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How to read a Contract Part 2: Implied Terms Revisited

By Peter Sheridan

In an article last year, "How To Read A Contract", I explained on the basis of the leading cases on construing express terms and the then leading case on implied terms, the Privy Council decision in *Attorney General of Belize v Belize Telecom Ltd* (2009) that there was no real difference between the construction of express terms and analysing whether there are implied terms. There was a single test to be applied, which was the ascertainment of the meaning which the document would convey to a reasonable person having all the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

This single test effectively replaced the old tests for implied terms, such as obvious, unexpressed intention of the parties and necessary to give business efficacy. These tests were not wrong, but they were merely another way of expressing the same concept as the single test.

This simplification of the analysis of implied terms was to be welcomed. However, the Supreme Court has recently performed a *volte face* in the shape of what is now the leading case on implied terms, *Marks and Spencer PLC v BNP Paribas Securities Services Trust Company (Jersey) Ltd* (2015).

In essence, what the Supreme Court has done is to go back to the position before *Attorney General of Belize*. There have been various formulations of that position, which Lord Neuberger reviewed in the *Marks and Spencer* case, but in summary an implied term should reflect the obvious unexpressed intention of the parties, objectively judged (their actual or subjective intentions being irrelevant) or be necessary (not merely desirable or reasonable) to give business efficacy to the contract. An implied term must be consistent with the express terms.

One difficulty Lord Neuberger had with Lord Hoffmann's approach in *Attorney General of Belize* was that it might be interpreted as suggesting that reasonableness was a sufficient ground for implying a term. However, the writer does not see how that interpretation could sensibly be placed on Lord Hoffmann's speech taken as a whole (as opposed to taking a summarising phrase), from which it is clear, as pointed out by both Lord Clarke and Lord Carnworth in the *Marks and Spencer* case, that the requirement of necessity was not being watered down. The interpretation referred to by Lord Neuberger seems to confuse the concept of a reasonable *reader* of the contract, which is a construct for what everyone agrees is an objective test, with the different concept of a reasonable *term*.

A second difficulty Lord Neuberger had with Lord Hoffmann's analysis is that, in Lord Neuberger's view, a sequential approach is needed whereby the express terms are construed first, and one then considers whether there are implied terms; otherwise how can one test whether the implied terms are consistent with the express terms? On Lord Hoffmann's approach, there is only a single approach. According to Lord Neuberger, the two processes are different and governed by different rules. However, Lord Neuberger accepted that in both processes, the words used in the contract, the

surrounding circumstances known at the time of the contract, commercial common sense and the reasonable reader are to be taken into account.

Once that concession is made, Lord Neuberger's objection to Lord Hoffmann's formulation loses any significance. Theoretical constructs such as obvious, unexpressed intention, business efficacy or officious bystander do not add anything to what is described in the last sentence of the previous paragraph; they are merely attempts in previous case law to say the same thing.

It is true that there is a distinction between construing what the parties are taken to have meant by an express term which is ambiguous and deciding what they would have provided for a situation which they did not address at all in the contract. But it is a distinction without a significant difference once it is accepted that the means of arriving at the answer in each case involves reference to the same factors, *i.e.* the words used in the contract, the surrounding circumstances, commercial common sense and the reasonable reader.

It is regrettable that the highest court should change its position on such an important issue after such a short time, particularly where the analysis in the earlier case was the more compelling one (Lord Carnworth's well reasoned speech a worthy exception on this issue).

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