Marks & Spencer plc v BNP Paribas Securities Services
[2015] UKSC 72, [2016] AC 742

Summary

Marks & Spencer ('M&S') rented four premises from BNP Paribas. Under the terms of the leases – which had been negotiated and drafted by specialist solicitors – (1) M&S had to pay rent in advance for each quarter, (2) M&S had the option of terminating the lease on 24 January 2012, (3) but in order to do that, it had to give BNP Paribas six months' notice, have no arrears in terms of the rent due under the agreement, and pay BNP Paribas a 'break premium' of one year's worth of rent. In early July 2011, M&S gave BNP Paribas notice that it would be exercising its power to terminate the lease on 24 January 2012. On 25 December 2011, M&S was due to pay £1.2m rent in advance for the following quarter and as the lease was still in force at the time, M&S paid that money to BNP Paribas. Shortly afterwards, M&S paid BNP Paribas the 'break premium' of a year's worth of rent, and the tenancies duly terminated on 24 January 2012. M&S then sued BNP Paribas to recover the proportion of the advance rent that they had paid for 25 December 2011-24 March 2012 that corresponded to the proportion of time (from 24 January 2012 onwards) that they were no longer in occupation of BNP Paribas' premises. As the terms agreed between M&S and BNP Paribas said nothing about when advance payments of rent would be repayable, M&S argued that there was an implied term (an implied term 'in fact') in the M&S-BNP Paribas lease that if the lease were terminated on 24 January 2012 any payments in advance rent for the use of the premises after that time would be refundable.

M&S won at first instance, lost in the Court of Appeal, and lost in the UKSC. Lord Neuberger gave the leading judgment (with the agreement of Lords Sumption and Hodge). In addressing the issue of when the courts would imply a term in fact into a contract, he endorsed (at [18]) the statement of Lord Simon in the Privy Council case of *BP Refinery* v *Shire of Hastings* (1977) 180 CLR 266, 283 that 'for a term to be implied... (1) it must be reasonable and equitable; (2) 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; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express terms of the contract.'

To this Lord Neuberger added six observations (at [21]): (i) in implying terms in fact into the contract, the courts are not strictly concerned with what the parties *actually* intended, but with what 'notional reasonable people in the position of the parties at the time at which they were contracting' would have agreed to; (ii) a term should not implied in fact just because it seems fair or that one thinks that the parties would have agreed to had they been asked – these 'are necessary but not sufficient grounds for including a term'; (iii) Lord Simon's condition (1) for implying a term in fact into a contract is redundant – it is hard to imagine a term that satisfies Lord Simon's other conditions being unreasonable or inequitable; (iv) conditions (2) and (3) are 'alternatives in the sense that only one of them needs to be satisfied, although I suspect it would be a rare case where only one of those two requirements would be satisfied'; (v) in determining whether condition (3) is satisfied, it is necessary to phrase the question that an officious bystander would have asked the parties about whether a particular term is part of the contract 'with the utmost care'; (vi) in determining whether condition (2) is satisfied, the test is 'not one of "absolute necessity"' but rather requires the courts to make a 'value judgment', asking themselves whether 'without the term, the contract would lack commercial or practical coherence.'

Lord Neuberger then turned to Lord Hoffmann's suggestion in *Attorney General of Belize* v *Belize Telecom* [2009] 1 WLR 1988, at [21] that there was no real distinction

between interpreting a contract and implying a term into a contract, and that there is in both cases 'only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?' Lord Neuberger made two points about this: (a) Lord Hoffmann's words should not be read as supplanting the traditional tests for implying a term in fact into a contract – in particular, they should not be read as suggesting that 'reasonableness is a sufficient ground for implying a term' ([23]). (b) The process of implying a term is not part of the exercise of interpreting a contract – 'construing the words used [in a contract] and implying additional words are different processes governed by different rules' ([26]). This is because 'When one is implying a term or phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed' ([27]). Given these two points Lord Neuberger thought that the safest way of regarding Lord Hoffmann's suggestions in the *Belize* case was to treat them 'as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms' ([31]).

Lord Carnwath agreed with Lord Neuberger's point (a), holding that Lord Hoffmann's judgment in *Belize* 'is not to be read as involving any relaxation of the traditional, highly restrictive approach to implication of terms' ([66]). With that point made, he saw no reason why the UKSC should not regard Lord Hoffmann's judgment as authoritative: 'a valuable and illuminating synthesis of the factors which should guide the court' ([74]). In particular, he thought criticisms of Lord Hoffmann for eliding the distinction between interpretation and implication amounted to 'an interesting debating point, but to my mind of little practical significance' ([68]).

Lord Clarke gave a short supporting judgment, pointing out that the disagreement between Lords Neuberger and Carnwath may rest on different views of what 'construing a contract' involves. Lord Neuberger was right to point out that 'when one is implying a word or phrase, one is not construing words in the contract because the words to be implied are ex hypothesi not there to be construed'. However, Lord Hoffmann (and by extension, Lord Carnwath) were pointing out that 'both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. On that basis it can properly be said that both processes are part of construction of the contract' ([76]). Lord Clarke agreed with both Lords Neuberger and Carnwath that Lord Hoffmann's observations in the *Belize* case were 'not watering down the traditional test of necessity', which Lord Clarke phrased as asking 'whether it is necessary to [imply the term in question] in order to make the contract work' ([77]).

Comments

(1) *The test(s) for implying terms in fact*. If, as all of the UKSC Justices agreed, whatever Lord Hoffmann said in *Belize* did not, and was not intended to, affect the traditional tests for determining whether a term can be implied in fact into a contract, then it is hard to see why we should pay any attention to what Lord Hoffmann said in *Belize* when determining whether a given term should be implied in fact into a contract. We should simply get on with applying the 'officious bystander' and 'business efficacy' tests. With regard to those tests, there is some help (though not much) in Lord Neuberger's judgment in particular as to how those tests should be applied – see especially points (i) and (v) on the 'officious bystander' test, point (vi) on the 'business efficacy' test, and point (iv) on how these two tests relate to each other. But *Marks & Spencer plc* to dispel the uneasy impression that the courts do not really understand what they are doing in applying these two tests. The fact that there are two tests prompts the questions – Why two? Why not one, if both of these tests are concerned with the same issue? But we should be very careful about succumbing (as Lord Hoffmann did in the

Belize case) to monomania – of trying to reduce everything just to one test, or one rule. Those who do so succumb in this area seem to take the view that the courts should simply apply a test of 'business efficacy' or 'necessity' to determine whether a term can be implied in fact into a contract – Lord Clarke's judgment may be seen as an example of this way of thinking, as is point (ii) in Lord Neuberger's judgment. I think this is a mistake – see, for example, my example in my essay on implied terms elsewhere on this website of the boss hiring a secretary to work for him. If we simply applied a 'business efficacy' or 'necessity' test in implying terms in fact into a contract, we would *not* imply a term in fact into the boss-secretary contract that he would not sexually harass her. Implying such a term into the contract requires us to use the 'officious bystander' test.

My own view is that the 'officious bystander' test and the 'business efficacy' test are both giving effect to the parties' intentions in entering into a contract, but they are doing so in different ways. The 'officious bystander' test gives effect to the parties' (unexpressed) intentions that a particular term should be part of the contract, where we read the parties' intentions in the usual objective way whereby you cannot deny that you had an intention that a particular term be part of the contract if you reasonably gave the other party the impression that that was your intention. (This gets rid of the problem in the boss-secretary situation of the boss being a monster who, had he been asked whether he was agreeing not to sexually harass his secretary would *not* have replied, 'Of course!') The 'business efficacy' test gives effect to the parties' (unexpressed) intention that their contract should *work*, with the result that if the parties have neglected to provide in their contract for some essential matter, the courts are given the power to fill the gap in the contract so long as (a) there is one obvious solution to how the gap is to be filled, and (b) the parties would not have objected at the time the contract was entered into to that solution being adopted as a way of filling the gap in their agreement.

On this view, Lord Neuberger's point (i) in his judgment is dangerous. When the courts imply terms in fact into contracts, they are giving effect to the parties' *actual* intentions at the time they entered into the contract – they are *not* giving effect to what the parties *would* have intended had certain suggestions been made to them, or had certain facts been brought to their attention. We can see the law on mistake as to circumstances, and the law on frustration, as giving effect to such hypothetical intentions – but when it comes to determining the express terms of a contract and terms implied in fact, the parties' actual intentions (or the intentions that they have allowed the other party reasonably to believe that they have) rule.

(2) *The difference between interpretation and implication*. Once that point is grasped, we can see that Lord Hoffmann was quite wrong in the *Belize* case to think that interpreting a contract and implying terms in fact into a contract were essentially concerned with the same thing. There is a powerful case to be made for saying that while implying terms in fact into a contract is concerned with giving effect to the parties' intentions, determining what the terms of a contract *mean* has nothing to do with the parties intentions. In other words, the parties' intentions cannot determine what the terms of a contract *mean*. This view is part of a wider view about language (originating in Wittgenstein's arguments about the impossibility of a private language) – that language loses its ability to convey meaning if *what* you are saying depends on what private intentions you have about what you mean to say. This is because no one else can know what your private intentions are. What you *meant* to say and what you *did* say are therefore two different things, and the second can never be reduced to the first. The best statement of this view in the contractual context is Robert Stevens' lecture 'Contract Interpretation: What It Says On The Tin' (available at www.innertemple.org.uk/downloads/members/lectures_2014/lecture_stevens_2014.pdf), though he would argue that when it comes to determining what the terms of the contract were, we are *not* concerned with giving

effect to what the parties' intended, but what they objectively agreed would be the terms of the contract. But even on that view, there is a disjunct between interpretation and implication. When it comes to determining what the terms of the contract are we are concerned with what the parties *actually* agreed, rather than what they *intended* to agree. But when it comes to determining what the terms of the contract *mean*, we are *not* concerned with determining what the parties agreed, because the parties' agreement was concerned with what terms would and would not be part of their contract and not on what those terms would mean.

(3) *The outcome of the case*. I did not spend any time in my summary of the case on the outcome of the case – the UKSC's rejection of M&S's argument that a term should be implied into the M&S-BNP Paribas contract that rent paid in advance for a period that M&S ended up not occupying BNP Paribas' premises should be refunded. This is because (i) this is not such an interesting issue, as it involves close consideration of the facts of the case; and (ii) Lord Neuberger (with whose judgment on this point everyone else agreed) made an absolute meal of this issue, going into some very obscure and not very relevant cases and statutes on the recoverability of rents paid in arrears and in advance. It should have been enough simply to observe that: (a) had the parties been asked, at the time they entered into the contract, 'If rent is paid in advance for a period after the lease has been lawfully terminated, will the rent be recoverable?' it is very unclear what the parties would have responded; and (b) it is was not necessary to imply a term into the contract about the recoverability of rent paid in advance to make the contract work.

I did wonder why the argument was not made that M&S was entitled to recover the rent paid for 24 January 2012-24 March 2012 period on the non-contractual basis that that was money that had been paid for a consideration that had totally failed. It turns out the argument was made at first instance ([2013] L & TR 31) but failed because it was held that the fact that M&S had been in occupation for one of the three months that it had paid rent in advance for (25 December 2011-24 January 2012) meant that it had not suffered a total failure of consideration in respect of that advance payment of rent. The argument that the advance payment could be divided into three payments of about £0.4m each for each of the three months between 25 December 2011 and 24 March 2012, and that there had been a total failure of consideration in respect of the payments of £0.4m for 24 January 2012-24 February 2012 and 24 February 2012-24 March 2012, was rejected on the basis that it was not traditionally possible to apportion advance payments of rent in this way. Restitution lawyers – who have traditionally been very hostile to the courts' refusal to allow claims for money back where the money has paid for a consideration that has not totally failed – must be disappointed that the non-contractual claim was not revived in the UKSC as doing so might have given the UKSC the chance to overturn the total failure of consideration requirement. It might have been thought that there was a conceptual obstacle in the way of such an argument being run: if the implied term argument was rejected, then that might have doomed the non-contractual claim as well *if* the UKSC had taken the absence of an implied term that a proportion of the advance rent would be recoverable as an indication that the parties had positively intended that payments of advance rent should *not* be recoverable – the existence of such a positive intent would have knocked out the possibility of a non-contractual claim for the recovery of the advance rent being made. However, it could have been argued that the parties' had no intention one way or the other as to what should happen in the event of the lease being lawfully terminated part way through a period for which advance rent had been paid – and the absence of such an intention, one way or the other, would have allowed the possibility of a non-contractual claim to recovery of part of that advance rent being made, provided that the total failure of consideration obstacle could be overcome.

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