contract between D and C. Whether that is a claim doomed to fail as either fanciful or not arguable in law is the matter in issue here.

10. D applies to strike out the claim and/or for summary judgment. Its case consisted of three essential elements namely: first that there is no real prospect of C establishing there was a positive contractual requirement that D had to use reasonable steps to procure repayment of sums due from the former employer of C within the WSG group; second that the pleaded case on breach (failure to take those steps) stands no real prospect of success in any case, and third that there is no reasonable prospect of establishing causation of loss.

D's application

11. It was accepted for purposes of this application that I could assume that C had an arguable case as against the two WSG companies, and the issue here was whether the claim against D was sustainable.

12. Mr Hunter argued that D is a different legal entity from WSG SG and WSG HK. This was not a claim on the basis of piercing the corporate veil or that D assumed, acquired or guaranteed the debts of the other companies. C only worked for D for 16 months. The two WSG companies, different entities, pre-dated the C's work at D by some time: and C's contract with WSG HK ran from 2006-2015 and with WSG SG from 2012-2018, continuing until after C's contract with D had ended (and overlapping with it).

13. It was elementary, it was said, that, absent piercing the veil, these were separate entities and must not be conflated. Yet C's approach amounted to treating them as inseparable: 'C was employed in the group of companies known as ….' and suchlike in the skeleton for C was a glossing-over of the fact that these were separate legal entities. D (per the corporate

structure diagram in the bundle) sat in amongst various companies which were also indirectly owned by the same entities who indirectly owned the two WSG companies. The WSG companies were operating companies and still exist under different names, and D was a corporate services company. D did not control the two relevant WSG companies, it was said.

14. Prior to 2015, D's employment per the statement of Mr Guet for D was under employment or consultancy contracts and variations thereof, the earliest being from 9/2/06 with the HK company, later terminated on 30/9/15. It was averred that there was a fundamental difference between the pleaded case, and the evidence now put in for this application by Mr Nair the claimant namely that, whereas the pleaded case was solely concerned with D failing to take steps to procure other entitles to act by compensating him, the skeleton argument and evidence now forming the basis of argument by C were said to pursue a different basis of claim by which the argument in C's skeleton was that D refused, itself, to compensate C. On this point, in this judgment I have approached the case as pleaded, the substance really being a claim that D failed to cause C to be paid his bonus, and in particular by failing to cause the two WSG companies to pay it, though it may be that Mr Nair would also say that had D chosen to pay the sums itself directly or for example procured the parent company of the whole group to pay then that would have been entirely acceptable: he just wanted to be paid. The failure it appears was accompanied by what was described by Mr Mill QC for C as conduct which was 'stringing him along' and effectively seeking to 'wriggle' out of Mr Nair's right to be paid what he was due.

15. It was noted that it was accepted that C had not actually asked D *specifically* to do the things which he had pleaded were repudiatory breaches of his employment contract, ie to secure payment from the WSG companies. The evidence in support did however indicate that Mr Nair, who I think is probably not a lawyer, pressed for the compensation he felt was due to him, by way of communication with the director of the two WSG companies who was *also* director of D. He was in effect asking generally to be compensated and from his perspective one infers that he did not much care at the time which company within WSG actually paid as long as the obligation to pay him was fulfilled. However his claim is specifically only against D, to which he had – as his claim puts it – transferred within the broader corporate framework.

16. At this stage I interject the observation that the correspondence in my view can fairly be said to show – and I make no findings of course since this is not a mini trial – that compensation

and so forth arising from his previous time at the WSG companies was part and parcel of overt discussion with D when seeking to negotiate a package of remuneration from D, respecting monies he felt to be due, and I must assume to be due, from his time at the two WSG companies, sufficient to prevent C from resigning his employment with D. There does not seem to have been refusal by D so much as matters reaching the point where Mr Nair felt he had been badly 'messed about' over such an enormous entitlement and that D was not advancing towards ensuring his compensation was paid for his work within the WSG group. He resigned when he did not receive what to him were adequate proposals, which had been part of a long drawn process without adequate conclusion. There did not seem to be a dispute about this factually.

17. The 'emergent' claim, as the argument in the skeleton was termed by Mr Hunter QC for D, as well as not being pleaded, was it was said in any event unsustainable even in its new unpleaded form. The skeleton was in effect moving from an omission (by D, to secure payment from the WSG companies) to an allegation of a failure to take a positive step namely for D to compensate C out of its own funds for money owed by the separate WSG companies. D argued that, according to authority, the ITTC is, in law concerned with prohibiting wrongful conduct, not importing positive duties, and as noted, there was no contractual assumption of liability by D of the sort now argued but not pleaded namely to compensate D for alleged breaches by WSG HK and SG in any event.

18. C's resignation from the defendant company was covered in the evidence of Mr Guet and that of the claimant in some detail but it was argued that the facts did not affect the legal analysis in terms of D's argument that the claim was unsustainable as a matter of law.

Legal argument: Applicant/Defendant

19. This was not a case, said D, where there was said to be a <u>separate</u> implied term to take reasonable steps to secure payment from WSG. Rather what was pleaded was that the <u>ITTC</u> was breached by D failing to take such steps.

20. It was common ground that the ITTC was implied in its usual customary form which was as it was put in the POC ("*not conduct itself so as to destroy or seriously damage the relationship of trust and confidence*" between C and D, albeit with the accepted addition so as to reflect case law of the words "*without reasonable and proper cause*" upon which nothing turned here).

21. It appeared from Mr Hunter QC that the mode of pleading had caused some initial confusion but that the above had been made clear: this was not a case where a new form of implied term was alleged either as a new form of 'standard' term or on the basis of a bespoke contract term implied by necessity in this particular contract.

22. Supreme Court authority was said to show that if one wants to extend the usual scope of the ITTC itself one had to establish public policy grounds for that, and that the current state of the law was one which focussed on prevention of wrongful conduct by a party, and any extension to derive a freestanding positive obligation would be an extension of the law and all reported cases had rejected any attempt to extend the scope of the ITTC so as to import positive duties to do something. I was referred on this point to two key cases (*Crossley* and *James Bowen*).

23. In *Crossley* one saw that (per headnote) C brought a claim alleging failure to warn C of the effects of resignation on entitlements under an insurance scheme, the employer being said to have breached an implied term requiring the employer to take reasonable care for the employee's *economic* wellbeing. That was rejected, per Dyson LJ. Courts proceeded slowly, and an interpretation to include a duty of the sort alleged or (as in case law cited in *Crossley*) to imply for example a duty to inform employees of matters in their economic interests might be capable of being found but that doing so would be an extension of the existing law.

24. Every similar case seeking to extend the scope of the ITTC, it was said by counsel, was rejected in favour of the usual law on implying positive duties by way of bespoke implied terms, where they met the necessity test, into specific contracts (which was not what was argued in this case). The ITTC must be interpreted negatively and not so as to impute positive obligations unless one was extending the law in the manner referred to and not done in *Crossley* or in any reported case. Cf The *Hagen* case reviewed in *Crossley* at para. 30, where the implied term was one where it was said that ICI (who had made various representations to employees) owed a duty to take all reasonable steps to ensure Cs were made aware of all entitlements under their contracts of employment. The principle in *Hagen,* which was approved in *Crossley*, was that individual acts of negligence such as that alleged there would not undermine trust and confidence so as to be repudiatory.

25. At *Crossley* para. 33 one saw analysis of the term which was proposed namely to take care of the employee's economic wellbeing. It was held that where a case was not within the existing scope of the accepted ITTC in contract law, one should look instead to whether

bespoke terms were implied under the law relating to necessity in individual contracts. Any extension of the scope of the ITTC had to be considered on the basis of reasonableness, fairness and public policy and cf 43-44 of the *Crossley* judgment: the proposed implied term was rejected as imposing an unfair and unreasonable burden on employers, and there was no basis for implying a bespoke term on the facts. The scope of ITTC was a matter of law.

26. It was D's position therefore that thus far in the authorities the ITTC was only recognised as relating to an obligation not to engage in wrongful conduct and that to extend it to positive conduct such as a positive obligation to secure payment from WSG would be extension of law. The principles, if there were an extension, were reasonableness, fairness and public policy. Accordingly one could not simply rely on the ITTC and say it meant something in any given case unless one was adhering to the requirements to show reasonableness, fairness and public policy, failing which one should look to a bespoke term if arguable.

27. The next substantive authority relied on was *Greenway*, again in the Court of Appeal. The Judgment of the court was given by Sales LJ. The Court rejected a contention that a standard implied term to protect an employee from physical harm should be extended to a duty to protect an employee against economic harm. As regarded exposure to platinum salts employees sought damages for loss of earnings. The judgment para. 37 onwards gave the classic formulation of the implied duty as to physical harm and, having regard to the general policy reasons which inform the question whether a standard duty to protect an employee from economic harm, he derived support from *Crossley*. After summarising *Crossley*, Sales LJ recognised that the existence of implied standard terms were a function of reasonableness, fairness and public policy and the imposition of the extended form of the implied term as to physical harm was refused.

28. Lastly the *James-Bowen* case was relied upon, a Supreme Court Authority. A press conference took place after a case relating to arrest of a suspect, at which in the view of the Claimants the police force had effectively blamed them – 'sold them down the river' as counsel put it, and that there was a breach of contract by their employer of a duty to take reasonable care to protect their welfare including professional and reputational welfare in the conduct of the Police's defence of the allegations which had been made. It was held in the opinion of Lord Lloyd-Jones that to derive from the ITTC an obligation to protect officers from economic and reputational harm in the conduct of litigation would be to move beyond the derivative duties previously established. Per para. 17 of the judgment the ITTC was a 'portmanteau' term from which obligations could be derived, but the court would not derive

from it the one sought to be derived in *James-Bowen* concerning protecting the interests of employees in the way in which litigation was conducted.

29. I shall quote paras. 16 and 17 of James-Bowen:

16. The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment rather than a term implied from the particular provisions of a particular employment contract (Malik v Bank of Credit and Commerce International SA [1998] AC 20, per Lord Steyn at p 45D). It was described by Lord Nicholls in Malik at p 35A, as a portmanteau concept. In that case the House of Lords considered it the source of a more specific implied obligation on the part of the employer bank not to conduct its business in a dishonest and corrupt manner, the breach of which gave rise to a cause of action for damage to the economic and reputational interests of its employees. Similarly, in Eastwood v Magnox Electric plc [2004] UKHL 35; [2005] 1 AC 503 the House of Lords recognised an obligation on an employer, in the conduct of his business and in the treatment of his employees, to act responsibly and in good faith (per Lord Nicholls at para 11). The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship (Gogay v Hertfordshire County Council [2000] IRLR 703; McCabe v Cornwall County Council [2004] UKHL 35; [2005] 1 AC 503; Bristol City Council v Deadman [2007] EWCA Civ 822; [2007] IRLR 888; Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512; [2015] IRLR 112; Stevens v University of Birmingham [2015] EWHC 2300 (QB); [2016] 4 All ER 258). Furthermore, any decision-making function entrusted to an employer must be exercised in accordance with the implied obligation of trust and confidence (Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661).

17. If the present case is approached on the basis of implied contractual terms, the issue becomes whether, in unpacking this particular portmanteau implied term of trust and confidence, it is possible to extract a duty of care owed by an employer to its employees to conduct litigation in a manner which protects them from economic or reputational harm. It is significant that, despite the researches of counsel, we have not been referred to any decided case in any jurisdiction which holds that an employer owes such a duty of care to his employees. To derive such an obligation from the implied term of trust and confidence would be to move substantially beyond the specific derivative duties established to date.

30. Accordingly the law was as above and the proposed derivation from the ITTC of a duty to secure payments from the WSG companies, or indeed for D to make payments itself of sums owed by the WSG companies, would firstly be outside the recognised scope of the ITTC and to interpret it as including such an obligation or as giving rise to a derivative obligation of the sort argued for would be a significant extension of the law set out in the cases referred to relating to economic interests. It would create among other things an unreasonable and unfair burden on employers whose interests were not necessarily aligned with those of the employee. Accordingly I should strike out the second sentence of para. 66 of the Particulars of Claim which was the plea as to the duty to take reasonable steps to secure payment from the WSG companies.

31. It followed, therefore that there could be no sustainable plea of breach of the duty, there being no such implied duty. A breach could only be in the form of wrongful conduct which has no reasonable and proper cause, and the cases had consistently refused to extend it to include negligence or failures by omission. It must be conduct looked at objectively which is likely to destroy or seriously destroy the level of trust and confidence which the employee is entitled to have in the employer such that the employee cannot be reasonably expected to remain in his employment. It had to be so serious that it is repudiatory without being remediable. Against that standard in this case one saw the pleaded breach which was a failure to take reasonable steps to secure payment to him by two other companies and that was a bare omission to act and not wrongful conduct so seriously wrongful as to breach the ITTC even arguably. There could be no extension of the ITTC to include a duty to protect this employee's economic interests, given the prior case law, and no bespoke implied term was argued. In the absence of such an obligation an omission to do so could not amount to the type of wrongful conduct sufficient to breach the ITTC.

32. As to the 'emergent' case in the skeleton, namely D failing to pay compensation to C itself, there was no obligation on D to compensate C in respect of things said to be done by former employers in the same group. The obligation was that of the former employers and it was not argued to have been assumed by D. One could not derive from the ITTC a duty to make positive payments, which was if anything a more extreme duty even than the pleaded duty which was to secure payments from the WSG parties. (I have noted above that in any event I have proceeded on the pleaded case in this judgment.)

33. Lastly in relation to the main case, Mr Hunter argued that the case was hopeless on the issue of causation. Leaving aside the above, the WSG companies had rejected a letter seeking payment of those expenses on the basis that any liabilities had been settled and there was no scintilla of evidence to alter the basic principle that the primary alleged debtors (WSG) disputed the debts and there was nothing pleaded to the effect that D could have done anything to ensure WSG paid. There was no real prospect of showing in general that the alleged failure to act by D was actually causative of any of the pleaded damage, given that the WSG companies were refusing to pay.

34. As to the claim to expenses in the sum of £125,000. That was governed by clause 7.1 ie production of proofs of incurring the expenses. D had only so far seen a bank statement. D's position was that it would pay subject to the required proofs and asked the court to stay that claim for ADR. C objected to that course. I indicated that in the event that the Summary judgment application succeeded that aspect may become a county court case and not suitable for the Queen's Bench Division.

The Respondent/Claimant's position

35. C started with observations about D's evidence which was from a Mr Guet. He was, per para. 3 not, and had not ever been, an officer of WSG. He implemented HR within Lagardère. The point was made that he was simply an HR officer put up to give evidence in the application. For example at para. 12 of his statement he referred to a managers' meeting at which the launch of the London office of D as a corporate head office was discussed and he gave an account of the meeting listing others involved. Not only was he not an officer, he was and is not on the relevant executive committee. No truly relevant witness had put forward evidence for this application. Mr Guet's knowledge of C and the facts was limited – he 'became aware' in 2014 of difficulties encountered by D in the IPL business, yet that issue had been ongoing for 4 years as at that date. Para. 2 of his statement indicated that his statement was (where not known to him directly) based on information from others yet he said little to nothing about people who had provided him with information but only attached a bundle of documents. Beyond the corporate documents and employment documents it contained correspondence. He said those contained 'what he believed were the' most relevant material. Essentially this was simply Mr Guet's personal selection of what he said

were the relevant documents. There was not one single board minute or note where C's entitlement to his bonus was discussed for example.

36. Against that, counsel indicated, was para. 60 of Mr Guet's statement to the effect that at no point did C suggest he was owed any money from the two WSG companies. There could be no conceivable basis for Mr Guet to say that and he gave no information as to who informed him of that, what papers he reviewed to say it and in short he had no business making such an assertion. Taking a step back I was urged to view him as a witness 'late to the story' and not even actively involved in the matters in dispute, not a director and not on the company executive committee, and presenting only his own selection of material. That was said not to be a sound basis for this application, unless the application turned solely on a matter of law not dependant on facts. Thus if this application was to be based on evidence of facts to an extent then this was a paradigm case of it being premature, and where the process of disclosure should take place. Furthermore even based on Mr Guet's evidence there was nothing there to rebut the notion that D was in a position to exert some control over the two WSG companies which C argued should have been caused to pay Mr Nair the money in issue.

37. The description of the corporate structure simply did not establish that the defendant lacked the necessary control to have procured payment. On the contrary the London HQ employed the group CEO. There simply needed to be more disclosure as to how the corporate structure works and how control is exercised. Who was to say that the group CEO was not in a position to direct the HK and SG subsidiaries to make payment? That was not a matter to be decided at a summary judgment application and without disclosure. These were triable issues.

38. Turning to legal principles, counsel for C took me to some principles which were of course familiar: arguments about the strength of the claim and prospects of success were for a Part 24 application rather than strike out. Under Part 24, I was reminded that in reaching a conclusion the court must take into account not only evidence actually before it but evidence which can reasonably be expected to be before it at trial. This related back to the above evidential points. Further, whilst a case may not appear complicated it did not follow that a final decision without trial should be made where a fuller investigation would alter and add to the material before the judge. If material to cast the applicant's evidence in a different light might reasonably be available at trial then that pointed towards a trial taking place. I was taken to the other usual points such as the requirement for an 'absence of

reality' to the case. If there were contested issues of law, whilst that may be possible in some cases, where the legal characterisation required the factual evidence to be known then summary disposal would also not be appropriate. I was told that that was exactly where we were in this case.

39. The oral agreement as to compensation pleaded by Mr Nair gave rise to a claim conservatively valued at over $25m USD and it was undisputed that the sum was unpaid 12 years on from the date of the agreement in 2008. Per paras 36 to 38 of the POC in April 2009 a draft agreement was emailed to C in the form a deed of sharing of facilitation fees. The draft agreement was intended to give partial effect to payment of C's entitlement arising from his work in procuring rights in India to media coverage of the IPL. I need not go into great detail in summarising what appears to have taken place but it is sufficient to note that Mr Nair's position is that WSG had endeavoured to modify and water down what was a clearly agreed bonus entitlement already accrued, so as to depend on the result of an arbitration process which was at that stage ongoing.

40. That had been unacceptable to Mr Nair and would have made his – already agreed and due – bonus contingent on an unknown event. His position was that for such to be considered the bonus itself would have to be much higher.

41. Later, once it was clear that the company structure would shift to a model where D would be the 'head office' in corporate function terms, during the negotiations with D to draft the proposed terms of his employment with them as a result of the move of company, and with D full well knowing that a linkage to the arbitration outcome was not acceptable, D nonetheless simply attached those same proposed variation terms to the proposed contract and they were, unsurprisingly, still not acceptable. Effectively D was simply pursuing the same, unacceptable, position which WSG had followed in trying to 'get out of' the agreed and very valuable bonus terms (my words).

42. Hence whilst it was correct there was therefore no 'novation' of the bonus terms under the contract with D, C's argument was that the termination of the WSG contracts with C were part and parcel of one process of restructuring so that the head office was in London and so that C was employed there and so that his bonus entitlement would be respected under the new arrangements. This was all I was told of a picture which required a proper consideration of the evidence which was not before me, and when it came to trial in order

to work out the contractual significance of the various exchanges and documents one had to have the material – for example there could also be an estoppel.

43. The bonus issue was 'left over' until later, expressly. It was 'parked' at the time employment was terminated at WSG and remained in play when C engaged in negotiations over his terms when he moved to D. There were other oral discussions reflected in C's own evidence with D as to what should then happen, and C took notes, where compensation was high among the matters of concern for C, unsurprisingly.

44. Turning to the case law, as to the *Malik* case per Lord Nicholls at p33 in the report the contracts of employment discussed there contained an implied term not to conduct themselves without reasonable and proper cause so as to destroy or seriously damage the relationship of confidence and trust between employee and employer. In his analysis the implied obligation upheld was no more than one aspect of the portmanteau notion of not undermining trust and confidence. He held that the court must when considering whether the ITTC or a duty derived from the portmanteau concept of conduct damaging trust and confidence, 'consider all the circumstances'. Proof of a subjective loss of trust and confidence was not essential. Importantly Lord Nicholls stressed that trust and confidence can be undermined in 'many different ways'. I shall quote the text below the heading 'an implied term':

> *Two points can be noted here. First, as a matter of legal analysis, the innocent employee's entitlement to leave at once must derive from the bank being in breach of a term of the contract of employment which the employee is entitled to treat as a repudiation by the bank of its contractual obligations. That is the source of his right to step away from the contract forthwith.*
>
> *In other words, and this is the necessary corollary of the employee's right to leave at once, the bank was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages.*

Second, I do not accept the liquidators' submission that the conduct of which complaint is made must be targeted in some way at the employee or a group of employees. No doubt that will often be the position, perhaps usually so. But there is no reason in principle why this must always be so. The trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others. The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.

45. So it was argued that, taking the key aspects of that case and applying it here, there was an admitted 'portmanteau' obligation in the form of the standard ITTC and there may be aspects which apply in particular cases because, per Lord Nicholls, an employer may undermine confidence '*in many different ways*' – and the same result must apply. In order to decide whether the conduct amounts to a breach one must take into account '*all the circumstances*'.

46. It was argued that this left the cases to which I had been taken by D in the following position: the context of those cases was (per para. 27 of D's skeleton) that where there are standardised terms in employment contracts it is only the existing recognised terms which fall to be implied. The standard for new such standard terms is very high indeed. This was an argument not in fact being made by C, to the effect that there was some new implied term. But the argument here was in relation to the existing standard term – the ITTC – and whether on the facts of this case when looked at fully, in 'all the circumstances' the conduct had breached the normal ITTC term as a matter of fact. This was not a matter of some new standard implied term but merely, per Lord Nicholls, testing the circumstances and against the ITTC.

47. In all the circumstances, said C, the ITTC obliged D to take certain steps to secure the payment of the bonus and it failed to do so. That was not to argue for a new standard term,

or a bespoke term in this agreement, but only to apply the existing known ITTC and ascertain whether the true facts amounted to a breach.

48. These cases – as I summarised C's case back to counsel on the point - were thus said to deal with further standardised terms whereas C was saying this case fell within the existing standardised term (ITTC) and that in all the circumstances this was a repudiatory breach of that term.

49. Dealing with D's argument that on the facts there was no prospect of showing that D refused to make payment, since he had never asked for payment, such was to take a very reduced carefully framed form of words and not a common sense approach to what had been covered in the exchanges where Mr Nair made it in truth 'abundantly clear' he was entering into the new employment contract in good faith. That could not be an 'unarguable' case.

50. As to the point that breaches of the ITTC had to be a failure, an omission, to do something – that was a mere matter of linguistics and related to how one expressed D's defaults and would be contrary to Lord Nicholls in *Malik* which expressed the approach to the ITTC.

51. As to the argument over causation of loss, which was D's last argument on the main case, it was said to be trite that to establish a cause of action for breach of contract one had to show the contract and the breach: that was sufficient to give rise to judgment even if only nominal damages resulted. The right arose whether or not causation of loss was shown. The fact that an inquiry into damages was sought did not mean that judgment was unavailable on a contractual basis in the usual way. If there was no loss then it resulted in nominal damages, it did not mean there was no viable claim to judgment in the first place. It was not viable for D to argue that there was a lack of ability for D to procure payment of the bonus by WSG or via the parent company. On the facts one could at this point have no idea about that without a trial on the evidence.

52. Lastly the modest ancillary claim for expenses. C expended the money at the request of the CEO of D, and had provided evidence of payment. He therefore asks D to 'put up or shut up'. D's position was unclear as to whether the sums were or were not due. It was merely asserted that 'it is not clear' what services were provided and that no invoices had been provided. It was not denied that the CEO had asked C to incur the expenses in question: Mr Guet's evidence did not address it. If C had to pursue that in the County Court he would do so.

Reply

53. In reply, on the law, Mr Hunter QC for D argued that Mr Mill had 'rattled through' the most recent appellate authorities and that, on his analysis, the case law characterised by Mr Mill as dealing with additional standard implied terms was in fact equally applicable to cases where what was under consideration was said to be an application of the standard ITTC. *Malik* was about wrongful trust destroying conduct (in that case 'proscribed' conduct), versus requiring some positive action required by the employer. Mr Hunter repeated the point that the authorities were all against extending the ambit of the ITTC to include requiring conduct preventing damaging consequences to an employee, rather than refraining from wrongful, damaging conduct. I need not I think say much about the reply because in my judgment it was 'a second go' mostly re-arguing the case indeed so much so that Mr Mill QC was allowed a further opportunity in rebuttal by myself.

Decision

54. What we see here on the alleged and assumed facts is a situation where a very significant bonus fell due to C, from the WSG companies, and where Mr Nair's employment at WSG ended at a time when some ongoing proposals from WSG to vary the terms of the bonus had been inconclusive but where (as I must assume) the entitlement to the bonus was clear.

55. Mr Nair as part of a rearrangement of how the group of companies operated, moved to the London HQ and, in formal terms, that is a different legal entity. It was Mr Nair's understanding, based on the various exchanges and the totality of evidence which would be available at trial, that his original bonus terms would be respected by the new employer following his transfer to it, yet the terms on offer from D remained in the same terms as the unacceptably (proposed) varied ones previously put forward by the WSG employer.

56. There was no meeting of minds and the parties parted ways. Hence it was common ground there was strictly no novation of the bonus terms so as to novate the terms as between C and WSG in a new contract with D. C was on his case effectively strung along over a prolonged period over an accrued entitlement to a multi-million dollar bonus which he simply wanted to be paid (and he did not much mind which company paid it). 'He had had enough' as counsel put it.

57. I paraphrased the case myself to counsel for C in terms that WSG 'started to wriggle' over paying the bonus and wanted less favourable terms linked to the arbitration, there was then the intervening decision to move him to London under the new corporate employer, with the bonus issue being 'left over' and still live, that new employer engaged in the same

'wriggling' over the bonus in exactly the same way (not it seems however actually ever denying the reality of the bonus entitlement such as by saying it was not a matter for them).

58. D continued to fail to respect the bonus or incorporate it in the new terms with D, strung him along, and ultimately Mr Nair left. Counsel accepted that as a good summary of the position, adding that Mr Nair was 'strung along' despite having acted in good faith and perhaps generously in the sense that he continued to engage in discussions for a long period before walking away.

59. I must remind myself of the basic principles on an application for summary judgment or strike out of a claim. This is not a mini trial. Whilst I am not obliged to take such evidence as there is at face value especially if it is contradicted by other material, this is not the forum for me to engage in making findings of fact or weighing detailed material.

60. This is all the more significant where one is considering an application at a point in the case where disclosure has not yet taken place and of course the case law enjoins me to consider what material it would be reasonable to expect would be before the court at a trial. For Part 24 purposes the approach is to consider not whether the case would probably fail or probably succeed but rather to consider whether the claim is fanciful or there is an absence of reality about it.

61. In the case of a strike out, whilst that is not a matter for evidence but for law, the court must tread cautiously where the correct application of the correct law will turn on the facts once known.

62. The authorities to which I was taken in my judgment establish in my judgment that the question whether the ITTC is breached is fact sensitive and depends on a consideration of all the circumstances, and that is at the core of the matter. I refer to the speech of Lord Nicholls in *Malik*.

63. They also establish that creating new forms of standardised terms – as is not argued here – demands a very cautious approach with attention to reasonableness, fairness and public policy. But this case is about whether the ITTC as ordinarily recognised was breached (or arguably so, on this application) and not about whether some new standardised term is to be implied. There is support for the proposition that, where in any given case the question of whether the ITTC itself was breached involves a form of 'extraction' of a new duty from the ITTC or possibly a significant extension of its normal scope, then the same considerations apply and there has been a sense of slight inconsistency in the authorities in the usage of

concepts of extension of the existing ITTC, 'extraction' of duties from the 'portmanteau' concept of the ITTC, or simply the creation of new standardised terms. This is not argued to be a case of a new standardised term. Whether it will appear to the court to be an extension of the ITTC, an 'extraction' of a new derivative duty under the ITTC or simply an application of the ITTC to the facts, is in my view itself a matter highly dependant on knowing the full richness of the facts of the case and cannot rest solely on a few pleaded words and very selective evidence.

64. The classic application of the ITTC is to cases where an employer engages in conduct which it was prohibited from doing such as acting unlawfully. It is correct to say that the authorities, when the facts have related to allegations of a requirement to 'do something' have been very cautious and have stressed an incremental approach. But in my judgment whether this is in fact a case which is pushing the boundaries of the ITTC as currently understood too far or whether in effect the consequence would be a species of new standard term, or some form of novel duty of care, is in itself fact specific, that is to say this is a case where the legal analysis is intimately tied up with the ultimate facts not before the court.

65. It seems to me that the arguable position in law is as set out in *Malik*, which I accept is a fundamental proposition, and it relates simply to the question whether the employer conducts itself so as to destroy or seriously undermine trust and confidence. That does not mean in principle that an employer's *failure* to do something is always excluded – not least since a prolonged course of prevaricating and 'stringing along' as part of a failure to respect a bonus payment could be seen as positively destructive conduct and not a mere failure in any event. As Mr Mill QC correctly argued, on the facts this may be a mere matter of semantics, and the view a court may take on that depends on those very facts. Nothing in the authorities, such as the *James-Bowen* or *Crossley* cases, in my judgment alters the position in *Malik* and indeed the nature of the breach here is not said to be a 'failure to protect the economic wellbeing of an employee' – a duty which has been rejected in *Crossley* - but a specific piece of conduct in relation to failing to secure payment of an existing bonus.

66. The *Malik* case in my judgment is clear authority that the ITTC can be breached, as Lord Nicholls said, in many ways and that requires one to look at all the circumstances. I set much store by Lord Nicholls' observation in the quotation which I gave above that:

"*I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others.*"

67. I thus do not set much store by the argument that in some sense the right to sue for breach of the ITTC only relates to a 'prohibition' on conduct so as to say for example that an employer must not act dishonestly: it is often possible to frame some action or inaction in positive or negative terms. What seems to me to be at the heart of it is simply that the term prohibits conduct which destroys or seriously undermines the relationship of trust and in an appropriate case a failure can be conduct: it depends on the failure whether that is a reasonable analysis and the failure and how it is viewed is fact sensitive. It does not seem to me to be unarguable that an egregious and knowing failure over enormous sums of money, perhaps even in bad faith and not having a real intention to respect the bonus, would be necessarily incapable of breaching the ITTC. What we have here is a case where we have not yet reached even the point of disclosure and where one can reasonably expect far more material to be before the court by the time of a trial.

68. There was I think much in the criticism by Mr Mill QC that the evidence presented in this application for D was very limited in scope by someone barely connected with some of the events in question such that this court cannot assume that nothing of use will be available by the time of trial, indeed far from it. I can reasonably expect evidence and disclosure of far more material and I can reasonably expect first hand evidence from those involved at D and WSG at the time for example as to not only the details of discussions and minutes but also in terms of whether in fact D had a level of control over WSG to enable it require WSG to make payment of bonuses.

Conclusions

69. Summary judgment would be inappropriate especially given the very much more informative material one would expect to be to hand at trial. The claim is not fanciful nor, based on my legal discussion above, can one say that the case law renders this case hopeless by any means, given that the question of the conduct leading to the alleged breach of the ITTC is dependent on knowledge of the facts. This is not a simple case where the law can be applied on the bare pleading, because the true character of the conduct as positive or negative and the application of the argued principle that there is a different treatment of positive versus negative conduct depends on that factual position.

70. As to the point on absence of proof of causation of loss I do not think I need say much: if contract and breach is established then it is not fatal if the quantum of some loss is not proved at trial.

71. As to the expenses claim, that must simply proceed to proof and trial and I urge the parties to deal with that sensibly. Clearly there is some form of reluctance by D to pay but as things stand it is unclear whether that is more than merely saying that there is insufficient proof. It is not a matter where one would impose a stay or suchlike to require ADR.

72. My conclusions in summary are:

(i) This is a case concerning whether the recognised implied term as to trust and confidence applies to circumstances where the employer (on complex facts yet to be ascertained) failed to secure payments due to the Claimant under contracts with other companies broadly in the same group.

(ii) There is nothing in principle which means that it is fanciful to suppose that the ITTC can be breached where the employer 'prevaricates', 'strings along', 'wriggles' or however one wishes to describe it and simply fails to respect very large bonuses which are known to be due from companies in the group and where the payments originally fell due under the employee's relationship with the connected companies and where the discussions included officers who were or may have been in a position to secure the payments (such as the CEO).

(iii) The existing case law on the issue whether there is an implied term (or an extension to the ITTC) in relation to an employer protecting or not damaging the financial interests of an employee does not imply that this claim stands no real prospect of success.

(iv) The test is whether, on the facts, in all the circumstances the employer so conducted itself as to destroy or seriously undermine the relationship of trust and confidence between it and the employee without reasonable or probable cause. Conduct can take the form of failure to do something or the form of positively doing something and often the difference may be merely semantic. That is fact specific.

MASTER MCCLOUD

06/10/20