

SURELY IT'S IMPLIED...?

You would think contracts were simple things really, a few express terms, some mutual obligations, throw in a bit of consideration... no problem. Why then is it that people so often realise that some fundamental point they thought was covered was not in fact included or even thought about at the time the contract was agreed?

What to do? Well obviously the first thing is to blame the lawyers I hear you say! Not a bad start and certainly a distinct possibility. But wait a minute...'surely there is an implied term...'. Or in other words maybe the original contract should have included that key provision but we won't worry because the court will agree that the relevant term can be applied into the contract in any event.

Unfortunately, to the great disappointment of a number of people it isn't that simple. The starting point is that if the parties to an agreement had intended something to happen then that agreement would have said so. Accordingly, the express provisions of that arrangement apply even if the unanticipated event causes a loss - in other words hard cheese. Even if the resulting loss or situation is patently unfair it is not the court's job to improve upon the drafting or construction of the agreement. No luck there then! This is a point that is sometimes misconstrued and all too often what someone thinks is an obvious implied term is really an improvement to a contract for their benefit.

But wait a minute. Because a court cannot alter the agreement between the parties does not mean it cannot interpret what is meant by that agreement. What a court will do therefore is look objectively at the contract and in appropriate circumstances imply a term into that contract.

How does it do this in practice? Over the years there have been a number of tests applied by the courts for this purpose. In the 19th century case law talked about giving business efficacy to the transaction', without really explain what that meant whilst in the late 1930s what was described as the so called "officious bystander" test was applied. Again it was never quite clear who this was in practice and more recently judges have talked about implying a term into a contract where 'it goes without saying'.

All these tests have one basic premise behind them which is that the proposed implied term must spell out what the contract actually means or to put it another way what would the agreement if read as a whole against the relevant background, reasonably be understood to mean? It remains at all times objective and is only concerned with the contract itself and not re-write the terms of the contract.

A recent Privy Council case has helpfully reviewed these various tests previously applied by courts and re-affirmed the objective approach to be taken as mentioned above. What effect does this have in practice? Well, it doesn't change the world but it does remind us just how important it is to try and get it right in the first place but if that does not work not to expect the courts to re-write the contract in favour of your particular interpretation over that of another.

The case in point involved the interpretation of a set of articles of association of a Belize based company in which the government of Belize had a controlling interest. Certain controls were built into the shareholder arrangements to allow for the appointment and removal of directors depending on the number and class of shares held. Because of an oversight in the drafting no one thought about the situation once a particular shareholder divested itself of their particular shares in question. As this involved a government and a state monopoly this was clearly worth litigating over. It also reassures us simple folk that even those acting for a government can get the drafting wrong!

The Privy Council essentially were asked to decide whether a term could be implied into the contract to potentially allow for removal of directors appointed by special shareholders when those

shareholders no longer retained their interest in the company. They took the view that no one could have expected the situation where directors, appointed by a previous shareholder who no longer had an interest in the company, could not then be removed either by the company or the existing shareholders!

They therefore implied a term to the effect that their appointment terminated on that shareholder ceasing to hold its interest in the company. This seems a sensible and pragmatic decision. Interestingly, this involved a question of interpretation of the articles of association of a company which until the decision was thought to be a form of contract to which implied terms could not be applied. That is another interesting point but that is enough excitement for one day!

If you would like more information on implied contractual terms, or would like to discuss your own situation, please contact Hugh Murrell on 01872 226995, or email hugh@murrellashworth.co.uk.



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