

## IMPLIED TERMS AND NAZIR ALI: TROUBLE FOR WORK-SPONSORED SCHOLARSHIP?

Matteo Maciel\* and Adam Walton\*

### ABSTRACT

**T**HE RECENT PRIVY COUNCIL judgment *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 has brought forward clear and consistent principles regarding implied terms set out within the Supreme Court Case *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*. It seems to be a foregone conclusion that *Nazir Ali* would be the approach taken by the Supreme Court. Correspondingly the ruling has produced two significant conclusions. Firstly, it draws forward questions relating to the crystallisation of implied terms in the academic-funding context of repayable loans. Second, it shows the approach of necessity made clear in *Marks & Spencer* is to be applied strictly. This case note examines the board's ruling and highlights key elements which may spell trouble for the courts in the future.

### I. INTRODUCTION

*Marks & Spencer Plc v BNP Paribas*<sup>1</sup> has provided clear and refined principles for when terms may be implied into legally enforceable agreements, most notably in the commercial context.<sup>2</sup> In *Nazir Ali v Petroleum Company of Trinidad and Tobago*,<sup>3</sup> the Privy Council was asked whether an implied

\* B.A. (Huron University College), LL.B. (York), B.C.L. (Oxon). \*\* LL.B. (York), B.C.L. (Oxon). The authors are grateful to the reviewers for their assistance. All errors and idiosyncrasies remain their own.

<sup>1</sup> *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742.

<sup>2</sup> *ibid* [21] (Lord Neuberger).

<sup>3</sup> *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] ICR 531.

term existed within a loan-repayment agreement between an employer and employee. It provides one of the first judicial applications of the new re-formulated principles established in *Marks & Spencer* and highlights a narrow interpretation of the necessity test. However, the implications of its judgment are more far-reaching. *Nazir Ali* is significant in its ruling because its timing facilitates further clarification of the breadth of the test. It also speaks directly to implied terms within repayable loans. The *Nazir Ali* decision, made in line with *Marks & Spencer*, might well have produced the correct decision in principle, but one must question whether it produced an equitable or even a just result with respect to repayable loans in a scholarship or academic funding context. The central point of *Nazir Ali* is that the test of ‘necessity’ was interpreted narrowly so that the term was said to be necessary only when the employer prevented the employee from performing his promise.

In *Willers v Joyce & another (No 2)*,<sup>4</sup> the Supreme Court streamlined an unsettled doctrine of precedent; where it held: (a) that English courts are not bound to follow Privy Council judgments where they are inconsistent with other binding precedent; and (b) that Privy Council judgments are not ‘binding’ but courts are expected to give great weight to them. They hold this weight especially if the panel expressly directs that they represent English law. In *Nazir Ali*, the Privy Council’s direct application of *Marks & Spencer* shows the new implied term regime in practice. In *Marks & Spencer*, the tenant appealed against an implied term concerning repayment of rent in a lease. The Supreme Court, in affirming the judgment of the Court of Appeal, revisited implied terms generally and approved two instances when terms may be implied into a commercial contract: (a) necessity: would the contract lack commercial or practical coherence without the term; and (b) the officious bystander: would both parties have unquestionably agreed to the inclusion of the term if asked at the time of contracting. In commercial matters, detailed agreements should lead courts to be hesitant in implying a term based on fairness or because the parties would have agreed otherwise.

It seems a ‘foregone conclusion’ that the Supreme Court will follow *Nazir Ali* in English Law.<sup>5</sup> Even if one is unable to attribute binding weight to *Nazir Ali*, it gives an indication of how the Supreme Court would rule in a case within this jurisdiction. Scrutinising the outcome of *Nazir Ali* with regard to scholarships paid by employers to employees for employee development, we suggest, although briefly, that this is contrary to Government goals of promoting workplace

<sup>4</sup> *Willers v Joyce & another (No 2)* [2016] UKSC 44, [2016] 3 WLR 534.

<sup>5</sup> *ibid.*

training and it weakens the position of employees. The principles set by the board are uncontroversial in their application of applying the test for implied terms. It has not altered *Marks & Spencer*. However, in the context of repayable loans, *Nazir Ali* is controversial in the board's interpretation of when the implied term engages and further, the consequences of that engagement. The result is that employees may be harmed. On the facts established at trial, the board skirted around a question fundamental to the coherence of repayable loans. At what point do the actions of the lender make it necessary for the lender to relinquishing any right to repayment? *Nazir Ali* has provided an indication of how English courts may rule when approaching repayable loans but it seems to fall short of providing a satisfying resolution to the dilemma which underpins its facts.

## II. FACTS, ARGUMENT AND JUDGMENT

In *Nazir Ali*, Mr Ali worked for the Petroleum Company of Trinidad and Tobago's (hereinafter, "Petrotrin") predecessor, the Tobago Petroleum Company (hereinafter, "Trintopec"), beginning in 1978. In 1989 Mr Ali was offered the opportunity to study a degree at Louisiana State University (LSU) in the United States with the course fees paid outright by Trintopec. This was indubitably an opportunity not reasonably achievable without the support of Trintopec. Trintopec also provided a repayable loan of TT\$3500 in a monthly allowance over five years and a TT\$33,000 lump sum for furniture. This loan would be waived if Mr Ali returned to work for Trintopec for a period of five years. In his dissent, Lord Kerr acknowledges that this arrangement was advantageous for Mr Ali and for Trintopec, both receiving long-term benefit. During Mr Ali's time at LSU, Trintopec underwent substantial restructuring and eventually a merged with Trintoc to create Petrotrin. This merger brought Petrotrin the financial hardships which plagued the company's predecessors.

Upon Mr Ali's return in 1994, the company initiated one of many voluntary redundancy schemes, advising a specific class of employees that it was looking to reduce employees within that said class. Mr Ali was within this class, and had previously expressed discontent with his role within the company following his return. He was disappointed with his position and felt let down by the company. At trial, it appears his discontent contributed to the Court's opinion that Mr Ali was aware that his loan would need to be repaid. The judge did not accept that Mr Ali was unaware. Factually this is significant because it meant that the board's decision of when the implied term engaged was of greater importance.

In holding this opinion, the board observed that “[i]nvitations to participate in the scheme would be sent only to those who had a minimum of five years’ service... whose jobs have become redundant as determined by the company”.<sup>6</sup> The opportunity to participate was a voluntary activity. Mr Ali signed the letter necessary to participate in the scheme in October of 1995. The company subsequently initiated the redundancy scheme and, upon termination, sought to recover the loan owed to Mr Ali by reducing the money owed through redundancy.

The Privy Council appeal asked whether the repayable loan included an implied term restricting Trintopec from terminating Mr Ali’s employment and seeking repayment. Lord Hughes, with whom Lord Neuberger, Lord Clarke and Lord Carnwath agreed, gave the leading judgment, echoing the principle of necessity,<sup>7</sup> as upheld and re-formulated in *Marks and Spencer*.<sup>8</sup> Lord Kerr JCS presented a visceral dissent, highlighting inconsistencies and barbed areas of concern within the application of the principles found in *Marks and Spencer* to the facts. It is interesting to note that Lord Kerr was not one of the Lords who sat on the panel in *Marks and Spencer*. The board rejected an implied term that could restrict Trintopec. They acknowledged that had Trintopec terminated Mr Ali’s contract without cause, there would necessarily be an obligation to waive the right to repayment. Lord Kerr questioned the substantive difference between volunteering for (potential) redundancy through a scheme and dismissal without cause. To understand why Lord Kerr’s fine-tuned argument holds particular zest, it is important to understand why the majority dismissed the appeal and found in favour of the respondents. Subsequently, this will highlight why Nazir Ali is of significance beyond the Caribbean commonwealth.

Lord Hughes rejected Mr Ali’s claim that there ought to be a term implied into the contract that the company was required to allow Mr Ali to work for them for at least the five years needed.<sup>9</sup> However, the board accepted Mr Ali’s second submission that a term is implied which waived the repayment of the loan had the defendants terminated his employment at their own initiative for reasons other than dishonesty or breach of fiduciary duty committed by Mr Ali.<sup>10</sup> Importantly, although the board decided that there was an implied term, they held that it had yet to be triggered. It was the question on when the term had been triggered which divided Lord Hughes and the majority from Lord Kerr. It was the moment at which the implied term was engaged that divided

<sup>6</sup> *Nazir Ali* (n 3).

<sup>7</sup> Also see *Stirling v Maitland and Boyd* (1864) 5 B&S 840, 122 ER 1043 (Cockburn CJ); *Southern Foundries Ltd v Shirlaw* [1940] AC 701, 717 (Lord Atkin).

<sup>8</sup> *Marks & Spencer* (n 1).

<sup>9</sup> *Nazir Ali* (n 3) [9]–[10] (Lord Hughes JSC).

<sup>10</sup> *ibid* [9], [11].

the Privy Council. The difference can be explained by the differing approaches between Lord Kerr and Lord Hughes in creating the implied term. Lord Kerr, followed an officious bystander test, while Lord Hughes applied the necessity test in accordance with *Marks & Spencer*.

### III. IMPLICATIONS AND ANALYSIS

*Nazir Ali* is significant for two reasons. Firstly, the decision on the facts highlights potential dangers in the application of when the implied term engages. Secondly, it highlights a strict inclination by the courts when interpreting the test of necessity.

The Majority held that the implied term was restricted so that the clause only became triggered when the employer prevented the employee for completing the five years of service without cause. It was further held that such an implied term did not run contrary to the express term which stated Mr Ali must complete five-year's service to waive the payment.<sup>11</sup> Lord Hughes went on to expressly reject the formulation offered by Lord Kerr, stating that such that a formulation falls far short from meeting the test for implication. It would mean the respondents would be required to waive the payment as soon as the redundancy circular was sent to Mr Ali, regardless of whether Mr Ali opted to take redundancy or not.<sup>12</sup>

Rather than following the board, Lord Kerr concluded that the result was inequitable. The authors suggest that Lord Kerr's opinion is clearly driven by the narrative of equity. These further frame his interpretation of the application of the officious bystander test and the implied term within Mr Ali's agreement. He relied on the fact that Mr Ali would not have attended LSU if not for the implied term. Redundancy, no matter what form, ought not to be able to trigger debt repayment.<sup>13</sup> "Mr Ali was told that he might be a member of a targeted group for redundancy and that there was no guarantee if he did not opt for it, he would not have been made redundant nevertheless".<sup>14</sup> One wonders whether there was an additional implied term for the employer to warn the employee that he would be required to repay should redundancy occur.

<sup>11</sup> *ibid* [12].

<sup>12</sup> *ibid* [13] (Lord Hughes JSC).

<sup>13</sup> *ibid* [31] (Lord Kerr JSC).

<sup>14</sup> *ibid* [26].

#### IV. SIGNIFICANCE OF LORD KERR'S DISSENT

Lord Kerr began by questioning the formulation of the 'officious bystander test' which is premised upon a notion of a unanimous agreement as to the inclusion of the term. He observed that the test does not question what is needed to make the contract work (necessity), merely what is an "irresistibly obvious" term which would have been agreed to by both parties.<sup>15</sup>

Lord Kerr's questioning of the breadth of the necessity test exposes a certain un-refined danger in its practical application considering the rules of Equity and indeed when thinking of facts to form the test of necessity through an element of retrospect. As noted by Sir Thomas Bingham MR, "Court[s] come to the task of implication with the benefit of hindsight, and it's tempting for the Court then to fashion a term which will reflect the merits of the situation as they appear. Tempting but wrong."<sup>16</sup>

Sir Thomas Bingham MR's opinion holds considerable weight considering Lord Kerr's observations of how Lord Hughes and the majority formulated the question posed to the 'officious bystander'. Lord Kerr believed had Mr Ali not opted for voluntary redundancy. For the board to act with hindsight would be introducing an "inadmissible retrospective dimension" (toward the facts necessary to deciding necessity). This would be a mistake. This knowledge of what has been and where the parties have gone, would not accurately represent how the parties would have responded to the so called officious bystander in reality.<sup>17</sup> It was for this reason that Lord Kerr rejected the opinion of the majority in favour of a judgment with a strong flavour of equity. Lord Kerr suggests that the bystander ought to be asked in the context as if:

Mr Ali was told that he might be a member of a targeted group for redundancy and that there was no guarantee that, if he did not opt for it, he would not have been made redundant.<sup>18</sup>

This prompts one to question when retrospect ought to be invoked. In *Marks & Spencer* Lord Neuberger P (who was part of the majority with whom Lord Hughes agreed) found that judicial observations, like those of Lord Bingham MR above, as invoked 'retrospect'. This was

<sup>15</sup> *ibid* [26] (Lord Kerr JSC).

<sup>16</sup> *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) 482 (Sir Thomas Bingham MR).

<sup>17</sup> *Nazir Ali* (n 3) (Lord Kerr JSC) [30].

<sup>18</sup> *ibid*.

expressly and assertively rejected, Lord Neuberger described this as a “clear, consistent and principled approach” which would be “dangerous to reformulate”.<sup>19</sup> Yet in the present case, ‘retrospect’ of the facts which are relied upon to decide necessity, had been central to enabling the courts to draw their conclusions. It calls attention to elements which may lead to substantial inequitable implications.

Lord Kerr suggested Trintopac did not conceive it necessary to include any term which referenced what would happen regarding the repayment of the loan in a situation of redundancy precluding Mr Ali from completing his five-year term of employment. Lord Kerr uses the doctrine of presumed intention established in the *Moorcock*<sup>20</sup> to highlight how this omission of such a term must be evidence of the parties’ intention with regard to a situation such as the one in the present case where an answer he suggests must be clearly obvious.<sup>21</sup> Lord Kerr seems to be invoking an approach, not dissimilar to that taken by Lord Simon when he exposed five terms necessary for terms implied into a contract.<sup>22</sup> That is to say, Lord Kerr seems to be pursuing the fact that their Lordship’s retrospective knowledge of where the facts have led, fundamentally changes the question asked of the Board. Lord Kerr’s observations run uneasy with the judgement of Lord Neuberger in *Marks & Spencer*, cutting against the expressly approved observations of Bingham MR,<sup>23</sup> who expressed caution that the Courts must be wary when implying terms where “it may well be doubtful whether the omission [of such a term] was the result of the party’s oversight or of deliberate decision”.<sup>24</sup>

<sup>19</sup> *Marks & Spencer* (n 1) [21] (Lord Neuberger PSC with whom Lord Sumption and Lord Hodge JJSC agreed); also see *Atkins International HA v Islamic Republic of Iran Shipping Lines* [1987] 2 Lloyd’s Rep 37 (CA) 42 (Bingham LJ).

<sup>20</sup> *The Moorcock* (1889) 14 PD 64 (CA) 68 (Bowen LJ).

<sup>21</sup> *Nazir Ali* (n 3) [27]–[28] (Lord Kerr JSC).

<sup>22</sup> *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC) 283 (Lord Simon with whom Viscount Dilhorne and Lord Keith agreed).

<sup>23</sup> *Marks & Spencer* (n 1) [19]–[21] (Lord Neuberger PSC with whom Lord Sumption and Lord Hodge JJSC agreed); *Philips Electronique* (n 16) 482 (Bingham MR).

<sup>24</sup> *Marks & Spencer* (ibid); *Philips Electronique* (n 16) 481 (Bingham MR).

## V. NAZIR ALI AND FUTURE SIGNIFICANCE

*Nazir Ali* has highlighted an example of a repayable loan which many students in the UK encounter yearly through Training Contracts and Graduate Schemes. It is quite easy, considering the collapse of King Wood & Mallesons,<sup>25</sup> to imagine a scenario which the Privy Council explicitly skirted around. The court has made clear that:

[I]t does not however, follow, that in every case of dismissal for redundancy the employer can be said to have prevented the employee from continuing to work for him so as to trigger the implied term of cooperation which must be read into the contract in the present case.<sup>26</sup>

Although the implied term Mr Ali sought could be read-in, less certainty can be said as to what circumstances might trigger the term. Indeed, it is this sentiment which clearly sits as the engine of Lord Kerr's dissent when he writes:

It is to my mind, inconceivable that the employer would have said that the living allowances would have to be repaid if, as a result of its actions, Mr Ali found himself unable to fulfil the conditions.<sup>27</sup>

It's likely that the Courts will require a second-pass at this question, their conclusion as to whether an employee, who is unable to complete the stipulated work requirements for exempting repayment loans, ought to pay for that funding, is wrong. At the very least, this seems like a place where parliament ought to voice clarity—and provide stability to employees. Education on the whole is a clear good which has been an objective of Government for quite some time, to risk unwinding this policy because some individuals will be unwilling to risk having to pay back their employer, if found in a similar situation to Mr Ali Lord Kerr's argument is particularly cutting when producing scenarios parallel to Mr Ali's case. In questioning the substantive difference between redundancy and termination without cause, Lord Kerr disagrees with the majority who

<sup>25</sup> Mark A Cohen, 'The King & Wood Mallesons Collapse: Déjà vu All Over Again' *Forbes* (New York, December 17 2016) '<<http://www.forbes.com/sites/markcohen1/2016/12/17/the-king-wood-mallesons-collapse-deja-vu-all-over-again/#53f95a8540ba>> accessed 19 February 2017.

<sup>26</sup> *Nazir Ali* (n 3) [18]–[19] (Lord Hughes JSC).

<sup>27</sup> *ibid* [26] (Lord Kerr JSC).



considered the substantive elements of the two events to be fundamentally different. Lord Kerr reaches his conclusion through construing the officious bystander test to find a way to imply what would be an equitable term.<sup>28</sup> His challenge extends from a questioning of whether the decision to take voluntary redundancy is in-fact ever truly ‘voluntary’.<sup>29</sup>

As previously stated, whilst the judgment in *Nazir Ali* is uncontroversial in its application of *Marks*, there is potential detriment incurred onto the value and. It is hard to say whether the board would side with Lord Kerr had the voluntary redundancy been followed by the winding-up of the company. Would their Lordships have viewed more favourably Mr Ali’s active attempt to take the predictability of his future into his own hands? It is trite that in insolvency, often the best human capital is lost as the certainty of a firm’s future waivers—it is why firms are increasingly looking to pre-packaged sales to preserve intangible value.<sup>30</sup> The authors query whether the policy outcome of the judgment in *Nazir Ali* is properly aligned with adequately empowering employees. If an employee is now hesitant to undertake education sponsored by her employer because of the risk of having to pay the fee back, then two major losses have occurred. First, the economy has lost. Real knowledge which may benefit the business and the British economy was prevented because of the unaffordability of education. Second, and most importantly, a scheme designed to increase class mobility by providing education, primarily through on-job training has failed. It has bound the employee to the employer. It devalues the value of her as human capital because she is required to dig-in and hope the employer does not run insolvent. This could be at a wage well below her market value. If that difference is insufficient to cover the cost of paying back her employer for education, then real devaluation has occurred. In a time of growing income inequality, wage suppression, and class immobility, both are aspects which the authors suggest are detrimental, and while not likely to outweigh the benefit of holding precedent, certainly draw forth a policy question for Government to address.

The repayable loan Mr Ali signed is almost ubiquitous in modern solicitor training contracts. Many stipulate a coverage of Legal Practice Course (LPC) fees and maintenance awards repayable should the trainee fail to complete the contract. It is unclear how the Law Lords would approach such a scenario under facts like *Nazir Ali*. The Privy Council does not resolve whether a future employee who has completed the LPC on firm sponsorship, yet to undertake a training contract will be indebted to the firm if that firm offers voluntary redundancy. The firm may well discharge

<sup>28</sup> *ibid* [29] (Lord Kerr JSC).

<sup>29</sup> *ibid*.

<sup>30</sup> Douglas G Baird, ‘Beyond Recidivism’ (2006) 54 *Buffalo Law Review* 343, 360.

the right to pursue collection, but this conclusion is not axiomatic. The activation of the implied term cannot, in principle, rest on good-will. It's conceivable that an administrator might pursue LPC students for unjust enrichment or unpaid debts to discharge obligations the firm owes the LPC supplier. To draw this point to its logical conclusion, we suggest that Lord Hughes' judgment in *Nazir Ali* shows it is not fully settled whether Mr Ali was absolved from the debt had Trintopec mandatorily made Mr Ali redundant, albeit it is seemingly likely that the board would have held this.<sup>31</sup> Surely an implied term must exist to protect employees who would not have undertaken the course themselves without the company's sponsorship. *Nazir Ali* does little to resolve this despite addressing a nearly identical problem and it will likely require a second-pass by the Court.

## VI. CONCLUSION

*Nazir Ali* reveals the firmness in the Supreme Court judgment of *Marks & Spencer*, while simultaneously showing the obstacles an implied term might encounter when the court is asked to determine the point at which the term has crystallised. The Privy Council has rightly identified an implied term to exist within the contractual scholarship between Mr Ali and Trintopec and most importantly it has shown the court's propensity to narrow necessity. However, the point at which the term engages leaves a sour taste.

It cannot be right that the Court's dividing line exists between voluntary and mandatory redundancy when these two actions have few substantive differences. We suggest that the board was right, on the facts established at trial, to dismiss the appeal. The Privy Council's judgment provides clarity into the implementation of implied terms. With that said, its decision of when to engage the implied term—at least in this academic scenario—seems unjust. The ruling solicits the need to pursue further clarification on whether an implied term is written into academic, work-related scholarships especially in view of the policy objectives which underpin encouraging worker education. With the ubiquity of their commercial use, the Courts or better, Parliament, would do well to settle this question.

<sup>31</sup> *ibid* [18]–[19] (Lord Hughes JSC).