THE IMPLICATIONS OF IMPLICATION: DECONSTRUCTING THE MOORCOCK & THE CURIOUS CASE OF THE OFFICIOUS BYSTANDER

[*]ARMAAN PATKAR

INTRODUCTION

"Implication of terms is, in its character, oil for the wheels of commerce"[1]

Contracts include both written terms and terms hidden in spaces between such terms. These hidden terms are silent things that are not said.[2] These hidden terms can be extrapolated by Judges from the silences of the contract, by implication in fact. This allows judges to find contractual expression outside the written form of the contract and by doing so, give effect to the true contractual bargain. Once such an implied term is found, it can be effectuated with the same force as express terms.[3] This lubricates the wheels of commerce, which would otherwise come to a grinding halt.

In terms of procedure, implication begins with identification of the reason for silence, which could be forgetfulness, or poor drafting; because the term was so obvious that there was no need to state it; or because the parties did not contemplate the term at all. Another reason could be that the parties favored business convenience during contract formation over drafting perfection, by focusing on and expressing, only important terms in written words, but leaving other terms to be understood. Having identified the reason for the silence, the Judge must determine whether there is sufficient ground to replace the silence in the contract with an implied term. In this process, Judges usually refer to the question "*what did the parties intend?*"

---

[*] Associate, AZB Partners, Mumbai.

[1] Richard Austen Baker, Implied Terms in English Contract Law (Edward Elgar Publishing 2011).

[2] Carolyn Heaton, 'The Significance of Implied Contractual Terms' (30 August 2012) <www.morrisonkent.co.nz/uploads/PDF%20Articles/THE%20SIGNIFICANCE%20OF%20IMPLIED%20CONTRACTUAL%20TERMS.pdf> accessed 11 September 2016..

[3] *Imam Din v Dittu* [1925] AIR 174 (Lah) [3]; Pollock and Mulla. vnit Lal & Co v956 Bom. 151, ¶, Indian Contract & Specific Relief Acts (13th edn, Lexis nexis 2006).

The *raison d'être* of this implication ensures that the answer to this question is rarely and readily apparent. Answering this question requires the application of subjective principles which can tempt judges to become silent parties to a contract and imaginatively introduce terms[4] by presuming the intentions of the parties. This temptation clashes with the Common Law principle of freedom of contract (i.e. that there must be no interference with the right of the parties to choose the terms on which they contract).[5] Therefore, it is writ large that the mandate of a Judge is not to impose his own views of contractual bargain or make the contract better, fairer or more reasonable. Further, in presuming the intentions of parties, judges cannot be presumptuous; they should not substitute their view as to that intention.[6]

In light of the above, Parts II, III and IV of this Article trace the milestones in the evolution of principles of implication, starting from Slade's case in 1602 and then evaluating Bowen, L.J.'s Business Efficacy Test and Mackinnon, L.J.'s Officious Bystander Test. In Part V, I critique two recent English judgements *viz. Attorney General of Belize v. Belize Telecom Limited*[7] (Belize Telecom**)** (which proposed a reasonability based test) and *Marks and Spencer PLC v. BNP Paribas Securities Services Trust Company* (Jersey Ltd)[8] (M&S) (which reinforced a nuanced, necessity-based business efficacy test); I propose that Belize Telecom should not be followed as reasonability is not enough, by itself, for implication. Instead, I advocate the nuanced principle making approach followed in M&S. In Part VI, applying a similar approach to principles of implication in India, I propose a restated principle of implication, with a caveat for implication of terms in commercial contracts.

SLADE'S CASE: THE DEVELOPMENT OF IMPLIED PROMISES

While the Business Efficacy Test (1889) and the Officious Bystander Test (1939) are ubiquitous to implication, review of implication would be incomplete without venturing further in time to 1602, three centuries before Bowen, L.J. and Mackinnon, L.J. pronounced their celebrated tests. In 1602, while Shakespeare was writing The Twelfth Night,

[4] *Electronique Grand public SA v British Sky Broadcasting Limited* [1995] EMLR 472 (Phillips Electronique case).

[5] *Printing and Numerical Registering Co v Sampson* [1875)] LR 19 Eq 462, 465 (Sir George Jessel MR); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR).

[6] Andrew Phang 'The challenge of principled gap-filling: a study of implied terms in comparative context' [2014] 4 JBL 263, 312 (Phang J).

[7] [2009] 1 WLR 1988.

[8] [2015] UKSC 72 (M&S).

Popham's C.J. pronounced his far-reaching decision in Slade's Case.[9] In this case, Popham C.J. implied a promise to perform into executory contracts actionable in assumpsit, in the following words:

"*That every contract executory importeth in itself an assumpsit, for when one agreeth to pay money, or to deliver anything, thereby he promiseth to pay, or deliver it; and therefore when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other in consideration thereof promiseth to pay so much money to the other, in this Case both parties may have an action of debt, or an action upon the case on assumpsit, for the mutual executory agreement of both parties importeth in itself reciprocal Action upon the Case, as well as Action of debt.*"[10]

Before Slade's Case, an action in assumpsit was only maintainable if there was a debt and a subsequent separate and express promise to repay the debt. Ames postulates that is was because the action of debt was originally conceived of as a grant, rather than as a contract. As such, at the time it was difficult to conceive that the same words used to create a debt, could also create another promise to repay this debt. It was more natural to consider that the force of the words used to create the debt was spent in creating the debt and that a separate expression of a promise to repay this debt would be required to succeed in an action for assumpsit.[11] Nevertheless, Popham C.J. gave a remedy in assumpsit for breach of this promise, though the debt itself could only be recovered in an action of debt.[12] This led to cases where the Courts supplied an implied promise to pay the amount of the services rendered or the worth of the goods delivered, where no price had been fixed by the parties. Therefore, it is considered that Popham C.J.'simplication of assumpsit may well be the source for the technique of implication, as we understand it today.[13]

THE BUSINESS EFFICACY TEST: THE MOORCOCK SAILS INTO CONTRACT LAW

In 1887, three centuries after Slade's Case, a steamship by the name of The Moorcock

[9] [1602], Rep 92a, 76 Eng Rep 1073; Baker (n 1); B Ames, 'The History of Assumpsit II, Implied Assumpsit' [1888] 2 Harvard LR 55 (Ames J); Theodore Plucknett, 'A Concise History of the Common Law' (5th edn, Little Brown & Co) 647, 649.

[10] Sir Edward Coke, The Selected Writings and Speeches of Sir Edward Coke (Steve Sheppard, edn 2003, vol 1).

[11] Ames (n 9) 55.

[12] Richard Austen-Baker, 'Implied Terms in English Contract Law in *Commercial Contract Law, Transatlantic Perspectives*' (L Dimatteo, edn 2013), 232.

[13] John Baker, 'An Introduction to English Legal History' (2nd edn 1979); Baker (n 1).

sailed into the river Thames. Its owner contracted with a wharfinger to discharge and load the Moorcock at a wharf by the river. At low tide, the Moorcock, which was moored alongside the jetty of the wharfingers, ran aground. Its hull was damaged due to the uneven condition of the river bed and the owner of the Moorcock successfully sued the wharfingers for damages. On the facts of the case, Bowen, L.J. treated the contract to contain an implied representation by the wharfingers to the ship-owner, that the wharfingers had examined the river bed and ascertained that it was in a condition which would not damage the vessel.[14] He stated that implication is justified if it follows the obvious or presumed intentions of the parties to the contract. In such cases, an implied term is necessary to give efficacy to the transaction and prevent a failure of consideration, which neither party would have intended. For this purpose, Bowen, L.J. put forth his Business Efficacy Test, which carries favour with English and Indian Courts to this day, thus:

"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 who are business men".

This was a new principle of law that went beyond the authorities cited before the Court of Appeal.[15] It has been moulded, applied and restated into various formulations since.[16]

SHIRLAW V. SOUTHERN FOUNDRIES: THE CURIOUS CASE OF THE OFFICIOUS BYSTANDER

Fifty years after the case of The Moorcock, Mackinnon, L.J, speaking for the Court of Appeal in *Shirlaw v. Southern Foundries Limited* ("**Shirlaw**"),[17] criticized the Business Efficacy Test. He stated that Bowen, L.J.'s words did not amount to a principle of law, though he admitted them to be sound and sensible. He lamented that the early 20th century witnessed the Moorcock principle make frequent voyages into courtrooms, often in support of vague and uncertain grounds. Disappointed with this result and believing that implication must be exercised with care, he pronounced his Officious Bystander Test. This test is expressed as a conversation between the parties to the contract and an officious bystander, as follows:[18]

[14] (1889) 14 PD 64 (Esher LJ).

[15] ibid.

[16] *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* [1977] HCA 40 (BP Refinery); *KC Sethia v Partabmull Rameshwar* [1950] 1 All ER 51.

[17] *Shirlaw v Southern Foundries Limited* (1939) 2 KB 206.

[18] ibid.

"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so 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!"

It is interesting to note that Mackinnon, L.J. did not conceive this test in the Shirlaw judgement. He had already devised the test and had expressed it in an essay in 1926; in fact, the test is a direct quote.[19] Incidentally, history repeated itself another fifty years later, when Hoffmann, L.J. criticized the Officious Bystander Test in an extra-judicial paper, as follows:

"Lord Justice Mackinnon was a witty and cultured man, for many years' president of the Jane Austen Society. His little scene is plainly based upon the contemporary cartoons of Bateman, in which some unfortunate person is always asking a question which causes general astonishment all around him. But I do not imagine Lord Justice Mackinnon ever thought how seriously this little jeud'esprit would be taken, how many times it would be cited, analysed, applied or distinguished in courts all over the world."[20]

Bowen, L.J. and Mackinnon, L.J. both criticized the decisions of their predecessors; first praising the intellectual merits of the judge in question and then lamenting that the judge did not understand the full import of their words. Much like Mackinnon, L.J. did in Shirlaw, Hoffmann, L.J. acted on his extra-judicial opinion in 2009 when he dismissed the Officious Bystander Test as irrelevant, in Belize Telecom[21], speaking for the Judicial Committee of the Privy Council. He explained that the test carried the danger of barren argument, as the parties who may respond with an "Oh, of course" are as likely to reply with a "Certainly not"; this is especially so since this test refers to the parties, as they were during negotiations, where both parties would invariably try to protect their competing interests at all times.[22] This makes it probable (almost certain, to my mind) that the suggestion of a term which is specifically onerous to one party would be considered by the officious bystander to be met with a "Certainly not" by the suffering party. This would not meet the requirements of the Shirlaw test since it requires the term to be such that 'they' (i.e. both parties) would answer with 'Oh, of course'"[23] Therefore, this test may only be suited for implication of neutral terms. However, even

[19] Mackinnon, 'Some Aspects of Commercial Law - A Lecture Delivered at the London School of Economics' (OUP 1926) 24; Phang (n 6) 13, J, ibid 7, p13.

[20] Hoffmann LJ, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 Law Teacher 127, 138.

[21] *Belize Telecom* (n 7).

[22] *Liverpool City Council v Irwin* [1977] AC 239, 258, 266.

[23] cf *Chartbrook* ibid (n 48).

in case of neutral terms, an officious bystander may not be capable of posing the correct question to the parties, especially in case of complex contracts and disputes.[24] Further, the Officious Bystander Test may not be suited for universal application, since the result of the test is influenced by the formulation of the question posed to the bystander; two different but appropriate questions may elicit different answers from the bystander.[25] Ultimately, Hoffmann, L.J. held that to require the Courts to conjure imagery of the parties and the officious bystander would divert their attention from the objectivity which should inform the process of implication.[26]

I am broadly in agreement with Hoffmann, L.J. especially in case of non-neutral terms. Further, on a purely academic note, I refer to the judgement of Falsaw, J. in *Delhi Cloth & General Mills*,[27](discussed in Part VI of this Article in detail, in exploring the development of the Indian law of implication); this judgement describes Scrutton, L.J.'s decision in *Reigate v. Union Manufacturing Co.*[28](the "**Reigate Case**") as an expression of the Shirlaw principle in "even more homely language".[29] The relevant portion of the Reigate Case is as follows:

"If it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties what will happen in such a case, they would both have replied. Of course so and so will happen; we did not trouble to say that; it is too clear."

On a bare reading, the above paragraph of the Reigate Case simply appears to paraphrase the principles of implication and taken by itself does not add much substance. It appears to combine The Moorcock and Shirlaw principles, by treating the Officious Bystander Test as the practical mode by which the Business Efficacy Test is to be implemented. In doing so, Scrutton, L.J. omitted Mackinnon, L.J.'s pesky officious bystander and replaced him with "someone." Further, Scrutton, L.J.'s someone does not propose a term like the officious bystander does in Shirlaw, but instead asks the parties to answer the question "what will happen in such a case". However, Scrutton,

[24] *Ashmore and Others v Corporation of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620; A *Marcan Shipping (London) Ltd v Polish Steamship Co (The Manifest Lipkowy)* [1998] 2 Lloyd's Rep 138, 142; M&S (n 10) [21] (Neuberger J); Andrew Kramer, 'Implication in fact as an instance of contractual interpretation' (2004) 63(2) CLJ 404.B

[25] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24, [10]-[13] (Mason J).

[26] *Belize Telecom* (n 7) 25.

[27] *Delhi Cloth & General Mills Co Ltd v KL Kapur* Co Ltd [1958] AIR 93 (P&H) (Delhi Cloth & General Mills).

[28] (1918) 2 KB 532 (B).

[29] *Delhi Cloth & General Mills* (n 27) 19-20.

L.J. could perhaps be credited with conceiving the Officious Bystander Test; while the officious bystander is missing in the letter of the Reigate Case, he appears to have made his first appearance in judicial history in spirit.[30] Interestingly, Mackinnon, L.J. was a pupil of Scrutton, L.J. and had close professional ties with him.[31] Mackinnon, L.J. did not refer to, or credit Scrutton, L.J. in Shirlaw with the development of the Officious Bystander Test; though in *Broome v. Pardess Co-operative Society of Orange Growers Ltd*.[32], one year after Shirlaw, Mackinnon, and L.J. applied the Reigate Case instead of referring to his own test in Shirlaw.

SIGNIFICANT DEVELOPMENTS IN ENGLISH LAW IN THE 21ST CENTURY

BELIZE TELECOM: IS BEING REASONABLE, REASONABLE ENOUGH?

Belize Telecom is considered by some to be a long overdue rethinking of the implication of terms since The Moorcock;[33] a *tour de force*,[34] a re-definition of the modern law of implied terms.[35] It was predicted that its extensive analysis would be regularly referred to by Courts in deciding cases of implication, which turned out to be true.[36] The crux of this analysis is Hoffmann, L.J.'s restatement of the principle of implication (the "**Belize Principle**"), thus:[37]

"*There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*"[38]

The Belize Principle replaces the officious bystander with a reasonable addressee who

[30] *Gardner v Coutts & Company* [1968] 1 WLR 173, 176 (Cross J).

[31] *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927[36], GR Rubin, 'MacKinnon, Sir Frank Douglas (, Oxford Dictionary of National Biography' (OUP 2004).

[32] [1940] 1 All ER 603.

[33] Brandon Kain, 'The Implication of Contractual Terms in the New Millennium', 51 CBLJ 170 (Kain);, Michael Davar, 'The supreme court re-frames the modern law of implied terms' (December 15, 2015) <www.lexology.com/library/detail.aspx?g=a5b370c8-489f-49fc-9dae-0be4fb23c78b> accessed September 2016.

[34] *Spencer v The Secretary of State for Defence* [2012] EWHC 120 (Ch) [50] (Vos LJ).

[35] Davar (n 33).

[36] *Mediterranean Salvage &Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531 (CA) [8]r (Clark LJ).

[37] *Belize Telecom* (n 7) 16; *Delhi Cloth & General Mills* (n 27) 19.

[38] ibid (n 30) 21.

must now answer, not ask, the relevant question.[39] This reasonable addressee is steeped in English jurisprudence; he was once known as the "man on the Clapham omnibus", a phrase coined by Charles Bowen (Bowen, L.J. of The Moorcock, as he later came to be known), acting as a junior counsel in case of The Tichborne Claimant (1871).[40] This phrase was coined in an era of horse-driven omnibus services; these services are long gone and have been replaced by modern public transport, though Hoffmann, L.J. notes that the Courts of common law still hear the ghostly creak of wheels of the omnibus and the crack of its driver's whip.[41]

But who is this man who rides the omnibus? He is an ordinary reasonable man who exists only as a fictional embodiment of the good sense of the judge presiding over the case. The judge becomes the spokesman of this man, representing anthropomorphized justice as the focal point of the Belize Principle.[42]

Hoffmann, L.J. and the Belize Principle make this man read the contract as a whole and in context and then decide whether it is necessary to imply a term into a contract. Instead of the intentions of the parties, this focuses on the perspective of the reasonable addressee who decides whether the term should be implied. On the contrary, MacKinnon, L.J. in Shirlaw required the officious bystander to simply ask the relevant question; the bystander neither answers the question nor is he required to be reasonable. This aspect is left to the parties, who must approve the implied term in unison in reply to the bystander's question, to justify implication. Therefore, in the Belize Principle, there is the anxiousness as to whether the judges may be allowed to improve contracts by imposing reasonable outcomes on the parties, under a smokescreen that suggests party autonomy.[43] Further too, it does not shed light on the rules to be applied in arriving at a decision and therefore, references to The Moorcock or Shirlaw may be required to complete the process of implication.

It should also be noted that Hoffmann, L.J. admitted that the Belize Principle is open to reformulation. He also observed that the Business Efficacy Test or that the term must go without saying, are not different or additional tests, but they subsume in the Belize

[39] *Spencer v The Secretary of State for Defence* [2012] EWHC 120 (Ch) [38] (Vos LJ).

[40] *Mcquire v Western Morning News Company* [1903] 2 KB 109 (CA).

[41] Lord Hoffmann, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 The Law Teacher 127; *McQuire v Western Morning News Company Limited* [1903] 2 KB 100; *Hall v Brooklands Autoracing Club* [1933] 1 KB 205; Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14 LCLR 4.

[42] *Davis Contractors Limited v Fareham Urban District Council* [1956] AC 696, 728 (Radcliffe, J).

[43] Catherine Mitchell, 'Obligations in Commercial Contracts: A Matter of Law or Interpretation?' (2012) 65 CLP 455, 474.

Principle.[44] However, Hoffmann, L.J. sought to avoid a strict necessity test because there may be contracts which work perfectly without implication of a term (as such, the term is not necessary and need not be implied). In such cases, the strict necessity test would require a judge to refuse to imply such a term; however, this may contradict a reasonable persons understanding of the contract (even though the term is not necessary).[45] The Belize Principle seeks to provide relief in such cases, as it allows a judge to give effect to what the instrument can be reasonably understood to mean, though this may not give effect to a meaning that is "necessary" or "always" what the contracting parties would have intended.[46]

Hoffmann, L.J. reiterated this principle three months after Belize Telecom, this time speaking for the House of Lords in *Chartbrook Limited v. Persimmon Homes Limited and others*.[47] Notably he also stated *obiter* that an unduly favourable term (to one party), may well be what the contract says. This may not make sense when judged from the perspective of the reasonable addressee, who is an outsider to the contract. However, such a term may not actually be so unreasonable in its true context, for example, if the term was accepted by the suffering party, to leverage a favourable position elsewhere in the contract; but the reasonable addressee is not privy to the negotiations and could not possibly know this, this seems to suggest that the subjective intentions of a party are irrelevant, and that the only thing that matters is what the reasonable addressee understands the contract to mean. Further, the Belize Principle is, to my mind, also open to barren argument[48] as it also requires a subjective review based on a reasonable understanding of the contract. Furthermore, should the judges be allowed to make an efficacious contract more efficacious? The Belize Principle blurs the lines in such cases. Such cases should be contained with reference to The Moorcock, which stated that only minimum efficacy should be secured or that the least onerous term should be implied, without which honest business could not be carried on.[49]

In this light, a necessity test (which would, in any event, include only a reasonable term, for no Court would exercise the extraordinary power of implication unreasonably) may fare better than a reasonability test.[50] This does not mean that the Courts should impose a one-sided term simply because a judge deems it necessary; such a term should

[44] *Belize Telecom* (n 7) 21-25.

[45] ibid 23-24.

[46] ibid 16.

[47] [2009] UKHL 38 [14].

[48] *Belize Telecom* (n 7) 21-25; *Shirlaw* (n 17) 226.

[49] Phang (n 6).

[50] *Liverpool City Council* (n 22); *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605; *In re Comptoir Commercial Anversois v Power, Son & Co* [1920] 1 KB 868, 899.

only be implied if it was proved to be in the contemplation of both parties.[51]

Theoretically, the necessity principle could also reconcile Business Efficacy Test and the Officious Bystander Test, since both tests can be considered to implement necessity, albeit at different stages in the life of the contract. While the Business Efficacy Test implements necessity at the time of performance of the contract (as there would be no justification to perform a contract which lacks business efficacy), the Officious Bystander Test implements necessity at the formation of the contract (to prevent the parties from having to include every pedestrian term in the contract).[52] In fact, the Officious Bystander and Business Efficacy tests may be considered to be merely useful practical aids evolved by the Courts to explain the criterion of necessity and to determine whether the single legal test of necessity has been satisfied.[53] Whilst such a necessity test may not be appropriate for interpretation of express terms, it is appropriate for implication; this is because implication requires a higher standard of proof, as it gives effect to rights or obligations that are not expressly stated, instead of interpreting and applying express ones.[54] To put it otherwise, being reasonable is not reasonable enough in matters of implication.

Therefore, to my mind, the Belize Principle should not be followed and Courts should reach beyond the written form of the contract, only if it is necessary (but not if it is merely reasonable) to do so.

THE MARKS AND SPENCER PRINCIPLE: EMPHASIZING THE NECESSITY OF NECESSITY

Despite people's consideration of Belize Telecom to be a path-breaking review of implication and a *tour de force*,[55] the truth is that it received a mixed response. Some considered it to be an unclear principle, which often gave rise to major issues.[56] Further, while it was regularly referred to by Courts in the U.K., it was not applied consistently; some Courts considered it to encapsulate existing law, whilst others recognized it as a

[51] *Satya Jain (D) through LRs and Ors v Anis Ahmed Rushdie (D) through LRs and Ors* 2013 [AIR] 434 (SC) [22].

[52] Kain (n 33) 185.

[53] *Society of Lloyd's v John Stewart Clementson* [1995] CLC 117, 132.

[54] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609, (Hoffmann LJ).

[55] *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] EWCA Civ 543 [44]; *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm) [15].

[56] *Spencer and Anr v The Secretary of State for Defence* [2012] EWHC 120 (Ch)[52] (Vos LJ).

persuasive departure from the existing law.[57] Even a few years later, it was still being absorbed and ingested.[58]

This continued until the UK Supreme Court delivered its decision in M&S, wherein Neuberger, L.J. disregarded the Belize Principle and rightly re-emphasized the importance of necessity.[59] He declared that Hoffmann, L.J.'s observations should be treated as characteristically inspired discussion rather than as an authoritative guidance on the law of implication. He also qualified the Belize Principle, by adding two conditions, thereby infusing the Belize Principle with the necessity principle, *viz*:

> (i) the reasonable reader should be treated as reading the contract at the time it was made; and
>
> (ii) such reader would consider the term (a) so obvious as to go without saying; or (b) to be necessary for business efficacy.

Another significant aspect of M&S was Neuberger, L.J.'s assessment of BP Refinery (Westernport) Pty. Limited v. President, Councilors and Ratepayers of the Shire of Hastings ("**BP Refinery**").[60] Simon, L.J. had in BP Refinery collected five principles of implication in one paragraph, which made it simple and convenient to cite. It set-out five criteria to be considered for implication, which the Court declared may or may not overlap:

(i) the term must be reasonable and equitable;

(ii) the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) the term must be so obvious that it goes without saying;

(iv) the term must be capable of clear expression;

(v) the term must not contradict any express term of the contract.

Hoffmann, L.J. did not treat these principles as cumulative, but treated them as different ways of expressing the central idea that the proposed term must spell out what the contract actually means.[61] To my mind, BP Refinery is a simplistic aggregation of principles of implication, which may have unintended consequences. These can, and

[57] *Stena Line* (n 56) 36.

[58] *M&S* (n 8) 21.

[59] *BP Refinery* (n 16) 40.

[60] *Belize Telecom* (n 7) 27; *Hickman v Turn and Wave Limited* [2011] NZCA 100, 248.".

[61] *M&S* (n 8) [21]; *McNeill v Gould* [2002] 4 NZConvC 193, 557 [25]-[27].

should, be contained by a nuanced prescription of principles. This seems to be the approach adopted by Neuberger, L.J. in M&S, who clubbed necessity for business efficacy and obviousness together, treating them as alternative requirements.[62] Further, Neuberger, L.J. stressed that implication depends on reference to reasonable people in the position of the parties at the time of contract formation, as opposed to proof of the actual intentions of the parties during negotiations; further too, in detailed commercial contracts, the mere fact that a term appears fair or such that the parties would have agreed to it, would not be sufficient by itself to justify implication.

The net result after M&S, is that BP Refinery's condition (i) cannot be de-linked from conditions (ii) and (iii), which may be satisfied in the alternative. Conditions (iv) and (v) are fairly straightforward and go without saying. To put it simply, for implication in accordance with the M&S principle, a term must be (a) reasonable and equitable; and (b) either (i) obvious; or (ii) necessary for business efficacy.

IMPLICATION OF TERMS UNDER INDIAN LAW

TWO CENTURIES OF IMPLICATION: A HISTORICAL PERSPECTIVE

While the Indian Contract Act, 1872 does not contain a positive rule in favour of implication of terms, Section 9 recognizes implied promises; it provides that promises are express when made in words and implied where it is made otherwise than by words.[63] Further, the Act is not intended to be a complete code, which allows the import of common law principles into the Act.[64] For example, The Moorcock was frequently cited by lawyers in Indian Courts in the early 20th century,[65] though it soon developed a poor reputation; it was considered to be an all too convenient last-resort argument for lawyers in cases where support from the written form of the contract was not forthcoming,[66] as Mackinnon, L.J. also observed.[67]

---

[62] Law Commission of India, The Indian Contract Act 1872, Report No 13, 18 (September 1958) [33] <http://lawcommissionofindia.nic.in/1-50/Report13.pdf> accessed on 27 September 2017.

[63] *Irrawaddy Flotilla Co v Bugwandas* 18 Cal 621 (PC); *Satyabrata Ghose v Mugneeram Bangur and Company and Anr* [1954] AIR 44 (SC) [12].

[64] *Delhi Cloth & General Mills* (n 29) [18]; *Lakurka Coal Company Ltd v Jumnadass Bhagwandass* (1916) 33 Ind Cas 838 (Cal)[13], [51]; *The Fort Press Co Ltd v The Municipal Corporation of the City of Bombay* (1919) 21 BOM LR 1014 (Bom)[20], [23]; *Rajkishor Mohanty and Anr v Banabehari Patnaik and Ors* [1951] AIR 291 (Ori) [5]; *Afshar MM Tackiv Dharamsey Tricamdas* (1946) 48 BOM LR 661 [20]; *The State of Maharashtra v SN Dahad and Ors* (1994) 96 BOM LR 315 [10].

[65] *Delhi Cloth & General Mills* (ibid28, para19); ibid (n 6).

[66] *Shirlaw* (n 17).

[67] *Delhi Cloth & General Mills* (n 27) 19.

Therefore, Courts had to be careful in exercising the extraordinary power of implication to ensure that implication does not undermine the freedom of contract. To do so, Courts laid down principles circumscribing this power to cases where the implied term does not involve a contradiction or variance of express terms of contracts. It was also clarified that implication could not be used simply to render a contract more attractive in the eyes of reasonable men. Accordingly, implication was only justified if the term was clearly intended or because the term would remedy an obvious oversight. Further, in such cases, only the minimum term necessary to save the contract from a shipwreck could be supplied, and nothing more.[68]Further too, Falsaw, J. in *Delhi Cloth & General Mills* in 1958, observed that implication would be justified if it repairs an intrinsic failure of expression in a contract, which omits to cover an incidental contingency. In such cases, an implied term may be supplied to give effect to business efficacy to the contract and to prevent the design of the parties from being frustrated.[69] He also referred to *Re Comptoir Commercial Anverpois and Power Son & Co.*[70] where Scrutton, L.J. held that neither reasonableness nor the fact that one party would not have made the contract without including the term (had he thought about the matter) would not be sufficient. He stressed that the term must be one which was necessarily intended by the parties to form a part of the contract, though they did not express it because the term was so obvious that it was taken for granted.[71]

Thereafter, both the Business Efficacy Test and the Officious Bystander Test were referred to by Indian Courts and were in some cases, applied together.[72] However, in the late twentieth century, there was a perceived ceiling on the use of The Moorcock and instead, the prevailing tendency was to apply the BP Refinery formulation.[73]

IMPLICATION IN 21ST CENTURY: SUPREME COURT WEIGHS IN

Indian case law on implication has largely followed English case law, summarized established principles and contextually applied them to the facts of each case. This

[68] *Delhi Cloth & General Mills* (n 27) 17.

[69] *Re Comptoir Commercial Anverpois and Power Son & Co* (1920) 1 KB 868.

[70] *Delhi Cloth & General Mills* (n 27) 35.

[71] *Deviprasad Khandelwal & Sons v The Union of India,* [1969] AIR 163 (Bom) [12]; *Noel Frederick Barwell v John Jackson and Ors* [1948] AIR 146 (All) [65]-[66], [100], [101]; *United India Insurance Company Limited v Manubhai Dharmasinhbhai Gajera and Ors and New India Assurance Company Limited v Consumer Education and Research Society and Ors* [2009] AIR 461 (SC) [47]; Shirlaw (n 19); *Enercon (India) Ltd and Ors vEnercon GMBH and Anr* [2014] AIR 3152 (SC) [85]; *R v Marshall* [1999] 3 SCR 456 [43]; *Aberdeen City Council v Stewart Milne Group Limited (Scotland)* [2011] UKSC 56 [33] (Clarke LJ).

[72]*The State of Maharashtra v SN Dahad and Ors* (1994) 96 Bom LR 315 [10].

[73] *Satya Jain* (n 51).

continued till December 2012, when the Supreme Court pronounced its decision in *Satya Jain (D) through L.Rs. and Ors. v. Anis Ahmed Rushdie (D) through L.Rs. and Ors.* (Satya Jain);[74] in this case, Gogoi, J., speaking for a Division Bench of the Court, noted that The Moorcock is normally invoked to achieve the intended results of the parties and to avoid a failure of consideration that neither party would have intended as reasonable businessmen. In such cases, only the bare minimum term required to achieve this goal should be read into the contract and nothing more.[75] This is because it is for the parties to determine the nature of their liabilities and not judges (it naturally follows that if the contract makes business sense without the term, the term should not be implied). Further too, the implication of an unfair term should not be allowed, where one side is either saddled with, or emancipated from, all the perils of the transaction, excepting those terms which must have been in the contemplation of both parties;[76] to the extent that this allows a one-sided (and consequently, not fair and reasonable) term to be imposed if proved to be in the contemplation of both parties, this takes exception to the M&S principle, which assumes (in passing, and not absolutely or conclusively) that terms which satisfy the other criteria (set out in BP Refinery) would also be fair and reasonable. However, this principle does not take into consideration cases where such term was not contemplated at all by the parties. To my mind, if an unfair term should only be implied if it was contemplated by both parties, only a fair term should be implied if the parties have not contemplated the term at all.

In summation, the Supreme Court ring-fenced the Business Efficacy Test as follows (the "Satya Jain Principle"):

"*The business efficacy test, therefore, should be applied only in cases where the term that is sought to be read as implied is such which could have been clearly intended by the parties at the time of making of the agreement.*"

The Satya Jain Principle links the test to terms which "could have been" clearly intended by the parties. It is not entirely clear whether this would include cases where parties did not contemplate the term at all. In such a case, the Satya Jain Principle can be interpreted to have two meanings:

On one hand, it could be argued that the phrase "could have been" includes cases where the parties who did not contemplate the term at all, would have included such a term had they thought about it. This interpretation would be in line with Delhi Cloth and General Mills, which held that implication of a term which remedies an obvious

[74] *The Moorcock* ibid [22].

[75] ibid 48.

[76] *Delhi Cloth & General Mills* (n 27) 19, 36 (Kapur J).

oversight would be justified in cases where the term was "not clearly intended";[77] in such cases, the term not contemplated is the obvious oversight and implication is the remedy. This suggests that the parties need not have contemplated such a term, but would have done so, or could have done so, and if they did, they would have both agreed to such a term. This would also be in line with my earlier observation that the term should be fair (if not contemplated by both parties); and

On the other hand, it could be argued that "could have been" means the same as "must have been" or "was" i.e. the term must have been actually intended by the parties. The paragraphs of the judgment immediately preceding the Satya Jain Principle suggest this interpretation, as they use language such as "must have been intended at all events", "must have been in the contemplation of both parties" and "the parties must have intended that term to form part of their contract".[78]

THE RESTATED PRINCIPLE

In view of the interpretive ambiguity in the Satya Jain Principle discussed in Part VI.B above, the Satya Jain Principle should be modified to ensure that the business efficacy principle can be extended to cases where the parties did not contemplate a term at all. Coupled with the judicial acceptance of implication of terms not clearly intended to remedy an obvious oversight,[79] the Satya Jain Principle may be restated thus (the "Restated Principle"):

"*A term should be implied in a contract, only when it is necessary to give business efficacy to the contract, in cases where the term was clearly intended by the parties at the time of making of the agreement, or would have been clearly intended by the parties, if not contemplated at the time of making of the agreement, and such term remedies an obvious oversight of the parties.*"

In cases falling within the latter half of the Restated Principle, there would be no cause for concern of retrospective judicial over-reach, since a term is only to be supplied to remedy an obvious oversight.

COMMERCIAL CONTRACTS

Indian Courts have historically treated commercial contracts as instruments to be

[77] *Satya Jain* (n 51) 22.

[78] *Delhi Cloth & General Mills* (n 27) 19, 36.

[79] *Citibank NA v TLC Marketing* [2008] AIR 118 (SC) [28].

construed broadly, with the aim being to validate rather than invalidate them.[80] This has been expressed in various ways, such as; one must not be astute to find defects in them or reject them as meaningless;[81] or that the Courts must, as far as possible, uphold a bargain and give efficacy to a commercial transaction; or that the law should not incur the reproach of being the destroyer of bargains, etc.[82] This embodies the words of Cardozo, L.J. of the N.Y. Court of appeals in *Otis F. Wood v. Lucy, Lady Duff-Gordon*,[83] pronounced at the time when Scrutton, L.J. was laying the foundation for the Officious Bystander Test on the other side of the Atlantic Ocean; in this case, Cardozo, L.J. observed that the law has outgrown its earlier primitive formalism when the precise word was the sovereign talisman.[84] It has developed so that every omission is not fatal and the Courts can take a broader view of the words used in a contract. Referring, *inter alia*, to The Moorcock, Cardozo, L.J. on the facts of the case upheld an implied promise. He held that if the whole writing is "instinct with an obligation" though imperfectly expressed, there is an enforceable promise.[85] Without this promise, the transaction cannot have such business efficacy as both parties must have intended it to have and therefore, the term could be implied. The Supreme Court also adopted such a wide interpretation in *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Company*[86] in relation to a clause in an international commercial contract, which provided for compensation in the event the contractor had to bear any extra costs, due to any change in law. It was argued that a strict interpretation should be taken for the clause, similar to the interpretation that would be applicable if the clause were contained in a contract of indemnity or insurance. However, the Supreme Court did not disturb the wide interpretation adopted by the arbitral tribunal and held it to be within the commercial purpose of the contract.

---

[80] *Dhanrajamal Gobindram v Shamji Kalidas & Co* [1961] AIR 1285 (SC) [22]; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1958] 1 All ER 725 (HL).

[81] *Coffee Board, Bangalore v Janab Dada Haji Ibrahim Halari [1966] AIR 118 (Kant) [24]; Hillas & Co v Acros Ltd* [1932] All ER Rep 494.

[82] *Otis F Wood v Lucy, Lady Duff-Gordon* 222 NY 88 (1917).

[83] Antoine Vey, 'Assessing the Content of Contracts: Implied Terms from a Comparative Perspective' Paper No 26/2011 <http://ssrn.com/abstract=1837545> accessed 15 September 2016; Lord Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2001) 121 LQR 577, 579; *Prenn v Simmonds* [1971] 3 All ER 237 (Wilberforce LJ); *Hindustan Lever Ltd. v Ashok Vishnu Kate and others* [1996] AIR 285 (SC) [41]; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 (The Antaios).

[84] ibid; *McCall Co v Wright* 133 App Div 62; *Moran v Standard Oil Co* 211 N Y 187, 198 , *Otis F Wood v Lucy, Lady Duff-Gordon* (n 86).

[85] *Sumitomo Heavy Industries Ltd v Oil and Natural Gas Company* [2010] AIR 3400 (SC) [25], [35]-[39].

[86] *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 (Diplock LJ).

This wide view would not be appropriate for implication. As discussed above, there is a principled rationale to adopt stricter tests for implication vis-à-vis interpretation;[87] more so in case of detailed and carefully drafted contracts, where even the slightest imbalance can have severe consequences. In such cases, a strict necessity test may be preferred;[88]this is because detailed and elaborate drafting, though not entirely faultless, suggests that the parties have applied their minds to the terms of the contract.[89]Further, easy and understandable language must be interpreted in accordance with its tenor, since the parties have entered into the contract with open eyes, conscious of the merits of the clauses of the contract and their implications.[90]

Given the above, implication of terms in such cases could amount to a destruction of bargains. Therefore, Neuberger, L.J in M&S highlighted that terms should not be implied into commercial contracts, merely because if appears fair or that one considers that the parties would have agreed to it if it had been suggested to them. In another case, Neuberger, L.J. held that where wording is clear, it should be given its natural meaning even if it results in commercial disaster.[91] As such, commercial common sense and attendant circumstances should not be allowed to undermine express language of such contracts. Therefore, parties have to be careful while drafting their contracts, as even the most obvious terms may be refused, if it can be shown that the language of the contract is otherwise clear and the contract is otherwise operable. In such cases, the Courts may refuse to read an implied term into the contract, which may at best "lie uneasily beside the express terms of the contract".[92]

COMMERCIAL CONTRACTS RIDER

The discussion in Part VII.A supports the case for adoption of differential necessity standards for implication of terms in commercial contracts. As Kain puts it, necessity is not a uniform proposition; as while food is necessary for human life, water is more necessary, and neither of these is as necessary as air.[93] Further, as Neuberger, L.J. rightly explained, necessity does not refer to "absolute necessity", but refers to a value judgment

[87] *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481 (**Ormrod LJ);** *Liverpool City Council (n 22).*

[88] *J Lauritzen AS v Wijsmüller BV* [1989] EWCA Civ 6.

[89] *Kamala Sugar Mills Ltd v Ganga Bishen Bhajan Singh* [1978] AIR 178 (Mad) [19], [20]; *Navnit Lal & Co v Kishan Chand & Co* [1956] AIR 151 (Bom) [8].

[90] *Arnold v Britton and others* [2015] UKCS 36; Satya Jain (n 51) 22.

[91] *M&S* (n 8) [20]; APJ Priti [1987] 2 Lloyd's Rep 37 (Bingham, LJ).

[92]Kain (n 33); *Liverpool City Council* (n 22).

[93] *M&S* (n 8) 21.

in relation to business efficacy.[94] As such, a variegated approach contingent on the commercial sophistication of the parties, the detail of the contract and other relevant factors may be helpful.[95] Accordingly, I propose that the Restated Principle should separately provide for detailed commercial contracts; in such cases, Courts should consider factors such as the detail of the instrument, care taken in drafting the contract and unique complexities, including attendant facts and circumstances, of that particular contract or kind of contracts (the "Commercial Contracts Rider"). This principle can be properly applied to formally negotiated and documented commercial arrangements. On the other end of the spectrum, it can also be applied to contracts which are not thoroughly drafted as they place business convenience above drafting formalities, such as purchase-order style contracts; in such cases, the parties settle key commercial terms in an email or a letter and boiler-plate terms and conditions which may be added later or imported by reference. These boiler-plate clauses are not negotiated to suit the contract and may leave significant gaps in the document which could have been addressed in negotiated document.[96]

Take for example, a carefully drafted and negotiated investment agreement which grants the investor a call-option to acquire equity shares of the promoter at a fixed price upon the occurrence of certain events, such that the investor's shareholding goes up to a maximum of 51%. The agreement provides that the call-option is to be exercised within one year of such event, on certain terms and conditions. However, it does not specify whether the call-option is to be exercised in one go or may be exercised by the investor in tranches, reserving the right to call the balance equity until the one year period expires. Let us assume that on the occurrence of such event, the investor calls upon the promoter to sell the required number of shares to the investor such that the investor reaches a shareholding of 26% in the company, within one month of the event; in this situation, does the investor have the right to call the remaining 25% over the next eleven months? Or does the call-option fall away?

Given that this agreement has been carefully drafted and negotiated, a Court tasked with interpreting the call-option using the Commercial Contracts Rider may be unwilling to read an implied term in the agreement which provides that partial exercise of the call-option shall not preclude its further exercise (within the specified time period of one year and up to the limit of 51% equity), unless there are unique complexities, facts or circumstances that attend to the investment agreement or agreements of this nature, which can justify the implication of such a term. If no such factors exist, Courts may be

[94]Kain (n 33); *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales* [1982] HCA 24 [6] (Mason J).

[95] *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18.

[96] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24 [13] (Aikin J).

inclined to hold that the call-option once exercised, falls away and that if the parties intended that the call-option can be exercised in tranches, they should have included a term to that effect. Per contra, in cases of standard-form contracts and other contracts drafted to suit business convenience, the Courts may find it easier, and at least not unconscionable, to read such a term into the contract. In such cases, it would be easier to find that there has been a failure of expression by the Parties, allowing the Courts, not to intrude, but to protect the contract, which the parties themselves failed to do.

To my mind, the Restated Principle should be flexible so as to distinguish between the different kinds of commercial contracts and prevent unfair formalist results. At this point, it is worth noting that the High Court of Australia observed (in the context of the Officious Bystander Test), that standard form contracts (such as Government tenders) *ipso facto* suggest that the words of the contract contain the only terms on which the contract maker is prepared to contract.[97] However, to my mind this is counter-intuitive to the nature of standard form contracts which are made for negotiation and business convenience, rather than function as a disclaimer that a party will not accept any term not stated therein.

In this light, the Restated Principle could be better applied if the Commercial Contracts Rider is added to it, which would read as follows:

"A term should be implied in a contract, only when it is necessary to give business efficacy to the contract, only in cases where the term is such that it was clearly intended by the parties at the time of making of the agreement, or would have been clearly intended by the parties, if not contemplated at the time of making of the agreement and such term remedies an obvious oversight of the parties. However, in case of commercial contracts, the Courts may consider factors such as the detail of the instrument, manner of formation, care taken in drafting the contract and unique complexities of that particular contract of kind of contracts, before determining whether or not to imply a term in the contract. However, it should be clear that only the bare minimum or the most limited term must be supplied and nothing more."[98]

CONCLUSION

Deconstructing the tests of implication and rebuilding it into the Restated Principle, required a journey through judicial history and the theoretical underpinnings of implication, including illuminating extra-judicial opinion. The result is a principle which would permit implication of terms in a manner which will serve the true purpose of contracts (i.e. to act as a framework of rights and obligations, like a contractual map

[97] Satya Jain (n 51) 22; *Delhi Cloth & General Mills* (n 27) 19.

for the future). Notwithstanding, the Restated Principle would protect contracting parties, from the concern of judicial temptation to imaginatively imply terms. It does so by limiting its application to cases where implication is necessary to give business efficacy to the contract. This is not a rigid test of necessity as, amongst other reasons, what is necessary for one contract may not be necessary for another. Accordingly, the Restated Principle includes the Commercial Contracts Rider that promotes certainty of interpretation in carefully drafted and detailed commercial contracts, but allows interpretative flexibility in contracts that are not so well drafted .If implication is not possible even after application of the Restated Principle to a disputed contract, the loss should lie where it falls, even if it is unreasonable for one party. With the exception of flawless contracts, this contractual gamble is always inextricably linked to the freedom of contract.