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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

The legal test for implying terms into a contract

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

This case here related to a claim by a tenant who argued that a term should be implied into a lease to the effect that certain advance payments relating to a period after the lease ended should be refunded. It is important because the Supreme Court took the opportunity to clarify the legal test for implying terms into contracts and also to comment upon what the following words of Lord Hoffman in the 2009 case of *Attorney General of Belize v Belize Telecom* actually meant:

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

Whilst the Supreme Court confirmed that the judgment was not to be read as involving any relaxation of the traditional, highly restrictive approach to implication of terms, Lord Neuberger stressed that these words did not mean that Lord Hoffman was suggesting that reasonableness alone was a sufficient ground for implying a term. Indeed, because the Supreme Court considered that some had wrongly suggested that this was what Lord Hoffman had meant, Lord Neuberger noted that these words should be treated as observations and:

"characteristically inspired discussion rather than authoritative guidance on the law of implied terms".

This lead the Supreme Court to restate the law on the implication of terms. There are two types of contractual implied term. The first, with which this case was concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second type arises because, unless such a term is expressly excluded, certain statutes can impose certain terms into contracts - for example through the Supply of Goods & Services Act 1982.

In relation to the first type of implied term, the Supreme Court went back to the 1977 Privy Council case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* [1977] UKPC 13, 26, where Lord Simon said that for a term to be implied, the following five conditions must be satisfied:

"(i) it must be reasonable and equitable;
(ii) 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;
(iii) it must be so obvious that 'it goes without saying';
(iv) it must be capable of clear expression; and
(v) it must not contradict any express term of the contract."

Lord Neuberger added six comments to those principles:

(i) The implication of a term was "*not critically dependent on proof of an actual intention of the parties*" when negotiating the contract. If you approach the question by reference to what the parties would have agreed, what matters is not the hypothetical answer of the actual parties, but the answer of notional reasonable people in the position of the parties at the time at which they were contracting;
(ii) A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds alone for including a term;
(iii) It was questionable whether Lord Simon's first requirement, (reasonableness and equitableness) , will usually, if ever, add anything. If a term satisfied the other requirements, it was hard to think that it would not be reasonable and equitable;
(iv) Business necessity and obviousness can be alternatives in the sense that only one of them needs to be satisfied, although the Judge suspected that in practice it would be a rare case where only one of those two requirements would be satisfied;
(v) If one approaches the issue by reference to the officious bystander, it is vital to formulate the question to be posed by that bystander with "the utmost care"; and
(vi) The necessity for business efficacy involves a value judgment. A more helpful test would be that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.

The Supreme Court said 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 you have decided what the parties have expressly agreed, it is difficult to see how you can decide whether or not a term should be implied and if so, what term. Remember that no term can be implied into a contract if it contradicts an express term. Therefore when deciding whether or not a term can be implied as a logical starting point, you cannot proceed to decide whether a term should be implied until the express terms of a contract have been considered and understood.

Adjudication: contract formation

RMP Construction Services Ltd v Chalcroft Ltd

[2015] EWHC 3737 (TCC)

This was an adjudication enforcement case where it was agreed that RMP had worked pursuant to a construction contract, but there was disagreement about how that contract was formed. RMP said it was formed by an email sent to RMP by Chalcroft on 5 December 2014, which accepted an offer made by RMP. Chalcroft put forward three alternatives and said that if the contract was formed by (or included) the Letter of Intent or by (or included) the sub-contract order, the contract incorporated a standard form of JCT contract wording. Mr Justice Stuart-Smith noted that whatever route you took, the Scheme applied and no adjudicator nominating body was specified by the parties. Thus, whichever the correct contractual analysis was, the procedure for appointing the adjudicator was the same: being that laid down by the Scheme.

Further, it was agreed that if RMP's interpretation was correct, then Chalcroft did not serve a pay less notice in time, with the result that the adjudicator's conclusion on RMP's entitlement would have been correct. However, it was also agreed that if one of Chalcroft's interpretations of the substantive obligations imposed by the applicable contract was right, it was at least reasonably arguable that a pay less notice sent on 26 August 2015 was valid and in time, and the adjudicator's conclusions would have been wrong.

RMP said that once it was acknowledged that the adjudicator would have had jurisdiction and would have acquired jurisdiction by the same procedural route whichever contractual interpretation was correct, the fact that different contractual interpretations may have led to different substantive outcomes was irrelevant. In such circumstances, the adjudicator was validly appointed and if, which was disputed, he misinterpreted the substantive contractual provisions so as to come to an incorrect answer, then that was no bar to enforcement of his decision.

The Judge noted that the distinction between jurisdictional challenges to enforcement and challenges alleging substantive error should be approached in two separate stages. The first question is whether the adjudicator had jurisdiction. The answer to that question here was that he did, on any contractual route being proposed by either party. He had jurisdiction and was to be appointed under the Scheme. Chalcroft's only point on jurisdiction was that RMP had not properly identified the contract that gave rise to the Scheme route to jurisdiction.

Whilst the Judge noted that it may be "*linguistically and even technically correct*" to describe Chalcroft's various alternative formulations as different contracts from the contract alleged by RMP, that difference should not be determinative when it was remembered that the Court was concerned with one contracting process, with the only question being which party has correctly identified where in that process the relevantly binding contract was formed. Where it is agreed that each of the alternatives was sufficient to found jurisdiction under the identical route of the Scheme, it seemed to the Judge that to rule RMP "*out of court*" because it may have misidentified the contractual provisions that would give the adjudicator jurisdiction under the Scheme was a "*return to the formalistic obstacle course*". The Judge noted that: *"the adjudication system was and is meant to provide quick and effective remedies to parties, equally accessible to those who are legally represented as to those who are not; and I bear in mind that the system now covers not only written contracts but also oral contracts which increases the likelihood that they may be mis-described".*

Therefore the adjudicator had jurisdiction because, however the contractual arrangements between the parties were correctly to be described, they mandated the use of the Scheme and he was properly appointed by the Scheme's procedure. The Judge made it clear that he was not ignoring the possible difference in substantive outcome that could arise from identifying the contract correctly. But the important point to note was that these substantive differences went not to jurisdiction but to substantive outcome only. Once that approach was adopted, the present case was to be treated as one where the adjudicator had jurisdiction to resolve the dispute that was referred to him (namely, how much was owing under interim application number 8) and addressed the correct question without bias, breach of natural justice or any other vice that would justify overturning his decision. The Judge concluded that:

"If, which cannot be resolved now, he has made an error of law in referring to the wrong contractual provisions when deciding the substantive question that was referred to him, that falls within the category of errors of procedure, fact or law which the Court of Appeal has repeatedly emphasised should not prevent enforcement."

Failure to mediate: a reminder

Reid v Buckinghamshire Healthcare NHS Trust Ltd

[2015] EWHC B21 Costs

Rejecting a reasonable offer to mediate can have consequences if you end up losing your case too. Here Master Hare noted that:

"If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate."

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