

## IMPLIED TERMS | GAP FILLING

Courts like to preserve the validity of contracts, but struggle when parties have left something out. This often arises when there is an issue in performance of contract, giving rise to an unexpected outcome. If no express term can be constructed to apply to the situation, the courts may imply terms to uphold the contract.

### Terms Can be implied in 4 ways:

#### 1. In Fact

- a. Ad hoc terms implied at common law into a particular contract, tailored to the specific parties and contract and implied only to give business efficacy and materialise the assumed intentions of the parties.

##### i. Formal (completely written) contracts:

1. 5 tests from BP Refinery, and confirmed in Codelfa v SRA:
  - a. Reasonable and equitable
    - i. Must be fair as between parties
  - b. Necessary to give business efficacy: No term is implied if contract is effective without it
    - i. Must be a gap so that term is necessary to make contract work in a business sense
  - c. So obvious it goes without saying
    - i. "But of course!" Test
  - d. Capable of clear expression; AND
  - e. Must not contradict express terms of contract
    - i. Needs to be harmonious with express terms
    - ii. In Codelfa the implied term was inconsistent with fixed price.
      1. **NB:** A term stating all terms are in writing does not overrule this, because implied terms are a matter of constructing and failing to find a solution in the express terms (Hart v MacDonald)
2. All 5 tests must be satisfied for term to be implied.

##### ii. Informal Contracts | Part/Entirely Oral:

1. Conditions are less stringent (Byrne v Australian Airlines):
  - a. First identify express terms **then** whether any terms can be implied:
    - i. **Tests:**
      1. Term is necessary for reasonable or effective operation of the contract; and
      2. So obvious it goes without saying.