

## Implied Terms

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When a contract is written, those terms that are explicitly written into the contract are said to be *expressed terms*; however, there may be terms that are *implied* by the nature of the contract. An *implied term* is a term not written into the contract but is still enforceable. For example, it is an implied term in any construction contract that the resulting structure will be built to code.

There are two types of implied terms: those required by statute (acts of a legislative body) and those required by legal precedence. For example, in Ontario, the minimum wage is currently \$10.25 by government regulation. This would be an implied term by statute in any employment contract in Ontario. Any terms implied by statute refer specifically to a specific class of contracts; for example, certain terms are implied in all residential leases.

For the purposes of contracts, however, the inclusion of implied terms occurs only when the terms are essential to the contract. Let us look at the precedence setting case of *The Moorcock* [1889].



Figure 1. A steamship from the late 19<sup>th</sup> century (photo by Ken Crosby).

### Precedence

In 1889, the *Moorcock* was a steamship whose owner entered into a contract with the owner of a wharf in order to unload cargo. While the ship was docked, the tide went out causing the hull of the ship to hit a ridge damaging the ship. The owners of the wharf claimed that there were no terms in the contract to ensure the ship's safety nor could the owners have foreseen the damage caused to the ship. The court, however, found that there was an implied warranty: Bowen L.J. said that

“[i]n business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events as it must have been in the contemplation of both parties that he should be responsible for in respect to those perils or chances.”

The Lord Justice argued that it was the owners of the wharf who were best positioned to determine the safety of any ship docked and thus they were under an obligation to ensure its safety.

As referenced in Marston [1], the case of *Pigott Construction Co. v. W.J. Crowe Ltd.* [1961], Laidlaw J.A. in his decision referred to a previous case in England. The 1961 case was later appealed to the Supreme Court which dismissed the appeal: "This Court was in full agreement with the reasons for judgment delivered by Laidlaw J.A. on behalf of the Court of Appeal."

#### Insight

In the case of *Hamlyn & Co. v. Wood & Co.* [1821], Lord Esher said

"I have for a long time understood that rule to be that a Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

It is important to note the relationship between *reasonable* and *necessary*.

Another case raised by Marston is that of *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.* [1983] where a subcontractor supplying circular staircases failed to review the relevant building codes and instead presented to the contractor a selection models of which the contractor choose one that, upon installation, did not have the required clearance. The subcontractor was required to replace the staircase and then sued to recover the cost of the replacement. The Ontario Court of Appeal, however, noted that the subcontractor either knew or should have known the relevant code requirements and that there was an implied term that any construction would be built to any code.

#### Aside

A more recent case is that of *Scally v Southern Health and Social Services Board* [1992]. Here, four doctors were employed by the board but had not worked the requisite forty years required to obtain full pension benefits. Employees, however, had the option of "topping up" their payments within twelve months of beginning work to get the full entitlements. As the employer did not inform them of this option, they failed to obtain full pensions. The House of Lords ruled that the employers had breached their contractual duty by not informing their employees about their rights.

I would define it as the relationship of employer and employee where the following circumstances obtain:

- (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference;
- (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit;
- (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.

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Most recently, in the case of *Bhasin v. Hrynew*, the Supreme Court of Canada included two additional implied terms in contracts:

1. the duty of honesty in performing contractual obligations, and
2. the duty to have appropriate regard to the legitimate contractual interests of the contracting partner.

In this case, both parties had supply contracts with Canadian American Financial Corp. (CAF), yet Hrynew first attempted to acquire Bhasin's customers first by suggesting a merger, next by having CAF engage in deceptive behavior to pressure Bhasin into a merger, and finally by having CAF terminate the supply contract with Bhasin causing his sales agents to resign and find employment with Hrynew.

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## References

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