Marks & Spencers – Refunds and implied terms

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Last week's decision of the Supreme Court in *Marks & Spencers v BNP Paribas* [2015] UKSC 72 should be of interest to anyone considering the question of how and when a court will imply terms into contracts.

The case concerned the exercise of a tenant's break clause. It was a condition of the exercise by Marks & Spencers of such a clause that the rent (which was payable quarterly in advance) was not in arrears. The rent was therefore prepaid for a full quarter although the effect of the break clause was to terminate the lease before the end of the quarter. The Supreme Court unanimously rejected Marks &Spencer's claim that there was an implied term in the lease that it would be entitled to a refund for the overpaid rent. Those involved in the drafting of leases will doubtless consider the implications carefully and (if a advising a tenant) will try to include appropriate express wording to ensure that overpaid rent is refunded.

What is of more general importance about the Marks & Spencers decision is the detailed review by Lord Neuberger (with whom Lord Sumption and Lord Hodge agreed) of the case law concerning the implication of terms into contracts and the rejection of the suggestion (contrary to the views of some judges and of many academic commentators) that the judgment in the Privy Council case Attorney General of Belize v Belize Telecom [2009] 1 WLR 1988 diluted the test for the implication of contractual terms.

Lord Neuberger tactfully said

"In those circumstances, the right course for us to take is to say that those observations [of Lord Hoffman in Belize Telecom] should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms."

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In Belize Telecom Lord Hoffman had said that the process of implying terms into a contract was part of the construction or interpretation of the contract and that:

"There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?".

Lord Neuberger in Marks & Spencers disagreed and said that "construing the words used and implying different words are different processes governed by different rules"

Lord Neuberger went on to say that:

"In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term… Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied."

The current state of the law on implication of terms can be summarised as follows:

(1) The question of implication of terms should normally only be addressed after the express words are construed.

(2) A term will only be implied (other than if required to be implied by statute) if it satisfies the test of business necessity or it is so obvious that it goes without saying;

(3) The implication of a term is not critically dependent on proof of the actual intention of the parties. Instead of the question as to what the parties would have agreed, one is concerned with

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the hypothetical answer of notional reasonable people in the position of the parties at the time they were contracting.

(4) It is a necessary but not sufficient condition for implying a term that it appears fair or that one considers that the parties would have agreed it if it had been suggested to them.

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