Implied terms in construction contracts

Implied terms are rarely thought about when contracts are formed, but they may have a significant effect on the parties’ rights and obligations. This article concentrates on the 2 more common types of implied term: those imposed by statute and those implied by case law.

Some of these may be familiar – for example the Housing Grants Construction and Regeneration Act 1996 imposes some minimum requirements for construction contracts which cannot be excluded. These include a right to adjudicate, the right to payment by instalments, notices of payment and suspension for non-payment, and making "pay when paid" clauses unenforceable except on insolvency.

Terms implied at common law include that the building owner will give possession of a site within a reasonable amount of time. Likewise the employer will co-operate to allow the contractor to carry out the works in a regular and orderly way and must not hinder or prevent the contractor from doing so. Also, the contractor will carry out work in a ‘good and workmanlike manner’ (this is now reflected in the requirement in the Sale of Goods and Services Act 1983 that services are to be provided with ‘reasonable skill and care’).

Others may be more of a surprise, particularly in the case of those which are not implied but which one might expect to be.

For example, is it an implied term of a construction sub-contract that the sub-contractor will execute the works so as to meet the contractor’s programme? Yes? Well actually, no. It is the sub-contractor’s obligation to finish by the completion date and it is up to him to organise his work as he sees fit. If the sub-contractor feels that he can leave all the work to the last month and complete on time then, despite the concern of the anxiously watching contractor, he may do so. If the contractor wants to impose some other obligation, there needs to be an express term.

How about the site conditions – does the employer have to ensure that the site is free from rubbish and debris so that the works can proceed? Again, no. How about the right to extend the time for completion of later phases where an earlier phase was delayed and an extension granted? Yet again, no. Well, surely a builder of a school should have uninterrupted possession of and access to the site? You’ve guessed it, no. To top it all, in a contract for construction to a given specification, the contractor does not have to warrant that the works will be fit for purpose upon completion.

The courts may imply terms into a contract when the parties have not expressed every material term, either in writing or orally. However, it is difficult to persuade a court that a term should be implied. Evidence is needed both that a term should be implied, and also the precise content of the term. Additionally where a contract has been expressly drafted it is difficult to imply a term as the contract is more likely to be exhaustive of the parties’ agreement. A term may not be implied which conflicts with any of the express terms of the contract, although it is not impossible for such a term to deal with the same subject matter as the express term.

Nevertheless, the courts are willing to imply terms when necessary to give business efficacy to the contract and where it would be so obvious that it ‘goes without saying’, provided the term is reasonable and equitable, capable of clear expression and does not contradict any express term. But it must be necessary, not just commercially reasonable. More recently the courts have taken a more purposive approach to implying terms, asking what the instrument, when read as a whole against the background, would reasonably be understood to mean and whether the proposed implied term is necessary to make the contract work.

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Clearly then there can be surprises in store, and terms and obligations should not be assumed to exist if not specifically stated in the contract. So what can be done?

There are two methods of escaping terms implied by the common law. The first method is by preparing and using contracts which deal with all the eventualities that will arise on the construction project. Unfortunately, as the multiple examples show, dealing with every eventuality is an almost impossible task, but those that can be foreseen should be dealt with explicitly.

Secondly, contracting parties can use an exclusive remedies or entire agreement clause. This seeks to exclude any other excludable terms and to prevent the parties bringing claims based in tort. The clauses set out are intended to be the whole of the bargain between the parties, so that they can only rely on rights, obligations and liabilities explicitly expressed in the contract. This can cause difficulties. For example, late completion or loss and expense could leave the other party with no remedy. However, even exclusive remedies or entire agreement clauses will not suffice to exclude implied terms which are fundamental to any building contract.

The approach should be clear – if you definitely want something in, or out, then say so explicitly and do not leave it to chance. Try to provide for all foreseeable eventualities, especially those peculiar to the site, and remember there are certain obligations, particularly those imposed by statute, that cannot be excluded and will be implied regardless. Also you should consider the effect of deleting terms from a draft contract and what the fall back position will be if no term is included. Will an implied term exist? Not even the use of an unamended standard form will necessarily avoid the implication of an implied term.

Finally, if any doubt exists as to the importance of implied terms, remember the case of *Mowlem plc v Phi Group Ltd* where an arbitrator declined to imply a term for payment. That cost the contractor millions.

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14 For example, an implied term that the contractor should have a sufficient degree of uninterrupted and exclusive possession of the site to permit it to carry out its work unimpeded and in the manner of its choice – *Queen in Right of Canada, The v Walter Cabott Construction Ltd* 21 BLR 42; Federal Court of Appeal, Canada.
16 [2004] BLR 421