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Case No: BL-2023-001680

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/12/2024

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

ZAHA HADID LIMITED	**Claimant**
- and -	
THE ZAHA HADID FOUNDATION	**Defendant**

- -
- -

Mr Michael Bloch KC and **Mr Rhys Jones** (instructed by **Dorsey & Whitney (Europe) LLP**) for the **Claimant**
Mr James Abrahams KC (instructed by **Joseph Hage Aaronson LLP**) for the **Defendant**

Hearing dates: 27, 28, 29 November 2024

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Approved Judgment

This judgment was handed down remotely at 11am on Friday 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson :

I. Introduction

1. This case raises two questions. The first is a familiar one: what do the words in a contract mean? The second is a relatively unfamiliar one: does the contract, or some part of it, operate in restraint of trade?

2. The contract in question is a trade mark licence agreement dated 1 May 2013 ("*the Licence Agreement*"). The trade marks the subject of the Licence Agreement are all registered marks of the name "*Zaha Hadid*", in a large number of jurisdictions across the world including the EU, the UK, China and Mexico. Clause 6 provides for payment of a royalty of 6% of "*Net Income for the Licensed Services*" (I will explain these defined terms further below).

3. The original parties were Dame Zaha Hadid, the renowned architect (as "*Licensor*"), and a company, Zaha Hadid Limited (as "*Licensee*"). Dame Zaha sadly died in 2016, but it is common ground that the benefit of the Licence Agreement has passed under her Will of 2015 to the Zaha Hadid Foundation ("*the Foundation*"), a charity established during Dame Zaha's lifetime whose objects include preserving her work and legacy. The Licensor is thus now the Foundation. The Licensee remains Zaha Hadid Limited (I will refer to it as "*the Company*"), the vehicle through which, during her lifetime, Dame Zaha and others conducted the architectural practice for which she is so well-known. Perhaps principal among Dame Zaha's associates in that practice was Mr Patrik Schumacher, himself an architect of considerable renown. Mr Schumacher continues in practice via the Company, which indeed has grown, both in terms of turnover and geographical reach, in the years since Dame Zaha's death. That notwithstanding, over the same period there have been a number of disagreements between Mr Schumacher on the one hand, and the other persons appointed as executors under Dame Zaha's 2015 Will, namely Lord Palumbo, Sir Brian Clarke and Rana Hadid (Dame Zaha's niece). At a broad level, those disagreements include differing views about the ongoing relationship of the Company and the Foundation. An important part of that relationship is the Licence Agreement.

4. In these proceedings, the Company is the Claimant and the Foundation the Defendant. The Company seeks, in effect, declarations entitling it to bring the Licence Agreement to an end by giving reasonable notice. In fact, notice has been given, in March 2024, stating that the Company will treat the Licence Agreement as at an end after a period of 12 months. So the clock is already ticking. The Foundation accepts that 12 months would be a reasonable period of notice, but denies that the Company has any entitlement to serve a termination notice. That is the issue which this Judgment must seek to resolve.

5. The critical language in the Licence Agreement is in Clause 12. Since this is the focus of much that follows, I think it useful to set this out straightaway:

> *"**12. DURATION AND TERMINATION***
>
> *12.1 This agreement shall commence on the Effective Date and shall continue indefinitely, unless terminated earlier in accordance with this clause 12.*

> *12.2 The Licensor shall have the right to terminate this agreement on giving the Licensee not less than 3 months' written notice of termination.*
>
> *12.3 Without affecting any other right or remedy available to it, the Licensor may terminate this agreement with immediate effect by giving written notice to the Licensee if:*
>
> *(a) the Licensee fails to pay any amount due under this agreement on the due date for payment and remains in default not less than 30 days after being notified in writing to make such payment;*
>
> *(b) the Licensee commits a material breach of any other term of this agreement which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;*
>
> *(c) the Licensee repeatedly breaches any of the terms of this agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this agreement;*
>
> *(d) the Licensee becomes insolvent, or if an order is made or a resolution is passed for the winding up of the Licensee (other than voluntarily for the purpose of solvent amalgamation or reconstruction), or if an administrator, administrative receiver or receiver is appointed in respect of the whole or any part of the Licensee's or business, or if the Licensee makes any composition with its creditors or takes or suffers any similar or analogous action in consequence of debt or if the Manufacturer ceases to carry on business*
>
> *12.4 For the purposes of clause 12.3(b),* ***material breach*** *means a breach (including an anticipatory breach) that is serious in the widest sense of having a serious effect on the benefit which the terminating party would otherwise derive from a substantial portion of this agreement over any 3 month period during the term of this agreement. In deciding whether any breach is material no regard shall be had to whether it occurs by some accident, mishap, mistake or misunderstanding."*

6. The Company's argument on construction relates specifically to Clause 12.1. The gist of the argument is that Clause 12.1 should be construed as including a right by either party to terminate the Licence Agreement on reasonable notice, which exists in addition to the express rights of termination conferred on the Foundation (as Licensor) under Clauses 12.2 and 12.3. In developing this argument, the Company has relied on authorities in which agreements of indefinite duration have been read as subject to a

right of termination on reasonable notice: Winter Garden Theatre (London) Limited v. Millennium Productions Ltd [1948] AC 173; Martin-Baker Aircraft Co Ltd v. Canadian Flight Equipment Ltd [1955] 2 QB 556; In re Spenborough Urban District Council's Agreement [1968] Ch 139; Staffs. Health Authority v. Staffs. Waterworks [1978] 1 WLR 1387.

7. If that is wrong, and the Company has no unilateral right to terminate on reasonable notice without cause, then it argues that the Licence Agreement is in restraint of trade. In developing that argument, the Company relied principally (but not solely) on the recent statement of the relevant principles by Carr LJ (as she then was) in Quantum Advisory Ltd v. Quantum Actuarial LLP [2021] EWCA Civ. 227; [2022] 1 All ER (Comm) 473. Mr Bloch KC for the Company emphasised the broad nature of the doctrine, which Carr LJ in Quantum Advisory said was not confined to immutable boundaries or rigid categorisation (see at [60](i)), but instead was "*to be applied to factual situations with a broad and flexible rule of reason*" (per Lord Wilberforce in Esso v. Harper's Garage (Stourport) Ltd [1968] AC 269 at 331, referenced in Quantum Advisory at [54]). Mr Bloch said that on the hypothesis the Licence Agreement was *not* terminable on reasonable notice by the Company, but *was* terminable on 3 months' notice by the Foundation (see clause 12.2), then it operated in restraint of trade because it imposed important limitations on the Company's freedom to act which were both unusual and unreasonable, and which the Company was locked into indefinitely with no independent means of escape.

8. The relief sought by the Company, if correct on its restraint of trade analysis, is described in its Amended Details of Claim document as follows, namely a declaration:

> *" ... that Clause 12 is unenforceable as an unlawful restraint of trade; and that, pursuant to Clause 18.1, Clause 12.2 is modified in the following terms:*
>
> *'12.2. The Licensor shall have the right to terminate this agreement on giving the Licensee not less than 3 months' written notice of termination, and the Licensee shall have the right to terminate this agreement on giving the Licensor not more than 12 months' written notice of termination".*

II. The Witnesses

9. This Judgment follows a short trial.

10. During the trial, two witnesses gave live evidence for the Company and were cross-examined, namely Mr Schumacher and Mr Charles Walker, both of whom are architects in the practice and directors of the Company. The Company also served a witness statement of Diane Unwin, its Head of Finance. Her evidence was unchallenged by the Foundation.

11. The Foundation served a witness statement of Sir Brian Clarke, the well-known architectural artist and painter. As mentioned already above, he is one of the 4 executors of the estate of Dame Zaha Hadid. He is Chair of the Board of Trustees of the Foundation. Sir Brian was not able to attend for cross-examination due to illness, but no objection was made to his witness statement being admitted into the trial record.

12. I should say that I was satisfied that both witnesses who were cross-examined were honest and did their best to assist the Court.

III. A Preliminary Point

13. Sir Brian's evidence dealt with a topic which had gained some prominence in the parties' ongoing exchanges over the Licence Agreement, namely whether it was Dame Zaha's intention, at the time it was entered into (it was signed in January 2013 but backdated to May 2013), that the 6% royalty due under it would be used, after her death, to fund the ongoing activities of the Foundation. The Company's position, as it has developed, is that that was not the case, because the idea of the Licence Agreement grew out of a desire to provide Dame Zaha with a form of income during her lifetime only, and actually had been inspired by a desire to regularise what had formerly been a rather haphazard system of Dame Zaha claiming remuneration and expenses on an *ad hoc* basis, which at one point it was thought might be the subject of press scrutiny and possible adverse comment.

14. Sir Brian's written evidence was that he had a firm recollection of Dame Zaha (i) wishing to form a foundation as part of her legacy plans, and (ii) wishing any such foundation – for which Dame Zaha had great ambitions – to have a stable and significant source of income. Sir Brian was not able though to be clear about the dates of specific conversations, which makes it difficult to be clear whether any of them pre-dated the Licence Agreement.

15. On this same topic, Mr Schumacher was equally clear that, given his very close relationship with Dame Zaha, which stretched back over 30 years, she would certainly have told him if her intention had been to fund the Foundation with income from the Licence Agreement. His evidence was that he could recall no such conversation, and so he denied that could possibly have been Dame Zaha's intention.

16. I do not think it necessary for me to resolve this debate, in order to answer the question of construction which arises on Clause 12. In the end, neither side pressed the point with real vigour. As I understood it, the Company's position was always that such evidence of subjective intention at the time of contracting was irrelevant, on established principles. For the Foundation, Mr Abrahams KC initially argued that in the unusual circumstances of this case, it was relevant. This was based on the premise that, since at the time Dame Zaha was the sole shareholder in the Company, and its controlling mind and will, she was effectively on both sides of the transaction (as Licensor and Licensee), and so her knowledge and intentions were part of the factual matrix, as "*background knowledge which would reasonably have been available to the parties when they entered into the contract*" (language which comes from Lord Hamblen's judgment in <u>Sara & Hossein Asset Holdings</u> v. <u>Blacks Outdoor</u> [2023] UKSC 2, [2023] 1 WLR 575, at [29]). To the extent it was maintained (the point was not formally withdrawn), I cannot accept this argument. I think it overlooks the fact that, in entering into the Licence Agreement, Dame Zaha, who was a director of the Company at the time, was in a position of conflict, which indeed she had declared through her solicitors who recommended that the Company take independent legal advice. It seems it never did, but be that as it may, the Licence Agreement is signed on behalf of the Company by Mr Schumacher, in his capacity as director. In such circumstances I cannot accept the proposition that Dame Zaha was on both sides of the transaction: I do not think she was. She was on one side and the Company, represented by Mr Schumacher, was on

the other. Given her position of conflict, Dame Zaha was not able to represent the Company in entering into the Licence Agreement. I therefore do not accept that whatever subjective knowledge and intentions she had can properly be attributed to the Company for the purpose of divining its meaning. To do so would be wrong in principle, and in any event, as I will explain, it is not necessary to resort to such devices in order to work out what the Licence Agreement means.

17. Had the factual dispute mattered, I would have held on the balance of probabilities that Dame Zaha did *not*, at the time of the Licence Agreement, have any settled intention that the royalty payable under it would be used to fund the Foundation. I *do* accept, in accordance with Sir Brian's evidence, that Dame Zaha at that stage had a settled intention to establish a foundation of some sort, and I also accept that she had ambitious plans for it that would require substantial funding. But I am not persuaded that any clear vision had arisen by 2013 or 2014 that the funding would come from the royalty payable under the Licence Agreement. There are later references to that being the plan, most importantly in a series of presentations prepared for Dame Zaha in 2015 as part of ongoing efforts of estate planning. But those references come after the date of entry of the Licence Agreement, and in my opinion are more consistent with the theory that use of the royalty as a funding source crystallised as a firm idea only later in the chronology, during that estate planning exercise. As I have explained already, however, I do not think that conclusion matters for the outcome of this case, and I mention it only in deference to the parties' submissions on it and in case the present dispute goes any further.

IV. The Licence Agreement

18. I will mention some key provisions of the Licence Agreement.

19. The grant in Clause 2 is the grant of a non-exclusive licence to use the "*Marks*" (as defined) in "*the Territory*" (meaning the "*World*").

20. Clause 3 is headed, "***TITLE, GOODWILL AND REGISTRATIONS***". Among other provisions, it requires the Licensee to use the Marks "*in the form stipulated by the Licensor*" (clause 3.2). By Clause 3.3, any goodwill derived from use of the Marks, "*shall accrue to the Licensor*".

21. Clause 4 is headed, "***QUALITY CONTROL***". It entitles the Licensor to stipulate relevant "*specifications, standards and directions*", which the Licensee is then obliged to comply with.

22. Clause 5 is headed, "***MARKETING, ADVERTISING AND PROMOTION***". Clause 5.1 was particularly relied on by the Company in Mr Bloch KC's closing submissions, so I set it out in full:

> *"The Licensee and its Group Companies shall use their best endeavours to promote and expand the supply of Licensed Services throughout the Territory on the maximum possible scale, and shall provide such advertising and publicity as may reasonably be expected to bring the Licensed Services to the attention of as many purchasers and potential purchasers as possible."*

23. This is a useful point to reference two defined terms which are used in Clause 5, and also in the royalty provision in Clause 6, and which are significant in terms of the Company's argument. These are, first, the definition of Licensed Services, which is very wide and which includes all services provided by the Company whether they use the Marks or not:

> *"**Licensed Services**: all or any services provided by the Licensee and the Group Companies from time to time including but not limited to services which are associated with or incorporate the Marks or any goodwill connected with the Marks".*

24. "***Group Company***" is defined as follows: "*in relation to a company, any member of its Group whether corporate or otherwise*". And the word "***Group***" itself then has the following, wide definition (I underline the words emphasised by Mr Bloch KC in his submissions):

> *"**Group**: in relation to a company, that company, any subsidiary or holding company from time to time of that company and any subsidiary from time to time of a holding company of that company <u>or any associated or affiliated company of that company</u> the majority of which is owned or controlled by the same shareholders or the majority of its board is common with the board of the company."*

25. Clause 6 then deals with royalties. It is necessary only to set out Clause 6.1, which makes use of the above definitions:

> *"The Licensee shall pay to the Licensor a royalty of 6% of the Net Income for the Licensed Services that are supplied by the Licensee and its Group Companies in the Territory to any person."*

26. As to "***Net Income***", this is defined as:

> *" ... the total income as is stated in the Licensee and its Group Companies' management accounts less the costs of any outside sub-consultants (which means third party consultants providing non-architectural services) and less value added tax and any other government taxes, duties or levies."*

27. The overall effect of the wide definitions of "*Territory*", "*Licensed Services*", "*Group Company*" and "*Net Income*", is that the royalty is effectively 6% of all taxed income worldwide earned either by the Company or any entity associated or affiliated with it, howsoever it is earned and whether earned using the Marks or otherwise. The Company regards this as oppressive, and has come to refer to the 6% royalty as an encumbrance on its activities and to refer to it as "*the levy*."

28. Clause 7 is headed, "***PROTECTION OF THE MARKS***". Amongst other things, this requires the Licensee to fund the cost of any proceedings for infringement, although the Licensor is to have conduct of such proceedings (Clause 7.2).

29. Clause 8 is headed, "***LIABILITY, INDEMNITY AND INSURANCE***". Clause 8.1 provides that *"[t]o the fullest extent permitted by law, the Licensor shall not be liable to the Licensee*" (my emphasis) for any losses arising from the Licensee's exercise of rights granted to it under the Agreement. By contrast, under Clause 8.2, the Licensee gives the Licensor a wide indemnity as regards the same (and other) possible sources of liability.

30. I have already set out the termination provision in Clause 12 above.

31. I will come back later to deal with the question of restraint of trade, but one of Mr Bloch KC's overarching points in that regard is that there is an obvious imbalance in the terms of the Licence Agreement, which is very largely for the benefit of the Licensor (the Foundation), and imposes significant burdens – both financial and otherwise – on the Licensee. This asymmetry, argues Mr Bloch, is both unusual and unreasonable, and in terms of the restraint of trade doctrine therefore unjustifiable.

V. The Construction Issue

Some Authorities

32. A number of authorities illustrate the point that, where a contract contains no express provision for termination, it may be construed as being subject to a right to terminate on reasonable notice.

33. In Staffordshire Area Health Authority v. South Staffordshire Waterworks Co. [1978] 1 WLR 1387, for example, a contract between the Defendant waterworks company and the Plaintiff health authority required the former to supply the latter "*at all times hereafter*" with 5,000 gallons of water per day free of cost. Foster J held that these words meant "*forever and in perpetuity*", but the Court of Appeal allowed an appeal against that decision, and read the agreement as subject to a power making it terminable at all times on reasonable notice. At p. 1399, Goff LJ endorsed the principles earlier laid down by Buckley J in In re Spenborough Urban District Council's Agreement [1968] Ch 139, 146-7, where Buckley J said:

> *"Authority establishes that, where an agreement does not in terms confer on the parties or one of them a power to determine the agreement, whether such a power should be inferred is a question of construction of the agreement to be determined in accordance with the ordinary principles applicable to such a question."*

34. After noting that Buckley J then cited from Lord MacDermott in the House of Lords in Winter Garden Theatre (London) Limited v. Millenium Productions Ltd [1948] AC 173, 203, Goff LJ continued to quote from Buckley J, as follows:

> *"Since ex hypothesi such an agreement contains no provision expressly dealing with determination by the party who asserts that this should be inferred, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in*

> *the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement."*

Construction or Implication of Terms?

35. There was some discussion before me about whether the exercise of identifying a right of termination where none is expressly set out is one of construction of the language which is already in the contract, or of implication of new terms. Some older authorities suggest the former. In Martin-Baker Aircraft Co Ltd v. Canadian Flight Equipment Ltd [1955] 2 All ER 722, for example, an agreement between an English company and a Canadian company concerning the manufacture and sale of aircraft ejection seats, contained no provision for its determination and therefore appeared indefinite in duration. McNair J held the agreement terminable on reasonable notice, and in the course of stating his reasons said (at p. 733E): "*To my mind, however, the question whether a contract such as this is permanent or revocable does not depend on the insertion of an implied term, but depends on the true construction of the language used*."

36. Both in his pleaded case and in submissions, Mr Bloch KC put his argument on termination on the footing of the proper construction of clause 12, rather than on an implied term. In response, one of the points made by Mr Abrahams KC was to say that in substance, what Mr Bloch KC was trying to do was so much at variance with the express language of the clause that he can only have been seeking to imply a term, which plainly he could not do given the stringent test for implication of terms as now explained in cases such as Marks & Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd and Anor. [2015] UKSC 72, [2016] AC 742 and more recently Tesco Stores Ltd v. Union of Shop, Distributive and Allied Workers and others [2024] UKSC 28 (i.e., necessary to give business efficacy to the agreement or so obvious as to go without saying). Mr Abrahams KC said that although at one stage in its development, the law of contract had tended towards merging the questions of construction and implication of terms as part of a unitary exercise (see Lord Hoffmann's analysis in the Belize Telecom case [2009] 1 WLR 1988, at [17]-[27]), it was now accepted that that was a mis-step (see the Marks & Spencer case at [26]). The two had to be approached differently, and whatever may have been the position in 1955 when the Martin-Baker Aircraft case was decided, it was now clear that the Company could not try to obtain a result which was really only achievable by implying a term, by pretending instead to be engaged in a conventional exercise of construction and interpretation.

37. As to this, it may at some stage be necessary to decide whether the approach taken in older cases like Martin-Baker Aircraft was really based on what in modern practice we would characterise as the implication of terms, rather than construction and interpretation, and if so whether the approach in such cases has survived the development of the law on implication of terms in the meantime (in cases such as Marks & Spencer). In the present case, though, Mr Bloch KC has firmly put his argument as one based on construction alone, and made it clear in submissions that he is not seeking to imply a term. That being so, I propose to take him at his word.

The Exercise of Construction in this Case

38. The modern approach to questions of construction is well-known. Recently, in Virgin Aviation TM Ltd v. Alaska Airlines Inc. [2024] EWCA Civ. 622 Phillips LJ summarised the position as follows at [20]:

> *"It was common ground that the process of contractual interpretation is a unitary exercise involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences: see Lord Clarke JSC in Rainy Sky SA v Kookmin Bank [2011] UKSC 50; [2011] 1 W.L.R. 2900 at [21] and Lord Hodge in Wood v Capita Insurance Services Ltd [2017] A.C. 1173 at [11]. Lord Hodge went on to say in that paragraph that:*
>
> > *'… once one has read the language in dispute and the relevant part of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.'"*

39. At [28] of his Judgment in Virgin Aviation, Phillips LJ said:

> *"The correct approach, at least in the first instance, is to seek to read all provisions of the Licence together, so as to understand the overall meaning and effect of the contract."*

40. In the present case in my view, looking at the language of the Licence Agreement as a whole, and then considering clause 12 in context, all leads to the same conclusion, which is that the Foundation is correct in its view of the meaning of clause 12. That view is only reinforced if one considers the wider commercial context (the factual matrix) at the time the Licence Agreement was entered into.

41. To start with, the Marks were obviously assets of great value to Dame Zaha, the Licensor. They reflected her life's work as an architect. By the Licence Agreement, she agreed to allow the Company to exploit them in return for a fee. The provisions of the Licence Agreement are consistent with her wishing both to preserve her own power to make use of the Marks (the Licence was non-exclusive: see cl. 2.1), but also wishing to exercise close control over the manner in which they could be exploited by the Company (see, for example, clause 3.2 (use to be in a stipulated form), clause 3.3 (goodwill to accrue to the Licensor), and clause 4 (the quality control provision)). Mr Bloch KC criticised such provisions as one-sided. That is true in a sense, because they are all designed in one way or another to reserve powers or benefits to the Licensor. But when one then comes to look at the language of clause 12 and to seek to divine its meaning, and specifically to ask whether it was intended that the Licensor should have wide powers of termination and the Licensee should have none, these provisions all support the view that that *was* the intention, because it would be consistent with the overall scheme of the Licence.

42. The words of clause 12 itself reinforce that conclusion. Its express wording is that it will continue indefinitely, "*unless terminated earlier in accordance with this clause 12*". The only provisions for termination then set out are rights of termination exercisable by *the Licensor* only, not the Licensee: clause 12.2, which gives the Licensor the right to terminate without cause on 3 months' notice, and clause 12.3 which gives the Licensor a right of immediate termination in the events there set out including commission of a material and irremediable breach. Again, one might describe that as one-sided, but to my mind there is no real doubt about what it means.

43. Arguing against this, Mr Bloch KC's case emphasised the first part of clause 12.1: "*This agreement shall commence on the Effective Date and shall continue indefinitely ... .*" Pausing at that point, and laying stress on those words, Mr Bloch said that on the face of it they signalled that this was to be an agreement of indefinite duration, and in such cases it was conventional to construe the agreement as subject to a right of termination on reasonable notice: see, for example, the Staffordshire Area Health Authority case and the Martin-Baker Aircraft case, cited above. Mr Bloch KC said, in effect, that the phrase I have set out could and should be looked at in isolation and on its own terms, and thus as subject to the right of either party to terminate on reasonable notice. He said the later provisions in sub-clauses 12.2 and 12.3 were intended only to be additional and possibly quicker rights of termination available to the Licensor only in certain circumstances, but the fact that the Licensor was given such additional termination rights did not mean that the Licensee had none at all. Mr Bloch KC said this view was in fact reinforced by the further language of clause 12.1, after that already quoted, which goes on: " *... unless terminated earlier in accordance with this clause 12*." His point here was that it makes no sense to refer to the agreement being terminated "*earlier*" if it is intended to be of truly indefinite duration, because there is no such moment in time as "*earlier than forever*."

44. I am afraid I cannot agree with any of these points. To my mind, respectfully, it makes no real sense to look at the first part of clause 12.1 in isolation, and to say that it needs to be construed as conferring on both parties a right to terminate on reasonable notice. The Licensor does not need such a right. It already has the right to terminate unilaterally without cause on 3 months' notice under clause 12.2, and the right to terminate immediately for cause in the events described in clause 12.3. It is quite unclear to me what an additional right to terminate on reasonable notice could possibly add. To put it straightforwardly, the express terms of the remainder of clause 12 seem to me flatly inconsistent with the construction the Company seeks to put on the first part of clause 12.1. As to Mr Bloch's point that there is no such moment in time as "*earlier than forever*", I admire the ingenuity of the argument, but in my opinion such metaphysical notions have no useful place in the practical business of construing a commercial contract. What the parties plainly meant, although perhaps it was inelegantly expressed, was that the Licence Agreement would continue unless the Licensor chose to terminate it.

45. The wider factual matrix, so far as relevant, is likewise consistent with this conclusion. At the time of the Licence Agreement, Dame Zaha was sole shareholder in, and a director of, the Company (i.e., the Licensee), but it is also common ground (and indeed part of the Company's case) that she intended that over time Mr Schumacher and other members of senior staff would be given equity in the business. In such circumstances, where there was likely over time to be a relinquishing of control at the level of the

Company, it makes good sense to think Dame Zaha would have wanted to retain other mechanisms of control via the Licence Agreement over the valuable Marks which to some extent embodied and reflected her life's work. It is natural to think that such mechanisms of control included a unilateral right to terminate the Company's entitlement to use them.

VI. The Restraint of Trade Point

The Legal Principles

46. Restraint of trade is a doctrine of uncertain scope. There are a number of issues, to some extent inter-related. The first question is to ask whether there is a restraint in the relevant sense. As Carr LJ said in the Quantum Advisory case at [54], by reference to Chitty, all contracts are to some extent in restraint of trade at least by preventing the parties to the contract from trading with others. So it seems something more is needed than the limitation on freedom of action which occurs almost every time two parties commit to perform a joint undertaking. Some cases are obvious: a covenant not to compete plainly imposes a restraint in the relevant sense. Other cases are not so obvious, and as Carr LJ said again in Quantum Advisory at [54], the Courts have made no apologies for refraining from any attempt to identify the dividing line between contracts which are and which are not in restraint of trade. One must instead apply a "*broad and flexible rule of reason*".

47. Even if on the face of it the provision operates in restraint of trade, it may not be caught by the doctrine. By convention, some forms of restraint have come to be regarded as acceptable. Lord Wilberforce gave an example in Esso v. Harper's Garage (Stourport) Ltd [1968] AC 269 at pp. 335-6: if a man sells his business and its goodwill and executes a covenant not to compete with the buyer, that will typically be regarded as unobjectionable because " *... the rule has become accepted that, in the interest of trade itself, restrictions may be imposed on the vendor of goodwill provided that they are fairly and properly ancillary to the sale ...*".

48. In other cases, though, the doctrine will be engaged. Whether that is so or not is a matter of public policy. The scope of the relevant policy is itself somewhat uncertain, and therefore incapable of precise definition. In Esso v. Harper's Garage (Stourport) Ltd, Lord Wilberforce described cases (such as the one mentioned above) which do not engage the doctrine as being justified in the context of a "*trading society*." Thus, the concept of the "*trading society*" test has sometimes been suggested as a method of separating cases falling outside the doctrine from cases falling within it. In Quantum Advisory, though, Carr LJ at [71] rejected the idea that the "*trading society*" test was the single test of universal application. The real test is one of public policy.

49. Finally, if there is a restraint of trade and if the doctrine is engaged, then competing interests arise: on the one hand the private interests of the parties and the notion that they should be held to the bargain they have struck, versus on the other hand the public interest in the facilitation of free and open trade. The Court has to apply a public policy test of reasonableness to determine whether the relevant provision should be struck down.

50. In the present case, there was disagreement as to whether Quantum Advisory laid down a three-stage test, or a two-stage test, for determining whether a provision should be

struck down as in restraint of trade. It will be clear from the summary above that in my view, it laid down a three-stage test. I think that clear, because of the way Carr LJ herself articulated the relevant principles at [68] of her Judgment, in three numbered sub-paragraphs, introduced with the phrase: "*There are three steps to consider ...*". She described these as follows:

> *"(i) Whether or not, in practical terms, the restraints in the covenant amount to a restraint of trade;*
>
> *(ii) If so, whether or not the covenant should be excluded from the application of the doctrine. The question is whether or not (as a matter of public policy) it is appropriate to dispense the contract from the necessity of justification under a public policy test of reasonableness;*
>
> *(iii) If the doctrine is engaged, whether or not the covenant is reasonable by reference to the private interests of the parties and to the public interest."*

Is there a Restraint in this case?

51. This tripartite classification has some importance here, as Mr Abrahams KC pointed out, because there is no obvious provision in the Licence Agreement which operates as a restraint, and so satisfies the first part of the test set out above.

52. All the same, in Quantum Advisory Carr LJ said that the analysis " ... *depends less on legal niceties or theoretical possibilities than on the practical effect of the restraint in hampering the freedom to trade ... It is a question of substance not form*." A good example is Stenhouse Australia Ltd. v. Phillips [1974] AC 391, where one of the provisions in an agreement between an insurance broker, Mr Phillips, and his former employer required him to account to the employer for one-half of any income he received from placing business with any client of the employer for a period of five years. That provision operated in practice as a restraint, even though it did not on the face of it inhibit him from doing anything, because it was likely to cause Mr Phillips to refuse business which otherwise he would take (see at p. 403A).

53. Before me, the parties were agreed that a provision (or group of provisions) which in practice operated as a restraint could, in an appropriate case, engage the doctrine; although the analysis might not be straightforward.

54. This basic difficulty is accepted by the Company in its pleaded case, and indeed reflected in the way that case has developed. The case in its original formulation placed emphasis on payment of the so-called levy under the Licence Agreement – i.e., the required payment of 6% of all taxed income worldwide, earned by the Company or any entity associated or affiliated with it, whether earned using the Marks or otherwise. It was said that, *"[t]he financial burden that this imposes, without the corresponding benefit of the exclusive use of the Mark, has the effect of sterilising the Company's economic activity as an architecture firm*."

55. On examination, however, it became clear that that plea was unsustainable. The Company's economic activity has not been sterilised. In fact, it has achieved considerable financial success in the period since the Licence Agreement was entered into (turnover was £36,864,585 in 2013, but by 2023 had grown to £69,401,831). The

overall picture is shown in the following table, which was agreed (n.b. the 2022 and 2023 years show depressed profits, but that is only because of the way profits are now treated given the implementation of an employee benefit trust: it was common ground that the Company remains successful):

Financial year to 30 April	Turnover	Profit (pre-tax)
2012	£34,478,861	£1,847,506
2013	£36,864,585	£4,081,927
2014	£46,574,147	£6,138,990
2015	£47,744,670	£5,954,118
2016	£44,633,878	£3,814,489
2017	£44,069,381	£3,708,089
2018	£43,489,171	£4,256,378
2019	£56,596,220	£1,877,709
2020	£53,011,803	£3,283,870
2021	£60,925,093	£9,068,429
2021 (group)	£63,497,395	£9,547,862
2022 (group)	£68,063,336	£917,947
2023 (group)	£69,401,831	£658,015

56. In light of such matters, the original plea alleging sterilisation of commercial activity was deleted.

57. What then remains as a practical restraint of trade? In argument, Mr Bloch KC put the point in various ways.

58. As noted already, the general thrust of the remaining pleaded case is very much focused on the one-sided nature of the Licence Agreement. What is said is that if the Company has no right of its own to terminate on reasonable notice, then it is tied into the continuing effect of the provisions in the Licence Agreement indefinitely. These include (in particular) clause 3 (goodwill), clause 4 (quality control), clause 5 (marketing, advertising and promotion), clause 6 (licence fee or levy – payable whether or not the Marks are used), clause 7 (protection of the Marks), and clause 8 (indemnity). On the other hand, the Company gets little in return – in effect, only the non-exclusive right to use the Marks. Moreover, it is in the fragile position of knowing that the Licence Agreement might be terminated at any time on 3 months' notice.

59. Mr Walker in his evidence was especially concerned about the long-term impact of the 6% licence fee or levy which he said was likely to affect matters such as the Company's ability to attract and retain talent, its ability to bid competitively, and its ability to expand. In cross-examination, Mr Walker gave a little more context. He accepted that the trend in recent years had been one of increased turnover and profitability (see above); he also confirmed that the Company had expanded its operations internationally

and over the last 10 years had opened new offices in Beijing (2014), Hong Kong (2017), Shenzen (2023) and Berlin (2023). But he expressed some concerns over the prospects of continued long-term success. At one point he said:

> "*I mean, until now it's clear that the business has been very successful and we can afford the levy. That's not an issue for me and I think it may be undisputed. The concern is the longevity of the business, whether it can sustain this in perpetuity. I think of it a little bit like maybe somebody trying to swim with rocks in their pockets that, you know, although a strong swimmer might be able to sustain that for a period of time, but under say, for example, the next generation of leadership if they are not as enterprising and if they are not able to secure the necessary work that they have to do year on year, eventually the burden could become too much for the business*."

60. Another articulation of the case, offered in submissions, was more precise. Mr Bloch referred to the judgment of Diplock LJ in Petrofina (Great Britain) Ltd v. Martin [1966] Ch 146, at p.180 where Diplock LJ cited the following extract from the opinion of Lord Parker of Waddington in Attorney-General of the Commonwealth of Australia v. The Adelaide Steamship Co. [1913] AC 781, p. 793 (emphasis added):

> *"At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests …".*

61. Mr Bloch argued that here, Clause 5.1 in particular operated to inhibit the Company's freedom to act as it considered most desirable. That is the clause requiring the Licensee and its Group Companies to "*use their best endeavours to promote and expand the supply of Licensed Services throughout the Territory [i.e., the World] on the maximum possible scale*." Mr Bloch KC gave an example: the directors of the Company might think it better to resist the idea of further expansion and to focus on being a smaller, niche business. On the face of it, Clause 5.1 would fetter their ability to do so. That was a restraint of the type Diplock LJ had in mind in the Petrofina case.

62. Mr Bloch said there were other issues as well. He referred to the Foundation's ability to terminate the Licence Agreement on 3 months' notice under clause 12.2. He said that left the Company in a fragile position, because its ability to use the Marks could be removed at short notice, and that might limit its ability (for example) to raise third party finance. He sought to draw a parallel with certain principles of EU competition law as illustrated by cases such as Case C-320/87 Ottung v. Klee & Weilbach A/S [1991] FSR 657 at [13], and C-567/14 Genentech Inc v. Hoechst GmbH [2016] BUS LR 1016 at [40].

63. Despite these submissions, I have great difficulty seeing how the Licence Agreement operates in restraint of trade as a matter of English law. (Respectfully I do not consider that the EU authorities cited, which deal with a very different context, are helpful comparators; and to be fair to Mr Bloch KC, the point was not pressed with any real vigour).

64. The nature of the bargain struck by means of the Licence Agreement is simple enough. The Company was given the right to use the Marks indefinitely, subject to the right of the Licensor to remove it on notice; but in the meantime, and for so long as the Licence Agreement persisted, the Company obtained something which was plainly of very significant value to it, namely access to the name Zaha Hadid. There is no doubt that the prestige associated with the name has contributed to the Company's success: references to Dame Zaha are still prominent on its website.

65. In return for access to the Marks, the Company agreed to the various obligations (some of them imposing limitations) I have described above. But they are all rationally and commercially defensible. It was entirely rational (for example) for the Licensor to demand a royalty in return. That is an entirely standard thing. Likewise, it was entirely rational for the Licensor to impose requirements as to things such as quality control and the undertaking of marketing and promotion activities.

66. The Company complains that these clauses, taken in combination, are unduly onerous and reflect a one-sided bargain that the Company cannot escape from – principally, it is required to pay too much by way of the 6% levy and that is an ongoing burden; it is required to use its best endeavours to promote and expand the supply of Licensed Services throughout the World when it might want to do other things; and all the while its licence may be revoked on a whim at any time.

67. It seems to me, however, that these are really just complaints about the nature of the bargain struck, which do not take one into the territory of restraint of trade. In my view a party which has by contract secured the right to use a valuable trade mark, with the intention of using it in the promotion of its trade, and which has done so successfully for a number of years, and which thinks it might be able to do the same in the future if it has appropriately driven and ambitious leadership (a point which was implicit in Mr Walker's evidence: above at [59]), is not subject to a restraint of trade in any meaningful sense.

68. As I see it, the real nub of the Company's complaint is that it has come to think it is paying too much for the right it has acquired, and considers that if it was paying less it could charge more competitively; or it has acquired the right on terms which it has come to regard as commercially onerous, and thinks it would be able to conduct its business in a more agile manner in the future, if the terms were different.

69. The trouble is that that is really the same as saying it wishes the terms were more generous, but almost every contracting party could say the same thing; and if the test for the existence of a restraint were whether, had a more favourable package of terms been agreed, the relevant party would be able to manage its affairs differently, then commercial life would become inherently unpredictable. So my starting point is that no legally relevant restraint is identified. All the Company says it is prevented from doing is possibly managing its very successful business in a different way: but to my mind that is not enough.

<u>Public policy test of reasonableness/reasonableness of the restraint</u>

70. The next two questions can be considered together – i.e., whether there is a basis for subjecting the terms in fact agreed to a public policy test of reasonableness, as a prerequisite to them being enforceable; and whether, if that test is to be applied, the

terms were reasonable or not. There is an overlap between the two questions, and " ... *the analysis has to be an iterative one between them ...*" (per Arden LJ in Proactive Sports Management Limited v. Rooney [2012] 2 All ER (Comm) 815 at [59], quoted by Carr LJ in Quantum Advisory at [66]). A number of points may be made.

71. One can again start with the Company's general attack on the one-sided nature of the Licence Agreement, which Mr Bloch characterised as unusual and unreasonable. As noted, the general thrust of this complaint was about the effect of the Licence Agreement as an overall package of terms on an ongoing basis, including the idea that the Foundation might bring the Licence Agreement to an end on 3 months' notice while the Company itself is locked in with no ready means of escape. Mr Bloch particularly emphasised the effect of the royalty or levy, which he said went beyond any level reasonably necessary to protect the legitimate interests of the Foundation: he argued that was demonstrated by the fact there was nothing to demonstrate expenditure by the Foundation on charitable causes, despite receiving approximately £21.4m from the Company in royalties since 2018 and despite holding total assets valued as approximately £40m.

72. The difficulty with such a general criticism, however, is that it takes the Court into the territory of having to pass judgment on the overall commercial reasonableness of the parties' bargain. Looked at purely in isolation, one might say that payment of a 6% royalty on the terms prescribed by the Licence Agreement looks high; but that is only one side of the equation. On the other side are the benefits which have accrued to the Company from having access to the Marks on those same terms, which seem to have been considerable, and which it appears might continue to be significant in the future, depending on other commercial drivers (such as the abilities of its management and staff) affecting the Company's overall performance.

73. On this point, I agree with the submission of Mr Abrahams KC that it is difficult, if not impossible, for the Court to subject the overall effect of the Licence Agreement to a form of qualitative assessment, to try and work out where the balance of commercial reasonableness lies between the parties. That cannot be what the "*public policy test of reasonableness*" requires. There is no public policy which demands that an apparently profitable commercial bargain will be enforced only if, looked at as a whole, it confers an equal (or not disproportionately unequal) balance of burdens and benefits on the parties to it. Such an approach would create great uncertainty, and the Court does not have the tools available to carry out the sort of exercise that would be required.

74. I should say that neither am I persuaded that Mr Bloch KC's argument about charitable expenditure makes any difference. If there is such an issue it is really for the Trustees of the Foundation in the first instance, and if necessary, ultimately for the Charity Commission.

75. I think there is a related point about the circumstances in which the Licence Agreement was entered into. Such considerations are relevant because a commercial agreement entered into on an arms' length basis is much less likely to require application of a public policy filter, or to fail any public policy test of reasonableness, than (say) an individual contract of employment entered into between parties of unequal bargaining power (see, for example, Quantum Advisory at [57]).

76. Mr Bloch KC said that in this case, there was a clear imbalance of bargaining power between the parties, and that was a highly relevant factor. He relied on Mr Schumacher's evidence to the effect that when he was presented with the Licence Agreement, he did not really feel it was for him to question it. Mr Schumacher said that Dame Zaha had very well attuned antennae for mistrust, and if he had suggested taking legal advice or inviting the Company's board to review the proposed terms, Dame Zaha would have been offended.

77. Again, however, I am not persuaded by this. I would make two points. First, I am sure Dame Zaha was a powerful figure and had clear ideas about what she wanted to achieve. All the same, for the purposes of entering into the Licence Agreement, she had declared a conflict, and the Company had been encouraged to take legal advice. Although it did not do so, the fact is that Mr Schumacher was himself a director at the time and had the means available to seek to protect the Company. He was not without agency, and indeed as a director had his own duties under the Companies Act 2006.

78. The second point is perhaps more fundamental, and concerns what emerged from the evidence as a central concern of the Company's current management. This was about the potential to trade freely in the future under a different name (i.e., not Zaha Hadid), without having to pay ongoing royalties under the Licence Agreement. The point made by the Company was that the Zaha Hadid name had diminishing significance, and although certainly it had had significant value historically, that would not continue indefinitely, and so it was an unreasonable fetter on its ongoing activity for it to have to pay royalties on the whole of its taxed income, *whether or not that was earned using the Zaha Hadid Marks*.

79. This gave rise to an issue of fact. The Foundation's case was that Dame Zaha (and everyone else) intended that the Company would continue to trade under her name in perpetuity. Mr Schumacher and Mr Walker both denied this and said that, consistently with what had happened in other premier architectural practices, Dame Zaha would have realised that her name had only finite value, and thus would have been entirely open-minded about allowing the practice she had founded to develop with a new generation of owners under a different name, and without restriction. Mr Schumacher said as follows during his examination in chief, when asked for his perception of Dame Zaha's intentions:

> *" ... she would have considered us continuing with the name for some time, possibly a transition period, but not a necessity of us trading in perpetuity under her name. I actually have evidence that she wouldn't have such ideas, because we had once discussed putting my name next to her in the firm or even coming up with a neutral name as I grew more and became a kind of nearly equal partner. So I know that she wouldn't have insisted on us."*

80. I am rather cautious about such evidence as a basis for inferring Dame Zaha's intentions, but even if I accept it, it seems to me that it only counts against the Company's case. What it appears to suggest is that Dame Zaha, if asked at the time, would have been open to discussion about some provision in the Licence Agreement designed to address just the commercial concern underpinning much of the Company's present complaint. If that is correct, then the reason such a provision was not included

is not because of some inequality of bargaining power, but because the Company did not ask for it at the time. The restraint of trade doctrine does not exist to allow parties to write into contracts terms which could have been included but which for one reason or another were overlooked. Where businesses have dealt with each other at arms-length, they are likely to be regarded as adequate guardians of their own interests (Quantum Advisory at [63]). That seems to me apt to describe this case, insofar as the Company was empowered to negotiate for just the forms of protection it now says it needs, and which its own evidence suggests it would likely have been given had it asked for them.

81. Moving from the general to the particular, it seems to me that the high watermark of Mr Bloch KC's case, when pressed on it in submissions, was really his point about Clause 5.1 of the Licence Agreement: the provision requiring the application of best endeavours in the promotion of Licenced Services around the World.

82. Leaving aside the fact that this submission was something of a departure from the pleaded case, it strikes me as rather counterintuitive to describe Clause 5.1 as operating in restraint of trade. It looks more like an encouragement to trade. If there is a restraint, it is at most a fetter on the Company's ability to have more limited commercial ambitions. If the question is whether it is necessary to subject this provision to a public policy test of reasonableness as a precondition to it being enforceable at all, I would think not. Best endeavours obligations are not unusual. Implicit in all of them is an agreement to limit the relevant party's ability to act in a different and perhaps less ambitious manner than the clause might require. If that is a legally relevant form of restraint (see per Diplock LJ in Petrofina, referenced at [60] above), I would say it is not one that engages any principle of public policy; or at any rate, I would say that the best endeavours provision in Clause 5.1 of the Licence Agreement is not such as to do so. If a test of reasonableness is to be applied, I would say the Clause is reasonable in the relevant sense. Dame Zaha having granted a licence of the Marks had an obvious interest in their successful exploitation and indeed in the success generally of the company through which she had traded for a number of years. Looked at in context, I see nothing unreasonable in her requiring of the Company the sort of commercial ambition inherent in the best endeavours undertaking in Clause 5.1. I have already noted above the circumstances in which the Licence Agreement came to be executed, which again are relevant to the question of reasonableness. And even if all that is wrong, then as Mr Abrahams KC pointed out, the obvious form of relief would be to strike down Clause 5.1 itself as a restraint of trade, not to rewrite the termination provision in Clause 12, which is the form of relief the Company actually seeks (see above at [8]).

VII. Conclusion and Disposal

83. For the reasons given above, the Company's claim is dismissed. I am very grateful to the parties' counsel and solicitors for their assistance so far, and hope they will be able to agree the terms of a draft Order reflecting the outcome of this Judgment.