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Mapping the Evolution and Practical Significance of Implied Terms in Contracts: Insights from the United Kingdom and Nigerian Legal Frameworks

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Abstract

Since *The Moorcock* case in 1889, the boat of implied terms has encountered storms and instability from scholarly debates. The key contentious issues orbit around the role of reasonableness, necessity, contract interpretation, and the continued relevance of the traditional tests. Historically, courts have used two main tests to imply terms into contracts: Lord Bowen's Business Efficacy Test and Lord Mackinnon's Officious Bystander Test. However, in *Belize Telecom Ltd* (2009), Lord Hoffmann opined that implying terms in contract is simply part of interpreting the contract as a whole, rather than applying the traditional tests: in response to this approach, a significant weight of judicial authority supports the view that *Belize* should not be perceived as a relaxation of the traditional tests towards implication of terms. While debates have continued on whether implied terms of fact should be a distinct process or simply part of contract interpretation, the UK Supreme Court in *Barton v Morris* (2023) held that if a term is sufficiently express, the doctrine of unjust enrichment and quantum meruit cannot be used to imply a term that possibly contradicts the express term—this is somewhat different from the position of law in Nigeria. This article is an illuminating synthesis of these differences: it charts a stable and harmonized course that smoothens out the rough patches which accrued over the years via intense legal polemics.

Keywords: implied terms, express terms, contractual interpretation, Lord Hoffmann, unjust enrichment, quantum meruit, Belize Telecom

1. Introduction: The Relevance of Implication of Terms in Fact

The *Black's Law Dictionary,* refers to a contract implied in fact as "a contract that the parties presumably intended as their tacit understanding as inferred from their conduct and other circumstances."[1] The relevance or necessity of 'implied terms' of facts in contracts draws from the regular practice of executing incomplete and indefinite contracts between business parties. For practical reasons, ranging from high costs of frequent (re)negotiations of

[1] (8th edn), p. 345.

contracts to future uncertainties about markets, businesspeople usually draft contracts to be sufficiently elastic to accommodate future but reasonably foreseeable facts which the parties could not have averted their minds at the onset (Ben-Shahar, 2004). The incomplete nature may or may not be a product of their common intention, but either reasons invites the court to decide on the extent it could save or kill the contract for lack of sufficient factual terms. Lord Bingham MR captured the forgoing challenge in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*,[1] when he noted the difficulty of inferring with confidence what the commercial parties must have intended in a rather comprehensive contract because "… it may well be doubtful whether the omission was the result of the parties' oversight or of their deliberate decision; if the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur."[2] However, there is a limit to what could be inferred into a contract. As Lord Pearson echoed in *Trollope & Colls Ltd*,[3] "it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which though tacit is part of the contract the parties made for themselves."[4]

Recently in *Betamax Ltd v State Trading Corporation*,[5] the Judicial Committee of the UK's Privy Council reiterated the age-old common law rule in relation to contract law that by nature, it bequeaths contracting parties with the power to make their own binding and enforceable rules subject to any applicable restrictions that anchor on law or public policy (Schwartz & Scott, 2003).[6] Based on the trite principle that the essence of contract is performance, common law courts tend to prefer an approach that salvages a wrecking contract for want of remediable facts, unless their incompleteness is too egregious and lacks fundamental terms upon which useful supplements could have been made. In furtherance to this objective of contract law, two observations may be noted. Firstly, where contractual terms/facts are incomplete or indefinite, courts would consider whether the incompleteness is too material as to result naturally to uncertainty and thus unenforceable.[7] Secondly, as the UK Supreme Court held recently in *Wells v Devani*,[8] it would further consider whether the incompleteness could be reasonably remedied through a gap-filling exercise that allows for the infusion of implied terms based on the presumed intention of the parties. In *Equitable Life Assurance Society v Hyman*,[9] Lord Steyn rightly observed that the implication of a term was "not critically dependent on proof of an actual intention of the parties." Nigerian courts have also adopted this type of reasoning: 'implied terms' is a regular staple in Nigerian contract law. In fact, a search with the keyword "implied terms of contract" in the database of Nigerian Weekly Law Reports—the country's most comprehensive database for law reports—produced more than a dozen Court of Appeal and Supreme Court decisions on the subject matter. Indeed, most of the cases reiterate the established positions of English case law on implied terms. For example, in *Union Bank of Nigeria plc v. Awmar Properties Ltd*,[10] the Nigerian Supreme Court (per Justice Rhodes-Vivour) held that "an implied term in a contract is a term necessary to give business efficacy to the contract. It is a term which though tacit, is part of the contract the parties made for themselves..." However, as can be seen in *British Movietonews Ltd*,[11] the eagerness of common law courts to imply terms into contracts to ensure their workability and performance should be qualified with their longstanding cautiousness not to intentionally make contracts for parties;[12] although as would be seen from Lord

[1] [1995] EMLR 472.

[2] Ibid, 481-482.

[3] *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, (1973) 2 All ER 260.

[4] Ibid, 268. Also see *Shell UK v. Lostock Garages* (1977) 1 All ER 481, Lord Denning MR at 488.

[5] [2021] UKPC 14.

[6] Earlier cases include Frost v Knight **(**1872**)** LR 7 Exch 111; Printing and Numerical Registering Co v Sampson (1875) 19 Eq 462.

[7] *Scammell and Nephew Ltd v Ouston* [1941] AC 251; *May & Butcher Ltd v The King* [1934] 2 KB 17.

[8] *Wells v Devani* [2019] UKSC 4**,** para 13.

[9] [2002] 1 AC 408, 459.

[10] *Union Bank of Nigeria plc v. Awmar Properties Ltd* (2018) 10 NWLR 64, 70. Also see *Multichoice (Nig.) Ltd v. Azeez* (2010) 15 NWLR (Pt.1215) 40, 42 and 51 (Court of Appeal).

[11] *British Movietonews Ltd v. London and District Cinemas Ltd* (1952) AC 166.

[12] See *Omega Bank v. O.B.C. Ltd*. (2005) 8 NWLR (Pt. 928) 547 (per Kutigi JSC, Nigerian Supreme Court).

Hoffmann's approach in *Chartbrook*, [1] enforcement or interpretation may include a broad scale rectification.

Whether or not an incomplete contract of parties resulted intentionally or otherwise, a court's power to intervene and cure the underlying defects is hardly in contention.[2] What is rather in contention, which by extension is the epicenter of this article is the methodologies common courts could employ to ascertain what terms should be implied in contracts. The article traces key judicial efforts, starting from *The Moorcock* case in 1889.[3] The case developed the 'business efficacy' test, which requires that an implied term of fact in contracts must be commercially efficacious as opposed to what a party unilaterally contends which may be commercially insensible or inefficacious.[4]

The challenge with the business efficacy test lies on its wide spectrum of subjective meanings, given that its determination may be derived from a party's unilateral (ambitious or restrictive) perception of the market (Kramer, 2004). Thus, the test may not be particularly helpful where the contracting parties supply two opposing perspectives on what constitutes 'business efficacy' in a given circumstance. For example, while a plaintiff may expect that fairly standard structures have been put in place for a particular transaction in order to satisfy the business efficacy test, the defendant may believe that the absent structures are part and parcel of its competitive pricing below market rates, and thus, ought to balance out the deficiencies in structures.

The business efficacy test which may ultimately evoke and impose benchmark standards mismatches with the more entrenched 1603 caveat emptor (buyer beware) doctrine, enunciated in *Chandelor v Lopus*. [5] The case predates Bowen LJ's business efficacy test and requires a (buyer) contracting party to carry out due diligence regarding the fitness and efficacy of whatever was offered. The obligation to beware and make business decisions based on the visible qualities of what a party is offering especially in commercial dealings is inarguably incompatible with Bowen's *ex post facto* test, and there was no illuminating commentary in *The Moorcock* vis-à-vis the intersection and overlap between the caveat emptor doctrine and business efficacy test. As Mustill LJ pointed out in a case,[6] the diametric views of contracting parties on what could satisfy the business efficacy test, leaves the judge to inevitably choose either of the parties' views or impose its own.[7]

Lastly, about half a century after the decision in *The Moorcock*, Lord Mackinnon developed the 'officious bystander' test in *Shirlaw v Southern Foundries (1926).* [8] The test is based on his proposition that "If, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'".[9] Again, the officious bystander test runs counter to the caveat emptor doctrine because while the doctrine (especially in a sale contract) is rooted in the personal knowledge of a buyer-party to the contract, the officious bystander's interjection is made without personally being knowledgeable about the facts that birthed the disputed contract.

Apart from the two forgoing tests by Lords Bowen and Mackinnon, there have been considerable efforts in the 21st century by some UK apex judges in providing further and better clarity on the elusive formulae for ascertaining implied terms of facts. Such notable cases are Lord Hoffmann's *Belize Telecom* (2009), [10] and Lord Neuberger's *Marks & Spencer* (2015).[11] And more recently in 2023, the UKSC decision in *Barton v Morris.* [12] Although these cases have made important progress in creating methodologies and formulae for ascertaining what should constitute implied terms in

[1] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 25.

[2] See *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 120-121 (per Lewison LJ).

[3] *The Moorcock* (1889) 14 PD 64 (per Bowen LJ).

[4] Ibid, 68.

[5] *Chandelor v Lopus* (1603) 79 ER 3.

[6] *Torvald Klaveness A/S v Arni Maritime Corporation* [1994] 1 WLR 1465 (HL).

[7] Ibid, 1473.

[8] *Southern Foundries (1926) Ltd v Shirlaw* [1939] 2 KB 206 (CA).

[9] Ibid, 227.

[10] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10. The facts and analysis are provided in part 4 below.

[11] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72. Hereinafer to be referred to as "Marks and Spencer". See part 5 below for the facts and analysis.

[12] Barton & Ors v Morris & Anor [2023] UKSC 3. See part 5 below for the facts and analysis.

contracts, this paper argues that the contemporary methodologies are yet to be sufficiently clear as evidenced by case law and scholarly opinions. Moreover, in Nigeria, the *Barton* decision arguably stands in opposition with Nigerian case law on contracts which formed around the traditional tests of implied terms, unjust enrichment and equitable maxims. Thus, *Belize Telecom, Marks and Spencer* and *Barton v Morris* have not been cited in any Nigerian case. The contents of Nigerian case law on implied terms are solely formed by the traditional tests: therefore, it is not yet clear how Nigerian courts would apply (or if they would be interested in applying) the ratios of these cases.

The central question which is herein investigated is therefore this: In what ways do the contemporary English case law on implied terms contradict with the established modes of making contracts as well as the doctrines of equity and unjust enrichment? This article would doctrinally unpack this central question throughout the six parts of this article, which includes this introduction. Part two discusses the article's scope, distinguishing agreements which require terms to be implied into them to give business efficacy and those called *agreement-to-agree* due to lack of fundamental terms to form valid contracts. Parts three and four discuss the law of implied terms from *The Moorcock* and *Shirlaw* purviews, up to the Privy Council decision in *Belize Telecom.* Here, the extent to which interpretation and implication of terms overlap are examined–this stems mainly from Lord Hoffmann's attempt to merge both concepts. In part five, the post-Belize UKSC cases—*Marks & Spencer* and *Barton v Morris*—are discussed, pointing out both the defects in the contemporary framework as well as the contradictions that ultimately fail to provide guidance to prospective contracting parties. The paper concludes in part 6 with recommendations and the way forward.

2. Scope of Discourse: Implied Terms of Fact Distinguished from Agreement-to-Agree and Terms Implied by Law

The article's discourse captures two possible types of incompleteness in contract-making for which a reasonable third party (courts) may be requested to enforce. For example, master agreements are by nature incomplete in factual terms due to their design for indefinite application. Where contracting parties deliberately execute an incomplete agreement for whatever reason, courts will usually assess whether such agreement as is, qualifies to be enforced after infusion of reasonable terms; or whether it is simply an agreement-to-agree due to lack of fundamental terms. If an incomplete contract's missing terms are not sufficiently fundamental, a court may under its inherent power to do justice, fill the gaps with reasonable terms that consequently bind the parties. This power of court derives from the presumption that contracting parties enter into agreements for the primary purpose of performance, and where they deliberately left out certain terms, the omission will not necessarily invalidate the contract. This differs from an agreement-to-agree where the missing terms are so fundamental that any attempt by a court to fill the gap invariably leads to a unilateral making of contract for the parties.

The consequential outcome of a judicial repair of agreement-to-agree philosophically runs contrary to the essence of contract as well as the function of courts as unbiased umpires in adversarial systems. What can thus be ascertained from the forgoing is that common law courts tend to have two polarized solutions for incomplete contracts. First, in assessing incompleteness, they ascertain whether the missing terms are too fundamental such that a repair will lead to making a brand new contract for the parties. If this is the case, common law courts will declare the contract to be an agreement-to-agree and thus unenforceable. Secondly, the court determines whether the missing terms are insufficiently fundamental in which case the missing terms can be filled with reasonable terms *suo moto*. In other words, in respect of incompleteness, courts will either enforce a contract after a minor repair, or not enforce it if repair is considerably fundamental.

In *Société Générale, London Branch v Greys*,[1] Lady Hale reiterated the two possible types of implied terms in contract. The first, with which this article is concerned, relates to a term being implied into a particular contract to give it a business efficacy in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. In Nigeria, Justice Uwaifo in *Ibama v Shell*,[2] opined something similar that "there are

[1] [2012] UKSC 63, para 55.

[2] *Ibama v. Shell Pet. Dev. Co. (Nig.) Ltd (1998) 3 NWLR (Pt. 542) 493.*

certain contracts where terms may be logically implied from the express terms of the contract, or where no such express words are available, implied terms may be imported into the contract in so far as they do not contradict the express terms of the particular contract."[1]

The second type of implied terms arises by operation of law, and its validity does not depend necessarily on the presumed intention of the parties. This article does not discuss incompleteness in the context of agreement-to-agree, neither does it focus on terms implied by law. Terms to be implied by law are those terms that can be found in legislations and do apply across board for contracts that have the same subject matter irrespective of the parties' presumed intention. Thus, the article will unpack the implication of 'incompleteness' in contracts on ad hoc basis, i.e., based on certain facts or assumptions which may or may not exist in each and every circumstance. Incompleteness and gap-filling go hand in glove. Gap-filling is part of interpretation: thus, in interpreting a contract between two parties, the court usually identifies the presumed stronger party or drafter of the contract and leans in favor of the presumed weaker counterparty. If there is an ambiguity in drafting, courts would normally apply the *contra proferentem* rule to resolve the ambiguity or incompleteness against the drafter (McCunn, 2019).

Similarly, if the contract terms are unconscionable and unfair against a party, courts would likely presume the existence of arbitrariness and one-sided bargain which runs counter to the presumption of equality and fairness in contractual bargains. Until *Belize Telecom* in 2009, whichever of the above methods a court employed to supply implied terms ultimately satisfied the two leading tests of 'business efficacy' and 'officious bystander'. However, post-*Belize Telecom*, the jurisprudence of implied terms of fact has arguably oscillated to the realm of vagueness and opacity. In part three below, the two traditional tests and their contemporary relevance to the discourse will be discussed.

3. Historical Tracings of Implication of Terms in Fact: The Business Efficacy and Officious Bystander Tests

Ascertaining what is an express term of a contract as well as its meaning is arguably more straightforward compared to the implied terms of such a contract (Wilmot-Smith, 2023). Implied terms arise from the seeming necessity of incompleteness due to future exigencies; or unknowingly, from the imperfections of the language of contract. As stated earlier, there could be legitimate reasons for executing an incomplete contract and such reasons may be within the contemplation or intention of the parties; although in dispute, each of them may disagree on the terms that were commonly but indirectly thought to apply. Implied terms of a contract are as applicable as their express term counterparts: the main distinction is that implied terms are the invisible extensions of express terms. Notably, both express and implied terms are weighted equally in the eyes of the law, although in case of the latter, the challenge lies in its lack of immediate visibility and the necessity of being discovered as a precondition for application.

Prior to 1889, what existed what a random set of methods that litigants employed for ascertaining implied terms of fact. However, in *The Moorcock* case, Bowen LJ crafted the business efficacy test as guiding formula. Accordingly, a factual term can be implied into a contract based on the contracting parties' presumed intention, if such term gives business efficacy to the contract. Bowen's reasoning in *The Moorcock* is not surprising because during the late 19th century, English contract law was dominated by the activities of merchants. English contract law's mercantile origin is hardly in contention and has been acknowledged by many English scholars. Lord Devlin (1951), in this extrajudicial piece, explained this mercantile heritage and why contractual interpretation especially in commercial dealings cannot reasonably disentangle from the (evolved) *lex mercatoria* and customs of English merchants (Steyn, 1997; Mitchell, 2003).

Based on the forgoing perception, it is unsurprising that the facts which gave birth to the business efficacy test in *The Moorcock* were commercial in nature, involving a maritime shipping contract. In the case, a cargo ship was damaged during the time it was docking at the defendant's jetty in River Thames, England. The cause of damage on the vessel was ascertained to have resulted from the jetty's insufficient fitness for purpose, the vessel having been

[1] Ibid, 496.

damaged by a ridge of hard ground on the riverbed. Bowen LJ, held the defendant liable for breach of an implied term to keep the river bed reasonably fit for purpose, a conclusion he believed could not have differed from the presumable expectation of the parties about the safety level of the jetty in ensuring that steamships load and offload cargoes safely.

Accordingly, both parties were in the business of maritime shipping and it was therefore reasonably expected that a term ensuring against the damage of the plaintiff's vessel would be implied into the contract to provide such business efficacy. In the words of Bowen LJ, "[t]he law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties."[1]

A self-evident challenge with the business efficacy test lies in the specialized nature of knowledge and experience needed to exactly ascertain it in a given circumstance. Its ascertainment by courts tends to be largely derived from the parties' presumed intention as experienced businessmen. Alternatively, where the parties are diametrically opposed as to what constitutes business efficacy in a circumstance, the court would have to rely on a third party expert opinion. Lord Bowen's test in the 19th century continued to influence legal scholars and judges in their approach towards contract interpretation.

In fact, much of the solution crafted by English judges in the 20th century in respect of interpretation of commercial contracts revolved around the commercial sense approach (Andrews, 2017). Lord Wilberforce[2] and Lord Diplock[3] were among the English judges whose interpretive solutions anchored largely on business common sense. In any case, the sophisticated nature of the business efficacy test evoked much uncertainty around its determination and application. There were also cost implications especially where the parties are in disagreement on what is commercially efficacious. This necessitated the need for a simpler test for denoting implied terms, perhaps to be rooted in common sense (Kramer, 2003), instead of in business efficacy.

The second test, the officious bystander test is based on a legal fiction and was somewhat a departure from the business sense approach. Its foundational notion anchors on the sensibilities of a random reasonable person portrayed to possess an omniscient ability. Presumably, the law would make do with what such a person eavesdropping on contracting parties' conversations about their contract terms would hastily think to be an express term of that contract. Before the official birth of the officious bystander test, forerunner efforts were already undertaken by Lord Scrutton: the foundational elements of the test were developed in *Reigate v. Union Manufacturing Company,*[4] in which mutual trust and confidence as well as their practical effects were implied into an employment contract. According to Scrutton, "[a] term can only be implied if it is necessary in the business sense to give efficacy to the contract".[5] He added that a term would only be implied if "it is such a term that it can confidently be said that if at the time the contract was being negotiated the parties had been asked what would happen in a certain event, they would both have replied 'Of course, so and so will happen; we did not trouble to say that; it is too clear'".[6]

Two decades after *Reigate*, MacKinnon L.J. in *Shirlaw* v. *Southern Foundries (1926) Limited,*[7] crafted the 'officious bystander' test. The officious bystander test arguably requires a lower threshold of proof compared to the business efficacy test because according to Mackinnon, the term to be implied has to be so apparently obvious such that if such term had been suggested for inclusion by an officious bystander when the parties were making the contract, they would without hesitation say 'of course!'[8]

Following the *Shirlaw* case, the difficulty that courts encountered in applying the officious bystander test related to the threshold of

[1] *The Moorcock* (1889) 14 PD 64 (CA) 68, Bowen LJ.

[2] See *Prenn v Simmonds* [1971] 1 WLR 1381, 1389 HL ("commercial good sense").

[3] See *Antaios Cia Naviera S.A. v Salen Rederierna AB* [1985] AC 191, 201 HL ("business common sense").

[4] [1918] 1 KB 592.

[5] Ibid, 605.

[6] Ibid.

[7] [1939] 2 KB 206 (CA).

[8] Ibid, 227.

knowledge and commercial awareness a person must possess in order to qualify for the role of being consulted by the parties. It gradually became obvious that while the test may be useful in apparently obvious cases with simple facts, in circumstances where the parties are dealing with complicated sets of facts within a specialized commercial area, the officious bystander test became insufficient to accurately ascertain implied terms.

The forgoing view accords with Lord Neuberger's in *Marks & Spencer* when he opined that "[t]he notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy. (The difference between what the reasonable reader would understand and what the parties, acting reasonably, would agree, appears to me to be a notional distinction without a practical difference.)." [1] The consensus among 21st century judges, championed by Lord Hoffmann in *Belize Telecom*, seems to be that elements of the traditional tests be used as tools, jointly and severally, when faced with the task of ascertaining implied terms.[2]

Legal historians would recall the staggered growth of the common law over several centuries (Baker, 2019). Its hardening process as a coherent body law took centuries to crystallize, and the foundational principle of *stare decisis* requires that common law judges treat similar cases alike (Cross & Harris, 1991). However, as society evolves, facts of disputes would naturally deviate from previously recognizable patterns, and viable solutions would consequently be adjusted or completely overhauled. As exemplified by the 1889 *Riggs v Palmer*, [3] the ensuing complexities of legal evolution require judges under the mandate of *ibi jus ibi remedium* to be disruptively inventive in providing remedies for hard cases (Dworkin, 1977). The forgoing tests for ascertaining implied terms had come during the era of rapid legal evolution, and it was frustrating to frequently encounter situations in which the available tests or remedies were insufficient to deal with a present situation. As the evolution of law could not keep pace with the fast evolving commerce, the potency of common law rules vis-à-vis commercial dealings were constantly challenged and judges craved for malleable tools that could fit in most situations.

Consequently, the rise of reasonableness/reasonable man's perspective as a tool of interpretation became increasingly mainstream. As was confirmed by Lord Wright (1935), reasonableness (the contemporary equivalent of public policy), also became a judge's leeway to infuse their own educated intuitions and conscience in solving legal problems. Lord Denning (a chronic dissenter) was in the vanguard of this approach as he demonstrated in many cases including his opinion at the Court of Appeal in *Liverpool City Council* v. *Irwin*.[4] In that case, the tenants of the Liverpool City Council withheld payment of rents in protest and the Council sought to evict them.

The tenants' leading issue was whether there was a contract and if so whether an implied term requiring the Council to properly maintain the common areas could be added. The tenants argued that the duty to maintain the common areas of the building was an implied term for which the Council failed to uphold. The House of Lords in *Irvin*,[5] agreed that there was an implied term that required the Council to take reasonable care in maintaining the common areas because such maintenance was necessary for the tenancy to function properly. As Lord Wilberforce emphasized, "such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity."[6]

At the Court of Appeal stage of the *Irvin* case, Lord Denning M.R had slightly dissented, opining that the test for implying a term, based upon the presumed intention of the parties, was "whether or not it was *reasonable in all the circumstances* to do so."[7] As glowingly evident in his book titled the *Discipline of Law* (1979), Denning often abandoned the strict constructionist approach to law, and was a

[1] See *Marks and Spencer* [2015] UKSC 72, para 23.

[2] The *Belize Telecom* case (2009) para 21.

[3] 115 NY 506 (1889).

[4] [1976] QB 319.

[5] [1977] AC 239, HL.

[6] Ibid, pp 254F-255A.

[7] [1976] QB 319, 330.

purveyor for deepening the role of reasonableness as well as what he described in *Dennis Reed Ltd* as "the common understanding of men".[1] He often used the term "man on the Clapham omnibus" as a measurement standard for what could pass muster in legal reasoning (Jewel, 2019). Admittedly, the Clapham omnibus term predates Denning, having been enunciated in 1903 in *McQuire v. Western Morning News Co*,[2] and appeared later in a number of non-contract cases such as *Hall v. Brooklands Auto-Racing Club*.[3] In any event, Denning used the term in a number of cases including in *Miller v. Jackson*,[4] to emphasize reasonableness, fairness, and public policy as tools of interpretation as well as a formula for ascertaining what term could be implied into a contract.

We would recall that at common law, the terms of contracts enjoy a bifurcated division into express and implied terms. The first is somewhat easier to prove because express terms either exist textually, or orally and by conduct. In *Carmichael v National Power Plc*, [5] Lord Hoffmann (with whom two other justices agreed) recognized the equality of these three modes of making contracts at common law. In that case the parties had intended that their contract be partly contained in letters, oral exchanges at the job interviews or elsewhere, and partly left to change via conduct as time proceeded. The court held that where the objective intention of contracting parties requires being gathered partly from documents as well as from oral exchanges and conduct, the terms of the contract are a question of fact which can be gleaned from any of such modes of contract-making. In other words, implied terms of fact are simply unexpressed intentions that have to be elicited by a reasonable inference to understand what the contract means. Thus, both express and implied terms enjoy equality in contractual interpretation. This accords with Lord Hoffmann's view that "[t]he implication of the term is not an addition to the instrument. It only spells out what the instrument means."[6]

However, based on the hindsight knowledge of case law, common law judges have struggled over the task of ascertaining implied terms without falling into the fundamental error of making new contracts for parties. This is because unlike express terms that clearly harbor the intention of parties, ascertaining actual implied terms comes from a general experience in that contractual subject matter. This is where the business efficacy and officious bystander tests come in—conclusively, the business to be made efficacious must relate to that which forms the subject matter of contract, and the officious bystander eavesdropping at keyholes to the parties' conversation must at least be fairly knowledgeable and experienced in the contract's subject matter to be able to make any reasonable interjections.

The forgoing however is somewhat different from Lord Denning's approach, which emphasized the perspective of the man on Clapham omnibus—Denning's approach is a much laxer method which presumes that a regular/random individual on a public bus could be sufficiently knowledgeable as to arbitrate or proffer reliable opinions that will not only be able to resolve a difficult contractual issue but also act as a final arbiter in the commercial parties' opposing views (Moran, 2003). Arguably, in this modern time, use of Denning's approach should be discouraged in interpreting or ascertaining implied terms of contracts, especially in complex/niche business areas. But as would be shown below in part 4, judges after the era of Denning have not performed spectacularly well in easing the confusion that surrounds implied terms. In fact, they have arguably intensified it—Lord Hoffmann's decisions (to be discussed below) have stirred roughly the somewhat settled methods that were based on the business efficacy and officious bystander tests.

4. Lord Hoffmann: The Overlap Between Implication of Terms in Fact and Contract Interpretation

4.1 Lord Hoffmann Before the Belize Telecom Case

Before Lord Hoffmann's decision in *Belize Telecom*, he had already acquired a reputation in contract interpretation which emphasized the infusion of background facts in realizing the presumed intention of the parties (Tan, 2016). This contextualist approach sits uneasily in contrast with the formalistic approach to interpretation which has been integral in the reputation of English contract as predictable,

[1] *Dennis Reed Ltd v Goody* [1950] 2 KB 277, 284.

[2] [1903] 2 KB 100, CA.

[3] [1932] 1 KB 205.

[4] [1977] QB 966.

[5] [1999] 1 WLR 2042, 2049.

[6] See the *Belize Telecom* case (2009), para 18.

whose judges typically vote for predictable justice in commerce even if the heavens were to fall (Charny, 1999; Wilkinson-Ryan, 2015; Jonathan, 2013). Scholarly commentaries have suggested that such level of predictability was commercially efficient for England especially in relation to its mission to be a jurisdiction of choice for international commercial dispute settlement (Atiyah & Summers, 1987; McKendrick, 1997).

However, in many ways, the 21st century Hoffmann may be comparable to his 20th century Denning predecessor who utilized every opportunity—for example—the *High Trees* case,[1] to jettison formalism in preference for context, equity and justice. For Hoffmann, the devil is in the detail: thus, during his active days in the House of Lords, he often considered the prevalent rules of contract interpretation too formalistic to provide true justice to contracting parties, and his key decisions sought frantically for the truth in contexts at the expense of formalism and predictability. Notably, Hoffmann's decision in *ICS v West Bromwich*[2] was designed (perhaps unintentionally) to rock a somewhat stable boat that sailed on formalism with the overall perception that the dangers of formalism often surpassed its advantage of predictability.

Thus, Hoffmann's opinion in *Belize Telecom* in relation to implied terms was already expressed a decade earlier in his five principles of contractual interpretation in *ICS*, particularly the fourth principle which states that "the meaning of a document may not be the same as the meaning of the words used. The court can and should attempt to ascertain what the words were intended to convey as opposed to their literal meaning."[3] Similarly, in the first of the five principles, he admonishes courts "[t]o consider the meaning a document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time the document was made."[4]

Hoffmann's criterion of a reasonable person including their use as a yardstick for appreciating gaps in contract is undoubtedly higher than Denning's, because it is rooted in the reasonable person's ability to first of all acquire all the necessary background knowledge and information that would reasonably have been available to the parties at the time the document was made. This is different from Denning's approach which only emphasized reasonableness based on the perception of a man on the Clapham omnibus. Nigerian courts tend to now share the view that more than reasonableness is required as a yardstick for contract interpretation and in ascertaining implied terms. In *Okoebor v. Eyobo Eng. Serv. Ltd*,[5] the Court of Appeal held that "parties ought not to imply a term merely because it would be a reasonable term to include in a contract. It must be such a necessary term that both parties must have interpled that it should form part of the contract and have only not expressed it because its necessity was so obvious that it was taken for granted."[6]

Returning to Hoffmann, it may be fair to argue that during his time, the English rules of contractual interpretation, as well as the methods in vogue for ascertaining implied terms, were perceptively unstable and incapable of providing just outcomes. Part of that perception stemmed from the rigidity and harshness of the Parol evidence rule (triggered by the inclusion of an *entire agreement* clause) which naturally excluded the possible admissibility of relevant background facts that could assist in ascertaining the contracting parties' true intention (Posner, 1998; Linzer, 2002; Zuppi, 2007). Thus, apart from the ratio in the *ICS* case which emphasized the necessity of going beyond the four walls of the contract into its relevant background facts, Hoffmann further developed this view in *Chartbrook Ltd v Persimmon Homes Ltd*.[7] In *Chartbrook*, Hoffmann's previous obsession with infusing background facts into contract had hardened into the radical point of proposing that judges unilaterally amend contracts "[i]f they believe that something has gone wrong with the language of the contract … they may proceed with a red ink to verbally rearrange and correct

[1] *Central London Property Trust Ltd v* High Trees *House Ltd* [1947] KB 130. Before *High Trees*, a promise made without a consideration was clearly unenforceable. Denning however created the doctrine of promissory estoppel to prevent a party from reneging on their promise if the counterparty has reasonably relied on that promise.

[2] [1998] 1 WLR 896.

[3] Ibid, 912-13.

[4] Ibid.

[5] (1991) 4 NWLR (Pt. 187) 553.

[6] Ibid, 555.

[7] [2009] UKHL 38.

provisions of the contract without any limitation."[1] As would be shown below in the facts and holding of *Belize Telecom*, Hoffmann approach increasingly blurred the line between interpretation and implication.

4.2 AG of Belize v Belize Telecom Ltd: Lord Hoffmann Attempts to Merge Implication and Interpretation

The facts of *Belize Telecom*[2] are as follows: the government of Belize decided to privatize the nation's telecommunication services. The Articles of Association of Belize Telecommunications Ltd provided for special class 'C' shares. Accordingly, "the holder of the Special Share shall so long as it is the holder of 'C' Ordinary shares amounting to 37.5% or more of the issued share capital of the Company be entitled at any time by written notice served upon the Company to appoint two of the Directors designated 'C' Directors and by like notice to remove any Director so appointed and appoint another in his or her place."[3]

Self-evidently, the Company's Articles of Association were, however, silent on how a shareholding below 37.5% would impact on the holder's power to appoint or remove directors. Belize Telecom Ltd, holding the requisite number of shares was able to appoint two directors. However, within a year of appointment, owing to financial difficulties, its shareholding in the class 'C' shares fell below 37.5%. Given that the Articles of Association were silent on how the directors appointed by the holder of the special share would be removed when the latter's shareholding had fallen below 37.5%, a dispute consequently arose.

Belize Telecom Ltd argued that owing to the silence on how the directors would be removed if Belize Telecom's shareholding fell below the minimum percentage, the directors were consequently "irremovable" unless they choose to resign voluntarily.[4] Similarly, Belize Telecom Ltd argued that the court lacked the power to introduce new terms into the written document (Articles of Association) because that would amount to rewriting the contract for the parties. The Attorney General of Belize argued otherwise, emphasizing the 'absurdity' of a situation in which the directors would become irremovable due to the lack of an expressly stated condition. Thus, in the absence of such an express term about their removal when the majority shareholding falls below the minimum percentage, the court ought to imply the term of the directors' resignation into the contract (Articles of Association).[5]

The Privy Council reversed the decision of the Court of Appeal of Belize, holding that the directors' resignation and vacation of office could be implied into the contract in the absence of any shareholder in possession of the minimum of 37.5% to appoint or remove them. The Privy Council opined that the implied term was "required to avoid defeating what appears to have been the overriding purpose of the machinery of appointment and removal of directors, namely to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles".[6]

The Privy Council's decision was unanimous. Although it was delivered by Lord Hoffmann, Lords Rodger, Carswell, Brown, and Baroness Hale, agreed with Hoffmann. Yet, anyone who is familiar with Lord Hoffmann's works would recognize the *Belize Telecom* decision as his brainchild because the *Belize* principles as outlined below are largely consistent with his views in the *ICS* and *The Achilleas*,[7] cases. Shortly after the *Belize* judgment in 2009, Lord Clarke MR predicted that Lord Hoffmann's analysis "will soon be as much referred to as his approach to the construction of contracts in Investors Compensation Scheme [1998] 1 WLR 896, 912-913".[8] The principles enunciated in *Belize* can be gleaned from the following quotes of the case and their resemblance with the *ICS* restatement is equally noted. In the case, Hoffmann noted that:

1) The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more

[1] Ibid, para 25. Also see para 14 thereof.

[2] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10. Hereafter referred to as: *Belize Telecom* or *Belize.*

[3] The *Belize Telecom* case, para 5.

[4] Ibid, para 14.

[5] Ibid.

[6] Ibid, para 32.

[7] *Transfield Shipping Inc v Mercator Shipping Inc* (The Achilleas) [2008] UKHL 48, paras 25 and 26.

[8] *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531, para 8.

reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.[1]

2) The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.[2]

3) In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.[3]

4) The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority.[4]

5) It follows that 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. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?[5]

As earlier stated, there is a noticeable pattern of radicalism in Lord Hoffmann's approaches to legal reasoning in contracts which tended to always reinvent the wheel. First, in his *ICS* case, he stated boldly that his five restatement "had discarded almost all the old intellectual baggage of interpretation."[6] Thus, in terms of formula, he hoped that the five restatements in *ICS* would be taken as the primary guide for contract interpretation, even though, arguably, the decision's roots in contextualism did not provide a clearly objective formula for this purpose. As could be seen from the later reactions of his peers, such as Lord Neuberger[7] and Lord Hodge,[8] the *ICS* (and *Chartbrook*) reasoning did not enjoy the unopposed sacrosanct position its creator had envisioned.

Secondly, in the Privy Council case of *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*,[9] Lord Simon (speaking for the majority, which included Viscount Dilhorne and Lord Keith) said that "[F]or 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."[10] However, in the

[1] The *Belize Telecom* case, para 16.

[2] Ibid, para 17.

[3] Ibid, para 18.

[4] Ibid, para 19.

[5] Ibid, para 21.

[6] *ICS v West Bromwich* [1998] 1 WLR 896, 912.

[7] *Arnold v Britton* [2015] UKSC 36, paras 17-21.

[8] Ibid, para 66 (Lord Hodge agreed with Lord Neuberger).

[9] (1977) 52 Australian Law Journal Report 20.

[10] Ibid, 26.

Belize case, Hoffmann arguably watered down the application of over a century's set of tests in determining implied terms of fact when he opined that the tests assembled by Lord Simon were not independent tests per se, but "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, or in which they have explained why they did not think that it did so."[1]

Similarly, Hoffmann's attempt in *Belize Telecom* to merge implication of terms in contract with contractual interpretation was not a product of necessity born out of the facts of *Belize*. Arguably, the outcome was based on a premeditated approach to expand his *ICS* legacy, considering his attempts to merge both concepts in at least two occasions that spanned over a decade. Hoffmann (1995, p. 139), argued in this extrajudicial piece published in The Law Teacher, that "[t]he officious bystander test diverts attention from the fact that the implication of terms into a contract is in essence a question of construction like any other". Two years later in *South Australia Asset Management Corporation v York Montague Ltd.*,[2] he similarly opined that "[a]s in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting".[3] The *Belize* decision was therefore a continuation of his mission to considerably blur the line of difference between the two legal concepts, which ultimately deepened the confusion that already existed in this area of law.

However, Sir Thomas Bingham elucidated in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*,[4] regarding the core difference between both concepts when he opined that "the courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."[5] Six years after *Belize Telecom*, Lord Neuberger's lead opinion in *Marks & Spencer* further clarified the lingering confusion on the role of the traditional tests vis-à-vis Hoffmann's *Belize* in ascertaining implication of terms in fact.

5. Implication of Facts in Contracts After *Belize Telecom*

5.1 Marks and Spencer plc v BNP Paribas[6]*: Necessity Trumps over Reasonableness*

Marks and Spencer plc (M&S) was a tenant under a commercial lease with BNP Paribas as the landlord. M&S exercised its right under the agreement's break clause to determine the lease on 24 January 2012, earlier than 2 February 2018, when the lease was scheduled to naturally expire. Although the rent was payable in advance on the usual quarter days, M&S had already paid rent in advance for the entire quarter due on 25 December 2011. The issue was whether it can recover from the landlords the apportioned rent in respect of the period from 24 January to 24 March 2012.

The lease did not expressly state that the landlord was required to refund any overpaid rent. M&S argued that a term should be implied into the lease requiring BNP Paribas to refund the overpayment. Given the absence of a provision in the Lease which expressly obliges the landlords to pay the apportioned sum to the tenant. Accordingly, the court held that in order to succeed the claimant has to establish that such an obligation must be implied into the lease. Lord Neuberger read the lead judgment (with Lord Carnwath slightly dissenting). Here, it is important to note that Neuberger has been a fierce opponent of Hoffmann, disagreeing with him in a number of cases, especially on his *ICS and Chartbrook* judgments, on the most appropriate method for contract interpretation. While Hoffmann is a proponent of contextualism, Neuberger has insisted that a literal interpretation rooted in the Parol evidence rule offers more predictability to contracting parties and prevents the court from shielding an "unwise" party from their decisions and

[1] The *Belize Telecom* case, para 27.

[2] [1997] AC 191.

[3] Ibid, 212.

[4] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] Entertainment and Media Law Report 472.

[5] Ibid, 481.

[6] [2015] UKSC 72. Hereinafter referred to as *Marks and Spencer*.

consequently rewriting contracts for parties.[1] Thus, for the sake of fairness, Neuberger's critique of Hoffmann's *Belize Telecom* should be appreciated alongside their intellectual disagreements.

In *Marks and Spencer*, Neuberger opined that a term will only be implied if it satisfies the test of business necessity. Apparently, in place of Bowen LJ's 'efficacy', he used the substitute of 'necessity' "[t]o emphasize that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that Belize Telecom has been interpreted by both academic lawyers and judges as having changed the law."[2] He opined that "that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in Belize Telecom could obscure the fact that construing the words used and implying additional words are different processes governed by different rules. Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication."[3]

Neuberger added that the forgoing "does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context."[4] Similarly, "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."[5] In what follows, the article will discuss *Barton* and its interface with the contract doctrine of unjust enrichment and quantum meruit.

5.2 Barton v Morris: A Shift Towards Unjust Enrichment and Quantum Meruit

In *Barton v Morris*,[6] an oral agreement was made between Mr. Barton and Foxpace Ltd ("Foxpace") — the latter owned a property (Nash House) which it wanted to sell. The express term based on the parties' oral agreement was that if Mr. Barton introduced to Foxpace a purchaser who bought Nash House for £6.5 million or more, Foxpace would pay Mr. Barton GBP1.2 million. Based on this term, Mr. Barton introduced Western UK Acton Ltd ("Western") to Foxpace to purchase the property for GBP6.55 million. However, upon discovery by Western that Nash House was located in a place awaiting to be constructed a rail link, the price was consequently impacted: it was eventually purchased for GBP6 million plus VAT.

The parties' oral contract was silent on what would happen in terms of Mr. Barton's remuneration if the property were to be sold less than GBP6.5 million. Foxpace argued that owing to the sale below GBP6.5 million it was relieved (based on the express term) from any obligation of paying the fee of GBP1.2 million or any amount whatsoever to Mr. Barton. The trial court agreed with this argument. The Court of Appeal disagreed and held for Mr. Barton, stating that he was entitled to a reasonable remuneration for his services. However, the Supreme Court disagreed and found favor in the trial judge's reasoning.

The central issue in *Barton* revolved around unjust enrichment and quantum meruit. First, Mr Barton was not a professional estate agent and in two occasions he had tried to purchase the Nash House and paid initial deposits altogether amounting to GBP1.2 million, but for various reasons he could not finalize the purchase. Consequently, these deposits to Foxpace were forfeited. Based on the forgoing, Mr. Barton agreed provide a buyer who will purchase the Nash House for GBP 6.5 million or

[1] *Arnold v Britton & Ors* [2015] UKSC 36, para 20.

[2] *Marks and Spencer*, para 24.

[3] Ibid, para 26.

[4] Ibid, para 27.

[5] Ibid, para 28.

[6] [2023] UKSC 3. Hereinafter referred to as *Barton* or *Barton v Morris*.

higher in exchange of recovering the forfeited GBP1.2 million. The issue for determination can thus be surmised as follows: where contracting parties agree orally that an introduction fee (GBP1.2 million) would be paid upon a property being sold for a particular amount (GBP6.5 million), and the property eventually sold for £6 million, less than that conditional amount of GBP6.5 million, does the seller have an obligation, whether contractual or non-contractual, to pay reasonable remuneration to the introducer for their services?

The UKSC by a 3-2 majority, held that implying a term requiring payment to Mr. Barton, despite the sale price being below GBP6.5 million, was not necessary to give the contract business efficacy. For the Court, the express terms of the agreement were clear, i.e., payment of the GBP1.2 fee to Mr Barton was conditional upon achieving a sale price of GBP6.5 million or more. Thus, implying a term for payment under different circumstances would contradict the express terms of the agreement. The Court opined that the existence of a valid contractual agreement between the parties which embodies an express term precluded a claim for unjust enrichment based on the forfeiture. Similarly, the Court reasoned that since the parties had allocated the risk within their agreement, the Court was no longer in the position to reallocate that risk based on the outcome.

The *Barton* case rests largely on the earlier ratio in *Marks & Spencer* in which the doctrine of absolute necessity was instituted as a guide in determining whether a term should be implied into the contract of parties. Thus, if the need for implied terms is not absolutely necessary to reflect the parties' intentions and to make the contract workable, the court would refrain from providing implied terms. Although *Barton* is barely two years old, its rule is foreseen to be fiercely controversial because in adhering to the absolute necessity rule in *Marks & Spencer*, it denied the century old rule on unjust enrichment and quantum meruit. This is likely to generate more hardship in long term contractual transactions where performance has been substantially performed even though some aspects of the performance may not entirely sit with the initially agreed express terms—it should be taken to go without saying that the reasonable costs incurred by Mr. Barton deserved a reasonable recompense or that the forfeited sum of GBP1.2 million as well as the GBP 6 million sale both stemming from Mr. Barton's efforts deserve remuneration.

It is curious that the Court seemed to have abandoned the relevant maxims of equity, particularly the maxim that equity inputs an intention to fulfill an obligation where a substantial performance of an obligation is generally treated as sufficient.[1] Similarly, equity abhors a forfeiture.[2] Foxpace made a total sum of GBP 7.2 million pounds, i.e., at about GBP 700,000 above the proposed sale price of GBP6.5 million for which Mr. Barton would be paid. At least, a court of equity with good conscience should have awarded Mr. Barton the surplus of GBP700,000 as a reasonable remuneration to offset his already forfeited sum of GPB1.2 million as well as the personal expenses he incurred in connecting Foxpace with buyer—after all, "equity delights to do justice and not by halves"[3] to ensure that where a common law remedy is insufficient to render justice, equity will intervene.

In Nigeria, the facts of *Barton* would likely yield a different outcome: the Nigerian courts are likely to view Foxpace's acceptance of the GBP6 million purchase price (instead of GBP6.5 million) as modifying the earlier oral contract by conduct as well as creating a reliance-based estoppel on Foxpace not to revert to the original express term.[4] Mr. Barton would likely have been awarded a reasonable fee (perhaps the difference between Foxpace's minimum expectation of GBP6.5 million and the total of GBP7.2 million which it received) to offset his own expenses. Similarly, the forfeited GBP1.2 million would have been viewed as an unjust enrichment in light of Mr. Barton's efforts which

[1] See *Dakin & Co Ltd v Lee* [1916] 1 KB 566; *Hoenig v Isaacs* [1952] 2 All ER 176. In both cases the courts held that if a party has *substantially performed* a contract but with minor defects, they can still enforce the contract, subject to deductions for any deficiencies.

[2] See *Stickney v Keeble* [1915] AC 386, HL; *Shiloh Spinners Ltd v Harding* [1973] AC 691, HL; *Patel v Ali* [1984] Ch 283. These English apex cases affirm that equity would intervene to mitigate harsh legal consequences where strict forfeiture would be unfair, particularly when the defaulting party has made reasonable efforts to comply with obligations.

[3] See *Walsh v Lonsdale* (1882) 21 Ch D 9; *Beswick v Beswick* [1968] AC 58, HL; *Chappell v Times Newspapers Ltd* [1975] 1 WLR 482.

[4] See generally *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, Lord Denning (promissory estoppel).

led to more than 90% of the agreed sale price.[1] It is a trite principle that legal formalities should not to be weaponized to undermine genuine equitable interests. In other words, equity will not allow a statute or formality to be used as a cloak for injustice given its habit to prioritize substance over form.[2]

In light of these, Nigerian courts would likely arrive at an opposite result because in *Daspan v Mangu Local Govt Council*,[3] a case with related facts, the Nigerian Court of Appeal held that "an implied contract is one that is inferred from the conduct of the parties and which arises where a party without being requested to do so, renders services under circumstances indicating that he expects to be paid and the other party knowing such circumstances avails himself of the benefit of those services. In the instant case, the respondent had availed himself of the services of the architectural/mechanical drawings and made no move to stop the appellant from producing them." [4] In matters of justice, Nigerian (common law) courts would typically recall that *ubi jus ibi remedium*—equity will not allow a wrong to be suffered without a remedy.[5]

6. Recommendation and Conclusion

The practice of ascertaining implied terms has clearly been dominated by the inquisitorial system approach in which the judge could descend onto the arena of dispute without minding if their descent would be perceived as being a biased umpire. The early proponents of the current formula for ascertaining implied terms seemed to be English judges that leaned towards the inquisitorial systemic thoughts —for example— Lord Denning's legal reasoning in many of his judgments gave birth to several equitable principles, which ultimately resembled the byproducts of the inquisitorial system. But the common law system is adversarial in nature, and the question is what will an adversarial system, strictly speaking, do in relation to implied terms of fact where concepts like reasonableness, officious bystander, business efficacy are to be used to determine implied terms.

Admittedly, living up to the standards of the adversarial system where the judge is not purportedly the man on the Clapham omnibus will be costlier for litigants because of the obligation to use third party experts to determine the reasonableness and officious bystander views in a given circumstance. However, commercial parties may be willing to pay extra as part of court fees if involvement of a third party expert would produce better clarity and accuracy in the determinations of implied terms in complex commercial contracts; compared to the perceptions of judges who usually lack actual commercial experience.

The *Belize Telecom* decision rocked the stable boat of implied terms of fact by attempting to merge implication and interpretation outside the traditional tests of business efficacy and officious bystander. Lord Hoffmann's influence in Belize vis-à-vis the merger of both concepts was commendably widespread in many cases in which the case's ratio has been cited. In Lewison (2014, p. 284), the *Belize Telecom* judgment is realistically taken to "represent the current state of the law of England and Wales". Notably, there is a similarity between Hoffmann's radical departure in *Belize Telecom* vis-à-vis implications of terms in fact as well as his *ICS* decision in which he considered the five restatement as discarding the old intellectual baggage in contractual interpretation, an approach that somewhat unsettled the law of interpretation (Peters, 2009; Davies, 2010; Carter & Courtney, 2015).

Although the UKSC restored the traditional tests in *Marks and Spencer* in 2015, none of the previous cases of Hoffmann in which he merged implication with interpretation were however overruled. Instead, the ratio decidendi in *Belize Telecom* was improperly distinguished in *Marks and Spencer* as not changing the law but as lowering the threshold for implying terms, thus conveying an impression that the scholarly community had completely misunderstood *Belize*. Similarly, in *Barton v Morris,* the UK Supreme Court veered off track vis-à-vis implication of terms in fact: therein, the implied term discourse was mixed up with unjust enrichment and quantum meruit.

The rapprochement between common law and

[1] In relation to unjust enrichment, see *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, HL; *Benedetti v Sawiris* [2013] UKSC 50.

[2] See *Rochefoucauld v Boustead* [1897] 1 Ch 196; *Binions v Evans* [1972] Ch 359; *Tinsley v Milligan* [1994] 1 AC 340.

[3] (2013) 2 NWLR (Pt 1338) 203.

[4] Ibid, 232.

[5] See the following Nigerian cases: *Dantata v Mohammed* [2000] 7 NWLR 176, 205 (Onu, JSC); *Thomas* v. *Olufosoye* (1986) 1 NWLR (Pt. 18) 669 (Oputa, JSC); *Bello & 13 Ors. v. A. G. Oyo State* (1986) 5 NWLR (Pt. 45) 828.

civil law systems continues to roughly impact on how common law issues are interpreted in adversarial courts. For example, the concept of using a reasonable person as a yardstick for measuring the intention of parties is a legal fiction, because, in practice, there is hardly such a reasonably third party bequeathed with the task to reasonably intervene: instead a judge sitting alone is the one who steps into the position of the imaginary third party. From Lord Denning's use of reasonableness (man on the Clapham omnius), to the traditional tests of business efficacy and officious bystander, to Hoffmann's merger, ascertaining implied terms in contracts continue to pose challenges. It is recommended that in commercial contracts the benchmark for reasonableness should not be based on an officious bystander's perspective even when they may lack special knowledge of the business. Similarly, the business efficacy test should truly be determined by an unbiased third party expert with extensive business experience—the cost for hiring this third party can be footed by the parties or incorporated as part of the court filing fees.

Lastly, quantum meruit is a well-established doctrine in contract law, which ensures that a performing party is rewarded fairly to the extent of their performance. Similarly, at common law, contracts can sufficiently be formed by conduct: for example, acceptance of a reduced sale price. In *Barton*, the monetary loss (the forfeited GBP1.2 million) should not have been allowed to remain where it had fallen in Foxpace's hands, since Mr. Barton did not come to court with unclean hands. These English apex cases—*Belize Telecom*, *Marks and Spencer* and *Barton v Morris*—have not yet been cited in any Nigerian case. The content of Nigerian case law is still largely comprised of the traditional tests, and it is unclear how Nigerian courts would apply (or be interested in applying) the ratios of these cases. This article recommends that Nigerian courts should not apply Baron as is—the doctrine of unjust enrichment and quantum meruit, as well as the maxims of equity should continue to guide courts in the enforcement of legal rights.

Biographical Note

Dr. Joseph Nwobike is a highly sought-after lawyer that leads the Osborne Law Practice in Nigeria. He is a Senior Advocate of Nigeria (SAN), a Fellow of the Chartered Institute of Arbitrators (UK), and has over 30 years of litigation experience in commercial law and human rights. He has provided a countless number of national and foreign clients with authoritative legal advice in the areas of Corporate Law, Insolvency and Debt Restructuring, Data Protection, Mergers and Acquisitions, Foreign Investments, Contracts and Finance Transactions. He is a scholar-practitioner and enjoys academic legal research and writing.

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