Contractual terms will only be implied if necessary

The Supreme Court has emphasised that English law takes a strict approach to the implication of terms into a contract. Terms will not be implied just because it would be reasonable to do so, but only if it is necessary because the contract would lack commercial or practical coherence without the implied term. And the more detailed the contract is, the more difficult it will be to imply a term.

For almost 20 years, English contract law has operated under the diktats of Lord Hoffmann. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann recast contractual interpretation as a process of ascertaining the meaning that the document would convey to a reasonable person having all the knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract. This moved interpretation on from a consideration of the words alone towards the background and what might be a commercially reasonable outcome.

Then in *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988, Lord Hoffmann brought implied terms into the interpretative fold. Implying terms was, according to Lord Hoffmann, merely part of the process of interpretation and depended upon whether an implied term spelt out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

Frank *Marks & Spencer*

But 2015 has seen the forces of the counter-revolution, led by Lord Neuberger, overthrow Lord Hoffmann's dominion. First, in *Arnold v Britton* [2015] UKSC 36, the Supreme Court emphasised that the words used in a contract remain sovereign (see our briefing entitled *Contractual interpretation: shades of grey*, June 2015). Commercial commonsense, background, context or whatever else it might be called will rarely justify departing from the natural meaning of the language used.

Now, the Supreme Court has decided in *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 that implication and interpretation are not the same. Terms should only be implied into a contract if it really is necessary to do so. Reasonableness does not enter the equation.

Paddington bare

Marks & Spencer concerned a large shop in Paddington Basin in London. The lease ran to February 2018, but the tenant had an option to terminate the lease on 24 January 2012. The tenant exercised that option. The problem was the rent was paid in advance on the usual quarter days. Rent for the period from 25 December 2011 to 24 March 2012 was therefore duly paid by the tenant on the first day of the period (the exercise of the option would not have been valid if there had been any rent outstanding).

Key issues

- Implication of terms is not the same as interpretation
- Necessity is the mother of implication

Marks & Spencer concerned the tenant's attempts to recover the rent it had paid in respect of the period after it vacated the building. The lease was silent on the point, so the tenant could only succeed if a term was implied requiring the landlord to repay this rent. This needed implication arising from the facts of this particular case – it was not a situation where the law generally implies a term as a result of the parties' relationship.

The Supreme Court decided that no term could be implied into the lease.

Lord Neuberger emphasised that implied terms do not depend upon the parties' actual intention. The test is necessity, ie whether it is necessary for the business efficacy of the contract in question. Lord Neuberger recognised that this involves a value judgment. The test is not absolute necessity but whether, absent the suggested implied term, the contract would lack commercial or practical coherence.

Lord Neuberger was keen to rebut Lord Hoffmann's argument that interpretation and implication are part of the same process. At a high level, they both involve determining what a contract means, but they are different processes governed by different rules. Indeed, interpretation should come before implication because it is only when the contract has been interpreted that attention can turn to whether it is necessary to imply a term (though, in deference to Lord Carnwarth, who appears still to be more on the Hoffmannite wing of the judiciary, Lord Neuberger accepted that it could conceivably be appropriate to reconsider interpretation after a term had been implied).

Lord Neuberger also observed that the more detailed a contract was, the less plausible it was to imply a term. If the parties employ lawyers to draft a detailed, and doubtless lengthy, contract covering a large number of contingencies, it is difficult to infer that the parties must have intended something, but then omitted to provide for it expressly.

In *Marks & Spencer*, a key point against the implication of the term favoured by the tenant was the legal background. The general law is that rent is not apportionable in time. For example, if rent is paid in advance and the landlord then forfeits the lease, the landlord can retain all the rent paid. The approach to implication is, if anything, more stringent if parties wish to depart from the established legal position.

Conclusion

It is fair to say that Lord Hoffmann's approach to implication was not greeted with the same initial judicial enthusiasm as his approach to interpretation. Fairly soon after *Belize Telecom*, the Court of Appeal observed that surely Lord Hoffmann couldn't really have intended to loosen the established test of necessity (*Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531), and the Singapore courts have expressly rejected any departure from the previous position (eg *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267).

Nevertheless, there remained the potential for a more generous approach to the implication of terms than has traditionally been the case. In *Marks & Spencer*, the Supreme Court played Scrooge and snatched this possibility away from the tenant's – and other contracting parties' - grasp. The words used by the parties really do mean what they say, and only what they say.

Hoffmannism is dead: long live Neubergerism?

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