



MARK SUTTON
ASSOCIATE DIRECTOR
HKA

COVID-19 Recovery – The Devil is in the Detail

Parties to a contract inevitably focus on the express terms of the contract and overlook implied terms. However, implied terms can substantially impact on the parties. This article centres on some common implied terms in construction contracts and how they may be construed by the courts in terms of the business efficacy test.

As the world remains in ‘lockdown’, construction contracts are delayed, disrupted, and are incurring additional costs associated with Covid-19. Existing construction contracts were not drafted with the unprecedented times we are faced with in mind, and as can be seen below, it may be difficult to incorporate implied terms to recover the cost or time associated with Covid-19. Therefore, the article also examines the importance of incorporating express terms to manage Covid-19 risks.

Implied terms can be enacted through statute and common law. Statutory obligations are those obligations that do not arise out of a contract but are imposed by law. A party to a construction contract cannot usually choose to ignore the statute law that is applicable to the construction contract.

Important statutes which could imply terms into construction contracts are:

Housing Grants Construction and Regeneration Act 1996 includes requirements for parties to construction contracts that must be complied with. The act enforces the parties right to adjudicate at any time, interim payments, notices for payment and a parties right to suspend works due to non-payment. The Act also makes “pay when paid” clauses unenforceable except when a party is insolvent. A recent case identifies that Covid-19 may not prevent adjudication proceedings from progressing.¹

During lockdown, ‘cash is king’ has never been more pertinent. The Late Payment of Commercial Debts (Interest) Act 1998 allows parties to claim interest on late payments for goods and services. Parties can also recover fair costs for recovery of the debt. However, if the contract contains a ‘*substantial contractual remedy*’ for late payment then the parties can agree to dismiss the rights to interest.²

For parties performing work with no written agreement, or where there is no agreed price or mechanism for calculating prices, statute implies:³

- Work is performed with reasonable care and skill
- Work is performed within a reasonable time
- The party executing the work will receive a reasonable payment

As related to payment, the definition of ‘reasonable’ is dependent on the facts of the case. Therefore, contractors who find themselves in this position may be at an advantage in relation to Covid-19, as when calculating what constitutes a reasonable payment they can consider

¹ Millchris Developments Ltd v Waters [2020] 4 WLUK 45

² The Late Payment of Commercial Debts (Interest) Act 1998

³ The Sales of Goods and Services Act 1982

the facts of the matter at hand (e.g. lockdown and government restriction on sites and travel).

Given the number of construction companies that ceased trading during the 2008 financial crash, unfortunately it is likely that we will see a similar trend as a consequence of Covid-19. Statute creates an entitlement for an individual, outside the contracting parties, to implement terms of that contract in his own right where the contract grants a benefit on the third party.⁴ Parties can place limits or restrictions on those rights or alternatively contract out of these provisions.

Common law or case law is capable of being implied into construction contracts. If either party wants to impose different obligations, then express terms are required.

“Do not rely on implied terms in place of a well drafted express provisions; you may not get what you had expected.”

Some interesting examples of implied common law terms and related cases are:

Carrying out the Work

During the Covid-19 lockdown, some employers have instructed contractors to suspend their work, or imposed restrictions that may prevent contractors from completing their work without disruption of some sort. When looking at extensions of time from an employer's breach, an implied term may be imposed for the employer not to prevent the contractor from proceeding with the works in a regular and orderly manner or prevent completion.⁵

Obligation to Co-operate

Common law examples of implying terms require obligation to co-operate that may be appropriate to Covid-19 issues are:

- (i). the employer will do everything possible to allow completion of the work⁶; and
- (ii). the employer must give possession to the contractor in a fair time.⁷

Completion of the Work

There is no doubt that Covid-19 has, and will continue to cause widespread disruption to projects, which may require contracts to re-sequence their work. It is a common misconception that a subcontractor will execute its work in line with the contractor's programme. However, this is not always the case, a sub-contractor is obligated to finish the work by the completion date. The method he employs is entirely at his own discretion.⁸ This may be particularly relevant where contractors require re-sequencing of work following the lifting of lockdown restrictions etc.

⁴ The Contracts (Rights of Third Parties) Act 1999

⁵ Allridge (Builders) Ltd v Grandactual Ltd (1996) 55 Con LR 51 4

⁶ London Borough of Merton v Leach (1985) 32 BLR 51

⁷ Hounslow L.B.C. v Twickenham Garden Developments (1971) Ch 233

⁸ Multiplex Constructions UC Ltd v Cleveland Bridge UK Ltd (2006) EWHC 2220

The Practicability of Implying Terms & COVID-19

Primarily, when attempting to imply terms into construction contracts the correct test is to ask if a reasonable person, viewing the contract from when the contract was established, rather than when the dispute occurs) would deem the term so obvious, that it would go without saying, that it is needed for business efficacy.⁹ This may therefore present issues for contractors wanting to imply terms relating to Covid-19, specifically where Covid-19 may have been unheard of at the time of entering the contract.

Case law identifies five conditions to satisfy the validity of an implied term¹⁰:

- it should be reasonable and equitable;
- it should be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- it should be obvious and “goes without saying”;
- it should be capable of clear expression;
- it should not contradict any of the express terms of the contract. It is not possible to decide whether a further term should be implied until the express terms of the contract have been construed.

An obstacle in implying terms because of Covid-19 events is also apparent in a 2018 case. The Court of Appeal reminded us that you cannot imply a term if, in hindsight, it makes sense to.¹¹

However, in some instances where contractors are, for example, working on verbal agreements and/or there is no agreed price or payment mechanism. The Sales of Good Act 1982 may imply terms and allow recovery of the cost and time associated with the pandemic.

Implied and Express Terms in the ‘COVID Era’

Existing contracts may, and often, include entire agreement and exclusive remedy clauses that if properly drafted can prevent terms being implied. The standard form contracts were not drafted with Covid-19 impositions in mind. It can therefore be difficult or even impossible to imply terms to existing contracts or rely on the standard forms in their unamended format to adequately accommodate Covid-19 risks in future contracts.

If the contract is silent on specific issues, this is likely to create conflict between the parties and in the event of a formal dispute terms may eventually be implied by the Courts under statute and common law. It is therefore key to ensure that all the required terms are expressly agreed in writing and obtain contractual advice when drafting agreements.

As we begin to emerge from the Covid-19 lockdown, parties should consider the new challenges Covid-19 has imposed on the industry. In new contracts, and where possible, in existing contracts (through deeds of variation) the parties should expressly identify mechanisms to avoid or allocate the risks associated with Covid-19.

The Cabinet Office has reacted to the impact of Covid-19 on existing

⁹ Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206

¹⁰ BP Refinery (Westernpoint) Pty Limited v The President, Councillors and Ratepayers of Shire of Hastings (1978) 52 AUR 20

¹¹ Bou-Simon v BGC Brokers LP (2018) EWCA Civ 1525

public sector contracts by updating its Procurement Policy Note 02/20: Supplier relief due to Covid-19 (PPN 02/20) to include guidance notes and 'FAQ's specific to construction contracts, along with model deeds of variation for the NEC3 Engineering and Construction Contract and the JCT Design and Build Contract 2016. Whilst drafted for use in the public sector, they can equally apply to private sector agreements for variation of existing construction contracts. Any amendments to the underlying contract forms would need to be considered as well as any amendments agreed outside the scope of those provided for in the model deeds.

When reviewing and drafting agreements parties need to consider that some implied terms, principally statute, cannot be ignored and will form part of the agreement. Where specific rights and obligations are to be excluded/included from the contract, clearly drafted express terms should be used. Importantly, do not rely on implied terms in place of well drafted express provisions; you may not get what you had expected.

If you require any further information, please contact Mark Sutton at marksutton@hka.com.