

## *Implied terms in construction contracts*

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There have been recent cases which make it worthwhile to restate the importance that implied terms can play in construction contracts.

An implied term may be straight forwardly described as a contractual provision that is not expressly written in a contract but is included in that contract nonetheless, by implication. There are two fundamental categories of implied terms, those that are “*implied in law*” and those that are “*implied in fact*” to give effect to the presumed intentions of the parties to a contract.

Terms “*implied in law*” include terms implied by statute, such as via the Late Payment of Commercial Debts (Interest) Act 1998, as well as other categories. In some instances terms implied by statute may be excluded by the express terms of the contract, in others the statute will prohibit the parties from excluding the terms that it implies. An example in the latter respect would be the Housing Grants Construction and Regeneration Act 1996 as amended by the LDEDCA 2009.

If the parties have omitted to include such terms or to deal with them expressly in writing in a manner which the law permits then such terms will be included in the contract all the same, by implication.

As regards terms “*implied in fact*” these are a more complicated area. The essence of an implied term of fact is that it is particular to each set of facts and circumstances and is dependent on the presumed intention of the parties.

*“An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract”* per judgement in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601

### In what circumstances will such terms be implied?

The judgement in the Privy Council case of *BP Refinery (Westernport) Pty Limited v Shire of Hastings* [1978] 52 ALJR 20 set out the test for implication of such terms neatly:

*“...for 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."*

The phrase *business efficacy* means that such terms are necessary to make the contract work.

#### Why are implied terms important to the construction industry?

Implied terms are important to the construction industry because there are numerous terms commonly implied by fact into construction contracts: these might include categories of terms such as implied design obligations; implied duty to warn; or implied obligations relating to co operation.

In part it is the nature of the contractual and practical relationships between the various parties involved in construction projects which make the industry's contracts prone to containing implied terms. On any project there may be various parties involved; the employer and agents, designers, other professionals and contractors all interacting to carry out and complete that project. All are to some extent relying on each other to facilitate the carrying out of the works.

Perhaps the best known judgement in respect of implied terms and construction is that of *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Ch). The case reflected that the two main implied terms found in many contracts would be implied in construction contracts; both within the category of co operation referred to above

The first is to the effect that a party to a contract will "*not hinder or prevent [the other party] from carrying out their obligations in accordance with the terms of the contract (and from executing the works in a regular and orderly manner)*".

The second is to the effect that a party will "*take all steps reasonably necessary to enable [the other party] so to discharge their obligations (and to execute the works in a regular and orderly manner)*".

These potentially wide ranging obligations are often implied into construction contracts. So, for example, an employer or main contractor has to facilitate access or such other things as may be necessary to allow the contractor or subcontractor to perform its own contractual obligations. This will need to be considered in light of the obligations in question, such as the time for completion; if a contractor is to do something in a relatively short timescale then the employer or his agent will be obliged to provide access or information or such other thing in sufficient time for the contract to complete in that relatively short timescale. If it does not do so then this may well be a breach of contract.

Of course, implied terms will not be found where they contradict express terms dealing directly with the same issue, as noted in the *BP Refinery* case above, but it can be the case that implied and express terms dealing with the same matter can co-exist in certain circumstances.

The NEC contract, in which respect there is not a welter of case law, has also been the subject of judgements on implied terms. In *Costain v Bechtel* [2005] EWHC 1018 (TCC) it was found that the principle requiring a third party certifier, under an implied obligation, to act impartially between a contractor and employer in issuing certificates (set down for Architects in the House of Lords case of *Sutcliffe v Thackrah* [1974]) applied equally to the project manager under the NEC.

### Recent cases

Recent cases have affirmed where certain lines are likely to be drawn in the implication of terms generally and in relation to construction specifically. The Court of Appeal case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 re-affirmed that “*there is no general doctrine of “good faith” in English contract law...If the parties wish to impose such a duty they must do so expressly*”.

Another recent case, that of *Leander Construction Limited –and- Mulalley & Co Ltd* [2011] EWHC 3499 (TCC), re-affirmed that “*all the authorities point the same way: the courts have been very reluctant to imply additional terms as to the timing or regularity of the contractor’s performance prior to the contract completion date*”. The courts have been extremely reluctant to imply terms that require work to be progressed regularly and diligently in the absence of express terms.

In other words if a construction contract contains a start and an end date and no express terms dealing with the regular and diligent progress toward completion required of the contractor then he is at liberty to progress the works as he thinks appropriate and will not be in breach in that respect if and until he misses the end date. That is one reason why standard forms such as the JCT subcontract forms require the subcontractor to proceed reasonably in accordance with progress of the Main Contract Works.

### Conclusion

Implied terms are commonly found in construction contracts, including those based on standard forms. Where there are lengthy express terms of contract it is likely that few implied terms may be required for business efficacy. However, it is rare for none to be found and often numerous implied terms will be present. This includes implied terms that reflect the basic need for co operation between parties to a contract to allow works to be carried out and obligations to be fulfilled.