Ward Equipment Ltd v Preston: *The Approach to Implication of Contractual Terms*

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I INTRODUCTION

The New Zealand Court of Appeal in *Ward Equipment Ltd v Preston* has recently considered the controversial issue of whether implication of terms in a contract should be regarded as contractual interpretation.[1] Notably, the Court addressed the approach of Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd*, who stated that in cases which give rise to issues of contractual implication, "the question … is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean".[2] This approach has been the subject of significant debate, and has given rise to concerns over whether orthodox principles of implication have been displaced.[3] French and Winkelmann JJ in *Ward Equipment Ltd v Preston* mentioned the uncertainties in this area of law in New Zealand, but did not decide the correct approach that should be taken. However, Kós P, in a separate judgment, expressed the opinion that implication and interpretation are different processes which are accompanied by different rules. Significantly, the President stated that orthodox implication principles should be applied in New Zealand.

II FACTS

The case involved a licence agreement between Ward Equipment Ltd and Mevon Pty Ltd. Under this agreement, Ward was licensed by Mevon to "import, hire and sell a range of patented construction products", and was granted "the exclusive right to the use of the Preston trade mark in New Zealand".[4] This agreement had originally existed in 1998 between an equipment company called Trestle Hire as the licensee and Patent Marketing Corp Pty Ltd as the licensor.[5] However, Patent Marketing later assigned the agreement to Mevon. After Trestle Hire went into liquidation in 2012 and

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1 *Ward Equipment Ltd v Preston* [2017] NZCA 444, [2018] NZCCLR 15; see HG Beale *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) vol 1 at [14-002]–[14-007]; and Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at [6.03] and [6.05].

2 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [21].

3 See Beale, above n 1, at [14-007]; and Lewison, above n 1, at [6.03].

4 *Ward Equipment Ltd v Preston* (CA), above n 1, at [1].

5 At [4].

Ward acquired all of Trestle Hire's assets, the agreement was transferred to Ward.[6]

The relevant terms of the agreement can be summarised as follows. Trestle Hire paid a sum of AUD 208,171 and obtained in return the licence to exclusively import and use the construction products, an undertaking that the Preston name and trade mark would not be used in New Zealand, and the ability to grant sub-licences to third parties.[7] The agreement provided that Trestle Hire would "exploit and/or manufacture the Products in the Territory in an honest, diligent, trustworthy and professional business-like manner".[8] Additionally, there were provisions for termination. Notably, the agreement stated that it would continue "without limit of time", but could be terminated by the licensor in a number of situations (for example, where payable sums had not been paid to the licensor, or where the ownership of the licensee had changed without the licensor's consent).[9] The licensee could also terminate the agreement on any breach of the licensor's obligations, where those breaches were not remedied within 30 days.[10]

Following the assignment of agreement to Mevon from Patent Marketing, and its transfer to Ward from Trestle Hire, it transpired that Mevon was not satisfied with Ward's performance.[11] Ward then learned that Mevon had begun to trade in New Zealand and had registered certain trademarks.[12] Ward viewed these actions as breaches of the agreement, and so began proceedings and sought an injunction against Mevon.[13] However, Mevon terminated the agreement, stating that Ward had breached its obligations to diligently exploit the products in New Zealand.[14] Mevon also stated that because the agreement had "no fixed duration", it was able to be terminated on reasonable notice.[15] Mevon considered that three months' notice was reasonable.[16]

III JUDGMENTS

The High Court

In the High Court, Fogarty J stated that there were two key issues to be resolved. The first was whether there was an implied term in the agreement which allowed termination on reasonable notice.[17] The second issue was

6 At [10]–[13].
7 At [6]–[7].
8 At [8].
9 At [59].
10 At [59].
11 At [17] and [19].
12 At [19]
13 At [20].
14 At [21].
15 At [21].
16 At [21].
17 *Ward Equipment Ltd v Preston* [2017] NZHC 240 at [3].

whether three months' notice was reasonable.[18] In relation to the first issue, Fogarty J commenced the analysis from the starting point that it is highly improbable that commercial contracts are intended to be of an unlimited duration.[19] Rather, contracts which have no defined duration can usually be terminated on reasonable notice, and this can be implied from the nature of the contract.[20] In this case, Fogarty J considered that the agreement between Ward and Mevon involved "a degree of trust and confidence", as Ward had the obligation to market the products.[21] As such, it was "a form of partnership",[22] and the parties could not have expected that it could not ever be terminated on reasonable notice.[23] In this situation, three months' notice was reasonable.[24] Overall, it was concluded that Mevon was able to terminate the agreement.[25]

The Court of Appeal

Ward appealed Fogarty J's decision to the Court of Appeal. It argued that the implication of a term that the agreement was determinable on reasonable notice did not meet the established requirements for implied terms.[26] Ward highlighted several factors in support of this argument. It argued that the term would be contrary to the agreement's express wording, and that it was not necessary for business efficacy.[27] A similar term providing for termination had also been deleted when the agreement was being negotiated. There was also an "entire agreement clause" in the agreement.[28] Furthermore, the agreement had earlier been varied in 2013, and the parties had not included a termination clause.[29] Mevon argued that Fogarty J was correct to imply the term into the agreement for the reasons outlined in the decision.[30]

1 French and Winkelmann JJ

French and Winkelmann JJ delivered the leading judgment, and held that the agreement was not able to be terminated on reasonable notice.[31] In reaching this conclusion, the Court began with the preliminary question of whether the parties' dispute should be resolved by applying contractual interpretation principles or principles relating to implied terms.[32] The relevant authorities

18 At [3].
19 At [33].
20 *Eden Construction Pty Ltd v State of New South Wales (No 2)* [2007] FCA 689 as cited in *Ward Equipment Ltd v Preston* (HC), above n 17, at [36].
21 *Ward Equipment Ltd v Preston* (HC), above n 17, at [37].
22 At [37].
23 At [41].
24 At [51].
25 At [52].
26 *Ward Equipment Ltd v Preston* (CA), above n 1, at [28].
27 At [28].
28 At [28].
29 At [28].
30 At [30].
31 At [77].
32 At [31].

were discussed, and the Court stated that the issue has been approached in similar cases by applying principles of interpretation rather than implication.[33] The question of what principles should be applied was said to be significant because the process of interpreting contractual terms may rely on a different test than what is used when implying a term into a contract.[34] French and Winkelmann JJ noted that it is unresolved in New Zealand whether the test is the same for implication and interpretation of contractual terms.[35] In *Attorney-General of Belize v Belize Telecom Ltd*, Lord Hoffmann had stated that implying a term into a contract is "an exercise in construction of the instrument",[36] and that:[37]

> … in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

French and Winkelmann JJ mentioned that the issue had been resolved in the United Kingdom in *Marks & Spencer plc v BNP Paribas Securities Services Co (Jersey) Ltd*, where the Supreme Court had stated that implication and interpretation are "different processes governed by different rules".[38] However, their Honours concluded that it was unnecessary to decide which approach should be adopted, as it would not affect the outcome of the decision.[39]

In line with the approach taken in similar cases, French and Winkelmann JJ applied interpretation principles instead of principles relating to implication of terms.[40] The express words of the agreement were examined, and particular attention was given to the provisions relating to termination, which were considered to be detailed.[41] Despite the fact that the right to terminate on notice was not included in the agreement, the termination provisions were nevertheless adequate in protecting the commercial interests of both parties.[42] It was held that Fogarty J had erred in finding that the agreement was a form of partnership, and that it only provided "for the grant of rights in return for the performance of agreed obligations and payments".[43] The fact that the agreement could be terminated with notice by Ward after expiry of the patents was also significant.[44] French and Winkelmann JJ therefore reached the conclusion that these terms were unlikely to have been

33 At [42].
34 At [46].
35 At [46].
36 *Attorney General of Belize v Belize Telecom Ltd*, above n 2, at [19].
37 At [21].
38 *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [26].
39 *Ward Equipment Ltd v Preston* (CA), above n 1, at [47].
40 At [57]. The interpretation principles as set out in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 were applied.
41 At [60] and [66].
42 At [66].
43 At [70].
44 At [73].

included in the agreement if it was able to be terminated on reasonable notice. They also found that it had not been established that there was the ability for either party "to terminate on reasonable notice and in the absence of cause".[45]

2 President Kós

At first, Kós P agreed with the conclusion that the agreement was not able to be terminated on reasonable notice. However, in a separate judgment, the President commented on the correct approach which should be taken in New Zealand with regards to implied terms.[46] Kós P regarded the term "construction" as the task of identifying meaning in a contract, and that this is not the same as contractual interpretation. Rather, interpretation (along with implication and rectification) are all methods of construction.[47] The President's view of *Belize Telecom* was that "Lord Hoffman's [sic] analysis was of the relationship between implication and construction, not interpretation".[48]

Kós P stated that if implication, interpretation and rectification are regarded as methods of construction of a contract, then:[49]

> … concerns about implication being part of construction — the *Belize Telecom* approach championed by Lord Hoffman [sic] — should diminish. For instance, as just noted, interpretation may alter express words — although only where the error and answer are obvious. But where major modification to the express words is required, because of incompleteness or error, interpretation must give way to implication or rectification.

The President stated that words in a contract are not easily altered by implication, and that there is accordingly an "articulated set of rules" that need to be followed before such alteration occurs.[50] The President further stated that the approach in *Belize Telecom* is still binding in New Zealand law, as it has been applied by both the Court of Appeal and the Supreme Court.[51] It was then indicated that this approach has not "watered down" the orthodox requirements for implication.[52]

Kós P emphasised that the "essential articulated rules" for implying terms apply, and that these require "substantial hurdles" to be met.[53] His Honour stated that:[54]

45 At [77].
46 At [84]. See also Tracey Kelderman "Implying Terms: Belize or BP Refinery?" (27 October 2017) Hudson Gavin Martin <https://whatshappeningnow.hgmlegal.com>.
47 *Ward Equipment Ltd v Preston* (CA), above n 1, at [86].
48 At [86].
49 At [89] (footnotes omitted).
50 At [91].
51 At [93]. The President referred to *Hickman v Turn & Wave Ltd* [2011] NZCA 100, [2011] 3 NZLR 318; *Dysart Timbers Ltd v Neilsen* [2009] NZSC 43, [2009] 3 NZLR 160; and *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48.
52 At [93].
53 At [94].
54 At [94] (footnotes omitted).

> *Belize Telecom* does not alter the fundamental point that implication is not to be deployed to improve a contract … The officious bystander, rather abruptly dismissed by Lord Hoffman [sic] … may be called on still where a gap has been identified to tell us what the parties would have said they meant. Importantly, the familiar and useful five conditions for implication in *BP Refinery Pty Ltd v Shire of Hastings* … remain applicable … In New Zealand for the foreseeable future the conditions nominated in *BP Refinery* — best viewed as guidelines — will remain a prominent part of the analysis …

It was therefore concluded that while *Belize Telecom* applies in New Zealand, it has not "fomented a revolution", and that the orthodox rules are still to be followed when deciding whether to imply a term into a contract.[55]

IV THE IMPORTANCE OF THE DECISION

It is clear that the separate judgment of Kós P provides important statements of principle relating to the law of implied terms. It should be noted at the outset, however, that these statements are obiter. French and Winkelmann JJ did not endorse or comment on Kós P's analysis, for the reason that detailed arguments were not provided to the Court, and that this kind of analysis was unnecessary to decide the case.[56] As such, a degree of caution is required when examining the President's analysis. However, his Honour's judgment will no doubt be considered in later judgments, and has the potential to form the basis of an authoritative approach to implied terms in New Zealand law.[57]

The most significant point in the President's judgment is that orthodox contractual implication principles should continue to be applied in New Zealand. These principles were formulated in *BP Refinery Pty Ltd v Shire of Hastings*, where it was stated:[58]

> … for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) 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; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

55 At [95].

56 At [48].

57 An example of this can be seen in the High Court judgment *The Malthouse Ltd v Rangatira Ltd* [2018] NZHC 816. In dealing with an issue of contractual implication, Churchman J followed Kós P's approach in *Ward* and analysed the issue "on the basis that the implication of a term is a different exercise to the interpretation of a contract and that the test set out in *BP Refinery* is still relevant" (at [130]). See also the Court of Appeal decision of *GTV Holdings Ltd v John Evan Harris and Sarah Louise Jones as Trustees of the Delargey Trust* [2018] NZCA 95, where Kós P commented on the differences between implication and interpretation. In that case, his Honour stated that "[t]he only real difference ... between interpretation and implication is whether the law places a pen in the hand of the bystander" (at [29]).

58 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) at 282–283.

Kós P's approach does not appear to be novel. New Zealand courts have, in the past, made reference to both the applicability of Lord Hoffmann's approach in *Belize Telecom* and the requirements in *BP Refinery*.[59] Kós P's approach in this regard also appears to be largely consistent with the statements in *Belize Telecom*, where it was considered that the requirements in *BP Refinery* are:[60]

> … best regarded … as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means.

Although Kós P's judgment arguably does not present a new approach to the principles of implied terms in New Zealand, it does address potential uncertainties that were raised after the United Kingdom Supreme Court's decision in *Marks & Spencer plc*. These uncertainties were mentioned by French and Winkelmann JJ,[61] and by the New Zealand Supreme Court in *Mobil Oil New Zealand Ltd v Development Auckland Ltd*.[62] There, the Supreme Court stated that the approach in *Belize Telecom* has been "significantly qualified" by *Marks & Spencer plc*, and that "there is thus scope for argument whether adoption of the undiluted version of Lord Hoffmann's interpretation approach is appropriate".[63] In this respect, Kós P's approach affirms the applicability of *Belize Telecom* in that the process for implication is encapsulated by contractual construction in the search for the meaning of the contract.[64] This approach also shows that the "substantial hurdles" of the orthodox implication principles must still be applied in order to determine that meaning.[65]

In this respect, there are a number of similarities between Kós P's approach and that adopted by Lord Neuberger in *Marks & Spencer plc*. Lord Neuberger approved the principles as outlined in *BP Refinery*,[66] and emphasised that, after the decision in *Belize Telecom*, there has not been any dilution of those principles.[67] Although both implication and interpretation involve assessing the meaning of the contract, they are different processes, and implication should not be considered as part of the process of interpretation.[68] This approach is largely illustrated in the judgment of Kós P.[69]

There are, however, some significant differences between Kós P's approach and that of Lord Neuberger's in *Marks & Spencer plc*. First, Lord

59 See Jeremy Finn, Stephen Todd and Matthew Barber (eds) *Burrows, Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at 221–222.
60 *Attorney-General of Belize v Belize Telecom Ltd*, above n 2, at [27].
61 *Ward Equipment Ltd v Preston* (CA), above n 1, at [46].
62 *Mobil Oil New Zealand Ltd v Development Auckland Ltd*, above n 51, at [81].
63 At [81].
64 *Ward Equipment Ltd v Preston* (CA), above n 1, at [86].
65 At [94]–[95].
66 *Marks & Spencer plc*, above n 38, at [18]–[21].
67 At [24].
68 At [26]–[27].
69 See *Ward Equipment Ltd v Preston* (CA), above n 1, at [89]–[95].

Neuberger considered that Lord Hoffmann's statements in *Belize Telecom* are to be considered "as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms".[70] By contrast, Kós P treated Lord Hoffmann's approach as "authoritative in New Zealand".[71] Secondly, Kós P's interpretation of the meaning of the term "construction", and his Honour's corresponding interpretation of Lord Hoffmann's approach as separating the meanings of construction and interpretation may be potentially controversial. The President interpreted Lord Hoffmann's statements not as treating implication and interpretation as the same process, but rather as analysing the relationship between construction and implication.[72] However, this was clearly not Lord Neuberger's interpretation of *Belize Telecom*. Lord Neuberger stated that the suggestion by Lord Hoffmann was that "the process of implying a term is part of the exercise of interpretation".[73] Commentators have treated Lord Hoffmann's statements as indicating that implication is the same process as interpretation.[74]

V CONCLUSION

Overall, the decision in *Ward Equipment Ltd v Preston* has the potential to provide guidance for later decisions to address uncertainty in the law relating to implied terms. The President's judgment clarifies that, following the United Kingdom decision in *Marks & Spencer plc*, the process of implying a term into a contract is not to be regarded as contractual interpretation. Rather, the orthodox rules of implication must still be adhered to, and these impose a high threshold before a term is implied into a contract.[75] However, the President's judgment is obiter, and is therefore of limited value until it is applied by an appellate court in an appropriate case.

70 *Marks & Spencer plc*, above n 38, at [31].
71 *Ward Equipment Ltd v Preston* (CA), above n 1, at [93].
72 At [86].
73 *Marks & Spencer plc*, above n 38, at [25]. See also Lord Neuberger's statement at [22].
74 See Lewison, above n 1, at [6.03]. In Beale, above n 1, at [14-002], *Belize Telecom* seems to be treated as assimilating implication "with the principles applicable to the interpretation of the express terms of a contract".
75 *Ward Equipment Ltd v Preston* (CA), above n 1, at [91]–[94]; Kelderman, above n 46; Lewison, above n 1, at [6.05]; and Finn, above n 59, at 217 and 223.