Neutral Citation Number: [2023] EWCA Civ 476

Case No: CA-2022-001936

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)
Mr Simon Gleeson (Sitting as a Deputy High Court Judge)
[2022] EWHC 1942 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2023

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE ASPLIN
and
LADY JUSTICE ANDREWS

- -

Between :

MACKIE MOTORS (BRECHIN) LIMITED	**Claimant/ Appellant**
- and -	
RCI FINANCIAL SERVICES LIMITED	**Defendant/ Respondent**

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- -

David Cavender KC and Thomas Pausey (instructed by **Freeths LLP**) for the **Appellant**
David Peters (instructed by **Stephenson Harwood LLP**) for the **Respondent**

Hearing date: 15 March 2023

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 4 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This is an appeal from the order of Mr Simon Gleeson, sitting as a Deputy High Court Judge, dated 22 July 2022, refusing the Appellant, Mackie Motors (Brechin) Limited ("Mackie"), permission to amend its Particulars of Claim and striking out the claim. The central issue is whether Mackie's claim that an umbrella or relational agreement can be inferred has a real prospect of success. The alleged umbrella agreement is said to overlay Mackie's car dealership arrangements with the Respondent, RCI Finance Services Limited ("RCI"), Renault UK Limited ("Renault") and Nissan Motors GB Limited ("Nissan"). There are also subsidiary issues as to whether Mackie's claims as to the interpretation of its dealership contracts, as to estoppels that have arisen and as to the terms that should be implied into those agreements have a real prospect of success.

2. The issues arise in the following circumstances. For many years, Mackie was the authorised distributor of Renault, Nissan and, later, Dacia cars in the north-east of Scotland. Mackie's relationship with Renault and Nissan and subsequently, Dacia, was founded on a series of written dealership agreements (the "Dealership Agreements"). Under the Dealership Agreements, Mackie was granted the right to promote, market, supply, sell, repair and maintain Renault, Nissan and, latterly, Dacia vehicles within its "exclusive territory".

3. RCI is a wholly owned subsidiary of Renault. Since about 2007/8 it has provided financing and administrative services to Mackie. Prior to 2007, financing was provided by Renault Finance Services and Nissan Finance. There were six contracts between Mackie and RCI in relation to dealer financing which included the financing of the purchase of stock both of new and used cars and of parts (the "RCI contracts"). Those contracts operated on a rolling basis.

4. Under the Dealership Agreements, amongst other things, Mackie was subject to an annual ordering commitment in relation to Renault vehicles and was obliged to offer RCI financing agreements to its customers. Renault was not, however, obliged to supply a particular quantity of vehicles. Moreover, customer finance was provided through agreements made directly between RCI and the customer. There was no written contract with Mackie in relation to the provision of such customer finance. In addition, there were no written agreements in relation to RCI's provision of ancillary administrative services, referred to as "platform services" and "database services". The platform services were provided via online platform systems through which Mackie could order vehicles and parts and propose new customers to RCI, Renault and Nissan. The database services were in the form of online databases of existing finance agreements to which Mackie was given access. Clearing services were also provided pursuant to written agreements (the "Clearing Agreements"). Those services took the form of clearing accounts controlled by RCI through which all financial transactions between Mackie, RCI, Renault and Nissan were conducted.

5. The Dealership Agreements were capable of termination by either party giving not less than 24 months' written notice expiring at any time. The RCI contracts contained a 7-day notice termination clause.

6. RCI became concerned about whether Mackie was involved in money laundering and, as a result, made a suspicious activity report to the National Crime Agency on 23

November 2021. The supply of spare parts to Mackie ceased on 24 November 2021 and all other services were terminated on 27 November 2021. On 7 December 2021, notices determining the RCI contracts were served. They expired on 16 December 2021.

7. These proceedings were commenced on 16 December 2021. Mackie sought an interim injunction restraining RCI from ceasing to provide the dealer financing services pursuant to the RCI contracts. Mackie alleged that RCI had abused a dominant market position contrary to section 18 of the Competition Act 1998 and that the provisions said to entitle RCI to terminate the RCI contracts on 7-days' notice were unfair pursuant to the Unfair Contract Terms Act 1977 ("UCTA"). The application for an interim injunction was refused by HHJ Saffman on the basis that neither the competition nor the UCTA claim had a real prospect of success.

8. Having failed to obtain injunctive relief, Mackie sold its sites to another Renault/Nissan franchised dealership in what it described as a "fire sale".

The DAPOC

9. Mackie then produced draft amended particulars of claim (the "DAPOC") in which its claim was re-characterised. The competition claim was no longer pursued. Instead, it alleged that Mackie, RCI, Renault and Nissan were parties to an implied umbrella "relational" agreement pursuant to which:

    i) RCI, both on its own behalf and as agent for Renault and Nissan, provided Mackie with dealer financing, customer financing, clearing services, platform services and database services (the "Services");

    ii) Mackie received the Services to enable it to perform its obligations and exercise its rights under the Dealership Agreements whilst seeking to earn commissions and bonuses set out in communications from RCI, Renault and Nissan; and

    iii) Renault and Nissan maximised the supply and sale of their vehicles and the advancement of their brands within Mackie's exclusive dealership territory.

10. Mackie alleged that the umbrella agreement was entered into in around 1976 between Mackie and Renault, in 1998 in respect of Nissan and in 2007 in respect of RCI. Alternatively, it was alleged that the umbrella agreement was entered into between Mackie, Renault, Nissan and RCI no later than 2008. Further, it was alleged that the umbrella agreement could "be inferred from and/or demonstrated by (in particular)" the matters set out in 10 sub-paragraphs.

11. Mackie also alleged two specific implied terms of the umbrella agreement as follows: (i) that the parties would act in good faith in its performance, and (ii) that RCI would not withhold the Services or terminate the umbrella agreement in the absence of good cause and without a reasonable notice period of 24 months.

12. Further, Mackie alleged that the termination provisions in the RCI contracts should be interpreted so that their notice period coincided with the 24 months specified in the Dealership Agreements.

13. In addition, Mackie alleged that RCI was estopped from relying on the 7-day notice provision in the RCI contracts. In particular, it was pleaded that, by representing that

RCI and Mackie were long-term partners, and by closely collaborating and co-operating with Mackie in the performance of the Dealership Agreements, and by training, incentivising and associating with Mackie's staff and representatives, RCI had represented that it would not terminate the RCI contracts or demand repayment of an interest free loan except on 24 months' notice, or in the alternative, until such notice expired at the same time as any valid notice to terminate the Dealership Agreements.

14. The DAPOC also contains an alternative claim that RCI was not entitled to invoke the 7-day notice term in order to terminate the RCI contracts as a result of section 3(2)(b) of UCTA.

15. Finally, Mackie advanced a case that the RCI contracts themselves were subject to implied terms restricting RCI's ability to terminate them or to withdraw or limit the financing provided under them.

The applications before the judge, his approach and conclusions

16. Mackie sought permission to amend its claim in the form of the DAPOC and to join Renault and Nissan as parties. RCI argued that the DAPOC did not plead claims with a real prospect of success and did not meet the test for strike out or reverse summary judgment. RCI applied, accordingly, to have the original pleading struck out, or, in the alternative, for summary judgment. It was these applications which came before the judge.

17. It is accepted that the judge applied the correct tests in relation to the task before him and otherwise directed himself properly. At [10] of the judgment, he cited the Court of Appeal in *Elite Property Holdings v Barclays Bank* [2019] EWCA Civ 204 as follows:

> "41. For the amendments to be allowed the Appellants need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No3)* [2003] 2 AC 1.
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> 42. The court is entitled to reject a version of the facts which is implausible, self-contradictory or not supported by the contemporaneous documents and it is appropriate for the court to consider whether the proposed pleading is coherent and contains the properly particularised elements of the cause of action relied upon..."

18. The judge went on at [11] to state that in assessing the factual basis of the claim, the Court should (i) not conduct a "mini-trial", (ii) be conscious of the concern that live

issues of fact may only be properly determined following the hearing of oral evidence and (iii) take into account the evidence that can reasonably be expected to be available at trial, as well as the evidence actually placed before it. He also reminded himself that it was not normally appropriate in a summary procedure to decide a controversial question of law in a developing area, as it was desirable that development of the law was based on actual rather than hypothetical facts, and that the test of whether a claim contained in a pleading is arguable is a relatively low threshold to overcome.

19. In relation to the alleged umbrella agreement the judge concluded that:

    i) the DAPOC simply did not address the issue of showing the necessity for implying such a contract and that it did not follow from the manufacturer's provision of the Services to assist the distributor, that the parties intended to create legal relations in respect of them; that the existence of the Services did not call such an intention into being; and that without that intention the implied contract fell away [20];

    ii) There was nothing in [32] of the DAPOC to suggest any intention by Renault, Nissan or RCI to create legal relations beyond the written contracts which were already in place [21] and [22];

    iii) the DAPOC failed properly to particularise the claim [23]; and

    iv) there was no need for him to consider the argument that even if there were an umbrella agreement, it had been effectively displaced by the entire agreement and no oral modification clauses in the RCI contracts (which it was conceded were entered into after the umbrella agreement allegedly came into existence) [24].

20. As to the alleged implied terms, the judge first doubted whether they were actually pleaded at all [25]. He went on, nevertheless, to consider whether it was arguable that such terms could be implied.

21. In this regard, the judge noted that Mackie seemed to argue that "... the essence of a relational contract – the implied obligation of good faith in dealings – should be implied not only into a relational contract, but also into any arrangement between the parties where, *if* that arrangement were incorporated into a single contract, that contract *would* be a relational contract. Another way of putting this might be to say that the relational good faith obligation arises not out of a contract, but out of a relationship, and that where a relationship of this kind exists, a duty of good faith should be implied between the parties, whatever the legal nature of their existing relationship may be" [27]. The judge assumed the validity of the proposition whilst stating that he had the gravest doubts about its correctness as a matter of law.

22. He accepted that if the position between the parties were contractual, it would clearly fall within the definition of a relational contract and that Leggatt LJ (as he then was) had included "long term distributor agreements" in his illustrative list of relational contracts in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 ("*Yam Seng*"). He pointed out, however, that not all such contracts involve an obligation of good faith and went on to adopt Fancourt J's approach in *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch). Instead of

seeking to identify and weigh the indicia of a relational contract in the narrow sense, Fancourt J had considered it preferable to consider directly whether the term should be implied in fact under the test of necessity in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 [31]. The judge concluded that the question, therefore, whether or not the arrangement was relational, was whether such a term satisfied the test of necessity for inclusion into the RCI contracts.

23. The judge also noted that Mr Peters, on behalf of RCI, had pointed out that the term which Mackie sought to imply would achieve nothing because the RCI contracts were framework agreements under which finance might be advanced in future on a case-by-case basis. This was accepted by Mr Cavender KC, who submitted that, if the term were implied, RCI would also be under an implied obligation to continue to provide finance as long as the agreement remained in place [34]. The judge went on to hold that the argument failed because it had no regard to the nature of the RCI contracts themselves and that an implication of terms of this kind would almost completely undermine their intended legal effect [35]. The RCI contracts were merely framework agreements and did not impose any commitment to provide finance at all. As the judge put it:

> "39. . . Mackie may have operated on the assumption RCI would continue to provide finance, but RCI carefully refrained from giving any commitment, written or oral, whose effect was to commit them to do any such thing in accordance with standard finance industry practice. I am satisfied that that was a deliberate decision on their part, that the terms of the agreements reflected exactly that decision, and that there is no question that they would have agreed, explicitly or implicitly, that the existence of the agreements subjected them to any legal obligation at all to provide or maintain finance.
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> 40. This seems to me to be an instance of a general principle that, where a framework agreement of this kind in relation to the provision of finance has been put in place, entry into such a framework agreement does not, without more, impose any commitment at all on the relevant finance provider to actually advance finance. ... in the absence of overwhelmingly clear evidence of a specific agreement to lend, such a commitment should never be implied from the existence of a framework agreement. In particular, the mere fact that (1) a framework agreement is in place, (2) the finance provider has a long track record of providing finance, and (3) the provider has informally indicated its intention to continue to provide finance, should never, without more, be treated as sufficient to imply a legal obligation on him to do so."

24. In addition, the judge stated that, even if he had accepted the existence of the umbrella agreement and further accepted that it imported a duty of good faith as a relational contract, he would not have accepted that the duty of good faith alone could operate to compel RCI to continue to advance funds and that there was nothing in the DAPOC which could provide a basis for such a commitment [41].

25. The judge also rejected the argument that the express terms of the financing agreements supported Mackie's case. It had been argued that the RCI contracts arose in the context of the Dealership Agreements and existed exclusively for the purpose of sustaining the arrangement under those agreements. It was contended, therefore, that it was realistically arguable that the 7-day notice clause in the RCI contracts should be construed as subject to the Dealership Agreements, which required 24 months' notice of termination. The judge held, however, that this argument failed for the same reason as the implied term argument. Even if the RCI contracts could not be terminated without 24 months' notice, such a provision would only be of assistance to Mackie if it were also inferred that RCI was also required to continue to provide finance during that period [47].

26. The judge also held that Mackie's estoppel claim had no prospect of success. He concluded that nothing which had been pleaded came close to an unequivocal representation by RCI that it would not rely on the 7-day notice provision [51].

27. Lastly, in the light of his rejection of the other claims, the judge also rejected the amendments to the UCTA claim on the same basis as HHJ Saffman had done so on the initial strike out application [54] and [55].

Ground 1 - The Umbrella Agreement

28. The main plank of Mackie's appeal is that the judge was wrong to find that there was no real prospect of establishing what it pleads in the DAPOC, namely that the parties intended to create legal relations in respect of the Services which were not the subject of either the RCI contracts or the Clearing Agreements and that he made errors in applying the standard of "necessity" for the implication of such an agreement. Mackie submitted that the judge had no proper regard to the close relationship between the Services and the Dealership Agreements, including the obligations in the Dealership Agreements such as clause 10 which required Mackie to offer RCI financing agreements to customers; RCI's role in providing administrative functions on behalf of the manufacturers; the dealer's inability to replace the Services as a result of the Dealership Agreements which required co-operation with RCI; and the two year commitment entailed in the Dealership Agreements.

29. Mackie contended that it was wholly at odds with business reality to view the Services, including those which were not the subject of written agreements, as being other than part and parcel of the Dealership Agreements. Although the Services were provided by RCI rather than Renault and/or Nissan directly, RCI was, in substance, the manufacturer and, to all intents and purposes, the Services were provided by the manufacturer as an element of the franchised dealership arrangements.

30. In his written argument, Mr Cavender also pointed out that customer financing services were only capable of being provided by the manufacturer. They were essentially subsidies offered by the manufacturer to the customer to incentivise the sale of cars. Similarly, it was said that the platform and database services were essential for the proper working of the Dealership Agreements and were the interface between dealer and manufacturer. They could only be obtained from RCI, and because of the way in which the manufacturers ran the Dealership Agreements, the co-operation of RCI in the provision of those services was essential. If there were no obligation upon RCI to provide the Services, including those which were not subject to written agreements,

then as a practical matter, Mackie could not operate its dealership, and as a legal matter, it would find itself in breach of the Dealership Agreements.

31. Mr Cavender said that the judge's central error was to pay no attention to such an analysis and only to make passing note of the fact that Mackie was required under the Dealership Agreements to offer RCI financing agreements to customers. The judge assumed that the manufacturers had gone beyond their legal obligations for their own benefit instead of appreciating, as he should have done, that the administrative functions delegated to RCI were essential to the entire scheme.

32. Mr Cavender submitted, therefore, that given the close connections between Mackie, RCI, and the manufacturers and between the Dealership Agreements and the Services, it was at least arguable that an umbrella agreement could be implied from the parties' conduct which would include those of the Services which were not the subject of written agreements, under which RCI would be required to provide the Services for the duration of the Dealership Agreements. He also said that the duty of good faith would apply to the dealer financing services which are the subject of written agreements and as a result, or as a result of a term which should be implied in any event, RCI would be obliged to provide such finance during a 24-month notice period.

33. It was also said by Mackie that the judge applied the legal test in *Modahl v British Athletic Federation Ltd* [2001] EWCA Civ 1447, [2002] 1 WLR 1192 incorrectly, gave no real weight to the matters pleaded in the DAPOC and had no proper regard to the evidence likely to be available at trial.

34. On the other hand, Mr Peters, on behalf of RCI, submitted that there was nothing pleaded in the DAPOC which was a sufficient basis for the creation of an implied contract by conduct at a particular time. Much of the alleged conduct post-dated the alleged contract and there was no viable case of an intention to create legal relations. One could not infer from the fact that RCI provided services over time, that it had contracted to do so.

35. Mr Peters accepted that if there were a sustainable pleading and an arguable case that an umbrella agreement had been concluded, it would arguably be a "relational contract". He observed, however, that the DAPOC contained no particulars of the terms of the implied contract which were said must be inferred from the conduct of the parties. Rather, Mackie jumped to the end of the analysis and sought to imply further terms into the relational contract in the name of commercial efficacy or because it was said they went without saying. He then drew attention to [45] of the DAPOC which, he said, framed the scope of the umbrella agreement by means of mutually inconsistent alternatives and by reference to how other dealers have been treated despite the fact that there was nothing in the draft pleading about any conduct or representation in this regard. He said that the key point was that the DAPOC did not identify the promise which RCI was alleged impliedly to have made with anything like the required particularity.

36. Mr Peters also pointed out that even if there were a relational contract in relation to the Services which were not the subject of written agreements, it would be contrary to the terms of the written agreements entered into subsequently.

Discussion and Conclusions

37. As Vos LJ, as he then was, pointed out in *Heis v MR (Global) Services Ltd* [2016] EWCA Civ 569, "the most significant aspect of the consideration of whether to imply a contract is the court's consideration of all the circumstances, and, in particular, of the conduct of the parties." He went on to consider the central authorities and distil the principles as follows:

> "36. . . Mance LJ gave two informative judgments on the subject in 2001 in [*Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737] and in *Modhal v. British Athletic Federation Ltd.* [2002] 1 WLR 1192. The first principles stated in the latter judgment at paragraph 100 are valuable: "[f]or there to be a contract, there must be (a) agreement on essentials of sufficient certainty to be enforceable, (b) an intention to create legal relations and (c) consideration". At paragraph 102, Mance LJ continued by explaining the distinction between express and implied contracts: "[w]here there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed … It is otherwise when the case is that a contract should be implied from the parties' conduct … It is then for the party asserting a contract to show the necessity for implying it". In this case, the question of intention to create legal relations is, I think, the central point, because UK submits with some force that what it did was as consistent with the intention to contract directly with Services, as it was with a number of other possible scenarios. It is for this reason that the intention of the parties may be relevant in determining the existence of an implied contract (see Lord Hoffmann's speech at pages 2050-2051 in *Carmichael v. National Power plc* [1999] 1 WLR 2042). This is echoed by Bingham LJ in [*Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 WLR 1195] at page 1202, where he said that "[h]aving examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create legal relations and that the agreement was to the effect contended for"."

He also noted Bingham LJ's *dictum* in *The Aramis* [1989] 1 Lloyd's Rep 213 at 224, that "it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract. ...".

38. The first question for us is whether the judge was wrong to find that Mackie had no real prospect of successfully demonstrating that the parties intended to create legal relations in respect of the Services (which were not covered by the RCI contracts and the Clearing Agreements). I agree with the judge that there is nothing in the matters pleaded in the DAPOC which necessarily implies an intention to create legal relations in relation to the Services which were not contained in written agreements.

39. In the circumstances of this case, the provision of the database services, the customer finance services and the platform services by RCI are not explicable only on the basis that they had a contractual foundation. As the judge put it, it was clearly the common

objective of the manufacturers and Mackie to sell more cars and it was to be expected that the manufacturers would assist Mackie in that endeavour. It does not follow, however, that in providing those additional services that RCI and, possibly, Renault or Nissan intended to become legally bound to provide them. They would or might have acted exactly as they did in the absence of a contract. To put the matter another way, it is not necessary to imply an agreement of the nature for which Mackie contends.

40. It seems to me, that the parties might well have acted exactly as they did without an umbrella agreement being in place. Having said that, in principle, it is possible to see that the provision of the database services and the platform services were central to the performance of the Dealership Agreements. If a dealer cannot gain access to the means of ordering cars and parts, it is not difficult to see that it may become impossible for them to meet the obligations under the Dealership Agreements. In circumstances in which 90% of vehicle sales are funded on credit and Mackie was required to offer RCI finance to its customers, it is also possible to see that the provision of customer finance and the ability to check a customer's credit position on the database might also have been central to Mackie's business and the performance of the Dealership Agreements. Whether that might result in an umbrella agreement for the provision of those services rather than a claim that terms as to the provision of those services should be implied into the Dealership Agreements themselves (something which is not pleaded) is another matter.

41. In any event, although Mr Cavender made the point that the Services were essential to the operation of the Dealership Agreements in oral submissions before us, he accepted that the DAPOC does not contain such an assertion. As the judged pointed out at [20] of his judgment, the DAPOC does not address the issue of whether it is necessary to imply the umbrella agreement at all. If nothing else, it seems to me that this is fatal to the umbrella agreement claim and to this ground of appeal.

42. Furthermore, as Mr Peters points out, the DAPOC is vague as to the date on which the alleged umbrella agreement arose and as to its terms. At [31], it is pleaded that it arose in or around 1976 with Renault, 1998 with Nissan and 2007 with RCI. In the alternative, it is said that it arose with Renault, Nissan and RCI no later than 2008. In reply, Mr Cavender stated that it would be necessary to re-amend the DAPOC to allege that the umbrella agreement arose in 2014. It seems to me that if such a step were taken, it would also be necessary to make further substantial and, as yet, unformulated amendments to the DAPOC. The fact that there appears to be doubt about Mackie's case as to when the necessary relationship arose adds further weight to the conclusion that the DAPOC does not plead a claim that has a real prospect of success.

43. The conduct upon which the umbrella agreement is allegedly founded is also unclear. It is alleged to have arisen on the basis of the matters pleaded in [1] – [29] of the DAPOC and that, in particular, it can be inferred from and/or demonstrated by the 10 matters set out at [32].

44. [1] – [29] set out the background to the relationship between the parties and the written contractual arrangements. As Mr Peters pointed out, it is pleaded at [8] that Mackie's relationship with RFS (the previous finance provider) was rolled over to RCI in or about 2008, which is the latest date in the pleading at which the umbrella agreement is said to have arisen. The matters in [10] and [11] are concerned with the provision of finance after that date. If 2008 is the correct date for the creation of the umbrella agreement,

those matters post-date it. They might be evidence of an agreement, therefore, but they cannot be conduct from which it can be inferred.

45. The relevant details of the Dealership Agreements, to which RCI was not a party, and the RCI contracts to which it was, are set out at [12]-[22]. As Mr Peters pointed out, the terms of the RCI contracts are antithetical to an intention to enter into an umbrella agreement containing the terms which are alleged. In broad terms, the RCI contracts contain either an unfettered discretion to vary or extinguish a prescribed credit limit, to accept or refuse any vehicle as a "funded vehicle" or to consider a hire agreement on a case-by-case basis. Further, the "Annual Offer Letters" in relation to the terms upon which finance might be offered to customers, referred to in [25] of the DAPOC, were expressly subject to review and change and both the Annual Offer Letters and the "Route to Market" presentations referred to in [26] were not consistent only with the existence of an umbrella agreement.

46. Furthermore, for the most part, the matters set out in [32] are concerned with the close relationship between the parties, but post-date the alleged implied agreement even if one takes 2014 as the operative date. If one takes the 2008 date, the only matter which precedes it and, therefore, is capable of being conduct from which a contract might be inferred, is the long-term nature of the relationship which is pleaded at [32(1)].

47. In my judgment, therefore, the judge was right to refuse permission to amend and to strike out the case based on an umbrella agreement for the reasons he gave.

Ground 2 – Implied terms in the Written Contracts

48. The second ground of appeal is that the judgment contained errors of law and fact at [25] – [41] leading to an incorrect conclusion that the nature of the RCI contracts precluded the implication of a term constraining RCI from withdrawing funding.

49. Even if the essential elements necessary for an umbrella agreement were pleaded, as the judge pointed out, it is of no assistance to Mackie unless further terms are implied into the umbrella agreement and the RCI contracts. As I have already mentioned, having first implied an umbrella agreement importing a term of good faith, Mackie also seeks to imply two specific terms.

50. At [44] of the DAPOC it is pleaded, amongst other things, that as an incidence of the implied term of good faith, the umbrella agreement would not be terminated and the Services would not be withheld other than for a good cause without reasonable notice of at least 24 months. At [45] of the DAPOC it is stated that in the premises, RCI, Renault and/or Nissan were under an obligation to provide the Services to Mackie and that in particular, "... there was an obligation to provide [Mackie] with the Services of an equivalent nature and to an equivalent extent as they were provided to other franchised dealerships operating on behalf of the Alliance [Renault, Nissan and Dacia] in the UK. Further, or alternatively, having habitually provided the Services to [Mackie], there was an obligation to continue providing the same and/or equivalent services during the parties' contractual relationship."

51. In other words, it is alleged that, as a result of the umbrella/relational agreement, it should be implied that the 7-day notice period in the RCI contracts should be overridden and that the Services, which include dealer finance and the provision of customer

finance, must actually be provided at the same level as before, or at the level provided to other unspecified franchises, until the Dealership Agreements are terminated.

52. Mr Cavender relied both on an obligation of good faith to be implied in a relational contract and the well-known dictum in *Braganza v BP Shipping Ltd* [2105] UKSC 17, [2015] 1 WLR 1661. There is no dispute that a relational contract involves trust and confidence and that the other party will act with integrity and in a spirit of cooperation: see Leggatt LJ's consideration of his previous decision in *Yam Seng* at [167]. Leggatt LJ also noted that a relational contract implicitly required (in the absence of a contrary indication) an obligation of good faith and, amongst other things, an obligation not to act to undermine the bargain entered into or the substance of the contractual benefit bargained for: [174] and [175].

53. Baroness Hale's dictum in the *Braganza* case is as follows:

> "18. Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making powers is given."

That was a case in which an employer had power to determine the cause of death of a chief engineer on one of its ships, for the purposes of determining whether a death benefit was payable. After investigation, it was decided that the chief engineer had committed suicide and, accordingly, the death benefit was not due.

54. In his written argument, Mr Cavender stated that the judge had failed to consider how the status quo might affect the operation of the implied duties pursuant to the "relational contract" and the *Braganza* line of authorities in respect of RCI's express discretions in the RCI contracts. He said that in circumstances where RCI, Renault and Nissan had created a legitimate expectation on the part of Mackie that funding would be advanced in accordance with "RCI Standards", it was properly arguable that the implied duties would require RCI to continue to advance funding to Mackie for the duration of the Dealership Agreements. He analysed this either as an incidence of the obligation of good faith or on the basis that RCI might only exercise its discretion for the purpose for which it was conferred, which was to support the Dealership Agreements.

Discussion and Conclusions

55. First, it seems to me, as it did to the judge, that it is far from clear that it is pleaded that the alleged terms should be implied into the RCI contracts at all. Secondly, as Mr Peters

pointed out, the nature of those implied terms is vague. The extent of the Services and therefore, amongst other things, the dealer and customer finance which it is alleged must continue to be provided is said to be that provided to other dealerships (which are unspecified) or as habitually provided to Mackie. No indication of the level of funding which is to be implied is given.

56. Thirdly, in my judgment, one cannot rely upon a good faith obligation arising from a relational contract and the *Braganza* line of authority to imply terms which are contrary to the express provisions of the written agreements. The purpose of a discretion in a finance agreement such as the RCI contracts relating to dealer financing is to determine whether it is appropriate to lend from time to time. There is no room for the alleged implication. It is an attempt to imply terms which are entirely inconsistent with the express terms of the RCI contracts and as a result, is an attempt to re-write the RCI contracts so that they impose obligations which are fundamentally different from their express terms. It seems to me that it is not possible to use a duty of good faith and the *Braganza* dictum in this way. In any event, the nature of the discretion in that case was entirely different from the framework of the RCI contracts. The RCI contracts did not contain a commitment to lend at any particular level or at all.

57. To put the matter another way, if the alleged implied terms were to be of any assistance to Mackie, it would have been necessary to imply a term as to the provision of finance which would undermine the very nature of the provision of dealership finance in the RCI contracts and the provision of customer finance on a case-by-case basis. As the judge pointed out, the RCI contracts are framework agreements, the whole essence of which is that there is no actual commitment to provide finance but only a non-binding indication of a preparedness to lend. The lender takes an independent decision whether to lend in the light of a particular request. As the judge explained at [37] the battery master hire agreement (one of the RCI contracts), for example, provided explicitly that: "On each occasion that you place an order for an Electric Vehicle ... you will be deemed to have requested us to enter into a hire agreement … If we are prepared to enter into a hire agreement, we will send you an updated listing schedule ...". In other agreements, the credit to be supplied was an amount specified to be in the absolute discretion of RCI such that it might be varied or reduced to zero at any time.

58. In accordance with standard finance industry practice, RCI refrained from giving any commitment to fund and retained the discretion to do so on a case-by-case basis. The facts that a framework agreement for the provision of finance was in place, that finance had been provided over a long period of time and that the provider has indicated informally that it intended to continue to provide finance cannot, without more, lead to the implication of a legal obligation to do so. If, in circumstances such as these, a term could be implied which required finance to be provided, lenders would be subjected to potentially unsustainable obligations.

59. This is all the more so in relation to customer financing. As soon as one considers the structure of the relationship, it becomes obvious that it is not possible to imply the kind of terms for which Mackie contends. The finance was only ever provided to the customer and not to Mackie and, inevitably, it was necessary for RCI to consider the individual circumstances of the proposed purchaser/borrower before entering into a Personal Contract Purchase agreement. RCI might or might not choose to finance the purchase of any particular vehicle by any particular customer depending on the circumstances.

60. Mackie seeks to use the device of an umbrella agreement, the implication of a good faith obligation into that contract as a result of its alleged relational nature, and the further implication of terms as a result, in order to seek to override express written terms, some of which were contained in agreements which post-date the pleaded umbrella agreement. It seems to me that those express terms leave no room for the implication of the terms which are proposed and which are expressly contrary to the written agreements. Mr Cavender was only able to point to one case in which express terms were overridden in this way. It was in the very unusual circumstances of *Bates v Post Office* [2019] EWHC 606 (QB). That case was concerned with the relationship between the Post Office and postmasters. We are a long way from that situation here.

Ground 3 – Interpretation of the RCI contracts – 7-day notice provisions to be read subject to 24-month term in the Dealership Agreements

61. Ground 3 of the appeal is that for the reasons set out in relation to ground 2, the judge made errors of law and fact leading to an incorrect holding at [43] – [47] of the judgment that the 7-day notice period in the RCI contracts could not be interpreted as subject to the 24-month notice period in the Dealership Agreements or so that any notice to terminate expired at the same time as the termination of the Dealership Agreements.

62. The interpretation claim is pleaded at [38] of the DAPOC.

Discussion and Conclusions

63. It seems to me that this ground of appeal suffers from the same flaw as the argument based on an implied term. In the absence of a term, whether express or implied, requiring RCI to provide finance, RCI was entitled to cut off funding to Mackie's customers without terminating the RCI contracts at all.

64. In any event, I agree with Mr Peters that the judge was correct to conclude that the interpretation argument has no real prospect of success. Three of the RCI contracts contain a termination provision in the following form:

> "13.4 Without prejudice to the foregoing provisions of this Clause this Agreement shall continue unless and until determined by seven days written notice by either party."

The express termination clause in the Used Vehicle Stocking Agreement dated 27 March 2008 and referred to in the DAPOC as "Contract 1" is:

> "13.3 Without prejudice to the foregoing provisions of this clause this Agreement shall continue unless and until determined by seven days written notice by either party."

The other two RCI contracts are terminable in the event of any of the other RCI contracts being validly terminated.

65. The language of clause 13.4 is unqualified and unambiguous. In those circumstances, the court must apply it and there is no room for implication or for a different interpretation arising from factual matrix or any implied term. Furthermore, as Mr Peters points out, the interpretation for which Mackie contends is inconsistent with the overall structure of clause 13. Mackie's argument is that the right to determine the

contract under clause 13.4 should be "construed" so that it cannot be exercised other than in harmony with the termination of the Dealership Agreements. However, clause 13.1 already provides for the three RCI contracts in which it appears to terminate automatically upon termination of the Dealership Agreements. Mackie's proposed interpretation of clause 13.4 therefore collapses it into clause 13.1, and deprives it of any meaning. I agree with Mr Peters' written argument that although Mackie's argument is presented under the heading "construction", it is in fact an impermissible attempt to excise clause 13.4 in its entirety.

66. The same logic applies to clause 13.3. It is unambiguous, and therefore there is no arguable legal basis for interpreting it as anything other than an unqualified right to determine that RCI contract on seven days' notice. No separate argument arises in relation to the remaining RCI contracts.

Ground 4 – Estoppel

67. In ground 4 it is stated that the judgment contains errors of law and fact leading to the incorrect conclusion that the pleaded estoppel by representation was not properly arguable. It is said that the judge erred insofar as he held that Mackie was seeking to rely upon estoppel by way of a cause of action and incorrectly assessed the quality of the representation by reference to the test applicable at trial.

68. Mr Cavender did not place much emphasis on this ground of appeal in his oral submissions. He did add, however, that in addition to estoppel by representation, which is pleaded at [39] – [42] of the DAPOC, Mackie also relies upon a promissory estoppel of the kind suggested in *Central London Property Trust v High Trees House Ltd* [1947] KB 130. In summary, it is pleaded that:

    i) by representing that Mackie was a long-term partner of RCI, co-operating and collaborating closely with Mackie in the performance of the Dealership Agreements and training, incentivising and associating with Mackie staff, RCI represented to Mackie that it would not terminate the RCI contracts or demand repayment of a £250,000 interest free loan, except on reasonable notice being 24 months or alternatively, unless such notice expired at the same time as the termination of the Dealership Agreements;

    ii) RCI made the representation or the alternative representation intending that Mackie rely upon it and Mackie did so to its detriment; and

    iii) in the premises, it would be inequitable to permit RCI to resile from the representation or the alternative representation by terminating the RCI contracts on seven-days' notice and demanding immediate repayment of the loan and it is estopped from doing so.

69. I agree with the judge that the estoppel claim has no real prospect of success. The matters alleged fall far short of meeting the requirement of a clear and unequivocal representation that RCI would not rely upon the 7-day notice period. He was also correct to decide that Mackie is impermissibly seeking to use estoppel as a cause of action rather than a defence.

70. Furthermore, the estoppel claim suffers from the same flaw as the interpretation claim. It is not even alleged that the estoppel precludes RCI from refusing to advance any further finance or to vary or extinguish the credit limits under the RCI contracts.

71. For all the reasons set out above, I would dismiss the appeal.

Lady Justice Andrews:

72. I agree. The fatal flaw in Mackie's case, as the judge identified, is the absence of any arguable legal route by which to fix RCI with an obligation to continue to provide Mackie (or its customers) with any specific level of finance. In practical terms, Mackie may well have been dependent upon the provision of finance by RCI in order to be able to carry on its business in accordance with the Dealership Agreements. But that situation is no different from any in which the provider of the essential finance is an independent financial institution such as a bank; the continuing need that the customer has for the provision of the funds does not make it necessary that the financier should be contractually obliged to continue to provide them. Moreover, I can see no principled basis upon which to import a *Braganza*-type obligation as a fetter upon the exercise of an express right to terminate the contract upon notice, which has been conferred on both contracting parties. That is not the type of contractual discretion with which the *Braganza* line of authorities is concerned.

Sir Geoffrey Vos, Master of the Rolls:

73. I agree with both judgments.