

## AD HOC IMPLICATIONS IN WRITTEN CONTRACTS

In *Dikstein v. Kanevsky*<sup>1</sup> O'Bryan J. defined legal implications in contracts as follows: "A term implied as a matter of law is one to which the law gives contractual efficacy, though it may be plain that it was something to which the parties, in making their contract, failed to advert at all." Such terms seem to fall into two categories: (1) settled (including statutory) implied terms and (2) *ad hoc* implications. The distinction is important in a number of ways, although it is admittedly not generally recognized. "*Ad hoc* implications" are terms which are "read into" contracts as the occasion requires and in accordance with broad tests and principles. These tests and principles, which the courts have developed and refined gradually, seek to combine a maximum of fairness between the parties with a minimum of distortion of the actual, express bargain which the parties have in terms made. No two *ad hoc* implications need be alike and there is no need for any exact precedent for the particular term sought to be implied. *Ad hoc* implications are recognized not by their content but by the occasion which calls for them and the purpose which they serve.

Settled implications, on the other hand, are terms with a clearly defined content which common law or statute imports into (a) all or nearly all contracts, (b) contracts with very generally defined characteristics (e.g. into all bilateral contracts, or into all contracts of unspecified duration) and (c) specific contracts (such as contracts of agency or contracts for the sale of goods). An example is the term which is read into contracts for the sale of goods<sup>2</sup> and also into many other bilateral contracts<sup>3</sup> that the parties' mutual performances are to be concurrently conditional. Such settled implied terms may well have originated as *ad hoc* implications and may have complied then with the very restrictive rules which the law has laid down for these. Most of these rules, however, cease to be relevant when an implication has become settled. Once the same kind of implied term has been read judicially into contracts of a particular type in a series of cases, it acquires a validity of its own and its existence need no longer be justified by showing that it once satisfied the rules which govern *ad hoc* implications. This is true where the implication has become settled as a matter of common law, but it is more clearly so, where, as in the case of sale of goods, it is based on statute. The borderline between *ad hoc* and settled implications is very indistinct and there is much room for argument as to the category to which any particular implication belongs. Only the rules which govern *ad hoc* implications will be examined in this article.

### 1. Implied terms in verbal and in written contracts

The law relating to implied terms is usually stated in textbooks without special reference to the distinction between verbal contracts and contracts in writing. In *Roxburgh v. Crosby & Co.*<sup>4</sup> Cussen J. observed that "in most

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1. [1947] V.L.R. 216 at 220.
2. *Sutton on Sale of Goods* (1967), at 84.
3. *Kingston v. Preston* (1773) 2 Doug. 689.
4. [1918] V.L.R. 118, at 131.

of the cases in which the question of an implication has been discussed there was a formal written contract between the plaintiff and the defendant". As the learned judge explained, finding implications in verbal contracts is not usually problematical, since the courts are invited in such cases to look at all the circumstances for the purpose of making out the contract; in the case of written contracts, however, particularly when they are carefully drawn and formal, "expressions affording ground for an implication may be met by a counter presumption that the parties must be taken to have provided for everything which they thought to be necessary". Similarly, Denman C.J. stated in *Aspdin v. Austin*<sup>5</sup>: "Where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications: the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under the instrument."

## 2. The inconsistency principle

It is well-settled that a suggested implied term cannot be read into a contract when it would be inconsistent with one or more of the express terms<sup>6</sup>. To ascertain whether such inconsistency exists Jordan C.J., in *Gammell Power Farming Co. Ltd. v. Nies*<sup>7</sup> endorsed and applied a test enunciated by Lord Parker C.J. in the *Tamplin Steamship Case*: ". . . to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any inconsistency." Whilst undoubtedly correct, this suggested test seems to provide a restatement of the problem rather than a method for resolving it. In fact, it may be doubted whether there is a simple test which will resolve all problems of inconsistency. The clearest illustrations of such inconsistency are cases where the suggested implied term directly negates or otherwise contradicts one of the express terms of the contract. In *Lapidos v. Carr*<sup>8</sup>, for example, the contract said expressly that a sum of money was payable in Sydney and, against this provision, the usual implied term that money is payable where the creditor has his residence or place of business could not prevail. In *Hogan v. Tumut Shire Council*<sup>9</sup> a contract for the appointment of a curator of a camping reserve stated *inter alia*: "The term of a Curator's appointment to be fifteen years, subject to the above duties being carried out to the entire satisfaction of the Council." McLelland J. held that this clause could not be read subject to the implication that, to justify dismissal, the Council's dissatisfaction had to be based on reasonable grounds: ". . . this is a case where the word 'reasonable' could not be implied into the particular clause, and this view is confirmed by the use in the present case of the adjective 'entire' in the contract. . . . genuineness and honesty are the sole tests in this case . . ." <sup>10</sup>

It seems that the courts apply the inconsistency principle with varying degrees of strictness to different types of implied term; therefore it will be

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5. (1844) 5 Q.B. 671, at 684.
  6. In *Heimann v. C/W* (1938) 38 S.R. (N.S.W. 691 Jordan C.J. stated (at 695): "No term can be implied if it is inconsistent with the express terms of the contract . . ."
  7. (1935) 35 S.R. (N.S.W.) 469, at 477.
  8. [1956] St. R. Qd. 194.
  9. (1954) 54 S.R. (N.S.W.) 284.
  10. *Id.*, at 290 *et seq.*

advisable to return to the problems of inconsistency from time to time rather than seek to exhaust the subject here. We must now turn our attention to the positive basis or bases upon which courts will read *ad hoc* implications into contracts.

### 3. Is there just one test?

In *Scanlan's New Neon Ltd. v. Toohey's Ltd.*<sup>11</sup> Latham C.J. expressed the optimistic view that the rule concerning the implication of terms is clear and intelligible and that it has not given rise to any serious difficulty in the law. It seems that most of the rules or tests which judges have suggested have been intended to apply to *ad hoc* implications. The suggestion that these are all governed by one broad test or principle is implicit in numerous judicial pronouncements.

If there is one proposition in relation to implied terms more frequently affirmed judicially than any other, it is the rule that an implication cannot be found in a contract merely because it would make the contract more just and reasonable. One of the best-known examples is Lord Atkin's statement in *Bell v. Lever Bros. Ltd.*<sup>12</sup>: "Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made, by importing implications which would appear to make the contract more businesslike or more just." Similarly, Mayo J. stated in *Todd v. Nicol*<sup>13</sup>: "It is not for a Court to fashion the contract for the parties, or to frame terms that the parties should have made in the light of the events that had happened." The temptation must be ever-present for the courts to use implied terms to rewrite the contract so as to make it more equitable by lightening the burden which it seeks to impose upon the weaker of the two parties. Dicta such as the ones quoted acknowledge that neither common law nor equity has given the courts a mandate to reform bargains which appear to them unfair.

Terms are implied not on the basis of some beneficent rule of reason but only, as Viscount Simon L.C. stated in *Luxor (Eastbourne) Ltd. v. Cooper*<sup>14</sup>, "under the compulsion of some necessity"<sup>15</sup>. Jordan C.J. summed up the position in the leading case, *Heimann v. C/W*<sup>16</sup> as follows: "It is not sufficient that it would be reasonable to imply the term . . . it must be clearly necessary." Such a broad test of necessity enjoys unanimous judicial support. Unfortunately the cases do not contain an unequivocal answer to the inevitable question: what does "necessary" mean in this context? Linguistically the term denotes either that some means is indispensable if a specified objective is to be attained or that some inference is so strongly suggested by a set of circumstances that it is inescapable. There may be other meanings, but it is these two which have been used in judicial attempts to elucidate the legal significance of the necessity principle which governs implied terms.

The *locus classicus* for a teleological definition of "necessary" is the famous decision of the English Court of Appeal in *The Moorcock*<sup>17</sup>, which will be

11. (1942-1943) 67 C.L.R. 169, at 194 *et seq.*

12. [1932] A.C. 161, at 226.

13. [1957] S.A.S.R. 72, at 82.

14. [1941] A.C. 108, at 125.

15. Viscount Simon's words were quoted by Walsh J. in *A. Norton Pty. Ltd. v. Fowler* [1966] W.N. (Pt. 2) (N.S.W.) 232, at 240.

16. (1938) 38 S.R. (N.S.W.) 691.

17. (1889) 14 P.D. 64.

examined in detail presently. The "business efficacy" principle developed in that case was restated by Bowen L.J. in *Lamb v. Evans*<sup>18</sup> as follows: "What is an implied . . . promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile." This principle is firmly entrenched in the law; Lord Atkin restated it in *Bell v. Lever Bros. Ltd.*<sup>19</sup> as follows: "The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction . . ."

Another equally strong strand of judicial dicta is couched in terms of "irresistible inference". In *Heimann v. C/W*<sup>20</sup> Jordan C.J. stated:

" . . . the test of whether [the suggested implied term] is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men—and they cannot be heard to say that they are not—must clearly have intended the term, or, if they had not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds"<sup>21</sup>.

In *Gullett v. Gardner*<sup>22</sup> Sir Owen Dixon formulated this principle succinctly in characteristically lofty language as follows: "The inference that the parties must have intended to bind themselves in the manner sought to be implied should arise from the circumstances and from the contract as a rational deduction of such cogency that another intention could hardly be supposed." There are so many instances of this type of definition that it also has a strong claim to being regarded as settled. How then does this type of definition relate to the business efficacy principle?

There is some judicial support for the view that the two definitions of "necessary" which have been traced are really expressions of one single principle. The most prominent attempt to combine the two strands was made by Scrutton L.J. in *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*<sup>23</sup>:

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case', they would both have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear!'"

With respect, this attempt to equate "business efficacy" with the concept of presumptive intention seems more heroic than convincing.

18. [1893] 1 Ch. 218, at 229.

19. [1932] A.C. 161, at 226.

20. (1938) 38 S.R. (N.S.W.) 691, at 695.

21. Much the same principles was suggested by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206 in even more cautious terms (at 227):

"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 officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

This test is open to the criticism that it does not cater for implications of some complexity (which are occasionally made).

22. (1948) 22 A.L.J. 151, at 155.

23. [1918] 1 K.B. 592, at 605.

Whatever general formula is devised, it must be wide enough to cater for three types of implied term: (1) implied terms imposing obligations, (2) implied terms qualifying obligations not expressly so qualified in the contractual document, and (3) implied terms regulating details of performance. A detailed survey of the first two will be made because Australian courts have been frequently concerned with them. The most carefully designed general formula can hardly be a substitute for such a survey. Anticipating the results of that survey, one might formulate the general principles governing *ad hoc* implications as follows: a term will be implied if it is necessary to do so (1) to give the contract such business efficacy as the parties intended it to have, or (2) to avoid the imposition of obligations which the parties, despite their use of seemingly absolute words of promise, cannot be taken to have intended, or (3) to avoid a failure of the contract for vagueness or uncertainty. Once it is clear that a term of some sort must be implied, the courts will choose the simplest and fairest formula which can be devised, being ever mindful of the fact that the parties' actual bargain should not be unduly distorted.

If a briefer formula is wanted, one may doubt whether the suggestion made by Salmond and Williams has ever been bettered: "It is . . . because the actual intentions manifested by the parties are insufficient to constitute a complete and workable contractual relationship between them that the law sets out to supplement those intentions by addition of further terms—implied terms—to the contract"<sup>24</sup>.

#### **4. The business efficacy principle: The Moorcock**

No single decision on implied terms has enjoyed greater popularity than *The Moorcock*<sup>25</sup>, *fons et origo* of the celebrated business efficacy principle. The plaintiff's ship, the Moorcock, was moored at the defendants' jetty in the Thames. When the tide ebbed the ship was damaged, due to the fact that it settled on a ridge of hard ground beneath the mud. The plaintiff sued for damages, relying on an alleged implied undertaking by the defendants that they had taken reasonable care to ascertain whether the riverbed near the jetty was safe. The contract was for the use of the defendants' wharf for unloading the plaintiff's vessel and contained no such express undertaking. Butt J. found that there was no such undertaking, but the Court of Appeal (Lord Esher M.R., Bowen and Fry L.J.J.) thought otherwise. Their Lordships agreed that the defendants could not be burdened with an implied duty to repair or make safe the river bed, because it was not under their control, but owned and controlled by the Thames Conservancy. However, the court considered that there was an implied undertaking by the defendants that they would examine the riverbed and warn shipowners using the jetty of hidden dangers. Bowen L.J. made it clear that the court was not attempting in any way to reform the contract made by the parties: "This is a business transaction as to which at any moment the parties may make any bargain they please, and either side may by the contract throw upon the other the burden of the unseen and existing danger"<sup>26</sup>. But the point, as the learned Lord Justice saw it, was that the contract before him made no provision for this kind of unseen peril, "leaving the law to raise such inferences as are reason-

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24. *Salmond & Williams on Contracts* (2nd ed., 1945) at 36 *et seq.*

25. (1889) 14 P.D. 64.

26. *Id.*, at 70.

able from the very nature of the transaction"<sup>27</sup>. Bowen L.J. relied upon a very general facet of the parties' contractual intention: they had intended the arrangement to be efficacious from a business point of view, they had intended the negotiations to bear some fruit. The learned Lord Justice thought an implication was justifiable if it was made "in order that such a minimum of efficacy should be secured for the transaction, as both parties must have intended it to bear"<sup>28</sup>. A particularly clear restatement of the business efficacy test is that by Cullen C.J. in *Barnewall v. Wood*<sup>29</sup>: "A stipulation will . . . only be implied where it is seen to be necessary to give that effect to the contract which is seen on the face of it to be the evident intention of the parties."

It is an unfortunate feature of *The Moorcock* that the facts of the case do not provide a sufficiently illuminating illustration of the efficacy principle. The gist of that principle is made more clearly apparent by some of the cases to which the rule was subsequently applied. One of the best Australian examples is *Vickery v. Jenner*<sup>30</sup>. The parties, who were neighbours, agreed that the plaintiff should repair a boundary fence and that the defendant should contribute half the cost. A quarrel developed over the cost of the repairs and the defendant pulled down a part of the fence which happened to be wholly on his land. The plaintiff sued for breach of an alleged implied promise that the defendant would leave the fence intact as a boundary fence once it had been repaired. The trial judge directed a verdict against the plaintiff. In support of his motion to have the verdict set aside the plaintiff argued that the agreement, although there was a written note of it, was not strictly in writing and that therefore "the Court will . . . have no difficulty taking all the circumstances into consideration, and, looking at what was intended at the time by the parties, in implying that which is necessary to make the agreement effectual"<sup>31</sup>. The court agreed that, if the term upon which the action was based were not implied, the whole contract would be a farce. Darley C.J. cited Bowen L.J.'s words: "The common law . . . assumes that there is a promise to do that which is part of the bargain, or which can fairly be implied as part of the good faith which is necessary to make the bargain effectual"<sup>32</sup>. The business efficacy principle was applied and the plaintiff prevailed.

Another, equally suitable illustration is *Dikstein v. Kanevsky*<sup>33</sup>. The plaintiff was the tenant (in pursuance of an oral agreement) from week to week of rooms on the sixth floor of a building owned by the defendant. Both parties were agreed not only that the plaintiff would carry on in these rooms the business of packing dried fruits and nuts but also contemplated that the volume of the business would increase during the tenancy. At first the defendant allowed the plaintiff adequate use of the lift in the building for the carriage of the goods the plaintiff needed for his business, but later he restricted such use to 8.30 to 9 a.m. daily, a period which was wholly inadequate for the plaintiff's purposes, particularly in view of the heavy demand for the lift made by other tenants just at that time.

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27. *Ibid.*

28. *Id.*, at 69.

29. (1921) 21 S.R. (N.S.W.) 291, at 297.

30. (1896) 17 N.S.W.L.R. (L) 438.

31. *Id.*, at 440.

32. *Id.*, at 442.

33. [1947] V.L.R. 216.

Since the agreement for the tenancy was oral, O'Bryan J. was able to find an *actual tacit* agreement that the plaintiff should be entitled to a reasonable user of the lift and granted him an injunction ordering the defendant to make the lift available to the plaintiff between 6 a.m and 9.15 a.m. daily. However, the learned judge made it clear that, even if the parties had not come to any such tacit understanding, the same term could still be implied as a matter of business efficacy:

"Here the contract made is the letting from week to week of part of a floor of a city building . . . the known purpose of the letting being that the business of fruit packing will be carried on by the tenant in those premises. The premises are practically useless to the tenant if he is deprived entirely of the use of the lift for the carriage of his goods. In order to give such a contract business efficacy, some right over the use of the lift for both passenger and goods traffic must be implied"<sup>34</sup>.

In the light of these authorities the business efficacy principle may be formulated as follows: where the immediate business objectives pursued by the parties by means of the contract are clearly apparent, the law will imply such obligations as are necessary to ensure the attainment of those objectives, in particular such obligations as will prevent either party from rendering the contract futile for the other party.

### 5. *Heimann's case: the plausibility test*

The cases in which the *Moorcock* principle was applied should be contrasted with *Heimann v. C/W*<sup>35</sup>, one of the most important Australian decisions on implied terms. The plaintiff sued the Commonwealth on the basis of a written promise to pay him a reward "in the event of your supplying information which leads to the Australian Department of Trade and Customs securing the conviction of the party or parties for evasion of Customs duty and to the recovery of the evaded duty . . ."<sup>36</sup> The plaintiff supplied the necessary information but the department declined to prosecute. The plaintiff sued for breach of contract, contending that the parties must have contemplated that the Commonwealth was to be obliged to act on the information. The defendant relied on the express term of the instrument: "The event on which the plaintiff is to be paid is a conviction and nothing else"<sup>37</sup>. Jordan C.J., with whom Nicholas and Owen JJ. concurred, considered that the ratio of *Re Railway and Electric Appliances Co.*<sup>38</sup> applied to the case. The principle in that case he formulated as follows: "The fact that a contract contemplates or provides that a party is to receive certain benefits if the other party does certain acts of a kind likely to be beneficial to himself does not of itself necessitate the implication of a promise by the latter to do the acts; because the former may have been content to rely on the self-interest of the other as a sufficiently compelling motive . . ."<sup>39</sup> In the light of this principle Jordan C.J. concluded that the proper inference from the written terms was that the plaintiff had been content to do without an undertaking by the Commonwealth and instead to rely on

34. *Id.*, at 221.

35. (1938) 38 S.R. (N.S.W.) 691.

36. *Id.*, at 692.

37. *Id.*, at 693.

38. (1888) 38 Ch.D. 597.

39. (1938) 38 S.R. (N.S.W.) 691, at 696.

the duty which lay upon the department to administer the Act in a proper manner. How can this case be reconciled with cases such as *Vickery v. Jenner*<sup>40</sup>? Was it not the obvious and immediate business purpose pursued by the plaintiff when he made the contract to earn the reward and was not the Commonwealth frustrating that purpose by failing to prosecute?

The answer lies in what might be called the plausibility test. An undertaking cannot be implied if the express terms by themselves (i.e. without the suggested implied undertaking) constitute a perfectly plausible arrangement which the parties might very well have deliberately made. In *Campbell v. Manly Municipal Council*<sup>41</sup> Owen J. applied this test when he asked whether the contract as expressed in the written document, without additions and implications, was "a workable and effective agreement". When this question or test yields an affirmative answer, then the terms expressly provided by the parties are the conclusive guide to the controversy before the court<sup>42</sup>. If the express terms alone are a workable and plausible contractual scheme, then there are no gaps or "interstices"<sup>43</sup> which have to be closed and the courts are led to infer that the parties intended the suggested implied term not to exist. It is not business efficacy in the abstract, but *such business efficacy as the parties intended* which the courts are pledged to promote. Facile departures from the plausibility test involve the danger of making "the contract speak where it was intentionally silent"<sup>44</sup>. That danger has often been emphasized, but never more persuasively than by Kay J. in *Re Railway and Electric Appliances Co.*<sup>45</sup> The learned judge refused to read into a deed for the sale of a patent an implied understanding that the seller would pay renewal fees so as to prevent the patent from lapsing. Kay J. stated:

"It may very well be that the parties discussed this matter, most carefully considered it on both sides, and deliberately and with intention omitted to put in this deed such a covenant as I am asked to imply; . . . the danger of raising a right by an implication of that kind is a very great one . . ."<sup>46</sup>

The reasons why the suggested implication in *Heimann's* case failed the plausibility test are clearly outlined by Jordan C.J. *Vickery v. Jenner* did pass that test: the absence of an express undertaking concerning the destruction of the fence does not indicate an intention not to create such an obligation; instead, it is indicative of the fact that the possibility of such callous conduct on the part of the defendant never occurred to the plaintiff, or that, if it did occur to him, he refrained from mentioning the matter for fear of offending

40. (1896) 17 N.S.W.L.R. (L) 438.

41. (1949) 17 L.G.R. 213, at 217.

42. This submission is supported by Jordan C.J.: "Whenever a question arises whether an unexpressed term should be implied, it is necessary first to consider the contract as a whole, to see whether any implication at all is required or justified beyond what is expressly stated; because no term need, or can, be implied, if the matter is covered by the express terms of the contract when properly construed . . ."—*Heimann v. C/W* (1938) 38 S.R. (N.S.W.) 691, at 694. The learned Chief Justice also stated that a term cannot be implied "if it appears on the face of the contract that the parties adverted to the point and deliberately abstained from dealing with it" (*id.*, at 695).

43. *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108, at 138, *per* Lord Wright.

44. *The Trustee of the Property of James Carey v. Carey* [1914] St. R. Qd. 167, at 172, *per* Lukin J.

45. (1888) 38 Ch.D. 597.

46. *Id.*, at 602.



the defendant. It would not be a plausible view to attribute to the plaintiff the intention that he would rely on the defendant's innate decency as manifested in his second-thoughts if he should decide, in the first instance, to do something so malicious as to destroy the fence. That contingency being unprovided for, a gap existed which threatened to render the whole contract futile and made the implication of an obligation necessary. The situation would probably have been different, had there been some other motive in existence (such as the need to confine his—the defendant's—own sheep, or a statute making it a criminal offence to take down fences, even if they are situated on one's own property) likely to induce the defendant to leave the fence intact. In that case the plaintiff might have been "content to rely on the self-interest of the other as a sufficiently compelling motive"<sup>47</sup>.

The plausibility test cannot always be sensibly applied without taking into consideration whether the general law makes some provision for the controversy between the parties. There will not usually be a need to imply a duty or privilege when the identical duty or privilege already flows from a statute or from the common law. In *Todd v. Nicol*<sup>48</sup> Mayo J. explained this as follows: ". . . the right to immunity from unlawful interference [rests] on no contractual basis. Such liberties do not require any implication . . . Such rights may be included expressly in an agreement but if the same subsist independently, they will not perhaps be implied in a contract." If, for example, the fence in *Vickery v. Jenner* had been exactly on the boundary, the general law would have provided both parties with sufficient protection against its destruction and the need for a contractual implication would not have existed; or, if in *Dikstein v. Kanevsky*<sup>49</sup> a statute had imposed an obligation on the landlord to give free access to the lift to all his tenants at all times, the implied term would have been superfluous. A gap filled by the general law is not a gap in the contract.

### 6. Efficacy implications: the object of the contract

Business efficacy implications cannot be sustained without some notice being taken of what Lord Wilberforce has recently called "the commercial, or business object, of the transaction"<sup>50</sup>. It would be an oversimplification to think of the typical synallagmatic contract as a device which has only one purpose or objective. As Latham C.J. observed in *Scanlan's v. Tooheys*<sup>51</sup>: "In the case of an ordinary contract, it is difficult to say that there is any common object other than the sum total of the individual advantages which the parties hope to obtain by virtue of the performance of the contract on both sides." The simple fact is that the parties to most contracts pursue different, though complementary aims (usually one wishes to obtain goods or services, the other to earn money) and that the law is concerned to ensure, by

47. *Heimann v. C/W* (1938) 38 S.R. (N.S.W.) 691, at 696, *per* Jordan C.J.

48. [1957] S.A.S.R. 72, at 85.

49. [1947] V.L.R. 216.

50. *Prenn v. Simmonds* [1971] 3 All E.R. 237, at 240. In *Reid v. Moreland Timber Co. Pty. Ltd.* (1946) 73 C.L.R. 1 the question arose whether a licence to cut certain timber was an exclusive licence. Dixon J. commented (at 11): "No doubt it is necessary that it should affirmatively appear that the intention was to give the sole right. But the intention to do so may be collected from the nature of the agreement, its business purpose, the subject with which it deals and the circumstances surrounding its making."

51. (1942-1943) 67 C.L.R. 169, at 197.

implication of terms if need be, that each party does his part in assisting the other in the attainment of his objectives. In a sense, the business objectives of the contract are a source of rights and duties and it is submitted with respect that Latham C.J. was over-cautious when he stated in *Scanlan's v. Tooheys*: "The object of a contract can be determined only after the obligations of the contract have been ascertained—not vice-versa"<sup>52</sup>. A study of the case law makes some small qualification of that statement unavoidable.

It would be too narrow a definition of "business purpose" if one equated it simply with a party's interest in obtaining the other party's performance. The concept embraces the full range of direct benefits and opportunities which the contract is meant to bestow upon each party. This is well-illustrated by the fact that in engagements of performing artists "the employer is not only bound to pay the remuneration agreed upon, but is also under an obligation to afford an opportunity to the persons employed to exercise and display their talents . . ."<sup>53</sup> This appears to be a settled implication which is commonly read into contracts of this type<sup>54</sup> and is obviously based upon the need of artists to remain proficient, develop their talents and keep their names before the public. Similar duties are implied even in ordinary employment contracts<sup>55</sup>.

On the other hand, "business objective" must not be confused with ulterior motives, indirect advantages or ultimate hopes of gain which a party might have attached in his own mind to the contract. Particularly when such matters are unknown to the other party, they can hardly ever be a fit basis upon which to build implied terms.

### 7. Efficacy implications: obstruction

In *Marshall v. The Colonial Bank of Australasia Ltd.*<sup>56</sup> Griffith C.J. (speaking for himself, Barton and O'Connor JJ.) stated: ". . . all contractual relations impose upon the parties a mutual obligation that neither shall do anything which is calculated to hamper the other in the performance of the contract on his part"<sup>57</sup>. *Vickery v. Jenner*<sup>58</sup> illustrates that courts can be readily persuaded to read implied prohibitions into contracts which are intended to protect the fulfilment (and, to some extent, the enjoyment after fulfilment) of a party's business objectives from obstruction by the other party. The usual restraints which surround the implication of terms, particularly in written contracts, need to be observed as usual, but it is not often that a duty not to obstruct is inconsistent with the express terms or that the supposition that it was *intentionally* deleted is particularly plausible. There seems to be a presumption that neither party to a contract intended the preservation of his contractual entitlements and advantages to depend solely upon the mercy of the other party<sup>59</sup>. Prohibitions of *malicious* obstruction are, perhaps, the ones

52. *Id.*, at 197.

53. *White v. Australian and New Zealand Theatres Ltd.* (1943) 67 C.L.R. 266, at 271, *per* Latham C.J.

54. See *Cromer v. Harry Rickards' Tivoli Theatres Ltd.* [1921] S.A.S.R. 325.

55. See *Mackie v. Wienholt* (1880) 5 Q.S.C.R. 211; *Cook v. Sandford* (1894) 15 N.S.W.L.R. (L) 377; but see *Tulip v. King* (1846) Legge 282.

56. (1904) 1 C.L.R. 632, at 647.

57. See also *Heimann v. C/W* (1938) 38 S.R. (N.S.W.) 691, at 696, *per* Jordan C.J.

58. (1896) 17 N.S.W.L.R. (L) 438.

59. See observations by Cussen J. in *Roxburgh v. Crosby & Co.* [1918] V.L.R. 118, at 133.

most readily implied<sup>60</sup>. However, malice is not a necessary ingredient of the obstruction cases. In *Newland v. Cooper*<sup>61</sup> a sharefarming agreement was made, only part of the landowner's (the defendant's) land being subject to the agreement whilst the balance was retained by him for grazing sheep. The fences were defective and the crops which the plaintiff had planted were greatly damaged by straying sheep. Richards J. considered that damages should be awarded for breach of the defendant's implied undertaking that he would refrain from anything that he knew would be likely to endanger the crops.

### 8. Efficacy implications: co-operation

In *Heimann v. C/W*<sup>62</sup> Jordan C.J. stated: "Generally speaking it is easier to imply a promise to refrain from doing anything to prevent the other party from performing the contract on his part, than a promise to do something to assist him to carry it out . . ." This may be correct, but there are nonetheless numerous cases in which positive duties of assistance, assurance and co-operation have been implied in the name of business efficacy.

The most obvious cases in which to imply such positive duties are those in which, as in *Roxburgh's case*<sup>63</sup>, the plaintiff has fully performed his part of the contract. In *Hart v. MacDonald*<sup>64</sup> the plaintiff erected a dairy plant for the defendant in a drought-prone part of New South Wales. The written contract provided that the price should be paid from the proceeds of "butter produced by your own cows". When, after eighteen months, no money had been received by the plaintiff he brought an action, claiming that there was an implied obligation upon the defendant to commence dairying forthwith. The High Court had no doubt that a term was implied "that the purchaser will on his part do all that is necessary to put himself in a position to pay"<sup>65</sup>. The action failed; the court considered that (in view of prevailing drought conditions) the plaintiff had not established a breach of this implied promise.

An important principle intended to generate a whole range of implied obligations was stated by Blackburn J. in *Mackey v. Dick*<sup>66</sup> as follows: ". . . as a general rule, . . . where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect"<sup>67</sup>. This rule has been invoked in Australian courts so often that it could almost be regarded as a settled implication.

Usually the duty flowing from this principle will call for incidental co-operative acts without which the contract cannot be effectively performed. In *Ray v. Davies*<sup>68</sup>, for example, a contract for the sale of a house property on credit (instalments to extend over 18 years) provided *inter alia* that, if the

60. *Vickery v. Jenner* (1896) 17 N.S.W.L.R. (L) 438.

61. [1940] S.A.S.R. 40.

62. (1938) 38 S.R. (N.S.W.) 691, at 696.

63. [1918] V.L.R. 118.

64. (1910) 10 C.L.R. 417.

65. *Id.*, at 421, *per* Griffith C.J.

66. (1881) 6 App. Cas. 251, at 263.

67. See also *Milne v. The Municipal Council of Sydney* (1912) 14 C.L.R. 54, at 69, *per* Griffith C.J.

vendors should arrange for a mortgage for the balance of purchase money on specified terms, the vendors would be obliged to pay the cost of such mortgage and half the cost of its discharge. Although there was no express promise by the purchaser that she would execute a mortgage so arranged, the High Court had no doubt that such a promise was implied under the principle in *Mackay v. Dick*<sup>69</sup>.

### 9. Efficacy implications: major obligations

As long as it is plain that the contract was meant to be a fully mutual arrangement the law will not hesitate to imply even major undertakings which will safeguard the promisee's contractual objectives. Needless to say, the plausibility test will be applied particularly carefully in such cases since parties who intend to create a major obligation will not normally fail to do so expressly.

A borderline case which shows the problematical nature of such implications is *The Trustee of James Carey v. Carey*<sup>70</sup>. The action was for £250, allegedly due under a compromise agreement made in earlier proceedings and intended to settle those proceedings. The "compromise" (as it was called in the judge's notes taken in the earlier proceedings) read as follows:

"Adjourn action and motion sine die. Action and motion to be discontinued on defendant paying to the plaintiff the sum of £250, or securing the payment of the said sum to the satisfaction of the plaintiff, such security to be made and given within fourteen days from this date. On discontinuance of such action and motion, each party to pay his or her own costs. Any suggestion of fraud against the defendant to be withdrawn by the plaintiff"<sup>71</sup>.

The proceedings were adjourned. The action, brought after repeated demands for payment, failed at first but succeeded upon appeal to the Full Court. The court might have found a *logically* implied undertaking to pay in the word "security" which surely assumes an obligation to be secured, but Lukin J., speaking for the court, explicitly disclaimed any such simple solution. Instead reliance was placed upon a genuine *ad hoc* implication. Although both *Mackay v. Dick*<sup>72</sup> and *The Moorcock*<sup>73</sup> were invoked, the gist of Lukin J.'s approach is summed up in the following passage:

"... where acts to be done by the party binding himself<sup>74</sup> can only be done upon something of a corresponding character being done by the opposite party, there is implied a corresponding and correlative obligation on him to do the things necessary for the completion of the contract, care being taken not to make the contract speak where

68. (1909) 9 C.L.R. 160.

69. See observations by Isaacs J. *id.*, at 169 *et seq.*; but see *Steanes v. C/W* (1920) 20 S.R. (N.S.W.) 27 (C/W held under no implied duty to its importer/supplier of electrical equipment to assist in obtaining U.K. export licence).

70. [1914] St. R. Qd. 167.

71. *Id.*, at 170.

72. (1881) 6 App. Cas. 251.

73. (1889) 14 P.D. 64.

74. There was no doubt that the plaintiff had undertaken to discontinue proceedings and withdraw his allegations of fraud—[1914] St. R. Qd. 167, at 171 *et seq.*

it was intentionally silent, and not to make it speak entirely contrary to the intention of the parties"<sup>75</sup>.

The parties intended to settle the litigation and they were obviously agreed that the stipulated acts would attain that goal. The law was willing to supply the mutual obligation to perform the acts. The learned judges of the Full Court were unanimous, but indicated that they had difficulties in arriving at their conclusion. The case stands for a presumption of mutuality (i.e. a presumption against a contract being unilateral) in cases in which the contract is distinctly intended to promote the interests of both parties. Further support for such a presumption can be found in *Hobart v. The Victorian Woollen and Cloth Manufacturing Co. Ltd.*<sup>76</sup> (undertaking implied that manufacturer would faithfully perform contracts made on his behalf by agent who had expressly bound himself to try to sell the whole of the manufacture)<sup>77</sup> and in *Independent Cable Association of Australasia Ltd. v. Evening Mail Newspaper Co.*<sup>78</sup> (undertaking implied that newspaper company would accept specified weekly supply of news dispatches which cable company had undertaken to supply).

As one might expect, the courts are usually unwilling to use the efficacy principle merely for the purpose of enhancing the volume, so to speak, of the performance a party is taken to have promised. In *Hunter v. F. Ash Ltd.*<sup>79</sup> the court refused to extend a chattel mortgage by implication to include goods which had, in the ordinary course of the mortgagor's trade (and under a specific authority in the bill of sale) replaced the goods which had been mortgaged originally<sup>80</sup>.

### 10. Efficacy implications: implied undertakings concerning quality of performance

To supply the whole of a party's obligation by implication is almost always problematical, but once this is done (or where a major obligation to perform was undertaken expressly) there will be less difficulty in implying some form of guarantee that the promised performance will be such as to satisfy the other party's obvious or specifically disclosed requirements. Foremost amongst implications of this type is the implication of "fitness for the purpose". In the broad context of supply of chattels Jordan C.J. stated this principle in *Gemmell Power Farming Co. Ltd. v. Nies*<sup>81</sup> as follows: "As a general rule, when one person, for value, supplies a chattel to another to be used for an agreed or stated purpose, or for a purpose indicated by the nature of the chattel, he impliedly promises, in the absence of some provision to the contrary, that it is reasonably fit for such use . . ." This type of implication has received its most detailed and technical elaboration in the context of Sale

75. *Id.*, at 172.

76. (1881) 7 V.L.R. (L) 30.

77. Stawell C.J. explained the implication as follows (at 34): "... the Court must, if possible, adopt an interpretation of the contract which will be fair to both parties, and must not allow one to injure the other . . ."

78. (1910) 13 W.A.L.R. 20.

79. (1892) 8 W.N. (N.S.W.) 130.

80. See also *Campbell v. Manly Municipal Council* (1949) 17 L.G.R. 213 (refusal to read licence to photograph persons for gain on public reserves, beaches and public roads for a fee of £300 p.a. as subject to a term that no other photographers would be similarly licensed).

81. (1935) 35 S.R. (N.S.W.) 469, at 475.

of Goods<sup>82</sup>, but it also applies, as a settled implication, to contracts of hire<sup>83</sup>. In *Barnewall v. Wood*<sup>84</sup> it was held that the owner of land, who was to supply seed wheat to his tenant under a sharefarming agreement, was under an implied obligation to supply wheat fit for the purpose and was liable in damages for having delivered seed infested with smut. Again the business efficacy principle was applied. Cullen C.J. stated: "To suggest that in a share-farming bargain the supplier of the seed should be at liberty to defeat the intention of both parties in the production of a good crop by supplying inferior or infested seed seems to me contrary to all the principles set out in those cases"<sup>85</sup>.

### 11. Implied qualifications of undertakings

The business efficacy principle generates obligations to make the contract as efficacious as the parties had intended it to be. Sometimes contracts are, in a sense, too efficacious and need to be "read down". A suitable example is *Bonney v. Hartmann*<sup>86</sup>. The plaintiff bought "Orient Gun", a racing filly. £105 were paid in cash and another £105 were to be paid "out of any and all first prize moneys won by the mare". The contract obliged the buyer to "train, feed and keep the mare for racing purposes at his own expense" during the continuance of the agreement, and allowed the seller to retake possession if the buyer made default in the observance of these obligations. When the buyer discontinued training and used the mare for stud purposes, the seller took her back and the buyer sued for conversion, contending that he had not broken the training clause because of the (undisputed) fact that the mare had developed a "sprung knee" and was no longer fit for racing. Since the obligation to train was expressed in absolute terms the question arose, as McCawley C.J. stated, "whether that express term is subject to the implied condition that should the mare become unfit for racing purposes there should be no obligation to continue to train or keep her for such purposes"<sup>87</sup>. The learned Chief Justice thought it clear that the training clause was not meant to be absolute: "Supposing it had been asked at the time when the contract was being negotiated 'What will happen should the mare become temporarily unfit to be trained for racing purposes?' The answer of the vendor would, I think, have been 'Of course you need not train her'. 'And if she becomes permanently unfit?' 'It would be absurd to keep her for a purpose for which she is permanently unfit'"<sup>88</sup>. Accordingly, the training clause was regarded as intended merely to improve the seller's chances of payment out of prize money; now all hope of prize money was gone no matter how hard the horse was trained and accordingly, "the purpose of [the training clause] is spent"<sup>89</sup>. The effect of this was that the obligation to train was not absolute, that the plaintiff had not broken it and that the defendant had not been justified in retaking possession of the horse.

82. *Sutton on Sale of Goods* (1967) at 109 *et seq.*

83. *Gemmell Power Farming Co. Ltd. v. Nies* (1935) 35 S.R. (N.S.W.) 469; *Derbyshire Building Co. Pty. Ltd. v. Becker* (1962) 107 C.L.R. 633.

84. (1921) 21 S.R. (N.S.W.) 291.

85. *Id.*, at 297; the learned Chief Justice was referring to *The Moorcock* (1889) 14 P.D. 64 and *Hamlyn v. Wood & Co.* [1891] 2 Q.B. 488.

86. [1924] St. R. Qd. 232.

87. *Id.*, at 235.

88. *Ibid.*

89. *Ibid.*

*Bonney v. Hartmann* would probably have been decided differently in the days when the rule in *Paradine v. Jane*<sup>90</sup> (the doctrine of absolute obligation) still reigned supreme in the common law. The principle stated by Lord Ellenborough C.J. in *Atkinson v. Ritchie*<sup>91</sup> would have been applied to the training clause: "No exception (of a private nature at least) which is not contained in the contract itself, can be engrafted upon it by implication, as an excuse for its non-performance." However, nowadays decisions such as *Bonney v. Hartmann* are very much a fact of life, even outside the realm of frustration of contract. The question is how one can account for such "implied qualifications" and in what circumstances courts are justified in reading them into contracts.

## 12. Construction or implication of terms?

A problem which has worried the courts on occasion<sup>92</sup> is the question whether the "reading down" of a seemingly absolute undertaking involves the implication of a (qualifying) term or whether it constitutes simply a process of construction, of working out the legal meaning of the term. This problem of characterization is sometimes said to be important since the constraints attached to implication do not impede the process of construction. A judicial division over this question occurred in *Stanford v. Bayne*<sup>93</sup>, decided by a strong bench of the Victorian Supreme Court. The facts (stripped of a number of non-essential complications) were that the plaintiff agreed to sell a tract of land to the defendant and to settle about three months later. The contract provided, *inter alia*: "Vendor reserves the right of removing at his own expense the pine trees on the property . . . to the bend of the fence." About five months after settlement the plaintiff had still not taken any steps to remove the trees and was then told that the time for removal had expired. He sued for breach of contract. The action was dismissed in the Supreme Court and the plaintiff appealed unsuccessfully. Cussen and Schutt JJ. read the "removal clause" as meaning that the plaintiff was to have the right to cut and remove the trees *while he was still in possession of the land* (i.e. until the agreed date of settlement). The learned judges inferred this from the contract as a whole, in particular from the fact that no right of entry after settlement was reserved in the plaintiff's favour. To Cussen J. all this was a matter of construction, not implication of a term: "[The authorities relating to implied terms] have little or no application here. The plaintiff's contractual rights as to the pine trees must either be unlimited as to time or must be limited to a reasonable time or the 1st May, 1920<sup>94</sup>. The first suggestion was not relied upon, and the choice therefore was between the other two. As a matter of construction, apart, it may be said, from implication as it is ordinarily understood, I prefer the latter of the two alternatives"<sup>95</sup>. McArthur J. dissented: to read something so specific as an actual date into the clause surely was more than mere construction; it amounted to the implication of a term! Such an implication was not legitimate, since it did not pass the necessity test: "There is nothing in the language of the contract . . . or in the

90. (1647) Aleyn 26.

91. (1809) 10 Ea. 530, at 533 *et seq.*

92. The most prominent example is *Davis Contractors v. Fareham U.D.C.* [1956] A.C. 696.

93. [1923] V.L.R. 283.

94. The date of settlement.

95. *Id.*, at 288.

circumstances under which it was made which 'drives me to the conclusion' that it must have been intended by the parties that the pine trees must be removed by the 1st May . . ."<sup>96</sup> With respect, it is a curious feature of his Honour's opinion that he did not feel compelled to read the right of removal as perpetual. He felt no difficulty in reading the clause as subject to a limitation that the trees had to be removed within a reasonable time. The learned judge probably thought that a limitation as unspecific as that could pass for construction; alternatively he might have thought that kind of implication to be so well-settled that it did not have to pass the necessity test<sup>97</sup>.

"Construction" is a process designed to remove an existing ambiguity. A promise, for example, to deliver milk "on every day of the week" is ambiguous, since "week", according to the Oxford English Dictionary, denotes either the seven-day period commencing on Sunday or the six-day period between Sundays. Both meanings are fully (i.e. in all their specificity) contained in the promise and the task of construction amounts to nothing more than to the making of a choice between the two possible meanings. "Implication of terms", on the other hand, is a process by which a proposition which is not expressly there already (not even as one branch of an ambiguity) is added to a set of express terms. Implication of terms, at least in abstract definition, differs from construction in that it adds particularity to the contract. However, it would be naïve in the extreme to deny that much the same is constantly being done in the name of construction<sup>98</sup> or, indeed, to believe that all the "ambiguities" "resolved" by courts come straight from the Oxford English Dictionary.

Consider, for instance, the following clause in an employment contract, discussed by Angas Parsons J. in *Cromer v. Harry Rickards' Tivoli Theatres Ltd.*<sup>99</sup>: ". . . the employers may at any time hereafter at their absolute discretion terminate this engagement . . . if they may so desire to do." In *re African Association and Allen*<sup>1</sup> an attempted summary dismissal under this clause was held invalid. There seem to be two ways of accounting for such a result: a court could imply a term requiring reasonable notice, or, if it wished to avoid complications, it could identify two possible meanings of the clause: one which allows summary dismissal, another which requires reasonable notice. This would reveal an ambiguity to be resolved *contra proferentem* in favour of the last-mentioned meaning. It must be doubted whether even the most astute legal logician could demonstrate that only one of these methods is logically valid.

It is submitted that no infallible logical criterion separates the two processes. Whether the qualification of a seemingly absolute undertaking amounts to construction or implication is best regarded as a question of the degree of particularity of that which is being added. To read a seemingly perpetual obligation as intended to lapse after a reasonable time should be characterized as construction, but if it were read as subject to a power in either party to terminate it by reasonable written notice the specificity of the addition would suggest that a term is being implied. We should avoid as far as possible

96. *Id.*, at 290.

97. See observations *id.*, at 292 *et seq.*

98. This is particularly obvious in the sphere of statutory interpretation where—in the absence of a doctrine of "implied provision"—all particularity which is added to the express provisions is added in the name of construction.

99. [1921] S.A.S.R. 325, at 333 *et seq.*

1. [1910] 1 K.B. 396.



making the rights of parties depend on this fluid distinction since this would lead the courts into a futile effort to refine it and would be productive of much artificial reasoning.

### 13. Implied qualifications: problems of inconsistency

When faced with a seemingly absolute undertaking a court has to inquire, first and foremost, whether the undertaking was positively intended to be just as absolute as it seems (clearly and purely a question of construction). Under the doctrine of absolute obligation<sup>2</sup> the answer was always affirmative. Even nowadays, many seemingly absolute undertakings are still taken to be so intended. The undertaking of a debt (e.g. to repay a loan) will be binding upon the promisor whatever hardships may subsequently befall him, unless some express qualification is written into the contract.

However, it was particularly the advent of the doctrine of frustration<sup>3</sup> which brought legal recognition of the fact that many promises expressed in absolute terms are nevertheless not positively so intended by the parties<sup>4</sup>. Since then it has been clear in law as well as in ordinary speech that a seemingly absolute undertaking is not always meant to be enforceable however dramatically the circumstances under which it was given may have changed. Contractual promises, like judicial dicta, may need to be read *sub modo*. It is an ancient principle of construction that contracts must be read *secundum subjectam materiam*<sup>5</sup>. In *Nickoll & Knight v. Ashton, Edridge & Co.*<sup>6</sup> Vaughan Williams L.J. formulated this approach, perhaps somewhat too sweepingly, as follows: ". . . where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made . . ."<sup>7</sup>

When is a seemingly absolute undertaking construed as absolute? One of the most useful guides to the right answer is a decision of the English Court of Appeal, *General Publicity Services Ltd. v. Best's Brewery Co. Ltd.*<sup>8</sup> The defendants, hotel proprietors, undertook to circulate or display the plaintiffs' advertising booklets "to their best advantage in the course of my (our) business over a period of three years". 5,000 booklets were delivered to the defendants who performed their part of the contract for about a year. Thereafter, display and/or circulation of the booklets ceased when the defendants sold the hotel and when the purchasers refused to take over performance of the booklet contract. The plaintiffs appealed from a decision of Jones J. dismissing the action for damages, arguing that the defendants had absolutely undertaken to circulate or display the booklets for three years certain. The defendants argued that they had undertaken to do so merely "in the course of our business" and that the obligation ceased once the business was sold. The Court of Appeal construed the words "in the course of our business" as defining

2. *Supra*, at nn.90-91.

3. See *Taylor v. Caldwell* (1863) 3 B. & S. 826.

4. See Grant, "Promises" (1949) 58 *Mind* 359, at 363.

5. 1 Bl. Comm. 229; 2 Mod. 80.

6. [1901] 2 K.B. 126.

7. *Id.*, at 137.

8. [1951] 2 T.L.R. 875; see also *Coulter v. Readhead* (1931) 31 S.R. (N.S.W.) 432; *Hamlyn & Co. v. Wood & Co.* [1891] 2 Q.B. 488.

the mode of performance but not as qualifying the obligation. So construed the undertaking was absolute and subject to what might be called the modern version of the doctrine of absolute obligations. Jenkins L.J. set out this version as follows: ". . . the first thing to consider is the express words that the parties have used . . . [which, in this case, indicate] an unqualified obligation to 'circulate or to display . . . [these documents] over a period of three years certain'"<sup>9</sup>. The consequence of this finding was described by Jenkins L.J. (partly quoting from a judgment by Scrutton L.J.) as follows: ". . . this is a case . . . 'where there is an express term giving the plaintiff a right to a continuing benefit' and therefore a case in which (*prima facie* at all events) 'the Courts will not imply a condition that the plaintiff's right in this respect shall cease on certain events not expressly provided for'"<sup>10</sup>. It is the insertion of the bracketed words which distinguishes this proposition from the old version of the doctrine of absolute obligations.

To overcome this *prima facie* inference of absoluteness the defendants relied on the rule that literal construction must not be carried to the point where it would produce absurd results: how could it possibly have been contemplated that the defendants should be bound not to sell the hotel just for the sake of some insignificant advertising booklets? Jenkins L.J. conceded that the argument had some superficial attraction but rejected it because he felt that it exaggerated the practical effect of the construction contended for by the plaintiffs: the defendants could still sell the hotel but would have to pay compensation to the plaintiffs<sup>11</sup>. It was a plausible view of the contract that such a result might have been intended by the parties and therefore no reason existed for departing from the presumption of absoluteness. Reading an implied qualification into the contract would have been inconsistent with the fact that the undertaking, on its proper construction, was absolute.

An absolute construction of the training clause in *Bonney v. Hartmann*<sup>12</sup> would have been less plausible (although arguably its practical effect would not have been the maltreatment of an unfit horse but merely the reversion of the horse to the seller), and this serves to distinguish the two cases.

Once it is established that an undertaking could not plausibly have been intended to be as absolute as it appears, it is best to recognize at once that one is dealing with a term which is curiously open-ended. The promise: "I shall train the racehorse", if read with the degree of specificity which the parties have in fact given it, would turn into: "For the time being and at least while there is no significant change of circumstances, I shall train the race horse." Neither is the intended duration of the obligation defined, nor are the circumstances specified which are to be regarded as essential to the continuation of the obligation. If the contract is to be equipped to provide answers to the questions which lapse of time or change of circumstances may throw up greater particularity has to be given to the undertaking than the parties themselves have provided. If construction does not suffice to do this, then implication of terms will surely be legitimate, for these will be necessary to fill undoubted gaps left by the parties.

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9. *Id.*, at 879.

10. *Id.*, at 881.

11. *Id.*, at 880 *et seq.*

12. [1924] St. R. Qd. 232.

#### 14. Contracts of unspecified duration

There is no more apt illustration of the problems just discussed than the type of arrangement which Carnegie has called "contract of unspecified duration"<sup>13</sup>. Agreements creating licences, contracts envisaging continuing supplies of goods or arrangements purporting to limit competition establish continuing legal relationships which are repeatedly or continuously productive of rights and liabilities. Frequently such contracts are reduced to writing and no time limit or method of termination is imposed. In *Llanelly Railway and Dock Co. v. L. & N.W. Ry. Co.*<sup>14</sup> Lord Selbourne stated what he took to be the general principle applicable to such cases as follows:

"An agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon anyone alleging that it is not perpetual, the burden of proving that allegation."

This supposed presumption of perpetual duration was applied in *Kitchen & Sons Pty. Ltd. v. Stewart's Cash & Carry Stores*<sup>15</sup> to a price maintenance agreement between a manufacturer of a washing compound and a wholesaler. The latter undertook to buy his requirements of Persil from the former and undertook to adhere (and cause its retailer customers to adhere) to specified minimum prices. There was no express time limit and a majority of the High Court judges felt justified in construing the contract as perpetual because of the nature of the particular contract. To give the wholesaler a power of withdrawal would disrupt the manufacturer's marketing arrangements and might ruin him financially<sup>16</sup>. To Rich J. who wrote a spirited dissent it was absurd to think that "as soon as the purchase is made the buyer becomes irrevocably bound for all time by the terms of the letter . . ."<sup>17</sup> With heavy sarcasm his Honour declined "to give such agreements the fullest operation which their terms [do] not make impossible"<sup>18</sup>.

This one exceptional case apart, one searches in vain for applications of the presumption formulated in the *Llanelly Railway* case<sup>19</sup>. Parties may, of course, stipulate expressly or by necessary implication that the contract is to be perpetual<sup>20</sup>, but the innumerable contracts in which duration is not thus specified do not in practice seem to be governed by any presumption of perpetual duration. Carnegie has advocated a presumption *against* perpetual duration<sup>21</sup> and the cases, particularly the more recent ones, show that this postulate has already been fulfilled. In *Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd.*<sup>22</sup> Lord Uthwatt succinctly and realistically

13. (1969) 85 *Law Quarterly Review* 392 where the whole subject is exhaustively discussed.

14. (1875) L.R. 7 H.L. 550, at 567.

15. (1942) 66 C.L.R. 116.

16. See *Palmolive Co. (of England) v. Freedman* [1928] 1 Ch. 264, at 285, *per* Lawrence L.J.

17. *Id.*, at 135.

18. *Ibid.*

19. One doubtful case is *Coulter v. Readhead* (1931) 31 S.R. (N.S.W.) 432. See particularly observations by Street C.J. at 436.

20. *Prints for Pleasure Ltd. v. Oswald-Sealy (Overseas) Ltd.* (1968) 88 W.N. (Pt. 1) (N.S.W.) 375.

21. *Loc. cit.*, at 414.

22. [1948] A.C. 173, at 198.

emphasized the "open-endedness" of undertakings of unspecified duration: "In my opinion a right to continue without more does not mean anything except a right to continue for a period which is left at large." To say no more than this only serves to make apparent, but does not in any way close, the gap which the parties have left open in the contractual scheme. If such an undertaking is not meant to be perpetual, then its duration must be specified in some way if the gap is to be closed<sup>23</sup>.

One possible solution would be to regard such contracts as intended for a specific term. There used to be a presumption that an employment contract of unspecified duration was intended to last for at least one year. In *Quinn v. Borough of Central Illawarra*<sup>24</sup> the court gave an indication that it might have read this term into a contract "to carry out the work of removing the night soil", had it been a contract involving personal service. This presumption of yearly hiring has steadily weakened and it is arguable that it has now disappeared<sup>25</sup>. Occasionally courts feel able to read fairly specific provisions concerning duration into contracts. In *Kerridge v. Simmonds*<sup>26</sup>, for example, a separation agreement (involving maintenance payments) between the partners to a *de facto* marriage was construed as intended to last during their joint lives.

Where such exceptional specific solutions are not available, one might expect the courts to employ the implication, already recognized in a number of arguably analogous situations, that the contract is to last for a reasonable time. Support for this solution can be found in Dixon J.'s judgment in *Reid v. Moreland Timber Co. Ltd.*<sup>27</sup> The vendor of a sawmill had given the purchaser a licence to cut and take away timber growing on the vendor's land. The main issue was whether the licence was an exclusive one (a majority of the court so held) and Dixon J. sought to meet the vendor's argument that an exclusive licence would make the land useless to him since he himself would then not be allowed to cut the timber and the purchaser was not bound to do so. Dixon J. conceded the situation might be unfortunate but pointed out that it would not last forever:

"... I do not regard the right as interminable. I think that the common implication would be made restricting the exercise of the right to a reasonable time... An implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary"<sup>28</sup>.

This seems to carry the implication that an agreement of unspecified duration simply lapses once a reasonable time has passed. Carnegie favours such a solution; he points out that it was adopted by the Supreme Court of New Jersey in *West Caldwell v. Caldwell*<sup>29</sup>. Such a solution may occasionally be

23. It is a possible view that such undertakings are too vague to be enforceable, but the courts have rejected that solution—see Carnegie, *loc. cit.*, at 394, in particular n.9.

24. (1903) 3 S.R. (N.S.W.) 696.

25. *Richardson v. Koefod* [1969] 1 W.L.R. 1812; see also *Healy v. The Law Book Co. of Australasia Pty. Ltd.* (1942) 66 C.L.R. 252.

26. (1906) 4 C.L.R. 253.

27. (1947) 73 C.L.R. 1.

28. *Id.*, at 13; for other instances of such a limitation, see cases cited by Dixon J. (*ibid.*).

29. (1958) 138 A.2d.402; (1969) 85 *Law Quarterly Review* 392, at 395.

appropriate<sup>30</sup>, but it would often lead to difficulties since it would cause many a contract to lapse when both parties are still actively promoting its continuation. Although such an implication might well give contracts "minimum business efficacy", it would be much more reasonable to give each party a power to terminate the contract. Thus the contract would at least endure as long as both parties wish it to continue. It is in fact this course which the courts have chosen; however, in most instances the implication made is more elaborate: the notice of termination must usually be *reasonable* notice. In *Australian Blue Metal Ltd. v. Hughes*<sup>31</sup> Lord Devlin stated that terminability upon reasonable notice is fairly readily read into agreements of a commercial character, particularly when one party has invested funds in the venture and when his expectation to "reap where he has sowed" would be disappointed by an abrupt termination of the contract.

An Australian example is *Bonda v. Wagenmaker*<sup>32</sup>. The owner of a formula for the manufacture of a particular type of detergent used in dairies granted a manufacturing and marketing licence to another party who undertook to devote all his time to the business, to do his best to increase sales and to pay specified royalties. No time limit was expressly set and Walsh J. held that it was terminable on either party giving reasonable notice to the other<sup>33</sup>.

One feature of this commonly made implication which has proved particularly problematical is the question whether the party who wishes to terminate the arrangement must send a "dated notice", i.e., must specify the date of termination, ensuring that the period allowed for further operation of the contract is reasonable. The corollary of such a requirement, if it were to be imposed, is taken to be that a notice which is not dated, or which specifies an unreasonable (usually an unreasonably short) period, must be regarded as null and void. In the *Australian Blue Metal* case the problem was argued and the Privy Council pronounced upon it, although this was, perhaps, not strictly necessary to the decision in that case. Lord Devlin pointed out that the imposition of the requirement that the notice be dated must depend upon the ordinary principles for the implication of terms. Relevant factors are that it is difficult to predict the period which a court will later find to have been reasonable, particularly when the party wishing to terminate has, as will often be the case, an incomplete knowledge of the relevant circumstances. In his Lordship's view these factors usually make the onus of dating a notice so obviously heavy that an intention to assume it cannot normally be fairly imputed. It seems to follow from this view that a simple notice will set in train a reasonable period after which the agreement lapses. It follows further than an attempt, by the party wishing to terminate, to specify a period as reasonable may, if it is inappropriate, be ignored as surplusage, the notice being given the effect which it would have had, had it been undated.

In exceptional cases where the need for a dated notice is held appropriate, Hale J. suggested a useful solution to the problems posed by ignorance of relevant circumstances in *W. K. Witt (W.A.) Pty. Ltd. v. Metters Ltd.*<sup>34</sup>:

30. See *Mathews v. Mathews* [1941] S.A.S.R. 152, 250.

31. [1963] A.C. 74, at 98.

32. (1960) 77 W.N. (N.S.W.) 363.

33. See also *McMahon v. Rowston* (1958) 75 W.N. (N.S.W.) 508; *W. K. Witt (W.A.) Pty. Ltd. v. Metters Ltd.* [1967] W.A.R. 15.

34. [1967] W.A.R. 15, at 24; the case was concerned with an "exclusive export agency" relationship of unspecified duration; Hale J. explained his suggestion by using the example of a licence.

“. . . the licensor must in the first place choose a period which is reasonable in the light of the knowledge which at the time he has or must be deemed to have: when giving the notice he should invite the licensee to inform him of any relevant facts tending to show that the length of notice is inadequate: if the licensee replies promptly the onus will rest on the licensor to reconsider his original view: but if the licensee does not promptly avail himself of the invitation to make representations he will be faced with a strong presumption that there is nothing useful to be said against the length of notice already given: and if he does reply there will I think be an equally strong presumption that he has not omitted to mention anything which he then thinks is of real materiality”<sup>35</sup>.

In view of the *Australian Blue Metal* case the courts will rarely have occasion to resort to this solution, since the requirement that a dated notice be sent will rarely be found implied.

Occasionally terminability at will rather than by reasonable notice will be implied. This was done by the Privy Council in *Australian Blue Metal Ltd. v. Hughes*<sup>36</sup>. The plaintiff, a mining company, was granted a license to mine magnesite by the defendants, holders of a mining lease in New South Wales. The plaintiff had to pay royalties for all magnesite extracted but was not under any obligation to mine any particular quantity nor was its right to mine exclusive. The written agreement made no provision as to the duration of the licence, in particular, it said nothing expressly about the right of either party to terminate the arrangement. Differences developed about the areas to which the licence extended and the defendants wrote demanding that the plaintiff immediately cease work and vacate the area of the lease. The plaintiff sought an injunction ordering the defendants not to prevent access to the area. Jacobs J. refused the injunction on the ground that the licence had been terminable at will and had been properly terminated by notice. The learned judge made it clear that the plaintiff had a reasonable period of grace to remove any mineral already mined and to vacate the land. The plaintiff appealed to the Privy Council, arguing that the licence was meant to last as long as the magnesite or, alternatively, that it could be terminated only by giving reasonable notice. Careful scrutiny of the agreement and of the surrounding circumstances led their Lordships to agree with Jacobs J. Uppermost in their Lordships' minds were considerations of mutuality: not having an obligation to mine, the plaintiff could terminate the arrangement at any time just by ceasing to work (not even so much as a notice was required). Accordingly it could hardly be supposed that the licensor would have wanted to be bound by significantly more stringent requirements of termination.

Even where termination at will is allowed, the licensee does not become a trespasser the moment such a notice arrives. Adverting to the example of a gratuitous licence given by A to B to walk across A's field, Viscount Simon stated in the *Winter Garden* case<sup>37</sup>: “Such a gratuitous licence would plainly be revocable by notice given by A to B. Even in that case, however,

35. This was a successful attempt by Hale J. to improve upon the suggestion by Lord Uthwatt in the *Winter Garden* case [1948] A.C. 173, at 200 that the licensee was obliged to give the licensor relevant information; for a convincing criticism of that suggestion, see the *Australian Blue Metal* case [1963] A.C. 74, at 101, *per* Lord Devlin.

36. [1963] A.C. 74.

37. [1948] A.C. 173, at 188 *et seq.*

notice of revocation conveyed to B when he was in the act of crossing A's field could not turn him into a trespasser until he was off the premises, but his future right of crossing would thereupon cease." To allow for what might be called "an orderly winding up" of the licence (or other arrangement) equity imposes a "period of grace". In the *Australian Blue Metal* case the Privy Council agreed with the way in which Jacobs J. had defined that period.

### Conclusion

This analysis of *ad hoc* implications is based primarily on Australian authorities and it is hoped that not too many of these have been overlooked. Unfortunately limitations of space have made it necessary to exclude from the article some fairly important aspects of the subject, and these should at least be mentioned. Logical implications<sup>38</sup> and what has been called "tacit terms"<sup>39</sup> are, like settled implications, in categories of their own, as are implied terms based upon commercial custom<sup>40</sup>. No apology is necessary for not dealing with these matters. However, it would have been desirable to explore the relationship between *ad hoc* implications and the parol evidence rule<sup>41</sup>, further aspects of the implied duty not to obstruct<sup>42</sup>, the effect of misconduct by one of the parties (not amounting to material breach) upon contracts involving sustained contractual relations over a period<sup>43</sup>, and at least those aspects of the doctrine of frustration which Reed J. has aptly called "frustration in the wider sense"<sup>44</sup>. It is hoped that, despite the unavoidable deletion of these matters, the article will still convey an adequate picture of the contribution made by Australian courts to the understanding of an important aspect of the law of contract.

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38. See, for example, *Colonial Ammunition Co. v. Reid* (1900) 21 N.S.W.L.R. (L) 338.
39. See observations by O'Bryan J. in *Dikstein v. Kanevsky* [1947] V.L.R. 216, at 219; for examples, see *Hardgrave v. Keogh* (1896) 7 Q.L.J. 57, at 59 *et seq.*, *per* Griffith C.J.
40. See *Hutton v. Warren* (1836) 1 M. & W. 466; *Oddy v. O'Keefe* (1902) 19 W.N. (N.S.W.) 221.
41. For conflicting authorities see *Horsfall v. Braye* (1908) 7 C.L.R. 629 and the observations by Jordan C.J. in *Consolidated Neon Pty. Ltd. v. Tooheys Ltd.* (1942) 42 S.R. (N.S.W.) 152, at 158.
42. See *Roxburgh v. Crosby & Co.* [1918] V.L.R. 118; *Barry v. Skuthorpe* (1876) 1 Q.L.R. (C.L.) 33.
43. See *Mulholland v. King* (1895) 6 Q.L.J. 268; *Kouveras v. Angas* [1919] S.A.L.R. 98.
44. *Re Unley Democratic Association* [1936] S.A.S.R. 473, at 480; apart from this case itself, which is an excellent illustration, see also *Mathews v. Mathews* [1941] S.A.S.R. 153, 250; *Cornish & Co. v. Kanematsu* (1913) 13 S.R. (N.S.W.) 83; *Bonda v. Wagenmaker* (1960) 77 W.N. (N.S.W.) 303.