The Implication of Contractual Terms after Marks & Spencer -V- BNP Paribas Securities Services

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In *Attorney General of Belize -v- Belize Telecom Ltd* [2009] UKPC 10 Lord Hoffmann considered that the correct approach to determining whether a term should be implied into a contract was to ask "what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" His Lordship regarded the traditional tests of necessity, business efficacy and the obvious response of the parties to an officious bystander's inquiry as merely routes towards answering that question.

This led to wide-spread academic debate and, perhaps more significantly for clients and their advisers, to considerable judicial uncertainty. It was debatable whether Lord Hoffmann had relaxed the test for contractual implication. If he had, then it was also debatable whether he had been correct and should be followed. Some commentators felt that conflating the processes of contractual construction and implication, although intellectually elegant, risked uncertainty by watering down the implied term test from necessity to inferred reasonableness.

A little over 3 years ago in a lecture entitled "Beyond Hoffmann – Contractual Interpretation and Implication" the author illustrated the resultant uncertainty by showing that each subsequent reported appellate decision on implied terms had involved a reversal of a lower court's view.

In *Marks & Spencer plc -v- BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 the Supreme Court restored a degree of certainty by returning to the more traditional approach.

A lease break clause required rent to have been paid up to date on the contractually stipulated break day. Since rent was payable quarterly in advance, the tenant, M & S, had to make an overpayment to comply with the break clause condition. The issue was whether there was an implied term that M & S should be refunded the overpayment in respect of the period from the break day to the end of the paid for quarter. The Supreme Court held that there was no implied term given the extensive nature of the lease and the general understanding that neither the common law nor statute apportioned rent payable in advance on a time basis.

The wider importance of the decision is the reinstatement of the traditional tests for implication of contractual terms. Given the respect rightly accorded to Lord Hoffmann's legal pronouncements, it is unsurprising that the Supreme Court Justices were delicate in their treatment of the *Belize* judgment. Lord Carnwarth, for example, did not accept that *Belize* had in fact watered down any of the traditional tests whereas Lord Neuberger described Lord Hoffmann's judgment as "a characteristically inspired discussion rather than authoritative guidance on the law of implied terms". Lord Neuberger, with whom Lord Sumption and Lord Hodge agreed, implied that *Belize* had attempted to recast implication as interpretation and had been wrong to do so.

The outcome is reasonably clear. According to the majority, the judicial pronouncements before *Belize* provided a "clear, consistent and principled approach" and "the express terms of a contract must be interpreted before one can consider any question of implication."

In the very recent case of *Marussia Communications Ireland Ltd -v- Manor Grand Prix Racing Ltd and others* [2016] EWHC 809 (Ch.) at [63] Males J provided the following convenient summary derived from Lord Neuberger's judgment:

"(1) For a term to be implied, the following conditions (which may overlap) must be satisfied

(1) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(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 any express term of the contract.

(These conditions are taken from what was said by Lord Glaisdale in *BP Refinery (Westernport) Pty Ltd -v- Shire of Hastings* (1977) 180 CLR 266, 282 – 283, but omitting the requirement that the term should be "reasonable and equitable" which Lord Neuberger considered would not usually add anything to the other conditions).

(2) It is not 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 be shown that either there was only one contractual solution or that one of several possible solutions would without doubt have been preferred; *Phipps Electronique Grand Public SA -v- British Sky Broadcasting Ltd* [1995] EMLR 477, 481 *per* Bingham MR.

(3) The need for implication usually arises where the contract terms have not been spelled out in detail or by reference to written conditions. It is much more difficult to infer with confidence what the parties must have intended when they have entered into a lengthy and carefully drafted contract but have omitted to make provision for the matter in issue. *Ibid.*

(4) The implication of a term is not critically dependent upon proof of an actual intention of the parties. The court is concerned with the intention of notional reasonable people in the position of the parties.

(5) Business necessity and obviousness can be alternatives in the sense that only one of them needs to be satisfied, although in practice it would be a rare case where only one of those two requirements was satisfied.

(6) Necessity for business efficacy involves a value judgment. The test is not one of "absolute necessity". It may be more helpful to say that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

(7) The question whether a term is implied is to be judged at the date the contract is made."

Males J then observed:

> "It is apparent from this summary, and in particular from the fourth principle, that the implication of a contractual term under English law does not necessarily depend upon an actual (albeit unstated) agreement or consent by the parties. On the contrary, sometimes a term will be implied which is effectively imposed upon the parties, or to which they are deemed to have consented, merely because notional reasonable people would have consented and there is nothing to show that they did not. This will be so if the term is necessary to give commercial or practical coherence to the contract even if the parties themselves did not think about it or if they are in fact unreasonable people who would not have consented. Their subjective thoughts and intentions are irrelevant."

The author's own review of reported implied term cases indicates that, unlike the post-*Belize* experience, the English courts have encountered little difficulty in applying the *Marks & Spencer* reinstatement in a consistent and predictable manner.

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May 2016