Neutral Citation Number: [2023] UKUT 284 (LC)

Case No: LC-2023-188

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)
FTT Ref/2017/999/1001/1002 and 2019/0002/0006/0007

Manchester Civil Justice Centre

1 December 2023

LAND REGISTRATION – RESTRICTION – contract for investment in development to be secured by legal charge – whether implied term of contract that land not to be sold before charge registered – whether restriction registerable to prevent breach of implied term – s.42(1)(a), Land Registration Act 2002 – appeal dismissed

BETWEEN:

DARREN STUART YARNOLD and
CHRISTOPHER GARETH BROADBENT (1)
MICHAEL JOHN OWEN and KIMBERLEY MARIE OWEN (2)
KATYA LOUISE LYON and DONOVAN MARK LYON (3)

Appellants

-and-

SENADA ZIGA (1)
SENSAR LIMITED (2)
ADIL RAZOQ (3)
AZDAR LIMITED (4)

Respondent

Re: 1, 5 and 9 Springbank Gardens,
Platt Bridge, Wigan

Martin Rodger KC, Deputy Chamber President

24 October 2023

S.M. Booth, instructed by Nyland and Beattie, solicitors, for the appellants
Dr Adil Razoq on his own behalf and for the other respondents

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The following cases are referred to in this decision:

Ali v Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531

Hallman Holding Ltd v Webster [2016] UKPC 3

Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd [2015] UKSC 72; [2016] AC 742

R (Sensar Ltd and Azdar Ltd) v The Chief Land Registrar [2018] EWHC 888 (Admin)

R (Sensar Ltd and Azdar Ltd) v The Chief Land Registrar [2021] EWHC 13 (Admin)

Yoo Design Services Ltd. v Iliv Realty Pte Ltd [2021] EWCA Civ 560

Introduction

1. The respondents to this appeal are the victims of a fraud perpetrated on them in 2014 and 2015. They invested money in a property development scheme on the understanding that their investment would be secured by a legal charge but before the charge was registered the owner of the property in question contracted with the appellants for them to purchase parts of it. When they realised that their investment was not protected, the respondents tried to enter a restriction to prevent the disposition of the property. The issue in this appeal is whether they were entitled to such a restriction.

2. The appeal is against an order of the First-tier Tribunal (Property Chamber) (Principal Judge Michell) (the FTT) dated 17 February 2023. The FTT directed the Chief Land Registrar to give effect to an application made on 23 December 2014 by the respondents, Ms Senada Ziga on behalf of Sensa Ltd and Dr Adil Razoq on behalf of Azdar Ltd, to enter a restriction on the registered titles of two parcels of land at Platt Bridge in Wigan. The application had been the subject of objections by the appellants, Mr Yarnold and Mr Broadbent, Mr and Mrs Owen, and Mr and Mrs Lyon, but these were overruled by the FTT.

3. The application to enter a restriction was made under section 42(1)(a), Land Registration Act 2002, on the basis that it was necessary or desirable to prevent unlawfulness in relation to the disposition of the registered estates. The FTT was satisfied that so called "joint venture agreements" between the respondents and the registered proprietor of the land, Newbury Venture Capital Ltd, contained an implied term that the land was not to be sold without the respondents' consent until legal charges had been executed to secure money advanced by them to fund its development. By the time the appellant couples each contracted to purchase one of the newly constructed houses on the land no legal charges had yet been executed. The FTT was satisfied that dispositions of the houses to the appellants would involve unlawfulness because they would breach the implied term it found in the joint venture agreements.

4. The FTT refused permission to appeal its order, but permission was granted by this Tribunal on 5 May 2023. At the hearing of the appeal the appellants were represented by Mr Booth and the respondents by Dr Razoq, both of whom had appeared before the FTT. I am grateful to them for their submissions.

The relevant statutory provisions

5. Before considering the facts in a little more detail it is necessary to refer to the applicable provisions of the Land Registration Act 2002 (the LRA 2002). Hereafter, statutory references are to the LRA 2002.

6. Interests in registered land may be protected either by a notice or by a restriction. In simple terms, a notice protects the priority of an interest, while a restriction prevents the registration of any disposition of a registered estate except in accordance with the terms of the restriction (see Megarry & Wade, The Law of Real Property (9th ed., 2019) para. 6-069).

7. A person who claims to have the benefit of an interest affecting a registered estate may apply for the entry of a notice on the register the effect of which will be to protect the priority of their interest: ss.32, 34(1). An application may be made either for an agreed notice or for a unilateral notice: s.34(2). The priority of an interest may be protected by a unilateral notice without the agreement or cooperation of the registered proprietor.

8. A restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register: s.40(1). A restriction may prohibit the making of an entry in respect of a disposition either indefinitely, for a specified period, or until the occurrence of a specified event: s. 40(2). A "specified event" can include the giving of notice or the obtaining of a consent: s.40(3)(a)-(b).

9. The Registrar has power to enter a restriction in the circumstances provided by s.42(1)-(2), as follows:

> "**Power of registrar to enter**
>
> (1) The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of—
>
> (a) preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
>
> (b) securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or
>
> (c) protecting a right or claim in relation to a registered estate or charge.
>
> (2) No restriction may be entered under subsection (1)(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice."

10. Anyone may object to an application for a restriction. If the Registrar considers that an objection is groundless, it will be cancelled and the application for the entry of the restriction will be determined. If the objection is not thought to be groundless, the Registrar will give notice of the objection to the applicant, and if the objection cannot be resolved by agreement between the applicant and the objector, the matter will be referred to the FTT. Until the objection is resolved the application for the restriction cannot be determined.

The Joint Venture Agreements

11. Newbury Venture Capital Limited (NVC) was registered as proprietor of title numbers GM 514222 and GM 554260 on 14 April 2014. On the same date a first charge in favour of Lancashire Mortgage Corporation Ltd was registered against both titles. In anticipation of development, which was to be known as Springbank Gardens, the land was divided into a number of plots, most of which straddled both registered titles.

12. On 22 July 2014, Ms Ziga entered into three agreements with NVC on behalf of her company, Sensar Ltd, each described as a "JV [joint venture] Agreement" for the purchase, redevelopment and re-sale of one of the plots (plots 1, 2 and 3). The following day Dr Razoq entered into three JV Agreements in substantially the same form on behalf of his company, Azdar Ltd, concerning plots 4, 5 and 7. Each of the JV Agreements recorded an "investment" of £60,000 (or in one case £40,000) to be used by NVC for the purchase and development of the plot in question, and promised the return of that investment plus a £24,000 profit on the eventual sale of the plot, envisaged to occur within 14 to 26 weeks. A fourth JV Agreement was entered into by Dr Razoq (again on behalf of Azdar Ltd) on 28 August 2014, this time in relation to plot 8 and recording an investment of £35,000 and promising a return of £17,500 with that investment.

13. Each JV Agreement consisted of two documents which were sent to the respondents together. The first was a covering letter on NVC headed paper addressed either to "Senada Ziga (Sensar Ltd)" or to "Adil Razoq (Azdar Ltd)", and the second an agreement letter of the same date (again on NVC headed paper). The extracts quoted below are from the versions sent to Ms Ziga, but those sent to Dr Razoq differed only in the name of the addressee and some of the figures.

14. Each covering letter identified a plot number and both title numbers as the subject of a "Joint Venture". The writer, Brendan Keily of NVC (whose electronic signature was attached to the letter) then welcomed Ms Ziga to "our Joint Venture Scheme" before continuing:

> "Once our solicitors HSK solicitors are in receipt of your investment of £60,000 NVC Legal Solicitors who act for you will write to you confirming when security of your investment has been registered against the property at HM Land Registry. HSK and NVC Legal will hold a copy of this agreement and the Loan Agreement on file. A CH1 will be registered as a First Legal Charge against the Property, which will protect your interest and stop the Property being sold without your consent. An updated schedule of profit will be provided to you for approval prior to exchange of contracts with any prospective purchaser.
>
> Upon sale of your JV property we will transfer £24,000 to your Solicitors plus return of your original £60,000 capital. A property account detailing all expenditure and building work cost will be provided prior to exchange of any contracts.
>
> The legal charge will record a longstop date of 12 months before which you cannot seek to enforce the charge for return of your funds in the event of a sale not taking place.
>
> If the legal charge is enforced by yourself, we additionally agree to pay an amount equivalent to 6% per month on your original capital invested in the amount of £3,600 per month.
>
> We envisage re-sale of the Property taking place a lot sooner than this. The projected re-sale time should be 14-26 weeks. […]"

The letter ended by listing the next actions required. The respondents were to sign and return the agreement, deposit, provide confirmation of identity and source of funds, and transfer the agreed sum. For its part "NVC Legal will securitise your investment". It was common ground that, in this context, "securitise" meant "secure" and referred to the legal charge which was to secure the respondents' investment.

15. The second document, the agreement letter, was also signed by Mr Keily and stated that it "forms the legal agreement between us and sets out the terms of the JVA". Notwithstanding that statement, it is common ground between the parties that the two documents should be read together and that, jointly, they record the terms of the agreement. That understanding was accepted by the FTT, which noted the reference in the covering letter to "this agreement and the Loan Agreement", indicating that both documents were intended to record agreements; I agree that it is the appropriate way to read the two documents.

16. The agreement letter continued:

> "Newbury Venture Capital will be entirely responsible for the Development, Completion and re-sale of the Property. They will report progress on the project to you each month or as otherwise agreed.
>
> In consideration of you today transferring the sum of £60,000 ("Investment") to NVC Legal it is hereby agreed that the Investment shall be used towards the purchase & development costs of the Property. The investment is to be securitised against the Property by a CH1 First Legal Charge at HM Land Registry until the Property has been sold or until 22nd July 2015 whichever is sooner.
>
> We hereby agree to pay you upon resale of the Property £24,000 and your original investment of £60,000.
>
> Your investment is made with full knowledge and acceptance that the investment will not be returned to you until the Property has been sold save that where this has not occurred by 23rd July 2015 then … upon receiving notice in writing from you of your desire to realise your investment we will refund your investment within 10 working days of expiry of such notice. Upon receipt you will sign such deed or documents to release the legal charge over the Property and acknowledge that no further monies are due from us to you and the JVA has been terminated and there is no further liability from us to you. It is agreed that in the event of no sale by 23rd July 2015 your legal charge may be enforced. You will receive £60,000 plus £3,600 per month until sale completion."

17. The form CH1 which was referred to in both parts of the agreement provides an option for the borrower to apply to enter a restriction but does not require them to do so, and granting a charge in form CH1 does not by itself impose an obligation on the borrower to obtain the consent of the lender before a sale.

18. The agreement letters were signed by the respondents who then advanced a total of £375,000 to NVC. Although the agreement letter refers to CH1 charges and to a "legal

charge to be signed with this agreement", no such charges were ever entered into. The covering letter also refers to "NVC Legal Services who act for you" but the FTT found that there was no evidence of communication between them and the respondents or that they ever gave any advice to Dr Razoq, Ms Ziga or their companies.

The appellants' purchases and the respondents' application for a restriction

19. Thereafter the precise course of events is less clear. A letter before action settled on behalf of the respondents later asserted that NVC had repeatedly and falsely represented that it had made applications to the Land Registry to register charges. On 18 December 2014 the respondents demanded repayment of the money advanced. I do not know whether they had yet become aware that NVC was taking steps to sell the houses which had by now been built on the various plots.

20. Three of the proposed sales were to the appellants, who entered into contracts with NVC towards the end of 2014 or early in 2015. Each contract was between NVC and one of the couples and was for the grant of a lease of one of the plots for a term of 999 years. Pursuant to their contract Mr Yarnold and Mr Broadbent purchased a lease of plot 1 dated 17 December 2014 which their solicitors attempted to register using a form AP1 which was received by the Land Registry on 27 January 2015. Mr and Mrs Lyon new lease of plot 3 was granted on 30 January 2015 and an application to register it was made on 3 February 2015. Mr and Mrs Owen were granted a lease of plot 5, also on 30 January 2015, and an application to register it was made on 17 February. The same firm of solicitors, Nyland and Beattie, acted for each of the appellants in these transactions.

21. When they were made aware of the applications to register leases Ms Ziga and Dr Razoq objected to them.

22. Each of these applications was received by the Land Registry after 23 December 2014, the date on which the Registry received an application by Ms Ziga dated 18 December for a restriction to be entered against titles GM 514222 and GM 554260 in respect of plots 1-5, 7 and 8. The application was made using a single Form RX1 naming Ms Ziga and Dr Razoq as the applicants, and the restriction requested was in the following terms:

> "No disposition of the registered estate by a proprietor of the registered estate is to be registered without a written consent signed by either of the applicants (Adil Razoq and Senada Ziga …) or their conveyancer."

23. The application explained that the respondents had advanced money to the registered proprietor under a joint venture to develop the land, that representations had been made to them by the registered proprietor that their beneficial interest would be protected by a first legal charge on the estate, which has not yet been registered, and that they were concerned that they would lose their security if this restriction was not entered. In the course of exchanges with the Land Registry the basis of the application was refined and came to focus on section 42(1)(a) and the prevention of unlawfulness. The unlawfulness in question was identified as the disposition of the registered estates in breach of contract.

24. The Land Registry considered the application for entry of a restriction at some length before initially concluding that it was inadmissible and should be cancelled. Its reasons were explained at length in a decision letter dated 8 July 2016, the substance of which was follows:

> "The papers […] do not show either specific consent from the registered proprietor for a Form N consent restriction, or documentation that specifies that such dispositions by the proprietor involving this land would specifically be in breach of contract or a breach of trust. [...]
>
> Unlawfulness does not relate to simple breaches of contract; it goes far beyond this. […] You would need to show specific documentation such as an act, or constitution of a company, or a specific agreement/consent that sets out clearly that the powers of disposition of the registered proprietor had been restricted in some manner. Further, that documentation would need to specifically relate to the land in title GM 514222 which is the subject of this application.
>
> […] You have not lodged any such documentation showing that your consent is formally required by the proprietor when dealing with the land and as such have not shown sufficient grounds for the type of restriction applied for."

25. The respondents challenged the Land Registry's July 2016 decision to cancel their application in judicial review proceedings which culminated on 12 March 2018 in a decision of His Honour Judge Barker QC (sitting as a judge of the High Court) (*R (Sensar Ltd and Azdar Ltd) v The Chief Land Registrar* [2018] EWHC 888 (Admin)). The Judge quashed the decision and remitted the application to the Chief Land Registrar for reconsideration. The foundation of the Judge's decision was his apparent acceptance (contrary to the view of the Land Registry) that the JV Agreement did include a requirement that the consent of the respondents was to be obtained before any disposition. At paragraph [50] he paraphrased the agreement as: 'a form requiring consent in the following terms, "The property is not to be sold without the consent of either Senada Ziga (Sensar Limited) or Adil Razoq (Azdar Limited)"'. He went on at paragraph [57] to dismiss the Registrar's argument that a simple breach of contract could not amount to "unlawfulness" for the purpose of section 42(1)(a) of the 2002 Act, for these reasons:

> "Unlawfulness is not defined in the statute. When a contract is made providing for a consent to be obtained before the registered proprietor disposes of a registered estate and the contracting party's consent is linked to some contractual interest of the contracting party in the disposition of that estate (such as here triggering a right to repayment of the loan or investment plus a defined profit) and further where there is a risk of breach of the contract by the registered proprietor in failing to seek or obtain consent, it is difficult to see why that should fall outside the scope of unlawfulness under section 42(1)(a) of the Land Registration Act 2002 and debar the contracting party from the entry of a restriction concerning the contracting party's consent."

26. In his submissions in this appeal, Dr Razok relied heavily on Judge Barker QC's observations about the effect of the JV Agreement, but he recognised that they were not determinative of any issue before this Tribunal. As the Judge himself had explained at

paragraph [29], his decision was a review of a decision of a public authority by a judge who was not in a position to substitute his own view of the correct decision for that of the Land Registry. He was persuaded that "the decision taken was not based on a sufficiently careful review of the documents lodged, supplemented by the raising of appropriate requisitions" and (whatever view he took of the meaning of the agreement) it was for that reason that the challenge to the decision to cancel the applications succeeded.

27. When the application was remitted to the Land Registry it invited representations from the appellants, whose solicitors asserted that the JV Agreement contained nothing which restricted the disposition of the property by NVC. Such a disposition would therefore not be a breach of contract on the part of NVC and would not amount to unlawfulness within the ambit of section 42(1)(a). After further consideration, and after initially indicating that the objections would be rejected and that entry of the restriction would proceed, the Land Registry eventually concluded (without giving reasons) that the appellants' objections to the restriction were not groundless. On 21 December 2018, it referred the applications for restrictions and the appellants' objections to the FTT.

28. Dr Razoq and Ms Ziga were dissatisfied with the Land Registry's decision and again sought and obtained permission to apply for judicial review. The FTT stayed its proceedings pending the judicial review which concluded on 5 January 2021 with a determination by Morris J (*R (Sensar Ltd and Azdar Ltd) v The Chief Land Registrar* [2021] EWHC 13 (Admin)). His conclusion was that, notwithstanding the failure to give reasons and other procedural unfairness, the Land Registry had been entitled to conclude that the appellants' objections were not groundless and that the statutory scheme required that those objections be considered by the FTT before the entry of a restriction could proceed.

29. Once again, it is not suggested that Morris J's decision is determinative of any issue in this appeal, but it was the respondents' case on the second judicial review that the JV Agreements were only capable of one interpretation, so it was necessary for the judge to consider their effect. He did so at [120]-[123], including the following:

> "120. […] It is arguable, that, as a matter of construction of the JVA, the contract itself does not impose a consent requirement; rather it imposes a requirement to register a CH1 which in turn, if and when registered, will impose a requirement of consent. […]
>
> 122. The Claimants' strongest argument that a disposition would amount to a relevant breach of contract is the contention that, because of the prior breach of contract in failing to register a CH1 charge, (and thereby failing to create a requirement of consent), a subsequent disposition by NVC without the Claimants' consent is itself a breach of contract.
>
> 123. That the failure to register the CH1 charge is a breach of contract seems to me to be very arguable indeed. But the question is whether disposition without the Claimants' consent, in circumstances where there has been a *prior* breach by failure to register the CH1 (and where, but for that breach, disposition without consent would have been impossible or a breach of the CH1 or otherwise unlawful) is itself a breach of contract. That is a contention which is not bound to succeed and certainly not one which no reasonable

> decision maker could find was bound to succeed. A contention that the breach of contract there relied upon has already occurred prior to the disposition (and was not constituted by the disposition itself) could not be regarded as hopeless."

The outcome of the second judicial review application was therefore that the appellants' objections to the entry of the respondents' restriction, and the appellants' own applications for registration of their leasehold titles, to which the respondents' objected, were all allowed to proceed to the FTT for determination.

30. I can briefly complete the account of the respondents' dealings with NVC. As well as applying to register the restriction the two respondent companies commenced a separate action in the High Court in January 2015, eventually obtaining summary judgment against NVC for more than £580,000 plus interest. On 14 August 2015 final charging orders were registered against NVC's interest in the two Springbank Gardens titles. Many others had been induced to lend money to NVC on the promise of similar gains, and eventually, on 11 February 2016, NVC was wound up by order of the High Court under the Insolvency Act 1986 on grounds of lack of transparency and lack of commercial probity.

The FTT's decision

31. There was a certain amount of common ground by the time the matter came before the FTT. At [38], the Judge recorded that counsel for the appellants, Mr Booth, accepted "that if it was a breach of contract to sell the plot without consent then a sale would amount to "unlawfulness" within the meaning of s.42(1)(a)". That acceptance enabled the Judge to concentrate on the proper interpretation of the JV Agreement.

32. The Judge identified the key issue to be determined, at [39], as follows:

> "Are Ms Ziga and Dr Razoq (or Sensar Ltd and Azdar Ltd) entitled to the entry of a restriction to prevent the disposition of the plots the subject of the joint venture agreements without the consent of the party to the joint venture agreements? […] If Ms Ziga and Dr Razok and their companies succeed on that issue, then the applications to register the leases will fail because consent to their grant has not been given."

It would only be necessary to consider the respondents' various alternative arguments that they had some form of equitable interest or charge that could prevent registration of the leases if they failed on this key issue. The Judge also explained that he had postponed consideration of further objections by Ms Ziga and Dr Razoq to the applications to register the new leases which had been referred to the FTT by the Land Registry only seven days before the hearing. These would be dealt with at a later date if necessary.

33. The Judge began his discussion of the effect of the agreement by considering whether it contained an *express* term that NVC would not sell the plot without the consent of the other party. He decided that it did not: "an agreement that an investment or loan will be secured by a legal charge is not by itself an agreement that the plot will not be sold without the consent of NVC". That might, in practice, be the effect of the registration of a

charge (unless the chargor could find someone willing to acquire the land subject to the charge) but its effect in law was to give the chargee rights in the land which would bind a purchaser precisely so that the chargee would be protected if the land was sold without their consent. The statement in the covering letter that the registration of the intended charge would "stop the Property being sold without your consent" was treated by the Judge as a statement of the practical effect of the registration of the charge and not as an express term that the property would not be sold where a charge had not been registered.

34. The Judge then considered whether some relevant term could be *implied* into the agreement. He directed himself by reference to the decision of the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72 on the implication of contractual terms. A term will be implied into a contract where it is necessary to do so to give effect to the intention of the parties in the light of the express terms of the contract, commercial common sense and the facts known to the parties at the time of entry into the contract. He also referred to the four part test for determining whether a term could be implied into an ordinary business contract (taken from *Hallman Holding Ltd v Webster* [2016] UKPC 3 at [14]), namely: (1) the term must be necessary to give business efficacy to the contract; (2) it must be so obvious that it goes without saying; (3) it must be capable of clear expression; and (4) it must not contradict an express term.

35. The Judge then addressed each of these requirements in turn.

36. The intention of the parties was clearly that the investors' entitlement to repayment on sale and to interest was to be secured by a legal charge. That was stated both in the covering letter and in the agreement letter ("The investment is to be securitised against the Property by a CH1 First Legal Charge at HIM Land Registry"). The Judge considered that: "The agreement would clearly lack business efficacy if NVC could deprive the lender of the security that features so prominently in the agreement documentation, namely a legal charge, simply by selling before a charge was registered." He did not accept a submission by Mr Booth that the agreement could operate perfectly well without the implied term because the effect of the JV Agreements was to create equitable charges allowing the respondents to protect their position by entering a unilateral notice. The intention of the parties had been that the respondents would have the benefit of a legal charge and "the implication of a term that the plot could not be disposed of (unless the lender agreed) until a legal charge was registered is necessary to give business efficacy to the agreement that NVC would grant a legal charge".

37. As to the requirement that the term must be obvious, the Judge said this:

> "It seems to me to be so obvious that it goes without saying that NVC was not to dispose of the plots until the charge had been executed unless the lender agreed. The JV Agreement letters said expressly that the investment was to be "securitised against the Property by a CH1 First Legal Charge … until the Property has been sold". It is clearly implicit that the legal charge was to be granted and registered before the Property was sold. There is nothing at all in the agreement documentation to suggest that the parties could ever have intended that the plot could be sold before the legal charge was registered."

38. The Judge was also satisfied that the suggested implied term was capable of clear expression and did not contradict any express term. He found that each agreements included an implied term that the plot would not be disposed of before registration of the legal charge except with the consent of the lender. The grant of long leases to the appellants were disposals in breach of that term and were "unlawful" in that sense. The entry of a restriction was "necessary or desirable" to prevent that unlawfulness. On that basis the Judge directed the Chief Land Registrar to give effect to the respondents' application received on 23 December 2014.

The grounds of appeal

39. Permission to appeal was given by Judge Cooke. It is necessary to refer to the terms of her order of 5 May 2023 before considering one of the points made by Dr Razoq in response to the appeal. The Judge granted permission as follows:

> There is a realistic prospect of a successful appeal in this case on the ground that the First-tier Tribunal erred in law by implying a term into the contracts between [NVC and the respondent companies] that dispositions of the properties concerned were not to be disposed of before the registration of a legal charge without the consent of [the respondent companies]. In each case the latter two companies had an equitable charge which (in the event that no legal charge was registered) they could have protected by the entry of a unilateral notice on the register, and so it is arguable that the implied term was not necessary to give business efficacy to the contracts."

40. Dr Razoq invited me to proceed on the basis that the scope of the permission to appeal granted by the Tribunal was limited to arguing that the implied term was not necessary to give business efficacy to the contracts. He argued that the appellants did not have permission to challenge the FTT's finding that the implied term was so obvious it goes without saying and pointed out that the Judge had specifically refused permission on "the rest of the grounds of appeal". Accordingly, he submitted, the appeal could not succeed since as it was sufficient that an implied term be obvious, even if it was not necessary to give business efficacy to the contracts

41. I do not accept Dr Razoq's argument about the scope of the permission granted to the appellants, for three reasons.

42. First, Judge Cooke cannot have intended to grant permission for an appeal which was bound to fail. If the first and second of the tests listed by the Privy Council in *Hallman Holding Ltd v Webster* are indeed cumulative rather than alternative, as Dr Razoq argued, he would be right that the appeal would be pointless, and that cannot have been the intention.

43. Secondly, the order granting permission to appeal must be read as a whole and, reading the paragraph quoted above, I do not consider that the general description of the ground of appeal in the first sentence is intended to be restricted by the second sentence in the manner suggested by Dr Razoq.

44. Thirdly, the order must also be read in its proper context, which includes the terms in which permission had been requested. In the first ground of his application for permission to appeal, Mr Booth did not distinguish between the issues of business efficacy and obviousness, and sought permission to argue that the FTT had been wrong to find the implied term was "necessary to give business efficacy thereto and […] obvious, notwithstanding the fact that the contracts created equitable charges that could have been adequately protected by the entry of a notice on the register". Judge Cooke dealt specifically with seven other grounds of appeal for which consent was sought, none of which related to the test for implying a contractual term and each of which she refused. She plainly did not intend additionally to refuse the appellants permission to argue that the term found by the FTT did not satisfy the requirement that it was so obvious it goes without saying. She did not say she was granting permission for only part of the first ground of appeal, she gave no reason for refusing permission on the remainder of that ground, and she focused on the potential significance of the respondents' right to enter a unilateral notice, which was a point made by Mr Booth in relation to both business efficacy and obviousness. It is clear to me that the appellants are entitled to challenge the FTT's reasons for finding an implied term in their entirety.

45. There is one further point about the scope of the appeal. Dr Razoq had presented many different arguments to the FTT which it had not found it necessary to deal with because it was satisfied that the respondents should succeed on their primary argument. Dr Razoq is entitled to rely on those arguments without the need to apply for permission to cross-appeal because they are said to provide additional grounds for upholding the FTT's order. He deployed a number of them in the course of his submissions, and Mr Booth responded, but both concentrated their arguments mainly on the appellants' ground of appeal.

The appeal

46. Mr Booth prefaced his submissions in support of the appeal by helpfully reminding me of the most recent restatements by the Supreme Court and the Court of Appeal of the principles relevant to the implication of terms, beginning with *Marks & Spencer v BNP Paribas*. For a concise summary he relied on Lord Hughes JSC, sitting in the Privy Council in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, at [7]:

> "… the process of implying a term into the contract must not become the rewriting of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this may it be if (i) it is so obvious that it goes without saying (and the parties, although they did not, *ex hypothesi*, apply their minds to the point, would have rounded on the national officious bystander to say, and with one voice, "Oh , of course" and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion."

47. A further statement of the proper approach was provided by Carr LJ in *Yoo Design Services Ltd. v Iliv Realty Pte Ltd* [2021] EWCA Civ 560 at [51]:

> "51. In summary, the relevant principles can be drawn together as follows:
>
> i. A term will not be implied unless, on an objective assessment of the terms of the contract, it is necessary to give business efficacy to the contract and/or on the basis of the obviousness test;
>
> ii. The business efficacy and the obviousness tests are alternative tests. However, it will be a rare (or unusual) case where one, but not the other, is satisfied;
>
> iii. The business efficacy test will only be satisfied if, without the term, the contract would lack commercial or practical coherence. Its application involves a value judgment;
>
> iv. The obviousness test will only be met when the implied term is so obvious that it goes without saying. It needs to be obvious not only that a term is to be implied, but precisely what that term (which must be capable of clear expression) is. It is vital to formulate the question to be posed by the officious bystander with the utmost care;
>
> v. A term will not be implied if it is inconsistent with an express term of the contract;
>
> vi. The implication of a term is not critically dependent on proof of any actual intention of the parties. If one is approaching the question by reference to what the parties would have agreed, one is not strictly concerned with the hypothetical answer of the actual parties, but with that of notional reasonable people in the position of the parties at the time;
>
> vii. The question is to be assessed at the time that the contract was made: it is wrong to approach the question with the benefit of hindsight in the light of the particular issue which has in fact arisen. Nor is it enough to show that, had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred;
>
> viii. The equity of a suggested implied term is an essential but not sufficient pre-condition for inclusion. A term should not be implied into a detailed commercial contract merely because it appears fair or merely because the court considers the parties would have agreed if it had been suggested to them. The test is one of necessity not reasonableness. That is a stringent test."

48. Mr Booth adopted the FTT's finding that the contracts did not include any express term that NVC would not sell the plots before it granted a legal charge in favour of the respondents. The only way in which the respondents could be entitled to enter a restriction to prevent unlawfulness would be if the agreements contained an implied term to that effect. In Mr Booth's submission no such term could be implied into these agreements, which were simply loans with provisions for repayment.

49. Mr Booth submitted that the test of business necessity was not a test of reasonableness. To be implied a term must be one without which the contract would lack coherence or would simply not work. Necessity was a high bar which was not crossed in this case. The JV Agreements were complete in themselves, and their effective operation did not require the term proposed. The agreement was a loan with provisions for repayment. The promise of a legal charge was an obligation to provide security for that repayment, but the underlying agreement remained one simply for the payment of money.

50. There was a contractual obligation on NVC to grant a charge, and once the money was handed over by the respondents that obligation gave rise to an equitable charge which the Respondents could have protected by the entry of a unilateral notice. They did not need any additional protection.

51. Mr Booth argued against construing the agreement with the benefit of hindsight. The question has to be asked as at the date of entering into the contracts whether a contractual term restricting disposition was then necessary. The answer in Mr Booth's submission was that it plainly was not.

52. I take seriously Mr Booth's warning against construing the JV Agreements in light of the events which are now known to have occurred. In a case like this, where private individuals stand to lose substantial sums of money, the natural sympathy which the Tribunal feels for both the respondents and the appellants, who are equally blameless, must not be allowed to supplant the established principles.

53. Nevertheless, to some extent the circumstances which excite sympathy (and which would not be present in a normal commercial transaction) are part of the background to the JV Agreements against which they must be read. The documents do not have the look of conventional commercial arrangements and contain some distinctly odd provisions (not limited to the improbably generous guaranteed return of 40% in six months or less). As the FTT pointed out, although described as a "Joint Venture Scheme" these were not joint ventures in the conventional sense in that they involved no sharing of risk. The documents refer to monthly progress reports and to the provision of accounts and schedules of profits, but these do not appear to have been intended to affect the amount which was to be received by the "investor". It is difficult to read the agreements without forming the impression that they were intended to wrap what could have been expressed as a straightforward secured loan in layers of reassuring verbiage.

54. Prominent in those reassuring layers were repeated assurances that the lender's money would be returned to them. The mechanism by which this would be achieved was the intended first legal charge. The charge was the means by which the "investment is to be securitised"; any breach of the agreement would be an event of default under the terms of the charge, triggering a power of sale to recover the investment; in the event of a sale not being achieved, the charge would be released only when NVC had refunded the investment; alternatively, the charge could be enforced and the investor would receive their investment plus guaranteed return.

55. Responsibility for arranging the legal charge lay with "NVC Legal Solicitors who act for you". It is not clear whether the NVC Legal Solicitors referred to in the covering letter

were a firm of solicitors or simply another way of referring to NVC itself, but Mr Booth acknowledged that they were not independent of the borrower.

56. How would someone with knowledge of the relevant background understand the JV Agreement was intended to work? In particular, in what sequence would they understand the parties intended the various events provided for would occur. There can be no doubt, I would suggest, that it was intended that the registration of the legal charge would come before any possibility of a sale. Thus, the investment would be "securitised" by the charge "until the Property has been sold"; the charge "will protect your interest and stop the Property being sold without your consent".

57. I do not accept Mr Booth's submission that the agreement was simply a contract for the repayment of money with a fixed return, and I agree with the Judge that it would lack business efficacy if NVC could deprive the respondents of their security by selling before a charge was registered. Viewed objectively, the parties cannot be taken to have intended that the property would be sold before the legal charge was in place to provide the protection which featured so prominently in their agreement. Nor can it have been intended that the investor would simply rely on the borrower's voluntary restraint in not selling the property before the charge had been registered. It would make no sense for the respondents' capital to be at risk for as long as it took to register a charge, and secure only after that. The parties must therefore have intended that the borrower would not be entitled to sell until the promised security was in place. A contractual fetter preventing the property from being sold before the security was in place was not simply reasonable in the circumstances, it was essential. Without it the lender's investment would be at risk, and the promised security would be illusory. The implication that the borrower was not to be entitled to sell until the legal charge was in place does not depend on the fact that the solicitor who was to act for the respondents in connection with the charge had been nominated by the borrower, although that unusual feature provides additional support for it.

58. As for Mr Booth's submission that an implied term is unnecessary because, on handing over money on the promise of a legal charge the respondents became equitable chargees who could have protected themselves by the entry of a unilateral notice, there are three points.

59. The first is that, as Mr Booth himself emphasised, hindsight ought not to be allowed to determine what, objectively, the parties must be taken to have intended by their agreement. The question is, how did the parties intend the agreement to operate, and what obligations were they assuming to each other, not what remedies would they have anticipated as being available if the agreement did not operate as they intended because NVC sold without waiting for the charge to be registered. The parties intended that the agreement would be secure and that there would be no question of a sale before the legal charge was in place to provide that security.

60. The second point is the one made by the Judge. The parties agreed on the form which the security was to take; it was to be a legal charge and there is nothing in the documents to suggest that the respondents might have to be content with the security provided by an equitable charge. A contractual term that the land would not be disposed of before the

charge was registered was therefore necessary to give effect to the agreement that the respondents' investments would be secured by a legal charge.

61. Thirdly, the respondents were acting through Dr Razoq, who is a medical doctor rather than a lawyer. The parties agreed that the practical steps to register the legal charge were to be taken on the respondents' behalf by NVC Legal Solicitors. It is unrealistic to suggest that the security of the loan in the period before a charge was registered was to depend on Dr Razoq himself appreciating that a unilateral notice could be entered to cover any gap or instructing another solicitor to advise. From the commencement of the JV Agreements until a charge could be registered the necessary basis of the security was NVC's implied agreement that it would not sell.

62. I have therefore reached the same conclusion as the Judge. The JV Agreements included terms that NVC would not dispose of the land before the respondents' legal charges had been registered. The grant of leases to the appellants were dispositions in breach of those terms. The registration of a restriction was justified to prevent that unlawfulness and therefore permissible under s.42(1)(a).

63. For these reasons I dismiss the appeal. It is not necessary to consider the additional points raised by Dr Razoq which were not addressed by the Judge.

64. The order I will make will be in the same terms as the FTT's, directing the Chief Land Registrar to give effect to the respondents' application to enter a restriction, if that has not yet been done, and cancelling the appellants applications to register their leases. I will deal separately with the costs of the appeal.

Martin Rodger KC,
Deputy Chamber President

1 December 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the

Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.