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# THE COST OF CORRECTION – IMPLYING TERMS INTO LEASES AND OTHER CONTRACTS

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When entering into a commercial relationship, we generally hope that we are contracting with reasonable people. Because of this, it is often tempting to think that any gaps in a contract can be sorted out later if a problem arises. However, with money on the line even the most reasonable parties may dig their heels in and deny liability. The result is that, as in *JN Hipwell & Son v Szurek [2018] EWCA Civ 674* ("the Szurek case"), a claim worth £22,750 may need to be resolved through litigation in which the costs inevitably far exceed the value of the claim.

Interesting as the law on the implication of terms is, particularly following Lord Hoffman's Privy Council judgment in *Attorney-General of Belize v Belize Telecom Limited [2009] 1 WLR 1988*, the principles have been unequivocally reaffirmed (with minor reformulation) in the recent Supreme Court case of *Marks & Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Limited [2016] AC 742*.

The test to be applied is one of "business efficacy"; i.e. is the term sought to be implied necessary to give the contract commercial or practical coherence, as judged at the time that the contract was formed. The business efficacy test is often used interchangeably with a test of obviousness (the "officious bystander" test), expressed most memorably by MacKinnon LJ in the case of *Southern Foundries (1926) Limited v Shirlaw [1939] 2 KB 206* as meaning:

> "*Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an official bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'oh, of course!'*"

In practice, whilst the two tests are different it is rare that one will be satisfied and the other not.

The problem of something being "*so obvious that it goes without saying*" is, of course, that it often goes unsaid. When a party to a contract is called upon to perform an unspoken (and undocumented) obligation, such a party may turn around and say "*show me where in the contract I am required to do that*". If that party refuses to relent, then the only recourse may be expensive and time consuming litigation.

In a commercial negotiation, if something is so obvious that it goes without saying, then there is no reason why it should not be said. It is a clause that ought to be uncontroversial. The clause would therefore be placed in the first draft of a contract and would likely draw no comment from the other party.

A simple addition to the contract at the beginning of the contractual negotiations may avoid litigation in which the amount at stake is "*worryingly small when compared to the costs of pursuing it at a two-day trial with numerous witnesses in the multi-track*", as the Judge commented about the Szurek case at [4] of the judgment.

It is worth remembering at this stage that, the costs presented to the Court are the litigation costs, and, save in limited circumstances, would not include further incidental losses to business

caused by the party being involved in litigation. Whilst it does not necessarily follow that being involved in litigation means your business suffers, there may well be opportunities lost because, for example, an individual giving evidence at trial is unable to devote as much time as they otherwise would to a particular pitch or task, or takes their eye off the business.

Whether parties are entering into a lease or trading goods and services, there is often a desire to keep costs as low as possible and draft contractual agreements without involving lawyers. In doing so, however, such parties are deprived of the benefit of legal advice from experts who know what terms are standard to in particular circumstances, and what sort of situations and disputes may arise in the future.

The Szurek case is a good example of this. That case centred on whether a term ought to be implied into a commercial lease whereby the landlord was obliged to ensure that the electrical installation serving the property was safe, and the subject of a current electrical safety certificate.

The property was part of a development including other business premises for which the electricity supply was from a common source. The lease expressly provided for the landlord to have access to the property to "*repair, maintain, cleans or renew…any service media serving the [property]*." Service media included wires and cables supplying the property with electricity. Agents for the landlord also accepted in oral evidence that the landlord "*was considered to bear responsibility for keeping in repair the structure and exterior of the premises and installations for the provision of eg water and electricity*".

The Judge stated, at [37], that:

> "*It is, to my mind, obvious from the reservation to the Appellant landlord of the right of access for the purpose of repairing, maintaining or renewing service media as defined connoted at least an obligation on the part of the landlord (the Appellant) as regards the safety of the service media it has installed at the premises*."

The term sought was implied into the contract accordingly. Earlier in the judgment, at [31], the Judge had described the lease as "*an oddly balanced document, imposing on the tenant far more extensive covenants than upon the landlord*". The lease failed to make any provision regarding the exterior of the premises or as to its plumbing or electrical installation and supply.

As the Judge said, at [32], this was "*a plain and obvious gap*". It is one that an expert lawyer with experience of commercial leases would likely have identified and closed with appropriate drafting. The cost of obtaining legal advice when a contract is negotiated or drafted is generally low. It is certainly significantly lower than the cost of litigation. As such, expert legal advice should always be obtained when drafting or negotiating a contract.



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