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Terms Implied in Fact Clarified in Singapore

Goh Yihan
Faculty of Law, National University of Singapore

Introduction

The Singapore Court of Appeal (the Court of Appeal) has in Foo Jong Peng v Phua Kiah Mai rejected Lord Hoffmann’s statement (articulated in Attorney General of Belize v Belize Telecom Ltd) that the implication of terms is to be approached as an exercise in the interpretation (or construction) of the instrument as a while. The Court of Appeal, however, accepted that the process of the implication of terms does involve interpretation, albeit “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)”. Its objection, then, was the adoption of what it regarded as an amorphous test of “interpretation” in place of the more specific and traditional tests of “business efficacy” and “officious bystander”, tests that the Court of Appeal regarded as “an integral as well as indispensable part of the law relating to implied terms in Singapore”. In doing so, the Court of Appeal pointed out that English case law subsequent to Belize still adopted the traditional tests when implying terms in fact, seemingly contrary to the broad tenor of Lord Hoffmann’s statement in Belize, even if his Lordship did say that the traditional tests were merely different ways of expressing the fact that implication is an exercise of interpretation.

Two questions arise from this decision and form the scope of this comment. First, is the Court of Appeal correct in saying that the English approach after Belize is inconsistent with the approach taken in Belize? Secondly, and more substantively, is the Court of Appeal correct to insist on the retention of the traditional tests to govern the implication of terms in fact in such a way that they supersede the more general test of interpretation, rather than merely being different ways of expressing that more general test?

Facts and decision in Foo Jong Peng

Before dealing with these questions, it may be useful to first understand the background of the decision at hand. Foo Jong Peng concerned the action brought

1 Foo Jong Peng v Phua Kiah Mai [2012] SGCA 55 (Foo Jong Peng). Andrew Phang J.A. delivered the judgment for a unanimous court comprising also of V.K. Rajah J.A. and Woo Bih Li J.
by the respondents to declare null and void certain resolutions removing them from their executive positions within the Singapore Hainan Hwee Kuan Association. Those resolutions had been initiated and passed at a meeting called by the appellants, who were all members of the Association. This was notwithstanding the fact that there was no rule providing for the removal of a member from an executive position before the end of the prescribed two-year term other than for misconduct, none of which had been alleged in this case. The contractual issue arose because the appellants argued that there was an implied term permitting such removal apart from misconduct within the contract between the members of the association. The Singapore High Court had declined to imply such a term, opining that members were not likely to desire constant “election battles” that could stifle the smooth running of the association.  

The appellants’ appeal to the Court of Appeal was dismissed. The court refused to imply a term that would allow the respondents to be dismissed from their executive positions in the absence of misconduct. Since there was no power otherwise to remove the respondents, the appellants’ purported removal in an earlier meeting was declared null and void. In a detailed examination of the law relating to terms implied in fact, the Court of Appeal, as already mentioned, rejected Lord Hoffmann’s use of a broad test of “interpretation” to govern the implication of terms in fact. The seeds of this holding were laid in an earlier Court of Appeal decision of MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd, 6 in which the court had rejected Lord Hoffmann’s “assumption of responsibility” test as being the appropriate one to govern contractual remoteness. The present rejection of a broad test of “interpretation” to govern the implication of terms in fact has similar undertones: in particular, it points to the Court of Appeal’s preference for using specific tests as opposed to elevating conceptual justifications to the status of otherwise impractical tests (insofar as their application is concerned). Indeed, in MFM Restaurants, the Court of Appeal had stated in obiter dicta that Lord Hoffmann’s test of interpretation results “in a lack of concrete rules (and consequent normative guidance) as well as uncertainty in the practical sphere”. 7 It also pointed out the lack of guidance “stems from the absence of a sufficiently specific set of concrete rules and principles”. Foo Jong Peng, then, was to be the case in which the Court of Appeal elaborated on the tentative views expressed in MFM Restaurants. This it undertook in three principal steps.

First, the Court of Appeal in Foo Jong Peng pointed out that the fundamental difficulty with the Belize approach was that the process of implication is “just one specific conception of the broader concept of ‘interpretation’”. 8 It stated that the process of implication “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”. 9

Secondly, the Court of Appeal held that there had been conflation of the tests governing implication and interpretation following Belize. This conflation had
occurred after Belize because, in the Court of Appeal’s view, the test of interpretation is premised on the concept of the reasonable man.12 The court pointed out that Lord Hoffmann mooted the concept of the reasonable man in the context of implied terms in his extrajudicial writings more than a decade ago.13

Thirdly, the Court of Appeal held that it was incorrect to conflate the tests and techniques that accompany interpretation and implication respectively, even if it acknowledged that the "(general) concept of 'interpretation' has much in common with the implication of terms inasmuch as both entail an objective approach".14 This was the crux of the Court of Appeal’s reasoning against the Belize approach. According to the Court of Appeal, while such a concept would work in certain areas of law, such as frustration (because it is a doctrine that applies by operation of law and does not concern the search for the parties’ presumed intention), it would not work in the sphere of implication (because this involves a search for the parties’ presumed intention).15 The conflation of the respective tests for implication and interpretation was thus to be avoided. Furthermore, in the Court of Appeal’s view, the adoption of the reasonable man (and, with it, the objective approach) does not "in and of itself, tell us how a particular term ought—or ought not—to be implied".16 In contrast, the Court regarded the traditional “business efficacy” and “officious bystander” tests to “constitute … 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".17 Moreover, in the court’s view, those tests encompass the stricter criterion of “necessity”, which may not be present if implication were governed by the test that dictates interpretation. This criterion was deemed necessary because, as the court pointed out, the court concerned cannot substitute its own view of what the contracting parties would have intended had the gap in their contract been brought to their attention for further consideration.18 Rather, using the strict criterion of necessity, the court concerned would try “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”.19

All in all, the Court of Appeal in Foo Jong Peng saw the Belize approach as only helpful “in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence)” but should otherwise be rejected in Singapore in so far as it suggests that the traditional tests are not central to the implication of terms in fact.20 In this regard, the Court of Appeal declined the opportunity to comment on a Singapore High Court decision that had interpreted the Belize approach narrowly, since that decision

15 Foo Jong Peng [2012] SGCA 55 at [32].
17 Foo Jong Peng [2012] SGCA 55 at [31].
18 Foo Jong Peng [2012] SGCA 55 at [34].
19 Foo Jong Peng [2012] SGCA 55 at [35].
is due to be heard by the same court.\textsuperscript{21} Probably of more relevance to a more international audience, the Court of Appeal also thought that the English cases decided after Belize have not been entirely uniform in their endorsement or application of the Belize approach.\textsuperscript{22} In particular, the court noted that there does not appear to be any clear statement in the decided cases as to how the reasonable man test is to be applied in the absence of any reference to the traditional tests.\textsuperscript{23} The academic literature also appeared to be equivocal in their support for Belize.\textsuperscript{24} Evidently, the Court of Appeal was concerned about the very practical question of application, so much so that it regarded cases that referred to Belize as encompassing the concept of interpretation as being unhelpful.\textsuperscript{25}

The discussion of the Court of Appeal’s reasoning in Foo Jong Peng will be approached in two main parts below. The first pertains to the last-mentioned aspect of the court’s decision, that is, its view that the English cases subsequent to Belize do not reveal a uniform view of how the Belize approach is to be applied. The second concerns the more substantive question of whether the Court of Appeal is correct in stating that the test governing implication should be kept distinct from that governing interpretation in general.

**Present English approach in implication of terms after Belize**

Although a leading textbook is not wrong in pointing out that the Belize approach has been referred to many times as the starting point for deciding whether should be implied into a contract,\textsuperscript{26} the reality is that some subsequent cases have only cited Belize without explaining exactly how it is to be applied. A brief examination of the English cases subsequent to Belize reveals at least three approaches taken with respect to that case.

**Citation of Belize without application or even undermining it**

First, some cases cite Belize at length, but do not actually apply it. For example, in Chantry Estates (South East) Ltd v Anderson,\textsuperscript{27} Jacob L.J. cited extensively from Belize, but yet, when it came to applying the test, phrased his approach as being “whether in [the relevant option agreement’s] relevant provisions as to the option period must mean what is contended for by the proposed implied terms”. He found that it did not because the option agreement worked perfectly well without the implied terms.\textsuperscript{28} In other words, he had found the existing agreement “reasonable” without the implied terms. However, this is rather different from asking what a

\textsuperscript{21} In Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2012] SGHC 118, the Singapore High Court interpreted Belize to retain the two traditional tests, although with an exclusionary gloss that the courts will not imply a term if it does not cohere with a reasonable interpretation of the contract.

\textsuperscript{22} Foo Jong Peng [2012] SGCA 55 at [37].

\textsuperscript{23} Foo Jong Peng [2012] SGCA 55 at [39].


\textsuperscript{25} Foo Jong Peng [2012] SGCA 55 at [40], referring to Procter & Gamble Co v Svenska Cellulosa Aktiebolaget [2012] EWHC 498 (Ch).

\textsuperscript{26} Sir Kim Lewison, The Interpretation of Contracts, 5th edn (Sweet & Maxwell, 2011), p.284.

\textsuperscript{27} Chantry Estates (South East) Ltd v Anderson (2010) 130 Con. L.R. 11 CA (Civ Div).

\textsuperscript{28} Chantry Estates (2010) 130 Con. L.R. 11 at [17].
reasonable man would understand the contract, less the implied terms, to mean. It
seems here that the court had evaluated the reasonableness of the contract and
concluded that it was perfectly workable without the proposed terms to be implied.
A similar example is Eastleigh BC v Town Quay Developments Ltd,29 where Arden
L.J., after citing extensively from Belize, including the part in which Lord Hoffmann
said that it is insufficient for the court to consider that the implied term expresses
what would have been reasonable for the parties to agree to, went on then to
consider exactly what the parties would have contemplated.30

Indeed, some cases purport to endorse Belize but end up citing authorities that
undermine the reasoning within. A good example of such a case is Mediterranean
Salvage and Towage.31 As Davies has pointed out,32 although Lord Clarke M.R.
predicted that Lord Hoffmann’s analysis in Belize will be very much referred to,
his Lordship did in fact refer to the judgment of Sir Thomas Bingham M.R. in
Philips Electronique Grand Public SA v British Sky Broadcasting Ltd,33 which
drew a clear distinction between the interpretation and implication of terms.
Bingham M.R. had clearly stated that the implication of contract terms is different
and more ambitious and hence had to be dealt with strictly. This is in contrast with
Lord Hoffmann’s approach which, although accompanied with the language of
necessity, nonetheless appears to be focused on the less strict criterion of
reasonableness.34 This case has since been cited as correct by the English High
Court in, inter alia,35 AET Inc Ltd v Arcadia Petroleum Ltd (The Eagle Valencia).36

Citation of Belize but preference for traditional tests

Another class of cases cites Belize but only to substantiate a preferential application
of the traditional tests, rather than as the foremost test to apply. While it is true,
as mentioned above, that Belize does not forbid the use of these traditional tests,
it is probably also true that Lord Hoffmann had intended to supersede those tests
with the broad notion of “interpretation”. An example of a case in this category is
Garratt v Mirror Group Newspapers Ltd,37 in which Leveson L.J. applied the
“officious bystander” test before saying that this approach is consistent with the
Belize approach.38 Yet the relationship between the two tests was not made clear
save for the citation of a passage from Belize that there is only one question, namely,
that premised on interpreting the instrument from the perspective of a reasonable
man. A similar case is Groveholt Ltd v Alan Hughes,39 in which an amalgamation
of the “business efficacy” and “officious bystander” tests were applied with an
special emphasis on the strict criterion of “necessity”. Belize was customarily

31 Mediterranean Salvage and Towage [2010] 1 All E.R. (Comm) 1 CA (Civ Div).
34 See also Ultraframe (UK) Ltd v Tailored Roofing Systems Ltd [2004] 2 All E.R. (Comm) 692; Port of Tilbury (London)
35 See p.245.
36See also Deutsche Bank AG v Sebastian Holdings Inc [2009] EWHC 2132 (Comm); [2009] 2 C.L.C. 908 at [48].
40 Groveholt [2010] EWCA Civ 538 at [44].

referred to but explained as placing a "superstructure of interpretation" on the conditions necessary for the implication of a terms [sic] on the grounds of business efficacy. 41 An English High Court example, among others, is that of North Shore Ventures Ltd v Anstead Holdings Inc. 42 The problem with these cases is that Belize did not only place a conceptual explanation over implication, it in fact imposed a test of interpretation that arguably superseded the traditional tests. In fact, the continued references to the requirement of necessity in these cases also go against (as will be argued below) a clear preference of "reasonableness" over "necessity" in Belize. The courts continued reference to the traditional tests, either in place or in elaboration of the Belize approach, may well evince an uneasiness over the application of a test based on "interpretation" alone.

Citation and proper application of Belize

In contrast with the earlier classes of cases, other cases have properly applied Belize. In KG Bominflot Bunkergesellschaft für Mineralöl mbH & Co v Petroplus Marketing AG (The Mercini Lady), 43 Rix L.J. properly asked if the additional implied term was "part of the intention of the parties" or whether it would "understood by reasonable merchants to have been part of its meaning." 44 Another example, among others, is Lomas v JFB Firth Rixon Inc (International Swaps and Derivatives Association intervening), in which the English Court of Appeal asked whether the contracts "mean" that the suspended payment obligation disappears on the maturity of the transaction. 45

A more realistic view?

The brief examination of just a few sample cases above show that while Belize is frequently cited, that does not by itself mean that it has been applied correctly. Indeed, rather than regarding Belize as representing the present orthodoxy, a more

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41 Groveholt [2010] EWCA Civ 538 at [45].
43 North Shore Ventures Ltd v Anstead Holdings Inc [2011] 1 All E.R. (Comm) 81 Ch D at [247].
44 See p.245.
48 Lomas v JFB Firth Rixon Inc (International Swaps and Derivatives Association intervening) [2011] 2 B.C.L.C. 120 at [57].
realistic view might be Arden L.J.'s view in *Stena Line Ltd v P & O Ferries Ltd* that the *Belize* approach is one "which the courts are probably still absorbing and ingesting" and that "[t]he implications of *Belize* on the case law on implied terms, which puts forward the different formulae referred to above, is not wholly clear". Indeed, Vos J. in *Spencer v Secretary of State for Defence* recognised that the "other cases after *Belize* do not entirely speak with one voice" in that some cases appear to view Lord Hoffmann as simply restating the existing law, whereas others thought the case to stand for a substantive departure from that existing law. This probably accords with the Court of Appeal's point in *Foo Jong Peng* that although *Belize* is frequently referred to, there remains no definitive pronouncement on the precise status of the traditional tests and, more importantly, on how the reasonable man test is to be applied in the context of implication. This does lend some strength to the Court of Appeal's view that the implication of terms should be governed by a distinct test from that for interpretation. This brings us nicely to an examination of the Court of Appeal's more substantive holding that the implication of terms cannot be governed by the same test that applies for interpretation.

**Can implication of terms be reduced to interpretation?**

*Is implication distinct from interpretation?*

The first point raised by the Court of Appeal in *Foo Jong Peng* was that implication is distinct from interpretation. Before *Belize*, some judges thought the processes of interpretation and implication ought to be kept distinct. The authors of *Chitty on Contract* thought likewise. While maintaining that there is a "certain affinity" between the processes of implication and the construction of express terms, they state that there is nonetheless a difference between the relevant principles. What accounts for the affinity is that, in both cases, the court tries to establish what the parties must be taken to have agreed having regard to the commercial purpose of the contract as a whole and the relevant background of the transaction.

However, after *Belize*, the idea that implication is a facet of interpretation is regarded having been acknowledged for some time. In this regard, commentators sometimes use Lord Steyn's speech in *Equitable Life Assurance Society v Hyman* to support the proposition that interpretation and implication are part of the same process. However, on closer reading, it is clear that Lord Steyn actually drew a distinction between three concepts: interpretation, implication and construction; he saw the former two as part of the overall concept of "construction". McMeel acknowledges that this is a different understanding of "construction" as compared with the norm, which regards both "construction" and "interpretation" to mean

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41 *Stena Line* [2010] EWCA Civ 543; [2011] Pens. L.R. 223 at [56].
43 *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch); [2012] 2 All E.R. (Comm) 480.
44 *Spencer* [2012] EWHC 120 (Ch); [2012] 2 All E.R. (Comm) 480 at [52].
45 *Foo Jong Peng* [2012] SGCA 55 at [39].
49 *Hyman* [2002] 1 A.C. 408.
50 *Hyman* [2002] 1 A.C. 408 at 459.
51 J.B.L., Issue 2 © 2013 Thomson Reuters (Professional) UK Limited and Contributors
the same thing. Indeed, although he acknowledges Lord Steyn to be emphatic that the process of implication is part of the “overall process of construction”, it is clear that the meaning that Lord Steyn attributed to “construction” is not the interchangeable equivalent of “interpretation”. For one, Lord Steyn himself stated that:

“It is necessary to distinguish between the processes of interpretation and implication. The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.”

McMeel himself notes that the process of implication “goes further and permits the court to plug what it perceives to be gaps in the express terms or explicit language of the parties’ agreement”. Thus Lord Steyn clearly regarded implication and interpretation to be different, and it is the sum of these distinct concepts that constitutes “construction”. Lord Hoffmann, on the other hand, ascribes a quite different meaning to the word “construction”. In his view, it means the same thing as “interpretation”. Thus, when he said in South Australia Asset Management Corp v York Montague Ltd that “[a]s in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting”, he regarded implication as a facet of interpretation, a view that was to become cemented in Belize. Yet this view may not represent the orthodox view before Belize.

In contrast, the prevailing orthodoxy before Belize seems to be as Sir Thomas Bingham M.R. said in Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd:

“The courts’ usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power ….”

Although not referred to by the Court of Appeal in Foo Jong Peng, this is entirely in line with its reasoning that the processes of implication and interpretation are quite distinct.

Has there been conflation between implication and interpretation?

Assuming that the processes of implication and interpretation are distinct, the next issue arising from Foo Jong Peng is whether the Court of Appeal was correct in stating that Belize resulted in a conflation of the tests that govern both processes. After all, as is well known, although Lord Hoffmann in Belize said that implication...
is a question of interpretation, he did not purport to supersede or render obsolete the traditional tests for the implications terms in fact. Indeed, his Lordship had preserved the high threshold of “necessity” pursuant to the “business efficacy” test before a term could be implied. This seemingly means that there was no conflation as the Court of Appeal had alluded to in *Foo Jong Peng*. However, although it is true that Lord Hoffmann in *Belize* did expressly say that a court might find the traditional tests helpful, the fact is that Lord Hoffmann actually undermined the strict requirement of “necessity” by referencing the criterion of “reasonableness”. As has been pointed out, the test of “interpretation”, which Lord Hoffmann says applies to the entire process of implication, broadens the traditional requirement of “necessity” in relation to the implication of terms in fact to one of “reasonableness”. This is because, according to *Investors Compensation Scheme Ltd v West Bromwich Building Society*, interpretation is the “ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. Thus the restriction which Lord Hoffmann placed on the word “necessity” in the context of the “business efficacy” test is no longer whether the implication is necessary to give effect to business efficacy, but whether the implication is necessary to convey the meaning as understood by a reasonable person. The criterion of “reasonableness” has instead become the governing test over that of “necessity”. This explains why the Court of Appeal in *Foo Jong Peng* regarded the tests governing implication and interpretation as having been conflated.

If there is conflation where there ought not to have been, then it is easy to understand why the Court of Appeal in *Foo Jong Peng* held that the approach in *Belize* should not be followed in Singapore. More to the point, while “reasonableness” itself—the underlying criterion in the *Belize* approach—is not an objectionable criterion, it is the potential uncertainty that it engenders that is open to criticism.

*Is there nonetheless room for interpretation to govern implication?*

However, it may be possible to conceive of an approach that straddles the positions taken in *Belize* (which stresses the over-arching test of “interpretation”) and *Foo Jong Peng* (which stresses the primacy of the traditional tests). This is the view that there are a variety of terms implied in fact. By this view, by no means accepted, in certain instances the courts are really “interpreting” the contract even while implying terms. This is because they are simply extrapolating from the existing material what the parties had in their minds, but left unexpressed. Some support for this may be derived from Lord Wilberforce’s speech in *Liverpool City Council v Irwin*, where his Lordship suggests that implication consists of “shades on a continuous spectrum”. He said this:

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“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.

(1) 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.

(2) 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 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 judicial trend — and I think that they were right not to accept it as applicable here.

(3) 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 although 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 desirable, way beyond sound authority.

(4) 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 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.”

This passage supports three types of terms implied in fact: first, terms implied as a matter of interpretation or, more precisely, extrapolation from the express terms as a matter of logic or obviousness. Secondly, terms implied as a consequence of specific (albeit limited) creation, here, in pursuance of the aim of achieving “business efficacy”. Thirdly, terms implied as a matter of general (again limited) creation, here, in pursuance of a broader notion of reasonableness. It suffices to note that McLauchlan, who divides terms implied in fact into several distinct sub-categories, alluded to the idea that there are distinct types of terms implied in fact. He identifies three such sub-categories: terms that are implied to give business efficacy to a contract, terms that are implied to fill gaps in an agreement intended to be binding that would otherwise be void for incompleteness, and terms that are implied as a matter of necessity. Where terms are implied as a matter of necessity, or as an extrapolation from the express terms of the contract, it may be argued that there is a case for equating it with interpreting the contract, but only in that situation.

However, it may equally be true that this does not occur all the time, particularly when courts imply individualised terms as to a reasonable price or time.

Returning to the Singapore context, it is clear that this approach does not find currency in Singapore. This is because the courts adopt the view that the traditional tests are complementary, inasmuch as the officious bystander test is the practical mode by which the business efficacy test is implemented. With the rejection of the interpretation approach in *Belize*, it is clear that the Singapore courts prefer a singular conception of implied terms in fact.

**Conclusion**

In conclusion, it is clear that the English approach towards the implication of terms in fact after *Belize* is not as uniform as is usually believed. Indeed, while many cases cite *Belize* in apparent endorsement, the actual application of *Belize* is not clearly in line with the reasoning in *Belize*. The Singapore approach in *Foo Jong Peng*, which rejects the *Belize* approach, affords a useful contrast to the supposedly uniform view in England. However, it may nonetheless be possible to adopt a middle ground between the *Belize* approach and *Foo Jong Peng* by positing a spectrum of terms implied in fact, of which one type corresponds to interpreting the contract, but others correspond to the more traditional tests, which go beyond interpretation. More broadly, although this is not a point developed above, it is also suggested that the Court of Appeal’s approach in *Foo Jong Peng* also shows a uniquely Singaporean approach to contract law—that is, the preference for clear tests supported by broad, unifying concepts. This is to be preferred over an elevation of the unifying concepts to the test itself and was demonstrated most specifically in the area of contractual remoteness and, now, the implication of terms. Such an approach is defensible and commercially practicable in so far as it achieves a balance of theoretical soundness, and the maintenance of a sense of practical balance.

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