This paper has been published in the Journal of Business Law and the Supreme Court Library Queensland gratefully acknowledges the permission of the editor, Professor Robert Merkin, to reprint it in the Yearbook. A version of this essay was delivered at the Current Legal Issues Seminar in the Banco Court on 12 September 2013. I would like to express my deepest appreciation to Ms Andrea Gan and Mr Jonathan Yap, Justices' Law Clerks, Supreme Court of Singapore, as well as to Asst Prof Goh Yihan of the Faculty of Law, National University of Singapore, for their helpful comments and suggestions. I would also like to dedicate this essay to all the participants who displayed an extraordinary (and, I might add, rare) degree of enthusiasm and (above all) friendship. All errors remain mine alone. Further, all views expressed in this essay are personal views only and do not reflect the views of the Supreme Court of Singapore.

Andrew Phang
The Challenge of Principled Gap-Filling —
A Study of Implied Terms in a
Comparative Context

by The Honourable Justice Andrew Phang Boon Leong*

There has been a veritable wealth of literature on implied terms — ranging from doctoral theses1 to book chapters,2 articles3 and (more recently) a book.4 What accounts for this interest? Perhaps the simplest explanation is that it is an extremely important topic with at least two important functions — one substantive, the other theoretical. As it has turned out, its continued success has (unsurprisingly, for reasons that will be apparent in a moment) been with respect to the former rather than the latter.

The substantive function of implied terms has — as its very nomenclature suggests — been in the sphere of gap-filling. Put simply, where the court encounters a gap in the overall contractual matrix which constitutes the nub of controversy between the parties, it must have recourse to a legal mechanism by which it can decide whether this gap can be filled (and, if so, how it should be filled). Even more simply put, this gap arises because an express term has been inadvertently omitted by the parties at the time they entered into the contract. Unsurprisingly, therefore, an implied term must (if it is appropriate in the circumstances) be called in to aid the filling of this particular gap so as to provide a legal solution to the dispute between the parties. Unsurprisingly, too, this is the substantive — and, indeed, inexorably direct — function of the implied term. More to the point, perhaps, the implied term is (in this particular regard) itself a legal doctrine. I should point out, at the outset, that this first function will be the focus

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3 There are far too many articles on the topic of implied terms and it would be impossible to cite a fair sampling. That this is the case will be evident if the reader avails himself or herself of a search through the various legal electronic databases.

of the present essay. And it is — for me at least — a fascinating journey which I first began (at least in the sphere of publications as a legal academic then) some 23 years ago. It has led me to the high realm of abstract theory and also (as I shall elaborate upon below) to literally the bowels of Langdell Library at Harvard Law School, thankfully to emerge with a publication on, inter alia, something which I had often wondered about but could hitherto never locate. This fascinating journey is a historical one as well which reaffirmed, once again, my faith in the use of legal history. On all this, more in a moment.

However, as mentioned earlier, there is a second — and inherently theoretical — function which, as we shall see in a moment, is an indirect one. More specifically, the implied term has been utilised as a rationale to justify a distinct and separate legal doctrine — as opposed, under the first function just mentioned, to being a legal doctrine in and of itself. This distinct and separate doctrine is, of course, the doctrine of frustration. But, alas, this particular function of the implied term met with swift — and it appears (at the present time at least) quite final — legal critique as well as condemnation. I do not propose to attempt to resurrect this particular function of the implied term in this essay (at least in the form it originally appeared). However, I will nevertheless attempt — albeit in the briefest of fashions — to consider this particular use of the implied term to ascertain whether (even in this day and age) an at least potential argument can in fact be made to utilise a quite different form of the implied term as a rationale to justify the doctrine of frustration.

Let me turn, first, to what I have indicated will be the focus of this essay, viz, the utilisation of the implied term as a substantive gap-filling measure. As the title of this essay suggests, I will attempt to present my study in a comparative common law context. Indeed, the development of a coherent system of contract law entails decisions which are consistent with logic, justice and fairness as well as common sense. In this regard, reference to decisions from other common law jurisdictions is an integral part of the search for principle. That having been said, although English law necessarily constitutes the starting-point in many instances (as it must since it is the source of the entire common law system), it is not an end in itself. Adherence to subsequent developments in English law is justified only if to do so would be consistent with (as just mentioned) logic, justice and fairness, as well as common sense. Indeed, one significant instance where an important subsequent (and relatively recent) development in the (at least ostensible) English law of implied terms was explicitly not followed in the Singapore context will be dealt with later in this essay.

Implied Terms and Gap-Filling

Last-Resort or Gap-Filling?

In the famous (and oft-cited) words of the late Sir Robert Megarry, implied terms are ‘so often the last desperate resort of counsel in distress’. Although this observation contains much truth, is it, on balance, a fair characterisation when viewed against the larger canvass of the common law of contract? It is certainly true that there is an element of last-resort in as much

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6 See also Andrew Phang, ‘Recent Developments in Singapore Contract Law — The Search for Principle’ (2011) 28 JCL 3, 3.
7 See the Privy Council decision of Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988; discussed in the main text below to nn 60–76.
as there is no choice but to have recourse to an implied term in a situation where a gap arises in the manner outlined right at the outset of this essay; there is no other legal mechanism which can assist the court concerned. It is also true that there may well be an element of desperation, given what I have just said, but I do not take Sir Robert to be intending anything of a pejorative nature, given the nature of the situation at hand. Put simply, counsel often find themselves in a situation of involuntary desperation which is due more to the fault of the parties to the contract who, ex hypothesi, have failed to include an appropriate express term in the first place; hence, the ‘desperate’ need for counsel for one of the parties to argue that a term ought to be implied instead. Indeed, Sir Robert’s words (quoted at the outset of the present paragraph) have, in my view, more to do with the central criterion of necessity which at once possesses both theoretical as well as (if I may be permitted to say) practical implications. Indeed, I shall return to the criterion of necessity below. It suffices for the moment to state that the concept of the implied term is (in most cases at least) simultaneously a measure of last-resort and a gap-filling legal mechanism. The question posed in the sub-heading to this part of the essay is therefore actually a misnomer of sorts.

It is important to be clear as to what kind of ‘gap’ an implied term is concerned with filling, lest unnecessary uncertainty and unpredictability ensue as a result of an illegitimate re-writing of the contract (in substance at least) by the courts. In this regard, in a very recent decision handed down by the Singapore Court of Appeal after an initial draft of this essay had been prepared, the court, in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*, clarified, as follows:

... Although the prayer to imply a term might imply that there is a gap in a contract, which needs to be filled, not all gaps in a contract are ‘true’ gaps in the sense that they can be remedied by the implication of a term. There are at least three ways in which a gap could arise:

(a) the parties did not contemplate the issue at all and so left a gap;
(b) the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it; and
(c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.

In our view, scenario (a) is the only instance where it would be appropriate for the court to even consider if it will imply a term into the parties’ contract (see *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No 2)* [2008] 1 Lloyd’s Rep 558 at [105]). This pertains to what the parties would be presumed to have agreed on had the gap been pointed out to them at the time of the contract. Scenario (c) is not a proper instance for implication because the parties had actually considered the gap but were unable to agree and therefore left the gap as it was. To imply a term would go against their actual intentions.

Scenario (b), also, is not a proper situation in which to imply a term. What drives this scenario is not the parties’ presumed intentions, but rather their objectively ascertained actual intentions. Oftentimes, what is sought to be corrected through the process of implication is the mistaken belief that ‘the document accurately records the transaction’ (see for instance, *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The ‘Olympic Pride’)* [1980] 2 Lloyd’s Rep 67

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at 72). The proper remedy for such a situation is the rectification of the instrument in equity: see *Codelfa Construction Prop Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 348.10

The Categories of Implied Terms

That having been said, how have the courts set about ascertaining whether or not a term ought to be implied? It is important, at this juncture, to note that there are four broad categories of implied terms, *viz*, ‘terms implied in fact’, ‘terms implied in law’, terms implied by custom, and terms implied by statute. In this essay, I will be focusing only on the first two. The third is relatively rare11 and the fourth is statutory in nature.12 More importantly, by their very nature, the first two categories of implied terms are those which are most commonly canvassed in practice, with the first category being even more commonly referred to compared to the second.

However, before proceeding to consider each of these two categories *seriatim,13* it would perhaps be useful to highlight what would clearly *not* constitute a proper category of implied terms. This category is the so-called ‘third variety’ of implied terms referred to by Lord Wilberforce in the following observations made in the House of Lords decision of *Liverpool City Council v Irwin*:

To say that the construction of a complete contract out of these elements involves a process of ‘implication’ may be correct; it would be so if implication means the supplying of what is not expressed. But there are *varieties of implications* which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is *an established usage*: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In *other cases*, where there is an apparently complete bargain, the courts are willing to add a term on the *ground that without it the contract will not work* — this is the case, if not of *The Moorcock* (1889) 14 PD 64 itself on its facts, at least of the doctrine of *The Moorcock* as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test — though the degree of strictness seems to vary with the current legal trend — and I think that they were right not to accept it as applicable here. There is *a third variety* of implication, that *which I think Lord Denning MR favours, or at least did favour in this case, and that is the implication of reasonable terms*. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, *I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority*.

The *present case*, in my opinion, represents a *fourth* category, or I would rather say a *fourth shade on a continuous spectrum*. The court here is simply concerned to establish

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12 The foremost example is, of course, the English Sale of Goods Act (which, for example, applies in Singapore as the Sale of Goods Act (Cap 393, revised ed, 1999).
The Challenge of Principled Gap-filling

what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied.14

The learned Law Lord’s nomenclature as embodied within the above quotation is, with respect, not altogether clear. Perhaps this is because, in his view, all the categories (or, in his view, ‘varieties’) of implied terms mentioned are merely ‘[shades] on a continuous spectrum’.15 Be that as it may, it would appear that Lord Wilberforce’s first category of implied terms relates to terms implied by custom.16 His second category is much more clearly identifiable, viz, the ‘business efficacy’ test which finds its origin in the seminal English Court of Appeal decision in The Moorcock,17 and which (as we shall see) constitutes one of the two main tests for ‘terms implied in fact’. I would pause to observe — parenthetically — that the learned Law Lord does hint at the other main test for ‘terms implied in fact’ (viz, the ‘officious bystander’ test), although it is in relation to his first category (which therefore appears to conflate it with terms implied by custom). As alluded to above, the point of focus for present purposes is the third category referred to by Lord Wilberforce. It is, in fact, a ‘non-category’ inasmuch as he mentions it only to reject it out of hand — and with good reason. This third ‘category’ refers to Lord Denning MR’s approach in the court below in this very case itself; put simply, the learned Master of the Rolls had attempted to imply a ‘term in fact’ based only on the criterion of reasonableness. Lord Denning MR’s approach was, in my view, correctly rejected by Lord Wilberforce for the simple reason that it would have conferred upon the courts too large a discretion to imply ‘terms in fact’. It will be recalled that, generally speaking, the approach towards the implication of terms must, by its very nature, be strict. The criterion that should therefore be utilised is that of necessity (as opposed to reasonableness, which is much broader). Lord Wilberforce’s fourth (and last) category is also ambiguous. As I have argued in an earlier article,18 this category — applied to the very case at hand — refers (in substance at least) to the more general category of ‘terms implied in law’. Hence, the only (and remaining) category of implied terms which the learned Law Lord does not include in the extract just quoted relates to terms implied by statute,19 which (in the nature of things) is understandable since this particular category is a clear one.

Let us turn now to first consider the category of ‘terms implied in fact’ in more detail.

‘Terms Implied in Fact’

General

The process of implying terms ‘in fact’ into a contract is described, in the Singapore High Court decision of Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd,20 as relating to:

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14 [1977] AC 239, 253–4 (emphasis added in italics and bold italics). And, for an analysis which is very similar to that soon to be proffered, see Gerard McMeel, The Construction of Contracts — Interpretation, Implication and Rectification (Oxford University Press, 2nd ed, 2011), para 10.43.
16 See above n 11.
19 See above n 12.
20 [2006] 1 SLR(R) 927 (emphasis in original).
the possible implication of a particular term or terms into particular contracts. In other words, the court concerned would examine the particular factual matrix concerned in order to ascertain whether or not a term ought to be implied.\(^{21}\)

As this particular process is highly fact-dependent, the court proceeded in the case just cited to observe thus:

There are practical consequences to such an approach, the most important of which is that the implication of a term or terms in a particular contract creates no precedent for future cases. In other words, the court is only concerned about arriving at a just and fair result via implication of the term or terms in question in that case — and that case alone. The court is only concerned about the presumed intention of the particular contracting parties — and those contracting parties alone.\(^ {22}\)

Hence, the implication of a term ‘in fact’ is, looked at in this light, a one-off event. Unlike a term implied ‘in law’, a term which is implied ‘in fact’ is, *ex hypothesi*, fact-centric, with no (normative) precedent being set for the future. More importantly, it was — and for a fairly long time at that — thought that the tests for ascertaining whether or not a term ought to be implied ‘in fact’ were straightforward. In this regard, the reader would undoubtedly be familiar with the two tests which were almost routinely applied by the courts in ascertaining whether a term ought to be implied ‘in fact’. They are, of course, the ‘business efficacy’ and the ‘officious bystander’ tests, respectively. I trust that the reader will forgive me for proceeding to set out these tests which he or she must already know by heart — if only because they are so fundamental not only in themselves but also to this part of the essay.

**The ‘Business Efficacy’ Test**

The first test, *viz*, the ‘business efficacy’ test, is embodied in the classic formulation by Bowen LJ in the English Court of Appeal decision of *The Moorcock*,\(^ {23}\) where the learned judge observed thus:

Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In 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 the 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 of those perils or chances.\(^ {24}\)

\(^{21}\) [2006] 1 SLR(R) 927 [41] (emphasis in original).

\(^{22}\) [2006] 1 SLR(R) 927 [41] (emphasis in original).

\(^{23}\) (1889) 14 PD 64.

\(^{24}\) (1889) 14 PD 64, 68.
It should be noted — parenthetically — that although the classic formulation just referred to has been the most often cited, as the court noted in the Singapore High Court decision of Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd:

Indeed, Lord Esher MR adopted a similar approach, although it is Bowen LJ’s judgment that is most often cited. This is probably due to the fact that a close perusal of Lord Esher MR’s judgment will reveal that the learned Master of the Rolls did not explicitly adopt the ‘business efficacy’ test as such. It might be usefully observed at this juncture that the third judge, Fry LJ, agreed with both Bowen LJ and Lord Esher MR (see [The Moorcock (1889) 14 PD 64] at 71).

It should also be noted that, in a very recent decision handed down after an initial draft of this essay had been prepared, the Singapore Court of Appeal, in Sembcorp Marine Ltd v PPL Holdings Pte Ltd, pointed to the possible limitations in the ‘business efficacy’ test, as follows:

The business efficacy test has its share of criticism. Indeed, MacKinnon LJ in Shirlaw expressed concern (at 227) at the trend of over — and seemingly undue — reliance on The Moorcock. First, it must be remembered that the test was propounded in the context of what must have been intended by parties to a business transaction. But not all contracts involve commercial transactions between businessmen. Depending on the nature of and the parties to the contract, for instance one between family members, there could conceivably be some other external normative standards which may be more appropriate than business efficacy in distilling the parties’ presumed intentions.

Second, the business efficacy test suffers from an inherent blind spot: what does it mean to invoke business efficacy? The efficacy of a contract or a transaction invariably straddles a spectrum. Many contracts might, to some degree, be efficacious and inefficacious at the same time. This explains why the contracting parties often end up in disagreements and disputes. Even if a contract or transaction can be said to be efficacious, there might be room for it to be more efficacious.

Where then should the line be drawn? Indeed, this was alluded to by Bowen LJ himself in The Moorcock (at 69):

Now the question is how much of the peril of the safety of this berth is it necessary to assume that the shipowner and the jetty owner intended respectively to bear — in order that a minimum of efficacy should be secured for the transaction, as both parties must have intended it to bear? … [emphasis added in italics and bold italics]

What is the ‘minimum of efficacy’ and why should the court stop there? Is it the bare minimum without which, as Bowen LJ said (at 71), ‘business could not be carried on’? It is also useful to note the oft-overlooked judgment of Lord Esher MR in The Moorcock in which he justified (at 67) the implication of the term on the basis that ‘honest business could not [otherwise] be carried on’. In the same breath, he framed the term necessary to be implied as the ‘least onerous’ one that could be implied. But why should the court stop at implying the ‘least onerous’ outcome or the ‘minimum of efficacy’? If the court is presuming what the parties must have intended, might it not be sensible to transpose the most efficacious outcome that the parties must have sought or could have secured?26

The ‘Officious Bystander’ Test

The second test — the ‘officious bystander’ test — is embodied within the famous and oft-cited observations of MacKinnon LJ in the English Court of Appeal decision of *Shirlaw v Southern Foundries (1926), Limited*, as follows:

> If I may quote from an essay which I wrote some years ago, I then said: ‘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!’

At least it is true, I think, that, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.27

Whilst the observations are clear, the origins of the essay referred to by MacKinnon LJ in those observations were — for a great many years — unclear and, indeed, unknown. Ever since I was a first-year student studying the law of contract, I had often wondered what the title of that essay was and why it was not to be found anywhere in the major (and, for that matter, minor) contract law textbooks. The essay itself was ‘unearthed’ — at least on an academic plane — in an article published almost six decades after this case was decided. I must, perhaps somewhat embarrassingly, make full disclosure by stating that that article was written by me.28 If I may digress somewhat, the discovery of that essay was purely fortuitous. In the first place, I did not, despite my best efforts, discover the essay in either England or Singapore. As alluded to earlier, I discovered it, in fact, literally in the bowels of Langdell Library in Harvard Law School whilst on sabbatical leave there about two decades ago whilst still in legal academia. The discovery of the essay was itself fortuitous inasmuch as I was scanning casually through HOLLIS, the library catalogue for Harvard University, for works by ‘Frank MacKinnon’ in various formats (including abbreviations). I unearthed what I would consider a most unexpected academic archaeological find when the following entry greeted my eyes onscreen: *Some Aspects of Commercial Law — A Lecture Delivered at the London School of Economics on 3 March 1926.*29 The title looked promising, but I still needed to check the work — which I duly did by extricating it from the shelf located some floors below. It was, in fact, a slim pamphlet only a mere twenty four pages long. I eagerly leafed through this work. Approximately mid-way through it — page 13, to be precise — I slowed down to read more carefully. There was definitely something here that fit the bill. There it was — the passage which MacKinnon LJ had cited in the *Shirlaw* case. I had finally found the essay which I had wondered about since I was a first-year law student! But, more importantly, did it shed any light on what the author subsequently stated30 in *Shirlaw v Southern Foundries (1926), Limited*?31 After a further analysis of the relevant portion of this work as well as more research into the English case law (both past and present) and the biographies of the key judges (including both Bowen and MacKinnon LJJ), I wrote the article I have already referred to. It was subsequently published in the *Journal of Business Law.*32 This was, on a personal

27 See [1939] 2 KB 206, 227 (affirmed *Southern Foundries (1926), Limited v Shirlaw* [1940] AC 701).
29 Published in London by Humphrey Milford, Oxford University Press, 1926.
30 See above n 27.
31 See above n 27.
32 See Phang, above n 28.
level, of some significance because my first article on implied terms had been published some eight years earlier in the same journal,\textsuperscript{33} which was followed by another two pieces in that journal.\textsuperscript{34} This particular article was, however, somewhat different and that difference was reflected in the title itself (‘Implied Terms, Business Efficacy and the Officious Bystander — A Modern History’). Put simply, it was not the traditional exercise in legal analysis as it also incorporated historical and biographical elements as well. Perhaps the abstract of this article captures — as abstracts are, of course, supposed to do — the essence of what I was attempting to say (utilising, inter alia, MacKinnon LJ’s extralegal essay (which is referred to in the words in parentheses in the following abstract)):

Adopting a primarily historical as well as biographical approach, the present article examines the underlying rationale and development of the two major tests for terms implied in fact: the business efficacy and officious bystander tests, respectively. Apart from interesting individual points that arise (such as the suggested origin of the officious bystander test as opposed to the source traditionally cited), this approach also provides us with valuable information as to the probable relationship between both tests. This probable relationship, it will also be argued, also finds support in the more recent caselaw. The article also explores some broader underpinnings and implications that might serve as points of departure for further research in this area.\textsuperscript{35}

I am unsure whether readers of the article referred to above would agree with the theses and/or arguments contained therein, but there appears to be at least one clear benefit that has resulted from the publication of that article — the aforementioned ‘unearthing’ of MacKinnon LJ’s essay which he had referred to in \textit{Shirlaw v Southern Foundries (1926), Limited}.\textsuperscript{36} It had — on one or two occasions — become the topic of conversation with other legal academics interested in the topic of implied terms. Indeed, some writers\textsuperscript{37} and even courts\textsuperscript{38} have simply cited the article (which, in turn, cited the essay) instead. Hence, whatever view one adopts of the merits (or otherwise) of the article, it cannot be said to have been in vain — at least when this particular (admittedly, less than stellar) perspective is taken into account!

But what precisely was it in this essay that shed light on the test for terms ‘implied in fact’ in general and which led to the subsequent formulation of the ‘officious bystander’ test in particular? I have, in fact, attempted to answer this question in the article which I have already referred to above. However, in the interests of saving the reader the time and trouble of locating as well as trekking through that article, I trust that you will permit me the liberty of drawing heavily (and even setting out almost verbatim actual text) from the relevant pages of that article (simply because I do not think that I can express the relevant content any more clearly or felicitously).\textsuperscript{39}

The essay in question was (as already mentioned) really the text of a lecture delivered at the London School of Economics on March 3, 1926 entitled \textit{Some Aspects of Commercial

\textsuperscript{33} See Phang, above n 18.
\textsuperscript{35} See Phang, above n 28, 1.
\textsuperscript{36} See above n 27.
\textsuperscript{38} See eg, \textit{Roxborough v Rothmans of Pall Mall Australia Limited} (2001) 208 CLR. 516, 576.
\textsuperscript{39} See Phang, above n 28, 14–15.
Law

by Justice MacKinnon before he was elevated to the Court of Appeal. The actual text of the lecture itself runs to 20 of the total of 24 printed pages in the pamphlet. I assume that this is the only form in which the full text of the lecture is to be found, although, as already mentioned, I located it several thousand miles away from England and at least two reports of the lecture (both identical and both not containing the critical passage on the implication of terms) exist. Further, a note by Justice MacKinnon himself (on the third printed page of the text) reads as follows: 'This lecture was given at the invitation of the Senate of the University of London, and is now printed by their request'. As also mentioned, the crucial passage is to be found on page 13 of the text. However, a brief examination of the rest of the text, ie, the context in which the crucial passage occurs, may be of some assistance. Justice MacKinnon's main thesis is, in many ways, ahead of its time, for in it he expresses his view that it is 'profitable' to look at commercial law 'as a set of rules for the construction of the various contracts that are used by commercial people', although he did admit that it was 'of course, untrue to say that the whole body of commercial law is concerned with rules of construction'. And the examples he gives are varied, including the doctrine of frustration. If Justice MacKinnon's lecture is looked at in this light, one begins to realise the pivotal importance that probably has to be accorded to the passage cited in the Shirlaw case. Indeed, the other main point he makes is with regard to 'the desirability for good draftsman' for 'prevention is better than cure'. This point emphasises the need to minimise the raising of issues (and concomitant problems) of construction. The sentence immediately following

40 The full title and author is Some Aspects of Commercial Law — A Lecture Delivered at the London School of Economics by Sir Frank MacKinnon (Of Trinity College, Oxford, and the Inner Temple; a Judge of the King's Bench Division), Humphrey Milford (Oxford University Press, 1926); see also above n 29.

See also, Lord Hoffmann's reference in his Lord Upjohn Lecture entitled 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 Law Teacher 127, 138, as follows: 'Mackinnon LJ invented them [the parties and the officious bystander] in a public lecture and afterwards gave them wider currency in his judgment in Shirlaw v Southern Foundries Ltd…' (emphasis added). This is, to the best of the author's knowledge, virtually the only (if not the only) reference to this lecture. Slightly more controversial, perhaps, is his Lordship's statement that the officious bystander 'is plainly based upon the contemporary cartoons of Bateman' (ibid) — unless, of course, Scrutton LJ was himself influenced by these cartoons some two decades earlier; see the argument below. See also, Masters of Caricature — from Hogarth and Gillray to Scarfe and Levine, edited by Gould (1981). 153, for a capsule summary of the career of Henry Mayo Bateman. And see, especially, Anthony Anderson, 'The Man Who … And Other Situations' in Ch 13 of The Man Who Was HM Bateman (Webb & Bower (Publishers) Limited, 1982). And for a very ample representation of Bateman's actual works, see HM Bateman — The Man Who … and Other Drawings, edited by Jensen (1975; reprinted 1991).

41 As already mentioned, in the depths of the Langdell Library at Harvard Law School; the work was received on August 27, 1926. Given the date that the lecture was delivered, the turnaround time from delivery to printing and receipt is impressive indeed.


43 See MacKinnon, above n 40, 5 (emphasis added), of the view, for example, that there is no doctrine of common mistake at common law or even frustration for that matter, and that everything boils down to a question of construction in the final analysis; see eg, PS Atiyah, 'Judicial Techniques and the English Law of Contract' (1968) 2 Ottawa L Rev 337 (Reprinted as Essay 9 in PS Atiyah, Essays on Contract (Clarendon Press, 1986)).

44 See MacKinnon, above n 40, 6.

45 Ibid 11–12. The implied term theory is now generally thought to have been discredited, although with the recent advent of terms implied 'in law', this negative attitude may need to be re-examined (and see the main text accompanying below nn 128–47).

46 See above n 27.

47 See MacKinnon, above n 40, 17. See, also ibid, 24:

'The task of the lawyer, in any case, whether as draftsman or advocate, in prevention of dispute or its cure, involves those two primary qualities—accurate thought, and clear expression. And for that reason it is that the profession of the law is one worthy of a man of ability and learning.'
The Challenge of Principled Gap-Filling

The critical passage (ie on page 13 of the lecture and as embodied in the Shirlaw case) is also important, and reads as follows:

But in most of these cases the Court has, as a matter of construction to find what is the implied term, if any, ie the obvious common agreement, upon a matter as to which it must have the strongest suspicion that neither party ever thought of it at all, and that, if they had, they would very likely have been in hopeless disagreement what provision to make about it. 48

The passage I have just quoted is very important inasmuch as it acknowledges the realities of the situation at hand, in particular, the fact that in the heat — indeed very event — of litigation itself, the implied term is a device that is utilised by the court in arriving at what it perceives to be a just outcome. The implication of this (ie, whether a sceptical view should be adopted as a consequence or not) has been briefly mentioned above. Perhaps it was the perceived controversy that would probably have been generated in this respect that persuaded MacKinnon LJ to leave this passage out of his judgment in the Shirlaw case, for as Professor Patrick Atiyah perceptively points out, what judges state in their formal judgments often differs from what they state in their extrajudicial capacity. 49 Perhaps it was left out simply because it would affect the pithiness of that portion of the judgment in the Shirlaw case, or he could have changed his mind since then. At this juncture, something more ought to be said about the Shirlaw case itself, and the starting-point is best expressed in the actual language utilised by MacKinnon LJ in Shirlaw itself:

I recognize that the right or duty of a Court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care; and a Court is too often invited to do so upon vague and uncertain grounds. Too often also such an invitation is backed by the citation of a sentence or two from the judgment of Bowen LJ in The Moorcock. They are sentences from an extempore judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when The Moorcock is so often flushed for them in that guise.

For my part, I think that there is a test that may be at least as useful as such generalities. 50

It is significant that the passage just quoted immediately precedes the text of the famous 'officious bystander' test in Shirlaw itself. One major issue that arises from this is whether the 'officious bystander' test is, in substance, an advance over Bowen LJ's 'business efficacy' test as enunciated in The Moorcock. In so far as MacKinnon LJ is concerned, however, it is clear that he intended the 'officious bystander' test to supersede the 'business efficacy' test, or at least being at least as useful. 51 In addition, we find that the learned judge perceives the test he advocates as being more specific than the 'business efficacy' test laid down in The Moorcock which he describes as encompassing 'generalities'. 52 But what he does not make clear is whether his ('officious bystander') test is an elaboration of the 'business efficacy' test or is intended as a wholly separate test. He certainly did not reject the 'business efficacy' test, but,

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48 Ibid 13 (emphasis added).
50 See [1939] 2 KB 206 at 227 (emphasis added).
51 [1939] 2 KB 206 227.
52 [1939] 2 KB 206 227.
on the other hand, was not in the final analysis overwhelmingly positive about it either, to say the least. But, at this juncture, it is suggested that we have only a part of the story; for a complete picture, we require an examination of the views of yet a third judge, Scrutton LJ, whose judgment in *Reigate v Union Manufacturing Company (Ramsbottom), Limited*[^54] is often cited, without a realisation of the significance of that decision on the precise relationship between the ‘business efficacy’ and ‘officious bystander’ tests. I will, in fact, deal with this other part of the story (including the role of *Reigate*) when I examine the relationship between the ‘business efficacy’ and ‘officious bystander’ tests a little later on in this essay. Suffice it to state at this juncture that Scrutton LJ’s judgment in *Reigate* not only sheds light on the relationship between these tests but also suggests that he ought perhaps to be credited as being the first to actually formulate the ‘officious bystander’ test, although he did not (unlike MacKinnon LJ in *Shirlaw*) expressly utilise this particular terminology.

It is important, at this juncture, to elaborate on a point made in an earlier footnote[^55] — that Lord Hoffmann had a somewhat different take on the possible origins of the ‘officious bystander’ test. In particular, the learned Law Lord, in his Lord Upjohn Lecture, observed as follows:

> With the omnibus passing down the Clapham Road and approaching its destination, we must hurry on to the trio at the back who are engaged in fixing a charterparty. Mackinnon LJ invented them [*viz*, the parties and the officious bystander in relation to the ‘officious bystander’ test] in a public lecture and afterwards came them wider currency in his judgment in *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206. This time we have not merely one imaginary person but an entire musical hall act, in which the officious bystander asks his question and the two reasonable contracting parties reply in carefully rehearsed unison with their stock catch phrase ‘But of course!’ Lord Justice Mackinnon was a witty and cultured man, for many years president of the Jane Austen Society. *His little scene is plainly based upon the contemporary cartoons of Bateman, in which some unfortunate person is always asking a question which causes general astonishment all around him.* But I do not imagine Lord Justice Mackinnon ever thought how seriously this little *jeu d’esprit* would be taken, how many times it would be cited, analysed, applied or distinguished in courts all over the world.[^56]

As I also noted — in the text of that very same footnote — I think that the true origin of the ‘officious bystander’ test is in the lecture (by MacKinnon LJ) to which I have already referred[^57] (and which, significantly in my view, Lord Hoffmann also refers to), but would respectfully differ from the learned Law Lord’s further observation that the ‘little scene [involving the parties and the officious bystander] is plainly based upon the contemporary cartoons of Bateman’ in so far as it suggests that the ‘officious bystander’ test originated *directly* from the cartoons themselves. However, it seems to me that this is not what Lord Hoffmann meant. What he seems to me to be stating is that, whilst the legal test is to be found in MacKinnon LJ’s lecture,[^58] the pictorial device (or, in the learned Law Lord’s words, the ‘little scene’) which inspired the legal concept or idea is to be found in this series of cartoons by the famous British artist, HM Bateman. Indeed, it might well be that the cartoon

[^53]: See the quotation at above n 50.
[^54]: [1918] 1 KB 592, 605.
[^55]: See above n 40.
[^57]: See above n 40.
[^58]: Ibid.
and the legal concept were created in an interactive fashion in MacKinnon LJ’s mind but, in
the nature of things, we will of course never know. However, that there is some relationship
or connection between the ‘officious bystander’ test and the series of Bateman cartoons
is probably undeniable, given the timeframe as well as the context in which the latter is
concerned. However, what is equally clear is that the cartoons themselves are insufficient, in
and of themselves, to constitute the ‘officious bystander’ test itself.

At this particular juncture, it might be appropriate to note that — almost a decade and
a half later — Lord Hoffmann articulated (this time in a judicial context) a quite different
test for ‘terms implied in fact’, departing (in substance at least) from the traditional ‘business
efficacy’ and ‘officious bystander’ tests. Indeed, this would be an appropriate point at which
to turn to that particular test which was laid down by Lord Hoffmann, delivering the advice
of the Judicial Committee of the Privy Council (on appeal from the Court of Appeal of
Belize) in Attorney General of Belize v Belize Telecom Ltd59 (which I will hereafter refer to as
‘the Belize test’).

The Belize test

In Belize, Lord Hoffmann, delivering the advice of the Board, was of the view that ‘[t]he
proposition that the implication of a term is an exercise in the construction of the instrument as
a whole is … a matter of logic’.60 The learned Law Lord then reformulated the test for ‘terms
implied in fact’, as follows:

It follows that in every case in which it is said that some provision ought to be
implied in an instrument, the question for the court is whether such a provision would
spell out in express words what the instrument, read against the relevant background,
would reasonably be understood to mean. It will be noticed from Lord Pearson’s
speech [in Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board
[1973] 1 WLR 601 at 609] that this question can be reformulated in various ways
which a court may find helpful in providing an answer — the implied term must
‘go without saying’, it must be ‘necessary to give business efficacy to the contract’
and so on — but these are not in the Board’s opinion to be treated as different or
additional tests. There is only one question: is that what the instrument, read as a
whole against the relevant background, would reasonably be understood to mean?61

More significantly, perhaps, Lord Hoffmann was of the view that the ‘business efficacy’
and ‘officious bystander’ tests merely represented different ways in which the courts have
expressed the key question italicised in the quotation in the preceding paragraph; indeed,
the learned Law Lord warned of the ‘dangers in treating these alternative formulations of
the question as if they had a life of their own’.62 The result is that both these traditional tests
are no longer the main focus. The central focus or test is premised, instead, on the reasonable
person.

However, there are, with respect, a number of difficulties with the Belize test. These
were, in fact, considered in some detail in the recent Singapore Court of Appeal decision of

Foo Jong Peng v Phua Kiah Mai,63 which rejected the Belize test in so far as that test suggests that the traditional ‘business efficacy’ and ‘officious bystander’ tests are not central to the implication of terms ‘in fact’. In that case, the appellants concerned were committee members of the management committee of a Chinese clan association. The first appellant was the vice-president of that association and had convened a meeting to remove the respondents from their offices as president and honorary secretary general of the association, respectively. Resolutions were passed at the said meeting to remove the respondents from their offices. The rules of the said association were silent on the power of the management committee to remove office bearers. The respondents filed an application to the Singapore High Court seeking declarations, inter alia, that the management committee had no power to remove them from their offices and that the meeting convened was void and invalid. The High Court declined to imply a term permitting the management committee to remove management committee members before the expiry of their fixed two-year term of office and the appellants appealed against that decision. The Singapore Court of Appeal held, inter alia, that, applying the ‘business efficacy’ and ‘officious bystander’ tests, a term conferring power on the management committee to remove office bearers could not be implied. In the court’s view, it was not necessary for the effective management of the association’s affairs (based on the ‘business efficacy’ test) nor was this power of removal so obvious that (based on the ‘officious bystander’ test) the members of the association would have considered that it would go without saying that the management committee itself should be free to remove an office bearer.64 Of more significance (for our present purposes) are the court’s observations with respect to the Belize test. In particular, the court observed as follows:

There has, in fact, been a dearth of local authority considering the Belize test. Whilst the recent Singapore High Court decision of Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2012] 3 SLR 801 referred to the Belize test, we refrain from commenting on it as we understand that appeals are pending before this court.65 There was also an observation, by way of obiter dicta, by this court in MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd [2011] 1 SLR 150 (‘MFM’), where it was stated as follows (at [98]; see also at [100], where there is a further reference in the context of terms ‘implied in law’):

It is interesting to note, at this juncture, that the broad underlying thread of interpretation which Lord Hoffmann utilises in advocating his approach centring on assumption of responsibility by the defendant (a point perceptively made by Wee [Paul C K Wee, ‘Contractual interpretation and remoteness’ [2010] LMCLQ 150] … has also been utilised by the learned law lord in the area of implied terms as well (in particular, to terms implied in fact) — hence, the analogy drawn by Lord Hoffmann between both these aforementioned areas. However, and with the greatest of respect, the uncertainty generated in the latter area would, in our view, apply equally to the former area. In the recent Privy Council decision (on appeal from the Court of Appeal of Belize) of Attorney General of Belize v Belize Telecom Limited [2009] 1 WLR 1988, for

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64 [2012] 4 SLR 1267 [46] and [47].

65 See now Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 SLR 193, discussed in the main text accompanying above nn 9–10 and 26 as well as below nn 70–74.
example, Lord Hoffmann, delivering the judgment of the Board, adopted an extremely broad approach towards the implication of terms in fact, effectively effacing the distinction between the time-honoured ‘business efficacy’ and ‘officious bystander’ tests (for a general account of these two tests (as well as their possible relationship), see the Singapore High Court decision of Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd [2006] 1 SLR(R) 927 at [29]–[40]). This results, however, in a lack of concrete rules (and consequent normative guidance) as well as uncertainty in the practical sphere (a point which is also emphasised by Wee at 162–166; reference may also be made to Elizabeth Macdonald, ‘Casting Aside “Officious Bystanders” and “Business Efficacy”?’ (2009) 26 JCL 97). One should not, in fact, be surprised at such a result as the lack of guidance as well as uncertainty is likely to be the result when the umbrella concept of interpretation, which is pitched at a necessarily high level of abstraction, is utilised (in substance, if not form) as the legal basis for different and disparate areas of law (cf also the collected essays in Brian Coote, Contract as Assumption — Essays on a Theme (Hart Publishing, 2010) (Rick Bigwood ed); in so far as The Achilleas itself is concerned, see the very recent comment by Brian Coote, ‘Contract as Assumption and Remoteness of Damage’ (2010) 26 JCL 211 (‘Coote’)). The lack of guidance stems from the absence of a sufficiently specific set of concrete rules and principles whilst the resultant uncertainty is the natural consequence when legal rules and principles lacking specific and concrete guidance are sought to be applied to the various sets of facts (which are themselves necessarily myriad in nature) (in this regard, see also generally this court’s observations in Mühlbauer AG v Manufacturing Integration Technology Ltd [2010] 2 SLR 724 (‘Mühlbauer’) (at [40]–[43]) about the danger of over-generalisation and over-abstraction in making legal arguments). Put simply, whilst it is desirable from a conceptual perspective to have umbrella doctrines that make for theoretical ‘neatness’, there is a limit to which one can have ‘one-size-fits-all’ doctrines that will not ultimately become legal procrustean beds (see also Wee at 166 and 175–176). Indeed, the necessity for specific rules and principles has always been the hallmark of the development of the common law. Such specificity has, in fact, been (perhaps paradoxically) one of the key strengths of the common law itself, which is why Prof S F C Milsom perceptively observed that the common law system developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such (see generally S F C Milsom, ‘Reason in the Development of the Common Law’ (1965) 81 LQR 496; see also Mühlbauer (at [42]) where it is observed that there is an interactive process between the universal and the particular or the general and the specific in law and decision-making). [emphasis in original]

As we shall see, the observations in MFM, although rendered by way of obiter dicta, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the Belize test. And it is that whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of ‘interpretation’. In particular, the process of implication is separate and distinct from the more general process relating to the interpretation of documents. Indeed, the process of implication of terms proceeds, ex hypothesi, on the absence of an express term of the contract. Hence, the implication of a term, whether in fact or in law (for the distinction between these two categories
of implied terms, see generally Forefront ([2006] 1 SLR(R) 927] at [41]–[44]); reference may also be made to the decision of this court in Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd [2006] 3 SLR(R) 769 at [90]–[91]), involves tests as well as techniques that are not only specific but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular (see also the observation of Lord Steyn in the House of Lords decision of Equitable Life Assurance Society v Hyman [2002] 1 AC 408 at 458 as well as the perceptive observations by Prof Gerard McMeel in The Construction of Contracts — Interpretation, Implication, and Rectification (Oxford University Press, 2nd Ed, 2011) at para 10.04). The (general) concept of ‘interpretation’ has much in common with the implication of terms inasmuch as both entail an objective approach. However, it is, in our view, incorrect to conflate the tests as well as techniques which accompany both the aforementioned processes. Before proceeding to elaborate further, it would be appropriate at this juncture — consistently with the views just expressed — to note the very pertinent observations by a learned author, as follows (see Paul S Davies, ‘Recent developments in the law of implied terms’ [2010] LMCLQ 140 (‘Davies’) at 144):

Lord Hoffmann’s speech in Belize may be seen to assimilate further implication within interpretation. Indeed, this was Lord Hoffmann’s stated aim, since ‘the implication of the term is not an addition to the instrument. It only spells out what the instrument means’. Yet this is questionable as a matter of logic: if the contract is silent on a point, by implying a term the court is supplementing, or replacing, this silence. It is submitted that it is stretching the boundaries of interpretation too far to suggest that implication is not an addition to the instrument, or that it simply gives effect to what the instrument means. An implied term may give effect to what the instrument should, ideally, have expressly provided for, but not what the instrument means in the form in which it was agreed by the parties.

There is no utility in artificially forcing the doctrine of implication within the confines of interpretation. Indeed, it may actually be dangerous. This is exemplified by the fact that it no longer matters if the parties would not have responded to the officious bystander with a cursory, ‘Oh, of course!’ Why should a term be imposed upon a party if it would not have instantly agreed to such a term upon being asked by a bystander? … Belize suggests that the subjective intentions of the parties are now irrelevant, and that the only matter of importance is what the reasonable observer would understand the contract to mean.

Returning to Belize … as is evident from Lord Hoffmann’s approach in that case … the central focus or test is premised on — to use more general terminology — the concept of the reasonable person. As a learned author put it, ‘the approach to be derived from Belize seems to entail, in the context of contractual implied terms, the replacement of the officious bystander by another character from legal folklore, formerly referred to as the man on the Clapham omnibus’ (see John McCaughran, ‘Implied Terms: The Journey of the Man on the Clapham Omnibus’ [2011] CLJ 607 (‘McCaughran’) at 614). It is important to note that this particular concept of the reasonable person is to be viewed as a single (and, hence, objective) standard inasmuch as it is the court which stands in the shoes of ‘the reasonable person’ in determining what the contractual instrument, read as a whole against the relevant background, would reasonably be understood to mean. Indeed, despite his more general misgivings on the concept of the reasonable person when it is in effect
used in a subjective manner, the invocation of this particular (objective) concept of the reasonable person in the context of implied terms is one which appears to have been mooted by the learned law lord at least as far back as 1995 in the 24th Lord Upjohn Lecture which was delivered on 12 May 1995 at the Inns of Court School of Law (see Lord Hoffmann, ‘Anthropomorphic Justice: The Reasonable Man and His Friends’ (1995) 29 The Law Teacher 127 (‘Anthropomorphic Justice’) (especially at 138–140); see also, by the same author, ‘The Intolerable Wrestle with Words and Meanings’ (1997) 114 South African LJ 656 at 662 and, more recently, ‘A conversation with Lord Hoffmann’ [2010] Law and Financial Markets Review 242 at 243). Significantly, though, the following (and oft-cited) observations by Lord Radcliffe in the House of Lords decision of Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 (at 728), which were relied upon by Lord Hoffmann in Anthropomorphic Justice in support of the ‘reasonable man’ approach in the context of the implication of terms, were made in the context of the doctrine of frustration (a point which the learned law lord himself noted (see Anthropomorphic Justice at 127–128) and which, very importantly in our view, is a doctrine that applies by operation of law and therefore does not concern the search for the presumed intention of the contracting parties (which is the case where the implication of terms is concerned)):

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.

As already alluded to above, inasmuch as the concept of the reasonable person implies an objective approach, that concept must surely be an integral part of the process of the implication of terms. However, the adoption of an objective approach does not, in and of itself, tell us how a particular term ought — or ought not — to be implied (ex hypothesi, on an objective basis). Put simply, a particular test (or tests) of implication are imperative. In so far as ‘terms implied in fact’ are concerned, these would, in our view, take the form of the ‘business efficacy’ and ‘officious bystander’ tests. These tests constitute (in the manner set out above at [28]) specific as well as concrete guidance for the courts in a situation where the contracting parties have not, ex hypothesi, made express provision for the situation concerned in the first place by providing default background guidelines on when the parties may be presumed to have — or not have — a particular unexpressed intention. More importantly, underlying both the ‘business efficacy’ and the ‘officious bystander’ tests is a criterion that is not necessarily present when applying the broader concept of interpretation, viz (with no pun intended), that of necessity. In this regard, the following observations by Lord Clarke MR in the English Court of Appeal decision of Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc; The Reborn [2010] 1 All ER (Comm) 1 (‘Mediterranean Salvage and Towage’) (at [15]) are particularly significant (reference may also be made to the English Court of Appeal decision of Eastleigh BC v Town Quay Developments Ltd [2010] 2 P & CR 2 at [32] (per Arden L.J.) as well as Lord Grabiner QC, ‘The Iterative Process of Contractual Interpretation’ (2012) 28 LQR 41 at 58–61):

[As I read Lord Hoffmann’s analysis [in Belize], although he is emphasising that the process of implication is part of the process of construction of the
contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term.

It should be noted that the threshold of necessity is of little guidance in isolation, and the ‘business efficacy’ and ‘officious bystander’ tests give practical meaning to this criterion. In contrast, a direct practical relationship with the presumed intentions of the contracting parties is absent from the threshold of ‘reasonable meaning’ as a standalone concept.

On a related (and no less important) note, the search under the rubric of implied terms is a search for the presumed intention of the contracting parties. In other words, the court ought not to — and, indeed, cannot — simply substitute its view as to that intention. Put simply, the intention may be presumed, but the court cannot be presumptuous. We accept that a sceptic might well argue that such a search by the court is a fiction. However, even if we accept that argument, not all legal fictions are necessarily fictitious in the pejorative sense that the turn of phrase is utilised by a layperson. Indeed, we would go further: We are of the view that there is no legal fiction involved inasmuch as the court concerned does indeed sift through the objective evidence before it in order to ascertain what the presumed intention of the contracting parties is. In doing this, the court is constantly cognisant of the cardinal (and guiding) principle that it will not re-write the contract for the contracting parties. It is true that the very nature of an implied term necessitates some investigation of sorts on the part of the court. However, it bears reiterating that the court does not substitute its own view of what the contracting parties should have intended had the gap in their contract been brought to their attention at the time they entered into the contract.

Indeed, there are legal boundaries or parameters which the court will not transgress. One of these is an obvious one: Where there is already an express term covering the situation at hand, the court will not imply a term which contradicts that particular express term (see, for example, Pearlie Koh & Andrew Phang Boon Leong, ‘Express and Implied Terms’ in ch 6 of The Law of Contract in Singapore (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 06.054). Another relates to a principle already emphasised above, viz, the criterion of necessity. The very nature of this criterion means that the court will imply terms ‘in fact’ sparingly. In order to arrive at its decision whether or not to imply a term ‘in fact’, it will utilise the two tests mentioned above (viz, the ‘business efficacy’ and ‘officious bystander’ tests) which, by their very nature, are directly related to ascertaining how the contracting parties would (or would not) have filled the gap which ought not to have existed had it been covered by an express term in the first place. Again, one must, in our view, resist the approach of the sceptic merely because the court is involved in this exercise. To put it bluntly, this is the court’s task, regardless of the views of the sceptic. More importantly, the court strives, from its external vantage point, to ascertain (through the objective evidence available) the internal intention of the contracting parties had they been apprised of the situation concerned. This is why the search is for the presumed — as opposed to the actual and subjective — intention of the contracting parties. The concern of the sceptic is, with respect, a misplaced one. No one would seriously controvert the sceptic’s concerns if all that he or she is saying is that the process is an imperfect one. After all, it was indeed the imperfection of the contracting parties in leaving a gap in their contract in the first place that created the necessity for implying the term. Utilising the criterion of necessity as embodied within the two tests referred to above, the court attempts its
level best to ascertain the presumed intention of the contracting parties in order
to ascertain whether or not it will imply the term concerned. Indeed, on a more
general level, the law of contract is not — owing to a variety of both theoretical
as well as practical reasons — concerned with the actual subjective intentions of
contracting parties per se but, rather, is (as already alluded to above) concerned
with ascertaining such intentions via objective evidence (and on the concept of
objectivity, see generally the analysis (as well as the literature cited therein) in
Andrew Phang Boon Leong & Goh Yihan, ‘Offer and Acceptance’ in ch 3 of The
Law of Contract in Singapore at paras 03.006–03.020). What is clear, however,
is that adopting the approach of the sceptic is to regress down a slippery slope
into legal oblivion and disempowerment. In this regard, it would not, perhaps,
be inappropriate to refer to some observations from a lecture delivered at the
University of Hong Kong in 2009 which were also referred to in MFM ([30] supra
at [138]) (see Andrew Phang, ‘Doctrine and Fairness in the Law of Contract’ in
The Common Law Lecture Series 2008–2009 (Jessica Young & Rebecca Lee gen
eds) (The University of Hong Kong, 2010) pp 17–100 at pp 18–24) …

The court then summarised the status of the Belize test in Singapore, as follows:

In summary, although the process of the implication of terms does involve the
concept of interpretation, it entails a specific form or conception of interpretation
which is separate and distinct from the more general process of interpretation (in
particular, interpretation of the express terms of a particular document). Indeed,
the process of the implication of terms necessarily involves a situation where it
is precisely because the express term(s) are missing that the court is compelled to
ascertain the presumed intention of the parties via the ‘business efficacy’ and the
‘officious bystander’ tests (both of which are premised on the concept of necessity).
In this context, terms will not be implied easily or lightly. Neither does the
court imply terms based on its idea of what it thinks ought to be the contractual
relationship between the contracting parties. The court is concerned only with
the presumed intention of the contracting parties because it can ascertain the
subjective intention of the contracting parties only through the objective evidence
which is available before it in the case concerned. In our view, therefore, although
the Belize test is helpful in reminding us of the importance of the general concept of
interpretation (and its accompanying emphasis on the need for objective evidence),
we would respectfully reject that test in so far as it suggests that the traditional ‘business
efficacy’ and ‘officious bystander’ tests are not central to the implication of terms.
On the contrary, both these tests (premised as they are on the concept of necessity) are an
integral as well as indispensable part of the law relating to implied terms in Singapore
…

The relevant part of the reasoning of the court in Foo Jong Peng in relation to the Belize
test has been cited in extenso in this essay simply because it embodies not only the very detailed
reasoning of the court but also because it cites the relevant case law as well as secondary
literature (also in some detail). By way of a comparative coda, after proceeding to examine in
some detail the relevant English case law handed down after Belize as well as the relevant
academic literature, the court in Foo Jong Peng arrived at the following conclusion:

68 [2012] 4 SLR 1267 [37]–[42].
In summary, therefore, neither the English case law nor the academic literature furnishes clear support for the Belize test. The entire picture is mixed at best and ambiguous at worst, and constitutes further support for the approach adopted by this court (set out above at [36]).

As already noted, after an initial draft of this essay had been prepared, the Singapore Court of Appeal delivered its decision in Sembcorp Marine, to which reference has already been made. In this case, the court confirmed the distinction that was earlier drawn in Foo Jong Peng between interpretation on the one hand and implication on the other. In this regard, it also helpfully clarified the relevant terminology, drawing a (further) distinction between construction on the one hand and interpretation on the other; in so far as Lord Hoffmann intended the Belize test to cover only the former (as opposed to the latter), there would be no conflict of views, so to speak. The court in Sembcorp Marine observed thus:

In Foo Jong Peng, we recognised (at [31] and [36]) that it is possible to fit the implication of terms within the concept of interpretation ‘in a more general sense’, which is what we have referred to above as construction of the document as a whole. This may be contrasted with ‘the interpretation of the express terms of a particular document’:

As we shall see, the observations in MFM, although rendered by way of obiter dicta, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the Belize test. And it is that whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of ‘interpretation’. In particular, the process of implication is separate and distinct from the more general process relating to the interpretation of documents. … Hence, the implication of a term, whether in fact or in law … involves tests as well as techniques that are not only specific, but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular … The (general) concept of ‘interpretation’ has much in common with the implication of terms inasmuch as both entail an objective approach. However, it is, in our view, incorrect to conflate the tests as well as techniques which accompany both the aforementioned processes.

In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). …

69 [2012] 4 SLR 1267 [43] (emphasis added in italics and bold italics). Reference may also be made to the English High Court decision of Wuhan Ocean Economic and Technical Cooperation Company Ltd v Schiffahrt-Geellschaft ‘Hansa Murcia’ mbH & Co KG [2013] 1 All ER (Comm) 1277, especially at [15]–[25] as well as the recent UK Supreme Court decision of Société Générale, London Branch v Geys [2013] 1 All ER 1061 at [55] (per Lady Hale SCJ), which, with respect, whilst expressly citing the Belize test, does not really consider it in any detail (and also cites only the ‘business efficacy’ test in the process). Further, none of the other judges considers the Belize test as such. See also Chitty on Contracts, vol 1, (Sweet & Maxwell, 31st ed, 2013), para 13–005 and Goh Yihan, ‘Terms Implied in Fact Clarified in Singapore’ [2013] JBL 237, 240–3.
71 See the main text accompanying above nn 9 and 26.
72 See [2013] 4 SLR 193 [77]–[82].
In our judgment, it is possible to bridge the gap with Belize on this point, if one concludes that Lord Hoffmann was saying that the implication of terms is to be seen as part of the overall process of construing the document as a whole, and no more. In this regard, it is pertinent that the relevant passages in Belize do not use the word ‘interpretation’, but rather, ‘construction’. Moreover, they also speak of the construction of the instrument or document as a whole rather than of specific express terms: see especially Belize at [16]–[19], [21], [25] and [27].

It is, however, respectfully submitted that if Lord Hoffmann’s judgment in the Belize case is analysed closely and read in its context, it would appear that the learned Law Lord had — in so far as the above observations just quoted are concerned — been utilising the concept of ‘construction’ as meaning ‘interpretation’. Indeed, as the court in Sembcorp Marine also observed as follows:

But this does not help us with the other parts of Belize. In so far as Lord Hoffmann in Belize proposed a standard of reasonableness for the implication of terms, we had respectfully registered our disagreement in Foo Jong Peng (at [36]), and we reaffirm that disagreement here. The standard for the implication of terms remains one of necessity, not reasonableness. Reasonableness is a necessary but insufficient condition for the implication of a term: Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Dyeing Company, Limited [1918] 1 KB 592 (‘Reigate’) at 605.

In this regard, I would also commend to the reader an excellent — and very recent — analysis by Wayne Courtney who painstakingly and perceptively analyses the Belize test (particularly in relation to the concept of ‘construction’), pointing out that:

Because Belize ignores the distinction between construction (to determine linguistic meaning) and the application of doctrine by construction, it does not come to terms with the question of the role which doctrine was designed to fulfill. As has been explained, the major role is the introduction of system — something which is inherent in doctrine. But by eliminating doctrine, and focusing simply on the linguistic issue of what a contract means, the decision in Belize denies to courts the comfort of doctrine. The fact that nothing is put in its place means that the whole issue of implication in fact is based on construction rules which are themselves underdeveloped.

It would be easy to understand eliminating doctrine in favour of construction if implied terms formed an exception to the rules which deny the use of raw material such as the prior negotiations of the parties. But given the rationale in Belize that the issue is one of meaning — it would not be possible to do that without changing the whole law of construction. Perhaps that is why Lord Hoffmann does not debate the issue.”

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74 [2013] 4 SLR 193 [82].
Finally, reference may also be made to the following observations by Professor Carter in relation to the *Belize* test in a recent (and seminal) work on the construction of commercial contracts:

Issue can be taken with the utility of saying that the implication of a term is always about what the contract ‘means’. For example, implication may relate to the scope or legal effect of the contract, not its ‘meaning’. That point aside, the view that construction determines what terms are implied into a contract must be correct. However, the view necessarily contradicts the idea that the law associates implication with specific (doctrinal) rules applied by construction, and it seems clear that neither of the two cases referred to by Lord Hoffmann suggested that those rules should be abandoned. Indeed, in *Equitable Life Assurance Society v Hyman*, Lord Steyn said it was ‘necessary to distinguish between the processes of interpretation and implication’. It is more consistent with the prior case law to emphasise the ‘close relationship between the process of construction and the process of implication’.

Lord Hoffmann’s views in *Attorney General of Belize v Belize Telecom Ltd* are significant and clearly have important implications, not all of which have been worked out. First, it is difficult to deny that the existence of specific requirements has been regarded as providing a degree of certainty in relation to implication. Although the degree of certainty may be slight, treating the whole issue as one of construction tends to beg the question whether the role of the specific requirements for implied terms is to facilitate implication or to limit implication.

Second, under Lord Hoffmann’s approach, extrinsic evidence is not admissible in the implication of a term. Whether that is correct may vary according to the basis for implication. However, the authorities do not support the view that extrinsic evidence is never admissible.

Third, and perhaps most important of all, if specific rules do not need to be applied, because the content of the implied term is worked out simply by construing the contract, any term which is implied must be largely formal or even redundant. It is simply the formal expression of an intention which can be inferred by construction of the document in the light of context.” 76

**The ‘Business Efficacy’ Test and ‘Officious Bystander’ Test are the Most Appropriate Tests**

In light of the analysis proffered above, it is my respectful view that the ‘business efficacy’ and ‘officious bystander’ tests are still the most appropriate tests — not merely because of their longevity (because bad or flawed law can also (unfortunately) have long ‘lives’) but, rather, because they are theoretically, logically as well as practically sound and (perhaps most importantly) they enable the courts to arrive at just and fair decisions in a principled manner. They are, again I say this with the greatest respect, far more concrete and helpful compared to the *Belize* test for the reasons canvassed earlier.

Before proceeding to the next area of ‘terms implied in law’, I would like to deal with one remaining (and important) issue in relation to ‘terms implied in fact’. Put simply, having argued that the ‘business efficacy’ and ‘officious bystander’ tests are still the most appropriate

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tests, how should they be applied? In particular, what is the precise relationship between them? And it is to this particular issue that our attention must now turn.

**The Relationship between the ’Business Efficacy’ Test and ’Officious Bystander’ Test**

What is the relationship between the ‘business efficacy’ and ‘officious bystander’ tests? As was pointed out in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*, [77] the relationship … between the tests is not wholly clear’. [78] However, this was (apparently) not the case only in Singapore; in the decision just cited, it was also pointed out as follows:

Surprisingly, this appears to be the situation not only in the local context but also in England as well. In the recent English High Court decision of *John Roberts Architects Limited v Parkcare Homes (No 2) Limited* [2005] EWHC 1637 (TCC), for example, Judge Richard Havery QC was of the view (at [15]) that it was unnecessary for him to decide the point. And in the equally recent House of Lords decision of *Concord Trust v Law Debenture Trust Corp plc* [2005] 1 WLR 1591, Lord Scott of Foscote merely referred (at [37]) to the fact that ’[v]arious tests for the implication of terms into a contract have been formulated in various well known cases’, and then proceeded to refer specifically (only) to the ‘business efficacy’ test in *The Moorcock …* [79]

In this same decision (viz, *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*), [80] the court expressed the following (detailed) views with regard to this particular issue:

On one view, the ‘business efficacy’ and ‘officious bystander’ tests are viewed as being wholly different tests (see, for example, the cases cited at [39] below). Looked at in this light, both tests could be utilised as alternatives. Such an approach, however, tends towards more complexity (and, possibly, confusion) in what is an already relatively general (even vague) area of the law.

On another view, however, the two tests are complementary. This is the view [is preferred] as it is not only simple, albeit not simplistic, but is also consistent with the relevant historical context. In the English Court of Appeal decision of *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copydyeing Company, Limited* [1918] 1 KB 592 (’Reigate’), for example, that great commercial judge, Scrutton LJ, observed (at 605) thus:

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 some one 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.’ Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. [emphasis added]

An even cursory perusal of the above statement of principle by Scrutton LJ will reveal the integration as well as complementarity of the ‘business efficacy’ and ’officious bystander’ tests. This is especially evident by the learned judge’s use of

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[77] [2006] 1 SLR(R) 927.
[78] [2006] 1 SLR(R) 927 [33].
[79] [2006] 1 SLR(R) 927 [33].
[80] [2006] 1 SLR(R) 927 [33].
the linking phrase ‘that is’ in the above quotation. Indeed, the plain and natural meaning of this quotation is too clear to admit of any other reasonable construction or interpretation. And it is this: that the 'officious bystander' test is the practical mode by which the 'business efficacy' test is implemented. It is significant that the observations of Scrutton LJ in Reigate ([35] supra) antedated the more prominent pronouncement of the 'officious bystander' test by Mackinnon LJ in Shirlaw ([31] supra) by some two decades. Of not insignificant historical interest, in this regard, is the fact that MacKinnon LJ was in fact Scrutton LJ's pupil and had close ties with him: on both professional as well as academic levels (see generally The Dictionary of National Biography 1941–1950 (LG Wickham Legg & ET Williams eds) (Oxford University Press, 1959) pp 557–559 at p 557).

The following observations by Cross J in the English High Court decision of Gardner v Coutts & Company [1968] 1 WLR 173 at 176 may also be usefully noted:

When one hears the words 'implied term' one thinks at once of MacKinnon LJ and his officious bystander. It appears, however, that the individual, though not yet so characterised, first made his appearance as long ago as 1918 in a judgment of Scrutton LJ … [emphasis added]

[It should be mentioned] that there is now local authority that supports this approach as well: see the recent Singapore High Court decision of Judith Prakash J in Telestop Pte Ltd v Telecom Equipment Pte Ltd [2004] SGHC 267 at [68]. Reference may also be made to the following observation by Colman J in the English High Court decision of South Caribbean Trading Ltd v Trafigura Beheer BV [2005] 1 Lloyd’s Rep 128 at [37], which is, however, rather more cryptic (and may, on one reading at least be the opposite of that proposed in this judgment at [35] above):

The conceptual basis for any such implication [of a contractual term] could consist either of that derived from the other express terms or that derived from business efficacy under the 'officious bystander' approach in The Moorcock (1889) 4 PD 64. [emphasis added]

It should, however, be noted that there are other possible approaches as well. For example, there is some authority in the local context which suggests that the 'business efficacy' and 'officious bystander' tests can be utilised interchangeably, thus signalling that there is no real difference in substance between the two tests (see, for example, the Singapore Court of Appeal decisions of Bank of America National Trust and Savings Association v Herman Iskandar [1998] 2 SLR 265 at [45]; Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association [2000] 4 SLR 137 at [42]; Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd [2001] 2 SLR 458 at [18]; Tan Chin Seng v Raffles Town Club Pte Ltd (No 2) [2003] 3 SLR 307 at [33]; and Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd [2004] 4 SLR 574 at [29]; as well as the Singapore High Court decision of Leong Siok Wah v American International Assurance Co Ltd [1999] 1 SLR 281 at [32]). There is yet other authority suggesting that these two tests are cumulative (see, for example, the Malaysian Federal Court decision of Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 at 170). It might well be that the approach from complementarity may be very close, in practical terms, to this suggested approach. However, the former could nevertheless still lead to different results and, in any event, does not comport with the background described briefly above. Finally, there is some authority suggesting that both the 'business efficacy' and 'officious bystander' tests are not only different but that the criterion of 'necessity' is only applicable to the former test (see the Malaysian
High Court decision of *Chua Soong Kow & Anak-Anak Sdn Bhd v Syarikat Soon Heng (sued as a firm)* [1984] 1 CLJ 364 at [7]). This last-mentioned approach is probably the least persuasive of all since the criterion of ‘necessity’ ought to be equally applicable to both tests (see, in this regard, *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association*, cited earlier in this paragraph).

Given the persuasive historical and judicial background as well as the general logic concerned, it is suggested that the approach from complementarity ought to prevail (see [36] above). It should also be noted that none of the cases in the preceding paragraph suggesting different approaches actually canvasses the rationale behind the respective approaches advocated.

Let me elaborate a little more on the approach just referred to, *viz*., that the ‘business efficacy’ and ‘officious bystander’ tests are complementary inasmuch as the ‘officious bystander’ test is the practical mode by which the ‘business efficacy’ test is implemented. As already noted, this is clearly the view of Scrutton LJ in the English Court of Appeal decision of *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Copdyeing Company, Limited.* However, in addition to judicial precedent, I would suggest that there are good reasons from both logical and practical points of view why this complementary approach ought to be adopted.

When we refer to the ‘business efficacy’ test, we are, in essence, referring to what is necessary in order to help the parties achieve business efficacy in so far as their contractual relationship is concerned, and this depends (in turn) on ascertaining their presumed intention. As a statement of general principle, it is, in my view, impeccable. However, there is — simultaneously — the need for a more specific or concrete criterion that will aid the courts in ascertaining the presumed intention of the parties. This is where the ‘officious bystander’ test comes in as inasmuch as it epitomises the essence of what the court is required (and is indeed seeking) to do, *viz*., ascertaining the presumed intention of the parties on the basis of what they would — having regard to the existing terms as well as the context of the contract itself — have agreed upon as a common intention in so far as the gap or lacuna is concerned. Admittedly, even the ‘officious bystander’ test is not a perfect test. However, I would suggest that it is — for the most part — still more specific (especially when viewed from a practical perspective) than the (more general) ‘business efficacy’ test. In particular, the ‘officious bystander’ test focuses the court’s attention on what the parties would have unhesitatingly agreed to had the gap concerned been in fact pointed out to them (here, by the officious bystander) at the time they entered into the contract. This explains, in my view at least, the approach which Scrutton LJ adopted in the cases (including *Reigate*) which formed (as we have already noted) the backdrop of (and even the inspiration for) the ‘officious bystander’ test enunciated by MacKinnon LJ in *Shirlaw v Southern Foundries (1926), Limited* approximately two decades later. Seen in this light, Scrutton LJ ought perhaps to be credited as being the first to have actually formulated the ‘officious bystander’ test.

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81 [2006] 1 SLR(R) 927 [34]–[40] (emphasis in original).
82 [1918] 1 KB 592, 605.
83 See above n 27. But cf Brandon Kain, ‘The Implication of Contractual Terms in the New Millennium’ (2011) 51 Canadian Business LJ 170, 185 (which is a comment on the Belize test, but which also argues that the ‘business efficacy’ test focuses on the performance of the contract whereas the ‘officious bystander’ test focuses on ensuring business efficacy in the formation of the contract — a distinction which, with respect, whilst interesting, is not only unpersuasive but also inconsistent with the existing case law).
84 And see the analysis set out in the extract from the Forefront case set out above at n 81.
It should, at this juncture, be noted that the very recent Singapore Court of Appeal decision in the *Sembcorp Marine case*85 confirmed the approach from complementarity proffered above (in the *Forefront case*86), observing thus:

Nor do the judicial authorities sing a common tune, as Phang J (as he then was) illustrated in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 (‘Forefront Medical’) at [34]–[39]. In so far as the law in Singapore is concerned, we affirm the ‘complementarity’ characterisation of the business efficacy and officious bystander tests in *Forefront Medical* at [35]–[38], for the reasons provided by Phang J. As Phang J observed at [35] of *Forefront Medical*, Scrutton LJ in *Reigate* clearly had in mind business efficacy as the *basis* for the implication of a term (Reigate at 605):

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 some one had said of 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’. [emphasis added in italics and bold italics]

Not only was business efficacy at the forefront of Scrutton LJ’s mind, it is also telling from the use of the words ‘that is’ that Scrutton LJ’s articulation of the officious bystander yardstick was intended to serve as an elaboration of the business efficacy test. We find the following excerpt from Jacob Petrus Vorster, ‘The Bases for the Implication of Contractual Terms’ (1988) Journal of South African Law 161 illuminating (at p 171):

… The absence of business efficacy is at best an indication that the parties may have intended to agree on some unexpressed term. More than one term may conceivably render a contract which contains a *lacuna*, efficacious. *Whereas the business efficacy test may indicate the existence of a lacuna, it cannot necessarily be used to define the term with which the parties intended to fill the gap.* [original emphasis omitted; emphasis added in italics and bold italics]

In our judgment, this excerpt precisely isolates the core of the officious bystander test: it is the device that enables the court to define that term which can be said to reflect the parties’ presumed intention *vis-à-vis* the gap in the contract. While the business efficacy test is helpful to identify the existence of a *lacuna*, that is to say that for the sake of the efficacy of the contract something more needs to be added into the contract, it does not assist in identifying what that ‘something more’ is with any degree of precision. That is where the officious bystander test serves an instrumental function.

The business efficacy test nonetheless reminds the court that the implementation of the officious bystander test must be conducted within the normative framework of business efficacy as its overarching theme. In this regard, we adopt the cogent explanation of Phang JA and Asst Prof Goh in *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012) at para 1063:

… [I]f the ‘officious bystander’ test is the ‘practical mode’ by which the ‘business efficacy’ test is implemented, then it seems that the ‘business efficacy’ test is the

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86 [2006] 1 SLR(R) 927.
rationale behind the ‘officious bystander’ test. An application of the ‘officious bystander’ test needs to be informed by the necessity for business efficacy. In fact, the ‘officious bystander’ test itself refers back to the ‘business efficacy’ test because it does not matter what the officious bystander thinks about the implication of the term. The role of the officious bystander is simply to suggest a term, and the true test is whether the parties themselves would suppress that suggestion with a common ‘Oh, of course!’.

Whether the parties would so suppress the officious bystander can only be decided with a normative reference point, and it is suggested that the ‘business efficacy’ test here guides the parties’ response to the officious bystander. Thus, only if a court thinks that the parties would, out of necessity for business efficacy, suppress the officious bystander’s suggestion with those famous words, would the court imply the term concerned. ...

Might it, however, be argued that, depending on the precise facts, the ‘business efficacy’ test might nevertheless be applied separately to those facts? More specifically, is this illustrated, for example, in Foo Jong Peng? It is suggested that, whilst this is possible, even this particular decision emphasises that the ‘officious bystander’ test is, in the final analysis, the test which has the most practical application. To elaborate, in this particular case, the court, in applying the ‘business efficacy’ test, held, as follows:

We did not think it was necessary for the effective management of the Association’s affairs for the Management Committee to be given the power to remove particular office bearers. The Management Committee still retains the decisive power to supervise the conduct of the office bearers, manage finances and to formulate the general policy direction for the Association. We were cognisant of the fact that many clubs and unincorporated associations, unlike companies, are run on a non-profit basis and many office bearers take on positions of responsibility on a voluntary basis. While it is conceivable that a change in leadership may sometimes be desirable, we did not think that it was necessary for leadership change to be effected through a blunt power of removal wielded exclusively by the Management Committee, instead of through sensible compromise and consensus. It was also noted that the First Respondent averred that it was the first time in the 157-year history of the Association that a president had been removed before the expiry of his term of office. While we accept that there is always a first time when unanticipated problems arise and that this does not per se mean that a term conferring a power of removal is unnecessary, in this particular factual context, it did suggest that the Association is capable of governing itself within the existing framework set out in the Rules without an ad hoc gap filling mechanism in the form of the implied term.

And, in applying the ‘officious bystander’ test, the court held, as follows:

Further, the power of removal was not, in our view, so obvious that it would go without saying that such a term ought to be implied under the ‘officious bystander’ test. The Rules include specific rules governing the removal of trustees and expulsion of members for misconduct (see rr 14 and 19, respectively) and therefore contemplate the possibility that individuals with certain positions of responsibility

88 [2012] 4 SLR 1267; discussed above at the main text accompanying nn 63–9.
or members may need to be removed in the interests of the Association. It is thus difficult to believe that the members did not advert themselves to the possibility of removal of office bearers or did not expressly say so because they had considered it so obvious that it would go without saying. We also do not think that the members would have considered it obvious that the Management Committee itself should have free rein to remove an office bearer. The members could have preferred the power of removal to be vested in the General Meeting or for the power to be exercised only when stringent voting margins or procedural pre-conditions are met; alternatively, as the Judge observed, the members could equally have intended that this apparent ‘gap’ in the Rules should mean precisely that office bearers cannot be removed and must be allowed to serve out their complete two-year term of office in order to ensure stability and continuity in the management of the Association. The Appellants submitted to us that the Judge’s reasoning on this point was flawed because the Rules did not expressly provide for a fixed term of office for an office bearer, but we were unable to agree with the Appellants’ — somewhat ironically — unduly literal interpretation of this aspect of the Rules. Rather, a purposive interpretation of r 9 in conjunction with r 7, which provides for a two-year term of office for Management Committee members, indicates that the term of office for an office bearer must logically also be two years. An office bearer elected from amongst the members of the Management Committee can only be an office bearer for as long as he is also a Management Committee member, and his term as an office bearer must therefore necessarily also be limited by his term as a Management Committee member. If an office bearer were to have an indefinite term of office, it would clearly contradict the express purpose of r 9(2), which places restrictions on office bearers occupying the same position for consecutive terms.

Indeed, if the officious bystander had asked whether the Management Committee had the power to remove the office bearers at will, the members would not have unequivocally thought that the term was obviously necessary for the effective management of Association and unanimously suppressed him with a testy ‘Oh, of course!’ The limited term of office — both for office bearers and members of the Management Committee — ensures that control of the Association will not always fall into the hands of a single individual, and a fixed period of office without the threat of removal encourages consensus and unity, instead of divisive power struggles and acrimony. If the Management Committee or general members have irreconcilable differences with a particular office bearer, the solution is to vote him out at the next election for a new Management Committee and/or office bearers. And, if an office bearer has behaved in a particularly egregious manner, the last resort would and should be expulsion.90

It will be seen that the reasoning of the court in relation to the ‘officious bystander’ test is much more detailed and, indeed, incorporates the more general reasoning in relation to the ‘business efficacy’ test, thus illustrating precisely the point made above with regard to what ought to be the relationship between both tests. It might be appropriate, at this juncture, to note that, in so far as the general approach to be adopted towards ‘terms implied in fact’ in the Singapore context is concerned, the Singapore Court of Appeal, in the Sembcorp Marine case,91 observed, as follows:

The Challenge of Principled Gap-filling

It follows from these points that the implication of terms is to be considered using a three-step process:

(a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.

(b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.

(c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded ‘Oh, of course!’ had the proposed term been put to them at the time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.92

I pause to note — on a comparative level (leaving aside English law for the moment) — that the majority of the Board in the leading Privy Council decision (on appeal from the Full Court of the Supreme Court of Victoria) of BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings93 observed, as follows:

Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that ‘it goes without saying’; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.94

92 [2013] 4 SLR 193 [101]. It may be the case that the lines between (a), (b) and (c) might be more fluid, particularly in the practical sphere and as illustrated by my discussion of Foo Jong Peng (just rendered above).

93 (1977) 180 CLR 266. This is a leading authority in the Australian context and has been cited numerous times (see eg the High Court of Australia decisions of Secured Income Real Estate (Australia) Limited v St Martins Investments Proprietary Limited (1979) 144 CLR 596, 605–6; Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales (1982) 149 CLR 337, 347 and 403–4; Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 65–6, 95 and 117–18; The Corporation of the City of Adelaide v Jennings Industries Limited (1985) 156 CLR 274 at 282; Breen v Williams (1996) 186 CLR 71, 90; and Roxborough v Rothmans of Pall Mall Australia Limited (2001) 208 CLR 516, 574–5). It should, however, be noted that the Singapore Court of Appeal in the very recent decision of Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] 4 SLR 193 observed at [98] that ‘these additional requirements [in the BP Refinery case] — if they may be called that — simply restate the basic overriding principle that a term is not to be implied into a contract lightly. It goes without saying that a term that is not reasonable, not equitable, unclear, or that contradicts an express term of the contract, will not be implied. Such a term will necessarily fail the officious bystander test.’


It is, with respect, unclear how the majority viewed the relationship between the ‘business efficacy’ and ‘officious bystander’ tests. On a literal reading of the quotation above, one could infer that the tests might ‘overlap’. It is significant, however, that the majority of the Board then proceeds to cite three decisions, viz, *The Moorcock*,95 *Reigate v Union Manufacturing Company (Ramsbottom)*, Limited and *Elton Copdyeing Company, Limited*,96 and *Shirlaw v Southern Foundries (1926)*, Limited.97 As already noted above, the first embodies the ‘business efficacy’ test, the third the ‘officious bystander’ test, and the second views both in a complementary fashion. At the risk of appearing overly technical, it might be said that there is, in the circumstances, at least some support for the approach from complementarity which has been endorsed in the present essay.98 Indeed, the analysis in a leading textbook appears to support both the approach from complementarity as well as this interpretation of the BP Refinery case; in this regard, the learned authors observe, as follows:

The question of whether a term should be implied into a contract involves two principal issues: the need for implication (that is, the existence of the term); and the type of term required (that is, the contents of the term). The test of what is necessary to give business efficacy to the contract … is designed to resolve the first issue, and in the Privy Council’s formulation of the requirements for implying a term in *BP Refinery (Westernport)* Pty Ltd v *Shire of Hastings* … it would seem that the criterion of what is obvious was designed to fulfil the second function, that is, the role of defining the contents of the term that is necessary to resolve the particular difficulty that has arisen in applying the express terms of the contract.99

The Malaysian position, on the other hand, appears to suggest that the ‘business efficacy’ and ‘officious bystander’ tests are cumulative in nature.100 However, as already noted, the Singapore approach is clear, viz, that both these tests operate in a complementary fashion.

Let me turn now to the other broad category of ‘terms implied in law’.

‘Terms Implied in Law’

*General*

The reader will recall that I had mentioned that I would also focus on another major category of implied terms, viz, ‘terms implied in law’ in this essay. As I shall elaborate upon in a moment, this particular category of implied terms is far more problematic although it is now an established part of the legal landscape in most (if not all) Commonwealth jurisdictions.101

95 (1889) 14 PD 64.
96 [1918] 1 KB 592.
97 [1939] 2 KB 206.
98 Though cf the recent High Court of Australia decision of *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 [74] (but without, it appears, any detailed consideration of the precise issue presently considered in this essay).
100 See eg the Malaysian Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, 170 (cited in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 [39] (see also above n 81)).
101 See eg the Malaysian Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151, 160 (per Peh Swee Chin FCJ) and the Australia High Court decisions of *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337, 345–6 (per Mason J) as well as *Breen v Williams* (1996) 186 CLR 71, 102–3 (per Gaudron and McHugh JJ).
The Challenge of Principled Gap-Filling

It has been described in the Singapore High Court decision of *Forefront Medical Technology (Pte) Ltd v Modern-Pak Private Ltd*, as follows:

There is a *second* category of implied terms which is wholly different in its nature as well as practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future contracts of that particular type*. The precise terminology utilised has varied. In the English Court of Appeal decision of *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 at 1196, for example, Lord Denning MR utilised the rubric of contracts ‘of common occurrence’, whilst Lloyd LJ in the (also) English Court of Appeal decision of *National Bank of Greece SA v Pinios Shipping Co No 1* [1990] 1 AC 637 (reversed in the House of Lords but not on this particular point) referred to such a category as encompassing ‘contracts of a defined type’ (at 645). But the central idea is clear: it is that the term implied is implied in a *general way* for *all specific contracts* that come within the purview of a broader umbrella category of contracts (reference may also be made, for example, to the House of Lords decisions of *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, especially at 307 and *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 45).

To distinguish this particular category of implied terms from the first, legal scholars have referred to it as the category of ‘terms implied in *law*’ (see generally, for example, Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) (‘Treitel’) at pp 206–213). The first or former category has, in turn, been referred as to the category of ‘terms implied in *fact*’ (see generally Treitel, at pp 201–206).

The same case has also described the *difference* between this particular category of implied terms and the (narrower) category of ‘terms implied in fact’ in the following way:

The *rationale as well as test* for this broader category of implied terms is, not surprisingly, quite *different* from that which obtains for terms implied under the ‘business efficacy’ and ‘officious bystander’ tests. In the first instance, the category is much broader inasmuch (as we have seen) the *potential for application extends to future* cases relating to the same issue with respect to the *same category* of contracts. In other words, the decision of the court concerned to imply a contract ‘in law’ in a particular case *establishes a precedent* for similar cases in the future for *all contracts of that particular type*, unless of course a higher court overrules this specific decision. Hence, it is my view that courts ought to be as — if not more — careful in implying terms on this basis, compared to the implication of terms under the ‘business efficacy’ and ‘officious bystander’ tests which relate to the *particular contract and parties only*. Secondly, the test for implying a term ‘in law’ is broader than the tests for implying a term ‘in fact’. This gives rise to difficulties that have existed for some time, but which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses

102 [2006] 1 SLR(R) 927 [42]–[43] (emphasis in original).
in the academic literature (see, for example, the English Court of Appeal decision of Crossley v Faithful & Gould Holdings Ltd [2004] 4 All ER 447 at [33]–[46]).

There was further judicial elaboration of the category of ‘terms implied in law’ in the Court of Appeal decision of Jet Holding Ltd v Cooper (Singapore) Pte Ltd, where the court observed as follows:

The category of ‘terms implied in law’ is not without its disadvantages. A certain measure of uncertainty will always be an integral part of the judicial process and, hence, of the law itself. This is inevitable because of the very nature of life itself, which is — often to a very large extent — unpredictable. Such unpredictability and consequent uncertainty is of course a double-edged sword. It engenders both the wonder and awe as well as the dangers and pitfalls in life. Given this reality, however, one of the key functions of the courts is not to add unnecessarily to the uncertainty that already exists. Looked at in this light, the category of “terms implied in law” does tend to generate some uncertainty — not least because of the breadth of the criteria utilised to imply such terms, which are grounded (in the final analysis) on reasons of public policy.

However, the category of ‘terms implied in law’ has now been firmly woven into the tapestry of our local contract law. It also aids, on occasion at least, in achieving a just and fair result. Most importantly, perhaps, it has formed both the theoretical as well as practical basis for statutory implied terms, such as those found in the UK Sale of Goods Act 1979 (c 54) (applicable in Singapore via the application of English Law Act (Cap 7A, 1994 Rev Ed) and reprinted as Cap 393, 1999 Rev Ed).

What is clear is that given the potential uncertainty that terms ‘implied in law’ could generate, it is important not to imply them lightly as doing so would (in the absence of subsequent reversal by the court) set a precedent for all future cases relating to that particular category of contracts. Perhaps paradoxically, therefore, although the reach as well as basis for implying terms ‘in law’ is broader than that for terms ‘implied in fact’, the need for caution is even greater. Nevertheless, as already noted, the implication of a term ‘in law’ may indeed be necessary in appropriate circumstances. It may also be argued that a ‘term implied in law’ may well be a ‘precursor’ of a term implied by statute. That having been said, there is a real as well as practical distinction between what the courts decide on the one hand and what the legislature promulgates on the other. The respective processes are quite different and have — in the jurisprudential sphere — been neatly encapsulated by the late Professor Ronald Dworkin’s distinction between ‘principle’ on the one hand and ‘policy’ on the other.

103 [2013] 4 SLR 193 [44] (emphasis in original). For a sampling of the academic literature discussing the various difficulties with respect to ‘terms implied in law’, see Phang, above n 18 and, by the same author, ‘Implied Terms in English Law — Some Recent Developments’ [1993] JBL 242 (however, possible advantages were also acknowledged as well: see, for example, the former article at 410–11). And for judicial observations to like effect, see Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd [2006] 3 SLR(R) 769 [90] (quoted below n 104), although the advantage of arriving (on occasion at least) at a just and fair result is also acknowledged (at [91], also quoted below n 104).

104 [2006] 3 SLR(R) 769 [90]–[91] (emphasis in original).


More importantly, in my view, if the focus (as I have already argued) is on the utilisation of the doctrine of the implied term to achieve justice and fairness in the case at hand in a principled manner, then that can in fact be achieved by implying a term ‘in fact’ (no pun intended), rather than having recourse to the more problematic category of ‘terms implied in law’. This can be illustrated by examining a recent Singapore decision dealing with the duty of good faith.

No Implied Duty of Good Faith Based on a Term ‘Implied in Law’

In the relatively recent Singapore Court of Appeal decision of Ng Giap Hon v Westcomb Securities Pte Ltd,107 the court held that a term could not be implied into the agency agreement in that particular case premised on the broader category of ‘terms implied in law’. Consistent with the caution that we noted above, the court observed, as follows:

As noted above … implying a ‘term implied in law’ into a contract not only involves broader policy considerations, but also establishes a precedent for the future. Put simply, the implication of such a term into a contract would entail implying the same term in the future for all contracts of the same type. This would, in and of itself, require that caution should be exercised on the part of the court before implying a ‘term implied in law’ (which, upon being implied into the particular contract at hand, would also, ex hypothesi, be implied into all future contracts of the same type as well). Indeed, the fact that broader policy considerations are (as just mentioned) involved where ‘terms implied in law’ are concerned furnishes a further reason for caution as well. Moreover (and this is a separate, albeit related, point), in the present case, the content of the First Implied Term (with its correspondingly broad implications) involves a concept which is itself controversial (at least at the present time). More specifically, the concept concerned relates to the doctrine of good faith, to which our attention must now briefly turn.108

The court then proceeded to consider — in some detail — the general legal status of the doctrine of good faith, as follows:

The doctrine of good faith is very much a fledgling doctrine in English and (most certainly) Singapore contract law. Indeed, a cursory survey of the relevant law in other Commonwealth jurisdictions appears to suggest a similar situation. This is, perhaps, not surprising in view of the fact that, even in the academic literature (which has witnessed the most discussion as well as analysis of the doctrine), there are differing views as to what the doctrine of good faith means as well as how it is to be applied …

[The] copiousness as well as the variety of (and, perhaps more importantly, the debates in) the academic literature (coupled with the relative dearth of case law) suggest that the doctrine of good faith is far from settled. The case law itself appears to be in a state of flux: see, for example (and most notably), the conflicting views expressed (in the Australian context) by Priestley JA in the New South Wales Court of Appeal decision of Renard [(1992) 26 NSWLR 234] at 263–268 on the one hand and by Gummow J in the Federal Court of Australia decision of Service

107 [2009] 3 SLR(R) 518. Reference may also be made to the recent Singapore High Court decision of Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd [2013] 2 SLR 577 [40]–[60].

However, two writers have recently argued vigorously that good faith is inherent in all aspects of the law of contract and that there is therefore no reason for any term concerning good faith to be implied into a contract (see generally Carter & Peden on ‘Good Faith’ [J W Carter & Elisabeth Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 JCL 155] as well as Elisabeth Peden, Good Faith in the Performance of Contracts (LexisNexis Butterworths, 2003) at ch 6). Peden is of the view (at para 1.10 of Good Faith in the Performance of Contracts) that:

[T]he principle of good faith should be seen not as an implied term, but rather as a principle that governs the implication of terms and [the] construction of contracts generally.

In a similar vein, the learned authors of Carter & Peden on ‘Good Faith’ argue that good faith is not an independent concept, but, rather, something ‘already inherent in contract doctrines, rules and principles’ (at 163). They take the view that, where the court implies a term of good faith, the court is implying either a term which is actually redundant or a term which, by definition, would impose a more onerous requirement. Such a term must be justified, the learned authors contend, by reference to the particular circumstances of each case and not by a general principle (ie, that of good faith).109 …

It is true, as Prof McKendrick pertinently points out, that ‘there are signs that the traditional English hostility towards a requirement of good faith might be abating’ (see Ewan McKendrick, Contract Law (Palgrave Macmillan, 7th Ed, 2007) (‘McKendrick’) at p 265) and that ‘[t]he courts have adopted a more sympathetic stance on a number of occasions recently’ (ibid) (see also the cases cited therein (ibid); and cf the oft-cited observations by Bingham LJ in the English Court of Appeal decision of Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433 at 439, which observations were reiterated in the (also) English Court of Appeal decision of Timeload Limited v British Telecommunications plc [1995] EMLR 459 at 468 per Sir Thomas Bingham MR). However, this is still far from a ringing endorsement of the doctrine of good faith as such (and see generally Prof McKendrick’s own essay, ‘Good Faith: A Matter of Principle?’; in

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Good Faith in Contract and Property (ADM Forte ed) (Hart Publishing, 1999) at ch 3). Indeed, the more open approach under English law in recent years may be due in no small part to the fact that there are, owing to the civil law influences that have become relevant as a result of the UK's membership of the European Community (and see in this regard Hugh Collins, ‘Good Faith in European Contract Law’ (1994) 14 OJLS 229 as well as Good Faith in European Contract Law (Richard Zimmermann & Simon Whittaker eds) (Cambridge University Press, 2000)), express references to ‘good faith’ in the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) (UK) and the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No 3053) (UK) (see McKendrick at p 265; reference may also be made to the House of Lords decision of Director General of Fair Trading v First National Bank plc [2002] 1 AC 481), none of which applies in the Singapore context.

Prof Furmston confirms the observation which we have just made in the preceding paragraph, ie, that the doctrine of good faith, although not lacking in supporters, particularly from theoretical as well as aspirational perspectives (see, for example, Roger Brownsword, “‘Good Faith in Contracts’ Revisited” (1996) 4 CLP 111 and, by the same author, ‘Two Concepts of Good Faith’ (1994) 7 JCL 197), is nevertheless still far from being an established doctrine under English law, as follows (see MP Furmston, Cheshire, Fifoot and Furmston’s Law of Contract (Oxford University Press, 15th Ed, 2007) at pp 32–33):

Do the parties owe each other a duty to negotiate in good faith? Do the parties, once the contract is concluded, owe each other a duty to perform the contract in good faith? Until recently, English lawyers would not have asked themselves these questions or, if asked, would have dismissed them with a cursory ‘of course not’. On being told that the German civil code imposed a duty to perform a contract in good faith or that the Italian civil code provides for a duty to negotiate in good faith, a thoughtful English lawyer might have responded by suggesting that the practical problems covered by these code positions were often covered in English law but in different ways. This may still be regarded as the orthodox position but the literature of English law has begun to consider much more carefully whether there might not be merit in explicitly recognising the advantages of imposing good faith duties on negotiation and performance. This view is reinforced by the fact that other common law systems have already moved in this direction (citing § 1–203 of the American Uniform Commercial Code, § 205 of the American Law Institute’s Restatement (Second) of Contracts as well as Renard ([43] supra), but not Service Station Association ([51] supra). … It is not inconceivable that on appropriate facts and with skilful argument, English law may make tentative steps in the same direction. [emphasis added in italics and bold italics]

Indeed, it would appear that even a more limited reform in the context of recognising a duty of good faith in the negotiation of contracts is met by the obstacle presented by the House of Lords decision of Walford v Miles [1992] 2 AC 128 … It should, however, be noted that Lord Steyn has commented that the above ruling in Walford is ‘surprising’ (see Lord Steyn’s 1997 article [at 439]. The learned law lord has also (in an extrajudicial lecture) stated that, ‘[w]hile [he does] not argue for the introduction of a general duty of good faith in contract law, it is difficult to see why an express agreement to negotiate in good faith should be invalid’ [emphasis added] (see Lord Steyn’s 1996 article ([48] supra) at 52) (on the issue of whether there is a duty of good faith in the context of contract

The court also observed that the situation was — from a comparative perspective — not much different from that in other jurisdictions; in particular, it surveyed briefly the respective situations in Australia, America and Canada, as follows:

The situation in other jurisdictions does not appear to be much clearer. For instance, we have already seen (at [51] above [and reproduced in the preceding paragraph]) that the situation in the Australian context is, at best, ambiguous.

It is also interesting to note that one learned commentator has recently pointed to the fact that the American doctrine of good faith in contract law (which is firmly established as an implied covenant under both § 1–203 of the Uniform Commercial Code and § 205 of the American Law Institute’s Restatement (Second) of Contracts, albeit in relation to the performance and enforcement of contracts as opposed to pre-contract negotiations) is no longer as settled as it used to be thought and is also apparently in a state of flux (see Howard O Hunter, ‘The Growing Uncertainty about Good Faith in American Contract Law’ (2004) 20 JCL 50, which was written almost a decade after the somewhat sanguine essay by Prof Farnsworth (see E Allan Farnsworth, ‘Good Faith in Contract Performance’ in Good Faith and Fault in Contract Law (Jack Beatson & Daniel Friedmann eds) (Clarendon Press, 1995) at ch 6)).

In Canada, there was a proposal by the Ontario Law Reform Commission to the effect that legislation should give recognition to the doctrine of good faith in the performance and enforcement of contracts based on § 205 of the (American) Restatement (Second) of Contracts referred to in the preceding paragraph (see ch 9 of Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987)). However, that was over two decades ago. Further, the doctrine may well be in a state of flux not only in the American context (as noted briefly in the preceding paragraph), but also (apparently) in the Canadian context as well (see


A valuable (albeit somewhat dated) comparative overview of the doctrine of good faith can be found in a work already referred to, viz, Good Faith in Contract [Good Faith in Contract: Concept and Context (Roger Brownsword, Norma J Hird & Geraint Howells eds) (Ashgate, 1999)]. It is also significant in the present regard because there appear (from this particular work) to be substantive difficulties with the doctrine of good faith even in jurisdictions where it has been legislatively mandated — which difficulties appear to be general ones that are unlikely to have altered with the passage of time since this work was published.”  

Unsurprisingly, therefore, the court concluded thus:  

In the circumstances, it is not surprising that the doctrine of good faith continues (as mentioned at [47] above [reproduced above at note 109]) to be a fledgling one in the Commonwealth. Much clarification is required, even on a theoretical level. Needless to say, until the theoretical foundations as well as the structure of this doctrine are settled, it would be inadvisable (to say the least) to even attempt to apply it in the practical sphere (see also Service Station Association [Service Station Association Ltd v Berg Bennett & Associates Pty Ltd (1993) 117 ALR 393], especially at 406–407 (per Gummow J); cf Peden’s 2001 article [Elisabeth Peden, ‘Incorporating Terms of Good Faith in Contract Law in Australia’ (2001) 23 Syd L Rev 222] at 228–230). In the context of the present appeal, this is, in our view, the strongest reason as to why we cannot accede to the appellant’s argument that this court should endorse an implied duty of good faith in the Singapore context. The First Implied Term should not, therefore, be implied into the Agency Agreement.  

However, this does not mean that a duty of good faith will never be implied. In Ng Giap Hon v Westcomb Securities Pte Ltd114 itself, the court left open the possibility that such a duty could be implied by way of the narrower category of ‘terms implied in fact’; in particular, the court observed, as follows:  

It will also be recalled that, for this particular category of implied terms, whether the term in question ought to be implied into the contract depends upon the particular factual matrix concerned … Hence, a close scrutiny of the relevant facts of the present proceedings is imperative. It should, however, be observed at this juncture that, although it is possible to incorporate the doctrine of good faith into a contract under this narrower category of implied terms (cf Peden’s 2001 article [Elisabeth Peden, ‘Incorporating Terms of Good Faith in Contract Law in Australia’ (2001) 23 Syd L Rev 222] at 227–228), this would not, in our view, be a very persuasive argument, having regard to the state of flux that the doctrine of good faith continues to be in (see generally the analysis above at [46]–[60] [parts of which have been reproduced above at notes 108, 109, 111 and 113]). However, even if the doctrine of good faith is not directly applicable as such (ie, as a ‘term implied  

111 Reference may also be made (for the purposes of the present essay) to the Ontario Court of Appeal decision of Transamerica Life Canada Inc v ING Canada Inc (2003) 234 DLR (4th) 367, especially at [51]–[53] and the Ontario Superior Court of Justice decision of Rio Algom Ltd v Canada (Attorney General) [2012] Carswell Ont 1200 [48]–[52].  


113 See [2009] 3 SLR(R) 518 [60].  

114 [2009] 3 SLR(R) 518.
in fact’), this does not necessarily mean that the concept of good faith would also be excluded (see also Carter & Peden on ‘Good Faith’ [J W Carter & Elisabeth Peden, ‘Good Faith in Australian Contract Law’ (2003) 19 JCL 155] and Good Faith in the Performance of Contracts ([52] supra at ch 6). Nevertheless, what is clear in the context of an analysis based on the category of ‘terms implied in fact’ is that, whilst the concept of good faith (or, more likely, the elements thereof) might be present, the focus of the court would, as already stated earlier in the present paragraph, be on the particular factual matrix before it.115

Where, however, there is (also in the Singapore context) an express term to the effect that the parties would negotiate in good faith, this would (as the Singapore Court of Appeal held in HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd116) be given effect to.117 VK Rajah JA, who delivered the judgment of the court, observed thus:

In our view, there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld. First, such an agreement is valid because it is not contrary to public policy. Parties are free to contract unless prohibited by law. Indeed, we think that such ‘negotiate in good faith’ clauses are in the public interest as they promote the consensual disposition of any potential disputes. We note, for instance, that it is fairly common practice for Asian businesses to include similar clauses in their commercial contracts. As Assoc Prof Philip J McConnaughay has insightfully observed in ‘Rethinking the Role of Law and Contracts in East-West Commercial Relationships’ (2000–2001) 41 Va J Int’l L 427 at 448–449:

A core term of many Asian commercial contracts — the ‘friendly negotiations’ or ‘confer in good faith’ clause — captures the essence of contractual obligation in the Asian tradition. Such clauses typically recite that, if differences or disputes arise during the course of the contractual relationship, the parties will discuss and resolve the matter amicably. The Western view of such clauses is that they impose no real obligation at all; at most, they represent a mechanism for making unenforceable requests for novation, or perhaps an initial formality in a multiple-step dispute resolution process culminating in compulsory adjudication intended to enforce precise contractual terms. But these views presuppose a Western understanding of the contract itself, which is not shared in Asia. From a traditional Asian perspective, a ‘confer in good faith’ or ‘friendly negotiation’ clause represents an executory contractual promise no less substantive in content than a price, payment, or delivery term. It embodies and expresses the traditional Asian supposition that the written contract is tentative rather than final, unfolding rather than static, a source of guidance rather than determinative, and subordinate to other values — such as preserving the relationship, avoiding disputes, and reciprocating accommodations — that may control far more than the written contract itself how a commercial relationship adjusts to future contingencies. Characterizing a ‘confer in good faith’ or ‘friendly negotiation’ clause as a ‘dispute resolution’ clause tempts a misapprehension of this essential nature, for no ‘dispute’ exists if all of the parties to the contract share an Asian understanding of its evolving

117 Distinguishing the problematic House of Lords decision of Walford v Miles [1992] 2 AC 128 in the process: see [2012] 4 SLR 738 [33]–[37] and [42]–[44].
We think that the ‘friendly negotiations’ and ‘confer in good faith’ clauses highlighted in the above quotation are consistent with our cultural value of promoting consensus whenever possible. Clearly, it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences. The second reason why we are of the view that ‘negotiate in good faith’ clauses should be upheld is that even though the fact that one party may not want to negotiate in good faith (for whatever reason) will lead to a breakdown in negotiations, no harm is done because the dispute can still be resolved in some other way. That said, if one party breaks the terms of a ‘negotiate in good faith’ clause and this is later discovered, there might be legal consequences, depending on the terms of the clause in question. For instance, the party which has been prejudiced could have a right to void the consequences of the other party’s breach.118

In addition to the comparative material considered in the Ng Giap Hon case,119 there has, in fact, also been continued interest in the doctrine of good faith in other jurisdictions, as evidenced by other decisions therefrom — in particular (and perhaps significantly) recent decisions from England itself. An important decision in this regard is the recent English High Court decision of Yam Seng Pte Ltd v International Trade Corporation Ltd.120 In that decision, Leggatt J furnished a very compelling argument in favour of recognising a general obligation of good faith in the common law. In particular, the learned judge observed, as follows:

In refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide. As noted by Bingham LJ in the Interfoto case, a general principle of good faith (derived from Roman law) is recognised by most civil law systems — including those of Germany, France and Italy. From that source references to good faith have already entered into English law via EU legislation. For example, the Unfair Terms in Consumer Contracts Regulations 1999, which give effect to a European directive, contain a requirement of good faith. Several other examples of legislation implementing EU directives which use this concept are mentioned in Chitty on Contracts, 31st Ed., volume 1 at para 1–043. Attempts to harmonise the contract law of EU member states, such as the Principles of European Contract Law proposed by the Lando Commission and the European Commission’s proposed Regulation for a Common European Sales Law on which consultation is currently taking place, also embody a general duty to act in accordance with good faith and fair dealing. There can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.121

The judgment of Leggatt J is — if I may say so — a very comprehensive and instructive one, not least because he engages in a scholarly survey across various jurisdictions and also aptly cautions that ‘[i]t would be a mistake … to suppose that willingness to recognise a

118 See [2012] 4 SLR 738 [40] (emphasis in original).
119 [2009] 3 SLR(R) 518.
The doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism. However, I would respectfully suggest that there is, in the final analysis, little (if any) difference between the approach adopted by Leggatt J in the *Yam Seng* case and that adopted by the Singapore Court of Appeal in the *Ng Giap Hon* case. In particular, Leggatt J observed (in the former case) thus:

Under *English law* a duty of good faith is *implied by law* as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one. *I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.*

I should also mention another English decision handed down subsequent to the *Yam Seng* case. This is the English Court of Appeal decision of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading as Medirest)*, in which the court construed an *express term* (which included a duty on the part of the parties to co-operate with each other in good faith) as covering only very specific as well as limited areas (and did not therefore cover a more *general* obligation). Jackson LJ also observed (significantly, in my view), as follows:

… I start by reminding myself that there is *no general doctrine of ‘good faith’ in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract: see Horkulak at paragraph 30 and *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at paragraphs 120–131. *If the parties wish to impose such a duty they must do so expressly.*

The observations just quoted are, in fact, consistent with what is the present legal position under Singapore law. Indeed, the learned Lord Justice’s further reference to the allowance of an *express* obligation is wholly consistent with the approach adopted by the Singapore Court of Appeal in the *Toshin* case. Significantly, the two other members of the court in the *Mid Essex Hospital* case — Lewison and Beatson LJJ — have themselves been involved in scholarly treatises on the law of contract as well. Both judges agreed with Jackson LJ in so far as the interpretation of the express term in question was concerned.

**The Implied Term as a Theoretical Concept**

I turn now to consider briefly whether or not the implied term (specifically, the term implied ‘in law’) can be possibly utilised as a theoretical basis or underpinning for the doctrine of

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122 [2013] 1 Lloyd’s Rep 526 [125].
125 [2013] EWCA Civ 200 [105] (emphasis added in italics and bold italics).
126 See the main text accompanying above nn 116–18.
frustration. I have, in fact, dealt with this particular issue in part of an article which was published close to two decades ago. In that article, I first acknowledged that even though the implied term was the original basis of the doctrine of frustration, it has nevertheless ‘received little favour from the courts in modern times’. However, I then proceeded to note that the seminal English decision by Blackburn J in *Taylor v Caldwell* was handed down at a particular historical point in time well before the ‘business efficacy’ and ‘officious bystander’ tests were firmly settled and, a fortiori, well before the concept of a ‘term implied in law’ was even formulated. I then suggested that the broader category of ‘terms implied in law’ would furnish a more than adequate basis for the doctrine [of frustration]. As I observed:

Courts imply ‘terms in law’ when broader considerations of policy and reasonableness require such terms to be implied in contracts of a certain type. It is submitted that this broad basis for the implication of ‘terms in law’ would be eminently suitable as a juridical basis for frustration. Indeed, it is precisely because of considerations of policy and reasonableness that contracts are held to be discharged by the doctrine of frustration. And just as the implication of ‘terms in law’ is within the sole purview of the court (which may even imply such a term when it would not otherwise do so ‘in fact’, or when it would even override the presumed intention of the parties to the contract), so also is the doctrine of frustration with the sole purview of the court, operating to discharge the contract by operation of law as opposed to any action on the part of the contracting parties themselves. That the doctrine of ‘terms implied in law’ has not really been linked to the doctrine of frustration is not surprising in view of the fact that the former doctrine has only been prominent relatively recently. The only problem might lie in the requirement that a term be implied ‘in law’ in relation to a certain category of contract, but can it not be argued that contracts that ought to be frustrated would constitute the required category? Admittedly, such reasoning may be a fiction of sorts, but so is the entire classification of ‘terms implied in law’ themselves; the main purpose, it would appear, is not to ensure doctrinal coherence as such but, rather, to allow justice to be achieved in certain (especially extreme) situations. To this end, it is not envisaged that terms will be easily implied under this category, and this is entirely consistent with the application of the doctrine of frustration, since it is generally well-known that frustration is a doctrine not to be liberally applied. … Indeed, and this is an important point, the present possible juridical bases for frustration will in fact be substantially incorporated within the theory of ‘terms implied in law’, involving (as it does) not only construction and implication, but also fairness to the parties owing to a radical change in obligation. One final objection might, however, be phrased thus: that it is really not very important to determine what the precise juridical basis of frustration is. Once again, the present writer has no quarrel with this view, having expressed a similar view elsewhere; however, inasmuch as this is perceived to be a relatively less important issue, it is suggested that it would be far better to lay it completely to rest via the suggestion proffered here, rather than to let it remain a thorn in the contractual side.

130 (1863) 3 B & S 826.
131 See Phang above n 128, 482.
132 Ibid.
133 As to which, see Andrew Phang, ‘Frustration in English Law — A Reappraisal’ (1992) 21 *Anglo-American L Rev* 278, 278–279. Reference may also be made to the oft-cited House of Lords decision of *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 693 and 702.
even if only in the academic context. More importantly, it is submitted that the line between the juridical basis on the one hand and the process of application on the other is a rather artificial one to begin with; indeed, … the very concept of the implied term (here, it is submitted, ‘in law’) would necessarily entail all the so-called ‘practical’ tests for frustration, the foremost amongst which is the “radical change in obligation” test. Indeed, it might be added that the courts do not draw any real distinction between juridical basis and practical test insofar as a ‘radical change in obligation’ is concerned, treating this concept as both the basis as well as a test for frustration.134

In that same article, I also referred to135 the following observations by Lord Sumner, delivering the judgment of the Board in the Privy Council decision of Hirji Mulji v Cheong Yue Steamship Co,136 which (in my view) bore (particularly in the language utilised) a striking resemblance to the present-day formulation of a ‘term implied in law’:

Frustration … is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to their mutual interests concerned and of the main objects of the contract … It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.137

Having returned to this issue once again after close to two decades, what I had proposed earlier as set out above still seemed attractive to me. However, on closer examination, I think that it might not be so persuasive after all. Let me elaborate.

It is clear that a ‘term implied in fact’ is clearly not an appropriate theoretical or conceptual underpinning for the doctrine of frustration and, hence, the current antipathy towards it in the case law and literature is entirely understandable and wholly justifiable. After all, the doctrine of frustration relates to an external (and catastrophic) event which has nothing to do (as is the case with ‘terms implied in fact’) with the parties’ intention, presumed or otherwise. As already noted above,138 ‘terms implied in law’ are not subject to the same critique simply because such terms can be implied, regardless of (and even, on occasion, overriding) the parties’ presumed intention at the time that they entered into the contract concerned. However, as also noted above,139 there remains the difficulty to the effect that a ‘term implied in law’ is applied to contracts of a particular type, and not (as in the case of frustration) to all (possible) contracts. Although I did, in the earlier article,140 attempt to respond to this particular difficulty by arguing that contracts that ought to be frustrated would constitute the required category in relation to a ‘term implied in law’, I also conceded that this was ‘a fiction of sorts’.141 Perhaps the use of such a fiction might still be justified on the basis that a ‘term implied in law’ is here being utilised not to actually imply a term as such

137 [1926] AC 497, 510 (emphasis added).
138 See the main text accompanying above nn 102–4. See also above, Andrew Phang, ‘Implied Terms Revisited’ [1990] JBL 394, 400.
139 See above n 133.
140 See above n 133.
141 See above n 133.
but is being utilised, instead, as a theoretical rationale or underpinning (here, for the doctrine of frustration). However, a more serious difficulty is this: an implied term (whether ‘in law’ or ‘in fact’) relates to the formation of a contract, whereas the doctrine of frustration relates to the discharge of a contract. As Lord Radcliffe perceptively observed in the leading House of Lords decision of *Davis Contractors Ltd v Fareham Urban District Council*:

Lord Loreburn [in *FA Tamplin Steamship Co Ltd v Anglo-Mexican Products Co Ltd* [1916] 2 AC 397] ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticized as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd v London and District Cinemas Ltd* [[1952] AC 166 at 184], *per* Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given ‘irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances’ (*Hirji Mulji v Cheong Yue Steamship Co. Ltd* [[1926] AC 497 at 510]). The legal effect of frustration ‘does not depend on their intention or their opinions, or even knowledge, as to the event.’ On the contrary, it seems that when the event occurs ‘the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence’ (*Dahl v. Nelson* (1881) 6 App Cas 38 at 59), *per* Lord Watson).

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.” 142

In the circumstances, there appears to be a disconnect, even if we are only purporting to utilise a ‘term implied in law’ in a theoretical or conceptual manner. There is — finally — a point also touched on in my earlier article,143 that the precise juridical basis of the doctrine of

142 [1956] AC 696 at 728.
143 See above n 133.
frustration is of little (if any) practical moment. Indeed, as also pointed out in that particular piece, the more generally accepted test is the ‘radical change in obligation test’ which could simultaneously constitute both a theoretical underpinning as well as a practical test. It is obvious, however, that the concept of a ‘term implied in law’ could — at best — serve only as a theoretical underpinning.

One final point may be made: Lord Hoffmann did, in a lecture to which we have already referred, observe as follows:

That does not mean that the judges who adopted the implied theory of frustration were wrong. They were also right because the implication of any implied term in fact is also a question of construction.

The above observation is wholly consistent with the learned Law Lord’s formulation in the Belize test. However, with respect, at least two (closely related) difficulties are immediately apparent. The first is that the learned Law Lord is focusing on the category of ‘terms implied in fact’ which, as explained above, is wholly inappropriate as a possible juridical basis for the doctrine of frustration. Secondly, whilst it may be argued that Lord Hoffmann is relying on the concept of ‘construction’, that concept is only one amongst a number of possible juridical bases and (unlike the ‘radical change in obligation’ test just referred to) does not have a practical dimension to it as well. Indeed, as I have sought to argue above, the concept of ‘construction’ is also too abstract and general even when viewed in the context of implied terms.

Conclusion

To summarise and conclude the present essay, we examined the function of implied terms in the context of gap-filling, focusing on ‘terms implied in fact’ and ‘terms implied in law’. The signal importance of the implied term (in particular a ‘term implied in fact’) is that it can be utilised by the court to achieve a just and fair result in the case at hand (and, indeed, the introduction of the concept of implied terms in English law has even been mooted by one writer as being an appropriate reform in the context of French law). However, it is precisely because the implied term involves the search for a just and fair result in situations where an allegation and/or perception of possible arbitrariness on the part of the court is possible that the legal mechanism (and resulting doctrine and tests) ought to be as clear as possible (which was in fact one of the criteria laid down by the majority of the Privy Council in the BP Refinery case).

To this end, I have argued that the ‘business efficacy’ and ‘officious bystander’ tests in relation to ‘terms implied in fact’ have served us well in the manner...

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144 See eg per Lord Radcliffe in the House of Lords decision of Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at 729. And, for more recent decisions, see eg the English Court of Appeal decisions of J Lauritzen AS v Wijsmuller BV (The ‘Super Servant Two’) [1990] 1 Lloyd’s Rep. 1 at 8 and Edwinsson Commercial Corporation v Traviris Russ (Worldwide Salvage & Towage) Ltd (The ‘Sea Angel’) [2007] 2 Lloyd’s Rep. 517 at [84]–[88] and [111]–[112]; as well as the English High Court decision of Bunge SA v Kyla Shipping Co Ltd (The ‘Kyla’) [2013] 1 Lloyd’s Rep 565 at [39]–[42].


146 See above n 134.

147 See generally the main text accompanying above nn 60–76.


149 (1977) 180 CLR 266.

150 See the main text accompanying, respectively, above nn 24 and 27.
(as well as priority) set out above. However, the relatively recent test suggested by Lord Hoffmann (viz, the Belize test) is, with the greatest respect, not an improvement upon the two aforementioned tests (as I have attempted to explain above). It results, instead, in a more abstract (as opposed to concrete and precise) test, although it is not inconsistent with the ‘business efficacy’ and ‘officious bystander’ tests. After all, as we have already seen, when MacKinnon LJ formulated the ‘officious bystander’ test, his starting-point — like Lord Hoffmann’s — was also that of construction. However, the very general and abstract nature of the Belize test is the very antithesis of the desiderata of clarity I mentioned right at the outset of this paragraph. Returning to the ‘officious bystander’ test, what MacKinnon LJ did was to build on the ‘business efficacy’ test and (perhaps more importantly) specify a practical way in which courts could imply terms ‘in fact’ via the ‘officious bystander’ test. To be sure, there will always be a measure of uncertainty not only because of the nature and functions of the implied term but also because of the myriad fact situations which will be encountered in the sphere of the application of the test itself. What is clear is that, whilst acknowledging the inevitable tension between certainty on the one hand and the need to achieve justice and fairness on the other, the law relating to implied terms is both important as it is practical.

I have been less optimistic — or at least more wary — of ‘terms implied in law’. The test for this particular category of implied terms is much broader and (more importantly) sets a precedent for all future contracts of that particular type (at least until overruled in a subsequent decision). Much (dare I say, virtually all) of the justice and fairness which are required on the facts of a given case can be achieved through the more specific (and focused) doctrine of ‘terms implied in fact’. This avoids the creation of difficult (or even dangerous) precedents for the future. Hence, for example (and as I have argued), the doctrine of good faith should (at best) be given effect to by way of ‘terms implied in fact’ (as opposed to ‘terms implied in law’). So the implication of terms ‘in law’ ought, in the final analysis, to be effected rarely — even when compared to ‘terms implied in fact’, which will themselves be implied sparingly and only when it is necessary.

I spent even less time on the concept of the implied term in relation to its more theoretical application as an underlying rationale for other (distinct) doctrines — principally, the doctrine of frustration. As elaborated upon above, whilst there appeared to be scope for the utilisation of the concept of a ‘term implied in law’ as a possible theoretical undermining for the doctrine of frustration (as opposed (in my view at least) to its less promising role as a doctrine in its own right), this was not as promising as it first appeared to be. In any event, such potential application was, admittedly, of little practical moment. What is most important (in the context of the present essay) is, in the final analysis, the fact that the implied term (especially in relation to ‘terms implied in fact’) furnishes the court with a principled basis upon which to achieve a just and fair result in the case at hand.

151 See generally the main text accompanying, above nn 24–92.
152 See the main text accompanying, above nn 60–2.
153 See the main text accompanying, above nn 60–76.
154 See above n 48.
155 See generally the main text accompanying, above nn 107–27.
156 See also generally the main text accompanying, above nn 101–6.
157 See the main text accompanying, above nn 128–37.
158 See generally the main text accompanying, above nn 128–47.