ATTEMPTING TO STAVE OFF THE INEVITABLE

The Court of Appeal has upheld an Order to strike out a US$100m claim brought by an unsecured creditor of the now defunct London Mining Plc against PwC and two of its insolvency practitioners. Fraser Turner brought the claims after London Mining's obligation to pay Fraser Turner a perpetual royalty was not transferred by the administrators to a third-party purchaser as part of a pre-pack administration. The decision is a useful reminder of the principles of contractual interpretation and how the courts will be slow to rewrite the terms of a defective contract. It further highlights the duty of administrators to act in the best interests of the company for the general body of creditors.

Background

Fraser Turner Limited (FT) provided consultancy services to companies operating in the mining industry in West Africa. In October 2005, FT assisted London Mining Plc (LM) in its purchase of an operating lease of the Marampa mine in Sierra Leone. London Mining Company Limited (LMCL), a subsidiary of LM, subsequently acquired a 25-year lease in 2009 and, between 2010 and 2014, secured syndicated funding to develop the mine, secured by way of fixed and floating charges over LMCL's assets.

A dispute subsequently arose regarding the payment of royalties to FT, culminating in a settlement which saw FT, LMCL and LM entering into a royalty deed (the **Royalty Deed**) by which LMCL was to pay FT a 0.3% royalty guaranteed by LM (the **Royalty**).

In 2014, LMCL was put into administration and its assets (largely consisting of the Marampa mine) were sold as part of a pre-pack administration to a company called Timis Mining. The terms of the sale did not provide for LMCL's obligations to pay the Royalty to FT to transfer to Timis Mining leaving FT as an unsecured creditor of an insolvent company with no remaining assets.

In May 2017, FT issued claims in the High Court against PwC and the administrators for damages for procuring a breach of contract, for conspiring to cause loss by unlawful means (the unlawful means being the breach of contract) and for breach of duty as administrators.

The breach of contract relied upon in the procurement and conspiracy claims related to alleged express or implied terms in the Royalty Deed for LM and/or LMCL to procure that a third-party purchaser of the assets of LMCL assume the obligation to pay the Royalty to FT.

In relation to the breach of duty as administrators, FT relied on an alleged conversation between one of its directors and one of the administrators before the sale took place in which the director is said to have brought the Royalty Deed to the administrator's attention and asserted that it needed to be brought to the attention of any purchasers. FT alleged that the administrator did not contest this assertion and relied on this as the basis for the assumption of an obligation by the administrator.

Strike out / summary judgment

PwC applied to strike out FT's Particulars of Claim on two grounds:

- The Royalty Deed did not contain the express or implied term alleged by FT (the Contractual Basis); and
- The administrators did not owe any duties directly to FT (the Duties Basis).

The judge at first instance accepted that this was a case where he should "grasp the nettle" and decide the points of construction and law in advance of a trial of the facts, and, in doing so, he dismissed FT's claims.

On the Contractual Basis, the judge found that FT's construction of the Royalty Deed was not correct and that neither the alleged express or implied terms existed.

On the Duties Basis, the judge considered that the evidence was far from sufficient to give rise to a special relationship of the type required to establish a duty to FT separate from the body of creditors as a whole. He found that FT had not referred "*to anything* [the administrator] *had said or done that suggested he was prepared to act in any other way than as an administrator who was protecting the interests of creditors generally*."

The Appeal

FT appealed against the first instance decision both in relation to the Contractual Basis and in relation to the Duties Basis.

Dismissing the appeal, Sir Geoffrey Vos (with whom Lord Justice Males and Mr Justice Snowden agreed) held that the judge was right to reject FT's proposed interpretation of the Royalty Deed and that the drafting in the Royalty Deed could not be fixed by implying a term as none of the proposed terms met the applicable criteria. In reaching this conclusion, he observed that it will be less likely for unexpressed obligations to be implied into contracts where they have been negotiated by professional lawyers on both sides. He commented that "*the court should be slow to assume that such errors have been made, when it knows nothing of the circumstances in which the royalty deed and the other two agreements were entered into*".

On the Duties Basis, he held that the judge was also right to conclude that the witness evidence did not give support to FT's case that such a special relationship or special circumstances existed in this case. He said "*All that happened here was what happens in hundreds of administrations every year. A creditor brought its particular problem to the attention of the administrator, who listened politely and said he would look into it… all that is alleged is that*

Mr Turner believed that the Administrators would do as he had asked. If he did so believe (and we must accept what he says at face value at this stage of the case), he was, I am afraid to say, commercially naïve." He added that *"it was not open to [the administrators] to prefer the interests of one creditor over the others*".

Comment

The case is a useful reminder of the English courts' approach to contractual construction. The starting point will be the objective intention of the parties and, whilst commercial common sense will be a consideration, it will not override the express language of the agreement. The courts will be slow to reject the meaning of a provision simply because one of the parties made a bad bargain. As for parties seeking to imply terms into a contract, they would be well advised to limit the number of terms contended for - the numerous implied terms FT argued for, and their repeated revisions of those terms in different rounds of pleading amendments, were a factor in the courts' conclusion that the terms FT sought to imply were not so obvious that "*it goes without saying*".

The case also highlights the courts' support for using the summary procedure to dispose of claims involving discrete points of law. This was a case which was well-suited to such a procedure, because it involved discrete points of law and construction, which, when determined in PwC's favour, disposed of the claims in their entirety. In particular, the Court of Appeal affirmed that the first instance judge was right to reject evidence that made no commercial sense in order to achieve that result.

Above all, the case illustrates the harsh but commercial reality for companies who contract with a business that subsequently becomes insolvent. FT lost out because it was an unsecured creditor and there were no funds left to cover unsecured creditors. The circumstances of the case are regrettably familiar in the commercial world and do not alter the legal duties of administrators, who, under challenging and pressurised circumstances, have to make decisions in the interests of the company and the body of creditors as a whole and not favour one creditor over another. The decision shows that the courts will not readily be drawn into second-guessing those difficult decisions.

Clifford Chance acted for PwC and the two administrators.

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