UK SUPREME COURT CLARIFIES IMPLIED TERMS PRINCIPLES

Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72

Introduction

By a decision handed down on 2 December 2015, the Supreme Court (Lords Neuberger, Clarke, Sumption, Carnwath and Hodge) held that it had been wrong to imply into a contract a term to the effect that a tenant was entitled to a rent refund for rent paid in advance on a quarterly basis if the tenant exercised a contractual break clause. Such a term could only be implied where such an intention was demonstrated in a very clear case.

Background

The case concerned the tenant and landlords under four commercial leases. The four leases had been negotiated, prepared and drafted with the advice and assistance of specialist solicitors.

The terms of each of the leases provided that rent was payable "yearly and proportionately for any part of a year by equal quarterly instalments in advance" on the usual quarter days. Furthermore, each of the leases included a break clause which allowed the tenant the right to terminate on 24 January 2012. The tenant had to give the landlord 6 months' prior written notice of the exercise of the break clause. Then, if there were no arrears of rent on the break date and the tenant paid a sum equivalent to 1 year's rent to the landlords as a break premium, the lease would be terminated.

In early July 2011, the tenant served the landlord with a break notice. In December 2011, the tenant paid a full quarter's rent, and, subsequently, paid the break premium. Accordingly, the lease terminated on 24 January 2012.

The tenant then claimed repayment of the rent paid for the period after the lease's termination, on the grounds that the lease should contain an implied term entitling the tenant to such repayment.

At first instance, Morgan J allowed the tenant's claim. However, the Court of appeal allowed an appeal by the landlords, refusing to imply the term contended by the tenant.

Decision

The Supreme Court granted the tenant permission to appeal. The parties agreed a set of facts and issues. Accordingly, the Supreme Court had to decide the question of whether the commercial lease contained an implied term which entitled the tenant to repayment of an apportioned part of the rent attributable to the period after the lease's termination.

The Supreme Court unanimously dismissed the tenant's appeal.

On the general issue of the implication of terms into contracts, the Supreme Court held that:

(1) the court would only imply a provision into a detailed commercial contract where such a term was: (a) necessary in order to give the contract "business efficacy"; or (b) so obvious as to go without saying. These tests were alternatives (i.e. only one needed to be satisfied);

(2) proof of what the parties actually intended when they were negotiating the contract was not a factor upon which the test for the court's implication of a contractual term was "critically dependent". Rather, the court should be concerned with what "notional reasonable people" would have agreed were they in the position that the parties were in at the time of the negotiations for the contract. Great care should be taken in phrasing the question to be posed to the 'officious bystander'; and

(3) it was also necessary for a purported implied term to appear fair or for the court to consider that, had the term in question been suggested to the parties, they would have agreed it. However, a term should not be implied into a detailed commercial contract merely on this basis alone.

In this regard, the Court analysed the judgment of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. Lord Hoffmann's judgment had suggested that the implication of contractual terms was a part of the same exercise as construing the contract. However, the Supreme Court held that these were in fact different processes – the issue of whether a term should be implied into a contract only arose for consideration after the process of interpreting the express words already used in the contract.

As regards the instant case, the Supreme Court held that:

(1) there was a well-established and clear general understanding at common law that rent was not apportionable in time. Although there was statutory legislation that had relaxed that position to an extent (section 2 of the Apportionment Act 1870), that provision was not applicable to rent payable in advance. Therefore, it would take an exceptional case for the court to conclude that it was proper to attribute an intention to a landlord and tenant that a tenant retained a right to recover apportioned parts of the rent that were payable and were paid in advance. The fact that both landlord and tenant had benefitted from professional and specialist advice in the preparation of the leases presented a barrier to the court's attributing such an intention to the parties;

(2) whilst the Supreme Court took the view that the tenant in the instant case had a strong case that the proposed term was necessary to give the contract business efficacy, the Supreme Court found that such an implication was not necessary in order to make the lease work, nor was it required in order to avoid absurdity; and

(3) Therefore, the Court of Appeal had not erred rejecting the tenant's claim.

Concluding Remarks

The Supreme Court's decision contains useful guidance on the processes adopted by the English courts to both the implication of terms into a contract and the interpretation of contractual terms.

As was noted by Lord Carnwath, Lord Hoffmann's judgment in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 had "stimulated more than usual academic controversy". However, the weight of that decision was undoubted by both the parties themselves and the Supreme Court. The decision in *Belize* had not undermined the position that a restrictive approach was to be taken to the interpretation of contractual terms, and nothing in the instant decision regarding the relationship between interpretation and implication of contractual terms would alter that position.

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