

1 Terms implied in fact

Excluding implied terms

Terms will not be implied in law, in fact, or by custom where they are expressly excluded by the parties or are inconsistent with the express terms of the contract. However, an implied term will not necessarily be excluded by an entire contract clause (a clause stating that the written contract represents the whole of the parties' agreement.)

Hart v McDonald

[An entire agreement clause] excludes what is extraneous (unrelated to the subject) to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of a contract as any term couched in express words.

Terms implied in fact

These are unique and tailored to each particular contract in question. They are to aid determining what was intended of the parties when constructing the contract. Lord Hoffmann: 'implication of the term is not an addition to the instrument. It only spells out what the contract means' *Attorney General of Belize v Telecom Ltd*

Identifying appropriate implied terms *****BP refinery tests*****

When identifying appropriate terms to be implied the court adheres to conditions set out in *BP Refinery Pty Ltd v Hastings Shire Council*

For a term to be implied, the following conditions 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.

Reasonable and equitable

A term that, although beneficial to one party, imposes a significant detriment or burden on the other party, is unlikely to be reasonable and equitable.

Business efficacy

Whether a reasonable person would consider the term necessary to enable the contract to operate in a businesslike manner.

The Moorcock

Facts: The claimant moored his ship at the defendant's wharf on the river Thames. The river Thames is a tidal river and at times when the tide went out the ship would come into contact with the riverbed. The ship became damaged due to uneven surfaces and rocks on the riverbed. The claimant sought to claim damages from the defendant and the defendant argued that there was no provision in the contract warranting the condition of the riverbed.

Held: The court implied a term in fact, that the river bed would be safe for mooring. The

court introduced the business efficacy test ie the term must be necessary to give the contract business effect. If the contract makes business sense without the term, the courts will not imply a term.

Obviousness

Shirlaw v Southern Foundries

Mackinnon LJ: any terms of a contract that must be implied rather than need to be expressed must be 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!'

Codelfa Construction Pty Ltd v State Rail Authority of NSW

Facts: Codelfa contracted with the Authority to build a railway. At the time of contracting, both parties assumed work could occur around the clock as legislation would prevent third parties from restraining it. However, the legislation was ineffective and an injunction prevented Codelfa from working nights and Sundays.

Held: The High Court declined to find an implied term that, if Codelfa's working hours were restricted, the Authority would indemnify it against additional costs. That term was not sufficiently obvious or necessary, as it was just one of several solutions the parties might have agreed had they considered the possibility of work being restrained.

Gwam investments pty ltd v outback health screenings pty ltd

Facts: Gwam and outback health contracted that gwam to design and construct a unit on a truck for outback health. Once the health unit was constructed the overall weight of the truck exceeded the maximum loaded mass requirements allowable for that truck so could no longer be lawfully driven.

Held: The full court of Supreme Court of SA held that there was an implied term that the truck once finished should be able to be lawfully driven on public roads. This 'went without saying.'

Clarity

For a term to be implied in fact it must be capable of being expressed in a clear manner.

Ansett Transport Industries v Commonwealth

Consistency

The BP refinery test precludes any term being implied in fact if that term contradicts an express term of the contract.

2 Terms implied in law

Terms implied in all contracts or particular types of contracts

Examples: the implied conditions of reasonable fitness and merchantable quality on a contract for the sale of goods, the implied warranty of seaworthiness

For a term to be implied in law, it must be:

- Applicable to a **defined category** of contracts. Suitable in a way which allows it to be

implied in **all** contracts in that category. The test of **necessity** is often used - a term can only be implied if its omission would entail that the rights of the parties under the contract were significantly diminished.

Common Law

Byrne v Australian Airlines Ltd

Facts: Plaintiffs [Byrne, Frew, appellants] were employees of the Defendant [Australian Airlines, respondent] and were fired for pilfering. The Plaintiffs sued the Defendant to recover damages for breach of statutory duty (clause 11(a)) which specified that a termination of an employment should not be harsh unjust or unreasonable. The Plaintiffs alleged that clause 11(a) is an implied term within the employment contract. They are thus suing in contract rather than statutory duty.

▪ Held: No necessity here, and therefore no implied term.

Liverpool City Council v Irwin

Facts Liverpool city council owned a block of flats in which the defendant was a tenant. The common parts of the flats had fallen into disrepair. A rent strike was implemented by many of the tenants including the defendant. The council sought to evict the defendant for non-payment of rent and she counter claimed for breach of an obligation to repair. However, the tenancy agreement did not mention any obligation to repair. The defendant asked the court to imply a term that the council had an obligation to repair the common parts of the block of flats.

▪ Held: The courts did imply a term. The implied term arose as a legal incident in contracts of a defined type between landlord and tenant that the landlord was to take reasonable care to maintain the common parts. However, there was no breach of this duty.