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Implied terms: Lord Neuberger's Cardinal Rule Applied

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Overview

In *IBRC v Camden*[1], the Court of Appeal held that a lender's express contractual power to market a loan was not subject to an implied limitation that doing so should not interfere with the borrower's ability to obtain the best price for the assets securing the loan. In so doing, the Court of Appeal reaffirmed the "cardinal rule" that an implied term must not contradict any express term of the agreement.

Background

Irish Bank Resolution Corporation Limited ("**IBRC**") appealed the High Court's decision to dismiss its application for summary judgment or strike-out of the claim brought against it by the Camden Market Group ("**Camden**") for breach of contract. The breach claimed by Camden was based on an alleged implied term in a facilities agreement between members of the Camden Group and IBRC (the "**Camden Facilities Agreement**") under which IBRC provided some £195 million for the purchase and development of properties at Camden Market, London (the "**Camden Properties**").

The dispute arose after IBRC was placed in special liquidation. The liquidators were instructed to sell off IBRC's loan book, which included the loans made to Camden under the Camden Facilities Agreement. The Camden Facilities Agreement expressly permitted IBRC to assign or transfer any of its rights under the agreement to another bank (with Camden's consent), and to disclose information about Camden and the finance documents relating to the Camden Facilities Agreement to any potential assignee or transferee (without Camden's consent). The liquidators began marketing the Camden loans as part of a package of loans containing distressed debt. Camden was concerned that prospective purchasers of the Camden Properties may mistakenly perceive that the Camden Facilities were also distressed and, instead of purchasing the Camden Properties, seek to acquire the debt under the Camden Facilities Agreement and enforce the security to obtain the properties at a discounted price.

Camden commenced proceedings in October 2013, contending that the right to market the loan was qualified by an implied term that IBRC should not do anything to hinder Camden's ability to achieve the best price for the Camden Properties.

The Court of Appeal's Decision

In February 2014, IBRC applied for summary judgment or, alternatively, strike-out of Camden's claim on the basis that the Camden Facilities Agreement expressly permitted IBRC to market the Camden loans, and that any implied term could not be inconsistent with that right.

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1 *Irish Bank Resolution Corporation Ltd v Camden Market Holdings Corp & Ors* [2017] EWCA Civ 7.

The judge at first instance refused IBRC's application, finding that it was arguable that the implied term did exist and was not inconsistent with the express terms of the Camden Facilities Agreement. The Court of Appeal disagreed, however, noting that the parties' submissions had to be considered in light of the Supreme Court's recent decisions in *Marks & Spencer*[2] and *Arnold v Britton*[3], both of which were subsequent to the first instance judge's dismissal of IBRC's application. The Court of Appeal referenced Lord Neuberger's dicta in *Marks & Spencer* that it is a "cardinal rule" that an implied term must not contradict any express term of the contract, and the principle in *Reda v Flag*[4] that "*an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification*".

Comment

Following Lord Hoffmann's judgment in *Belize Telecom*[5], it had been suggested by some commentators that the highly restrictive traditional test[6] for implying terms had been watered down. However, the Supreme Court's relatively recent decision in *Marks & Spencer* has made clear that *Belize Telecom* should not be interpreted as having relaxed that traditional test. At the same time, the Supreme Court also rejected the apparent suggestion in *Belize Telecom* that the implication of terms was part of the process of construing a contract; rather, the construction of the express words of the contract and the process of implying terms are different exercises governed by different rules. It is only after consideration of the contract's express terms that the existence of implied terms can be considered.

Six months before its decision in *Marks & Spencer*, the Supreme Court had handed down its judgment in *Arnold v Britton*, which concerned the interpretation of express terms and emphasised that the reliance placed in some cases[7] on commercial common sense and surrounding circumstances "*should not be invoked to undervalue the importance of the language of the provision which is to be construed*". Against this background, and applying the principle in *Reda v Flag*, in *IBRC v Camden* there was simply no scope to imply the term pleaded by Camden, notwithstanding that there were compelling arguments appealing to commercial common sense and the circumstances existing at the time of the agreement.

IBRC v Camden is demonstrative of the courts' reluctance to depart from the express words of a contract in an appeal to "commercial common sense", and illustrates the strict constraints imposed on the courts' ability to exercise the "extraordinary power" of implying terms. This reluctance is all the more so for lengthy and carefully drafted agreements between commercial parties. These principles are well worth bearing in mind at the drafting stage.

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2 *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72.

3 [2015] UKSC 36.

4 [2002] UKPC 38.

5 *Attorney General of Belize and others v Belize Telecom Ltd* [2009] UKPC 10.

6 See, for example, *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20.

7 See, for example, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.