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Traditional Tests for Implication of Terms Prevail in Singapore Despite 'Acceptance' of Belize Test: Sembcorp Marine Ltd v PPL Holdings Pte Ltd

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***Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2012] SGHC 118**

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Introduction

There is an ongoing legal debate concerning the test governing the implication of terms in fact, prompted in no small measure by Lord Hoffmann's influential speech in Attorney *General of Belize v Belize Telecom*.[1] In *Belize*, Lord Hoffmann famously said that the question for a court considering whether a term should be implied is 'whether such a [term] would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean'.[2] This has generally been regarded by judges[3] and academics[4] as subsuming the implication of terms within the broader rubric of 'interpretation'. The consequence is that the 'reasonable person' test that underpins contractual interpretation now applies to determine whether a term should be implied.

In *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*,[5] the Singapore High Court purported to accept Lord Hoffmann's approach in relation to the implication of terms as stated in Belize, but, it is respectfully submitted, ended up affirming the traditional approach towards implication and recognising nothing new. This may well have been consciously intended by the court and flowed primarily from a narrow reading of *Belize*, which recast Lord Hoffmann's test of interpretation as a threshold step before that of implication, rather than as an overarching test that subsumes implication. The approach in *Sembcorp* really stands for three points, each of which will be dealt with in this brief note. First, it recognised that

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[1] [2009] 1 WLR 1988 ('*Belize*').
[2] [2009] 1 WLR 1988 at [21].
[3] See, *eg*, *Spencer v Secretary of State of Defence* [2012] EWHC 120 (Ch) at [71]; *Stena Line v Merchant Navy Ratings Pension Fund Trustees Limited* [2011] EWCA Civ 543 at [36]–[41]; *Thomas Crema v. Cenkos Securities plc* [2010] EWCA Civ 1444 at [38]–[39].
[4] See, *eg*, Sir Kim Lewison, *The Interpretation of Contracts*, 5th ed, Sweet & Maxwell, 2011 at 281–285; Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 2nd ed, Oxford University Press, 2011 at 344 –345; Paul S Davies, 'Recent developments in the law of implied terms' [2010] LMCLQ 140; Elizabeth Macdonald, 'Casting Aside "Officious Bystanders" and "Business Efficacy"' (2009) 26 JCL 97 at 99–100.
[5] [2012] SGHC 118 ('*Sembcorp*').

implication is a distinct step from interpretation; more specifically, implication is not a subset of interpretation. Second, it acknowledged that the traditional tests of 'business efficacy' and 'officious bystander' still govern implication in fact and provide normative guidance in the process. Third, it postulated that the parties' subjective intentions could be admitted in the implication process, especially if they were 'objectively ascertained'.[6]

Implication as distinct from interpretation

Turning to the first point outlined above, the court in *Sembcorp* appears to have read Belize narrowly so as to preserve the traditional distinction between implication and interpretation. For example, it stated that the *Belize* approach was not 'an overhaul of the process of implication of terms' and that '[t]he process of implication is closer to the process of interpretation that might have been explicitly stated before *Belize*'.[7] Moreover, the court said that '[w]hen implying terms into a contract, the court must necessarily interpret the contract to ascertain the parties' presumed common intention before the court can determine what term to imply ... to give effect to such intention'.[8] Finally, and most expressly, the court said no less than three times that implication and interpretation were 'separate' and 'distinct'.[9]

While these statements would not be out of place in a judgment criticising *Belize*, the court in *Sembcorp* was actually very much in agreement with that case. In particular, the court noted that '[t]he value of *Belize* lies in its clear elucidation of the relationship between interpretation and implication' and that it has 'made explicit a process which must have been impliedly carried out in all previous instances where terms were implied in fact'.[10] It is respectfully submitted that the court's approval of *Belize* flowed from too narrow a reading of *Belize*. Although English cases decided after *Belize* do not speak with one voice, the vast majority have considered the process of implication as being subsumed within that of interpretation following *Belize*. A few examples would serve to illustrate this point:

- In *Procter & Gamble & ors v Svenska Cellulosa Aktiebolaget*, Hildyard J said that Lord Hoffmann in *Belize* clarified and emphasised 'that the implication of a term is an exercise in the construction of the instrument of the instrument as a whole'.[11]

- In *Spencer v Secretary of State of Defence*, Vos J said that '*Belize* made clear that the process of interpretation and of implication of terms are part of the same unified process of establishing the objective meaning of the contract. The implication of a term "only spells out what the instrument means". It is, as with the process of construction, what it means to the reasonable observer, not to the parties.'[12]

- In *Stena Line v Merchant Navy Ratings Pension Fund Trustees Limited*, Arden LJ said that Lord Hoffmann emphasised that 'it must not be forgotten that the real task is always one of interpretation. The effect of the implication must be to make the instrument mean what it would reasonably be understood to mean. The danger of using formulae, such as "necessary to give the contract business efficacy", is that such phrases can take on a "life of their own" and divert focus from the task of interpretation.'[13]

[6] [2012] SGHC 118 at [58].
[7] [2012] SGHC 118 at [49].
[8] [2012] SGHC 118 at [51].
[9] [2012] SGHC 118 at [55]–[56].
[10] [2012] SGHC 118 at [60].
[11] [2012] EWHC 498 (Ch) at [8], [81]–[83].
[12] [2012] EWHC 120 (Ch) at [71].
[13] [2011] EWCA Civ 543 at [36]–[41].

- In *Thomas Crema v Cenkos Securities plc*, Aikens LJ said that the Belize approach is such that 'if the "reasonable addressee" would understand the instrument, against the other terms and the relevant background, to mean something more, *ie* that something is to happen in that particular event which is not expressly dealt with in the instrument's terms, then it is said that the court implies a term as to what will happen if the event in question occurs.'[14]

These cases all indicate that Lord Hoffmann's approach in *Belize* has only to do with interpretation, and interpretation alone. It may therefore be reconsidered if the court's reading of *Belize* was correct in *Sembcorp*.

More specifically, it appears that while the court in *Sembcorp* accepted the role of interpretation, it did not regard it being determinative, in and of itself, to ascertain whether a term could be implied. Rather, the court viewed the process of interpretation as a threshold step to be satisfied before a term could be implied. As a threshold point, and with respect, the court was probably not as accurate as it could be when it said that the court must interpret the contract to ascertain the parties' *presumed* common intention.[15] Interpretation does not yield the parties' presumed intention, but rather, their objectively ascertained *actual* intention. But more to the point, the court's reference to 'presumed common intention' further reinforces the point that it saw implication as distinct from interpretation. It is only through the process of implication, as distinct from interpretation, that we arrive at the parties' *presumed* intention. The traditional tests for implication operate as default rules (broadly speaking)[16] that operate in the absence of a clear indication of intention: thus, it is *presumed* that the parties would want the contract to cater to business efficacy. It is for this reason that a term is implied as a matter of business efficacy so as to give effect to the parties' presumed intention (that the contract is to cater to business efficacy). Such a process would be absent pursuant to a purely interpretative approach because the court would, pursuant to such an approach, be wholly concerned with the parties' actual intentions, as objectively ascertained by the process of interpretation.

What the court in *Sembcorp* did was really to acknowledge the very established rule that an implied term must not be inconsistent with an express term. Thus, the court's statement that 'the interpretation of the contract is often a preliminary step in the implication of a term'[17] and that '*Belize* demands that the term implied must be checked for consonance with a reasonable interpretation of the contract'.[18] These statements imply a limited scope for interpretation. Rather than being determinative of whether a term can be implied, interpretation acts as a negative test: is the term to be implied consistent with the express terms as objectively interpreted, failing which, it will not be implied. Indeed, this is illustrated by the court's application of its statement of the law to the facts of *Sembcorp*:[19]

> The court has to ascertain whether the particular factual matrix of the case (see *Ng Giap Hon* at [89]) gives rise to circumstances that would make it necessary to imply the Second Implied Term into the JVA and the SA, with reference to the business efficacy, officious bystander, and *Belize* requirements. Satisfaction of either[20] the business efficacy or officious bystander tests would suffice for the implication of the term and the *Belize* statement requires that the term implied be checked for consonance with a reasonable interpretation of the JVA and the SA.

[14] [2010] EWCA Civ 1444 at [38]–[39].
[15] [2012] SGHC 118 at [51].
[16] *Cf Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 458–459.
[17] [2012] SGHC 118 at [56].
[18] [2012] SGHC 118 at [60].
[19] [2012] SGHC 118 at [65].
[20] With respect, this assumes that the traditional tests are alternatives, contrary to established Court of Appeal authority that the two are complementary.

The statement that the implied term be 'checked for consonance with a reasonable interpretation' of the various agreement simply restates the basic principle that the implied terms must not be inconsistent with a reasonable interpretation of the express terms of the contract. This is not controversial and has been recognised in many local decisions.[21] This is also consistent with the court's view in *Sembcorp* that implication and interpretation are wholly distinct doctrines. However, such a limited scope for interpretation in the implication of terms may not be what Lord Hoffmann had in mind in *Belize*.

Therefore, despite its apparent agreement with *Belize*, the approach in *Sembcorp* may actually be to disagree with *Belize*, based on a broader (and, correct, it is submitted) reading of that case. In preserving a limited (and distinct) role for interpretation in implication, the court in *Sembcorp* may actually be agreeing with the Court of Appeal's critique against the Belize approach in *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd*[22] that that approach involved an unnecessarily high level of abstraction engendered by a broad test of interpretation.[23] Viewed this way, and taking the Court of Appeal's criticisms of *Belize* in mind, the court's approach in *Sembcorp* cannot be regarded as being substantively wrong. If there is anything that requires reconsideration, then it is respectfully submitted would be the court's rather narrow reading of *Belize*.

Traditional tests still govern implication?

The second point arising from *Sembcorp* is that the court considered that 'the *Belize* test is really the same two traditional tests combined into a minimalist package'.[24] The court also emphasised elsewhere that Lord Hoffmann in *Belize* 'did not purport to supersede or render obsolete the traditional tests for the implications terms [in fact]'[25] and that he preserved the high threshold of 'necessity' pursuant to the 'business efficacy' test before a term could be implied.[26] Although it is true that Lord Hoffmann in *Belize* did expressly say that a court may find the traditional tests helpful,[27] the fact is that Lord Hoffmann actually undermined the strict requirement of 'necessity' by referencing the criterion of 'reasonableness'. As has been pointed out,[28] the test of 'interpretation', which Lord Hoffmann says applies to the entire process of implication, broadens the traditional requirement of 'necessity' in relation to the implication of terms in fact to one of 'reasonableness'. This is because, according to *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[29] interpretation is the 'ascertainment of the meaning which the document would convey to a *reasonable* person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'[30] [emphasis added]. Thus, the restriction which Lord Hoffmann placed on the word 'necessity' in the context of the 'business efficacy' test is no longer whether the implication is *necessary* to give effect to business efficacy, but whether the implication is necessary to convey the meaning as understood by a *reasonable* person. Therefore, the criterion of 'reasonableness' has become the governing test over that of 'necessity'.

While 'reasonableness' itself is not an objectionable criterion, it is the potential uncertainty which it engenders that is open to criticism. And, more to the point, this may also undermine the court's belief in *Sembcorp* that the traditional tests of implication still apply in their

[21] See, *eg*, *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518.
[22] [2011] 1 SLR 150.
[23] *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150 ('*MFM Restaurants*') at [98].
[24] [2012] SGHC 118 at [46] and [59].
[25] [2012] SGHC 118 at [59].
[26] [2012] SGHC 118 at [57].
[27] [2009] 1 WLR 1988 at [21].
[28] E MacDonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 JCL 97 at 99.
[29] [1998] 1 WLR 896.
[30] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912.

original form under Lord Hoffmann's approach in *Belize*. However, as has been argued above, because the court in *Sembcorp* adopted in effect a narrow reading of *Belize*, its view that the traditional tests still co-exist with the regime of interpretation can be justified. It is, rather, its reading of *Belize* that should be reconsidered.

Consideration of parties' subjective intentions?

Finally, the court in *Sembcorp* made the point that the parties' subjective intentions could be referred to in the implication of terms. Ignoring the correctness of this statement for the moment, this firstly reinforces the point made throughout this note that the court in *Sembcorp* did not, in fact, follow Lord Hoffmann's approach in *Belize* by treating implication as a facet of interpretation. This is because Lord Hoffmann's approach does *not* permit the court to consider the parties' intentions since it involves an *objective* interpretation of the contract by a *reasonable* person. This has been further emphasised by later English cases. For example, in *Mediterranean Salvage and Towage limited v Seamar Trading & Commerce Inc*,[31] Lord Clarke MR said that 'Lord Hoffmann [in *Belize*] then warned against considering the subjective state of mind of the parties ... and stressed the need for the court to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean".[32] Likewise, in *Stena Line v Merchant Navy Ratings Pension Fund Trustees Limited*,[33] Arden LJ said that 'the process of interpretation is an objective one; the court does not ask what the parties intended any more that it asks what it would have been reasonable for them to agree. Indeed, the test propounded by Lord Hoffmann is written in the passive voice avoiding any suggestion that reasonableness is to be tested by reference to the views of a reasonable bystander or of one of the parties to the document'.[34]

Returning then to the correctness of the court's statement in *Sembcorp* that the parties' subjective intention could be taken into account in the process of implication if it can be objectively ascertained, two points can be made.

The first is that the court appears to have wrongly relied on *Kim Eng Securities Pte Ltd v Goh Teng Poh Karen*[35] as the authority that the parties' subjective intention can be relied on in implication. In *Sembcorp*, counsel for the plaintiff argued that *Kim Eng* stood for the application of *Belize* in Singapore. The court in *Sembcorp* rightly rejected this argument, since the court in *Kim Eng* had merely cited, without agreement, counsel's argument that *Belize* applied in Singapore. However, the court in *Sembcorp* then went on to justify the court's approach in *Kim Eng* as being determined 'based on the subjective knowledge and actions of the defendant there at various points in time, as would be appropriate in reliance on the traditional tests [of implication].'[36] However, the court in *Kim Eng* had relied on the defendant's subjective intention for the implication of a term *by trade practice or custom*, rather than in fact. In fact, as will be seen, subjective intention is used in implication in fact to *negative* an implied term; in *Kim Eng*, the court had actually *found* an implied term. Thus, *Kim Eng* does not, with respect, stand for the proposition that the parties' subjective intention can be taken into account pursuant to the traditional tests.

The correct case ought to be that of *Spring v National Amalgamated Stevedores and Docker Society*.[37] In that case, Sir Leonard Stone VC refused to imply a term when it would go against one of the parties' actual (subjective) intention; such as when the plaintiff would

[31] [2009] EWCA Civ 531.
[32] [2009] EWCA Civ 531 at [13].
[33] [2011] EWCA Civ 543.
[34] [2011] EWCA Civ 543 at [41]. See also *Spencer v Secretary of State of Defence* [2012] EWHC 120 (Ch) at [57].
[35] [2011] SGHC 201 ('*Kim Eng*').
[36] [2012] SGHC 118 at [41].
[37] [1965] 1 WLR 585.

reply 'What's that?' instead of 'Of course not' to the officious bystander. As has been pointed out, this may well be decided differently following the approach taken *Belize* premised on interpretation,[38] but the court's acceptance of the continued relevance of subjective intention serves only to underscore, it bears repeating, the preservation of the traditional approach for implication of terms in Singapore.

The second point that can be made is with reference to the court's statement in *Sembcorp* that such subjective intention must be 'objectively ascertained' in order to be relevant.[39] This is not controversial but it must be emphasised that the court was using the word 'objective' not in the sense as contrasted with 'subjective', but simply to underscore the fact that evidence before the court is to be evaluated independently. The court in *Sembcorp* must not be regarded as saying that the subjective intention must somehow be infused with objectivity in a sense that is contradistinguished from subjectivity; indeed, such a reading would be inherently contradictory.

Conclusion

In summary, then, although the court in *Sembcorp* purported to agree with Lord Hoffmann's approach in *Belize*, the reality is that it in fact disagreed with that approach. The preservation of the distinction between implication and interpretation, the continued recognition that the traditional tests still apply to govern implication in their narrow ways, and the holding that the parties' subjective intention still matters in implication are all incompatible with the widely-accepted reading of *Belize*. Yet, the approach in *Sembcorp* is not substantively wrong; indeed, its acceptance of the pre-*Belize* approach is actually in line with the Court of Appeal's critique of the *Belize* approach in *MFM Restaurants*. Assuming that the Court of Appeal's critique is correct, the actual approach in *Sembcorp* is not substantively wrong. What may warrant a reconsideration is the court's reading of *Belize*. In the end, it seems that, notwithstanding an apparent acceptance of *Belize*, the traditional tests (and approach) in relation to implication in fact still survive for further application (and consideration) in Singapore.

[38] Sir Kim Lewison, *The Interpretation of Contracts*, 5th ed, Sweet & Maxwell, 2011 at 300–301.
[39] [2012] SGHC 118 at [58].