

## Court of Appeal dismisses Quixotic contractual construction

In a curious case about Terry Gilliam's *The Man Who Killed Don Quixote*, the Court of Appeal has dismissed an appeal about an option over rights in the film.<sup>1</sup> It upheld the decision of the High Court that the construction of the definition of "Work" as "a feature film project ... to be directed by Terry Gilliam", along with the relevant provisions that extended the option period, reflected the natural meaning of the contractual language and the commercial context in which it was agreed. Both text and context pointed to Mr Gilliam's inextricable connection with the film, and so a dispute over his involvement in the project triggered the option-holder's right to extend the option period.

### Background

Worthy of the famous knight-errant's misadventures, the production of the film was fraught with difficulty at every turn. Over the past 20 years, productions of the film have been plagued by actors taken ill, legal battles, flash floods and fighter-jet fly-pasts. In 2014, when asked why he kept going back to *Quixote* after so many failed attempts, Mr Gilliam replied: "I really don't know anymore ... I've wasted far too much of my life doing it. If you're going to do Quixote, you have to become as mad as Quixote."<sup>2</sup>

### Dispute

The dispute concerned a Deed of Agreement of 31 March 2016, under which Recorded Picture Company Limited (**RPC**) granted the producers, Alfama Films Production and Paulo Branco, an option to obtain a licence to develop, produce and exploit the film. After entering into the Deed and paying the option fee of €25,000, the producers started pre-production and entered into a separate Director's Agreement with Mr Gilliam on 29 April 2016, to which RPC was not a party.

By August 2016, the relationship between the Alfama parties and Mr Gilliam had broken down amid claims that the Alfama parties had breached the Director's Agreement, including allegations that they had failed to provide financing and a budget plan for the film and had not paid Mr Gilliam for eight weeks. Counter-allegations were made, and French litigation ensued. The decision of a French court in the Alfama parties' favour is currently the subject of an appeal.

On 30 September 2016, the final date before the option exercise period expired, the Alfama parties wrote to RPC, informing it that pre-production had been suspended and asking for an extension of the option for a further six months. RPC refused and served a notice of expiry to the effect that the option term had expired on 1 October 2016. It then granted an option to a third-party producer, Tornasol Films, on substantially the same terms.

The film has now been completed. It was directed by Mr Gilliam and produced by Tornasol. The appeal hearing was expedited to accommodate the terms of the distribution agreement.

RPC's case was that the option expired by effluxion of time, and it sought a declaration to that effect. The Alfama parties, on the other hand, contended that the option term of six months was extended and continues in force.

### Deed

The Deed set out various definitions, including the following key defined terms:

- Option – "the exclusive and irrevocable option for the [Producers] to acquire the Rights";

<sup>1</sup> *Recorded Picture Company Limited v (1) Alfama Films Production (2) Paulo Branco* [2018] EWCA Civ 767.

<sup>2</sup> <https://www.rollingstone.com/movies/features/terry-gilliam-brazil-zero-theorem-monty-python-20140919>.

- Rights – “a licence to develop, produce and exploit (1) feature length film based on the Work (in whole or in part) which licence includes without limitation all rights of exploitation and communication of the Film”;
- Film – a “feature film which the [Producers propose but do not undertake] to produce based in whole or in part on the Work”; and
- Work – “a feature film project provisionally entitled ‘The Man who Killed Don Quixote’ written by Tony Grisoni **and to be directed by Terry Gilliam**” [*emphasis added*].

Under clause 3 of the Deed, the producers were entitled to exercise the Option within the option term by 1 October 2016. The option term was subject to clause 16, which provided for the following extension of time periods under the Deed: “If [the] Deed cannot be performed or its obligations fulfilled by reason of an Event of Force Majeure or if [RPC] is in default or in material breach of any of the warranties or other terms of this Deed or **if there is any litigation or claims affecting the Work, the Rights or the Film, then any dates or time periods in this Deed shall be extended automatically until the Deed can be performed or its obligations fulfilled** plus an additional thirty days provided that no extension of time following an Event of Force Majeure will exceed six (6) months unless any claim, action or proceeding remains active and unresolved for a period in excess of six (6) months” [*emphasis added*].

### First instance

At first instance, the High Court found that the dispute between Mr Gilliam and the Alfama parties over the Director’s Agreement prevented the performance of the Deed because it made it impossible for RPC to grant the “Rights”. The exercise of an option to produce a film without Mr Gilliam as director was not what the parties had contracted for, and the Alfama parties’ dispute with Mr Gilliam was a “litigation or claim affecting the Work, the Rights or the Film” for the purposes of clause 16. The judge rejected RPC’s argument that the words “to be directed by Terry Gilliam” were merely descriptive of the underlying film project. In her view, the ordinary meaning of those words was that RPC’s performance – i.e. delivery of the Rights to produce the Film – was inextricably linked to the provision of rights to produce a film directed by Mr Gilliam. So the Alfama parties’ dispute with Mr Gilliam fell squarely within clause 16, since it made it impossible for RPC to grant the “Rights” that it had promised under the Deed. RPC appealed.

### Decision

Lady Justice Asplin, giving the Court of Appeal’s judgment, dismissed the appeal. She agreed with the judge that the phrase “to be directed by Terry Gilliam” was not a mere descriptor. Despite the fact that RPC did not guarantee Mr Gilliam’s services, and the Producers did not undertake to produce the film, the natural and ordinary meaning of the definition of “Work”, in the context of the Deed as a whole, read against the relevant background, was that it referred to a film project based on a particular script and directed by Mr Gilliam. The definition encapsulated the product in relation to which the option was to be granted.

Asplin LJ set out the grounds on which the text supported this construction. The future tense of the phrase “to be directed” in the definition of “Work” was contrasted with the historical provisional nature of the remainder of the definition. If the parties wanted to agree a lower level of certainty they could have chosen other language such as “anticipated”. Furthermore, when the phrasing was interpreted against the factual matrix, “including the lengthy involvement of Mr Gilliam with the project, its chequered history and Mr Gilliam’s involvement with the grant of option”, the natural and ordinary meaning was clear.

In Asplin LJ's view, the judge's interpretation also made commercial common sense. The Alfama parties were paying for an option to produce a film in relation to which Mr Gilliam's involvement was well known in the market place. They would not have been interested in paying the option fee if the "Rights" were only in relation to the script. The risk that Mr Gilliam would withdraw from the project, given all the other matters supporting the judge's interpretation, did not lead to the conclusion that the "Work" and so the "Rights" should, as argued by RPC's counsel, be construed narrowly to refer solely to copyright matters and the chain of title.

In considering clause 16, it was undisputed that its purpose was to allocate risk in relation to supervening events that affected the performance of the obligations under the Deed. Asplin LJ agreed with the High Court that there was no support in the wording of clause 16 or the Deed as a whole for limiting the ordinary and natural meaning of "litigation or claims" to disputes in relation to the chain of title or the rights. The words themselves were very broad, and there was no reason why the phrase "litigation or claims" should not include the Alfama parties' dispute and French litigation with Mr Gilliam, particularly when interpreted in light of the relevant factual matrix. Although that dispute arose out of the Director's Agreement to which RPC was not a party, it affected the "Work" and the "Rights" because they were concerned with the production and development of the "Film" (to be directed by Terry Gilliam).

Asplin LJ noted that the draft licence attached to the Deed contained an equivalent of clause 16, which provided for an extension of the licence period in circumstances including "litigation or claims affecting the Work". The parties had taken account of the potential for supervening litigation both during the option period and while the licence had been granted. This highlighted the significance that the parties attributed to the possibility of supervening litigation preventing performance of the Deed, which was consistent with a wider definition.

So, as a result of the dispute and French litigation over the Director's Agreement, the option period was extended under clause 16 before the end of the initial six-month option period.

## **Comment**

At its simplest this case was an argument about whether: (a) a film company had granted the producers an option to make a particular film or to make a particular film directed by Mr Gilliam; and (b) whether a dispute between Mr Gilliam and the Alfama parties, over a director agreement to which the option grantor was not a party, constituted "litigation or claims" affecting the film or the right to make it. If Mr Gilliam's directorial involvement was not an inextricable aspect of the option granted, then the fact that he was in dispute with the Alfama parties would be irrelevant, because it would not affect RPC's performance of the Deed.

In confirming the High Court decision, Asplin LJ applied the principles of contractual construction as re-stated and reformulated by the Supreme Court in *Wood v Capita*,<sup>3</sup> which emphasises the need to strike a balance between the indications given by the contractual language used and the role of commercial common sense: "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation." Rather, they should both be used: "as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement ... The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement."<sup>4</sup>

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<sup>3</sup> [2017] UKSC 24.

<sup>4</sup> *Wood v Capita* [2017] UKSC 24 at [13].

Asplin LJ's textual and contextual conclusions run side by side through this decision. The language "to be directed by Terry Gilliam" included in the definition of the "Work" went further than mere description and, based on the facts, Mr Gilliam had had an inextricable connection to the "Work" for many years. Similarly, there was no language in clause 16 restricting the types of claims affecting the "Work" to those concerning the chain of title, and in practice the potential supervening events that could affect the performance of the obligations under the Deed, given the project's notoriously troubled developmental history, were far more numerous and varied.

For the *Quixote* film, the decision means that the option-holder's rights in the project have been confirmed. Ultimately, then, Mr Branco's permission will be required for the completed film to be released – another picaresque hurdle for this epic production to overcome.

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