De Lege Ferenda (2021) Vol III, Issue i, 21–41

Interpretative, iterative, and kindred: implication in fact as contractual interpretation

Timothy Ke*

I. Introduction

The eccentric proposition that a court can make a contract on the parties' behalf by implying terms based on what it considers fair or just is, in similar or gentler terms, said to be 'almost blasphemy.'[1] Because a judge 'finds in himself the criterion of what is reasonable,'[2] the yardstick for determining contractual outcomes might become unpalatably close to being measured, not by the length of the Chancellor's foot,[3] but by the foot of a Justice of the common law. If, however, implication of terms in fact is considered an instance of contractual interpretation, a court implying a term is squarely positioned as a *reader* of a contract, not an author of one. This adjoined conception properly characterises considerations of the commercial background (including considerations of fairness and justice), ensuring due regard is had to the express terms of a contract and that implication is only performed when confidently warranted according to legal principle.

This article advocates for this adjoined conception to construction and implication, defending particularly the principles advanced by the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* ('*Belize*').[4] The once-dominant *Belize* ruling characterised implication in fact as part and parcel of contractual interpretation,

* LLB Candidate (University of Manchester). For David, Ellen, and Lily. I am grateful to the Journal's reviewers for helpful comments on earlier drafts. All errors and omissions remain entirely my own.

1 *Per* Lord Wright in the 1935 Holdsworth Club lecture, cited at *Liverpool City Council v Irwin* [1976] QB 319, 330 (Lord Denning MR).

2 ibid.

3 A proverbial shorthand pointing to the unpredictability of English equity's reliance on a judge's conscience, originating from Samuel H. Reynolds (ed), *The Table Talk of John Seldon* (Clarendon Press 1892) 61.

4 [2009] UKPC 10.

such that the many tests for implying terms in fact were given coherence by a single enquiry: whether the term would give shape to the objective meaning of a contract. *Belize* has, in the five years past, fallen out of fashion with English courts, a shift spearheaded by the 2015 Supreme Court ruling, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* ('*Marks & Spencer*'),[5] which sought to segregate the two processes, abolishing the single enquiry in *Belize*.

In efforts to revitalize the *Belize* principles, this article will cast for, and attempt to grasp, a common *raison d'être* of the two processes, namely, to give effect to the parties' presumed intentions by interpreting and fulfilling a contract's objective meaning. Part II offers, first, brief accounts of the law on interpretation and implication in fact, highlighting the significance within both processes of ascertaining the objective meaning of the parties' contract. A detailed contention will follow that the common paramountcy of contractual meaning unites the two processes as means to the same end. Part III presents a rebuttal of Lord Neuberger's arguments made in *Marks & Spencer*, which is the most significant judicial opposition to the assimilation of the two processes to date. Primary focus will be due to his Lordship's argument that the processes are *sequential* and thus separate. A perspective is advanced that perhaps too often lacks due emphasis in the literature—that implication is, like interpretation, very much an *iterative* process. It is a diligent exercise of comparing rival constructions of a contract's unspoken meaning against the other express terms and the commercial background. As an iterative process, implication in fact systematically requires that due heed is paid not only to the commercial background, but also to express provisions of a party's contract—such that the account of the processes as kindred should be welcomed, not shunned, as a matter of principle.

This article recognizes that the assimilated approach is not the current prevailing view. Several recent authorities have accepted *Marks & Spencer*'s approach,[6] but these authorities do not give independent reasons for why implication does not fall under the umbrella of interpretation. This paper addresses *Marks & Spencer* directly, defending the approach in *Belize*.

Less relevant to this article, and thus set aside, are the formulations of implied terms which do not depend upon the parties' intentions and circumstances.[7] These include, *inter alia*, terms implied by custom or common law[8] and by statute.[9]

[5] [2015] UKSC 72.

[6] E.g. *Parker v Roberts* [2019] EWCA Civ 121 [88]; *Law Debenture Trust Corp Plc v Ukraine* [2018] EWCA Civ 2026 [205]; *Sparks v Biden* [2017] EWHC 1994 (Ch) [36].

[7] *Marks & Spencer* (n 5) [15] (Lord Neuberger), [69] (Lord Carnwath); *Luxor (Eastbourne) Ltd v* Cooper [1941] AC 108, 137 (Lord Wright).

[8] E.g. *Hutton v Warren* (1836) 1 M & W 466 (HC) (fair allowance for farm labour).

[9] E.g. s.12(1), s.12(3) Sale of Goods Act 1979 (that the '[seller] has a right to sell the goods').

II. A Common Purpose—Interpreting the Objective Meaning of Contracts

A. Interpretation

Though not wholly identical, implication and interpretation of terms share a fundamental similarity as devices achieving the same purpose—that of discerning the overall objective meaning of the contract authored by the parties themselves.

The stage must first be set by briefly affirming that interpretation is, at its core, concerned with the objective meaning of the contractual language which the parties have chosen first-hand to utilize. The roots of the authoritative modern approach to interpretation are due to Lord Wilberforce in two landmark rulings.[10] In a later judgement, *Investors Compensation Scheme Ltd v West Bromwich Building Society* ('*ICS*'),[11] Lord Hoffmann neatly summarised the principles laid down in both cases, in the course of which his Lordship famously propounded that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge … available to the parties … at the time of contract.'[12] Since *ICS*, several more iterations of the principles of contractual interpretation have been handed down by the Supreme Court.[13] There do not, however, appear to be fundamental differences between the leading authorities on interpretation, with the most notable point of contention being the balance between literal interpretations adhering closely to express wording and contextual interpretations according greater weight to background material.[14]

The law of interpretation is generally seen as one of 'continuity rather than change,'[15] a view sustained by the courts' tendency to cite several of the leading cases together when speaking of the "principles of construction" and treating all such cases as authoritative.[16] One critical consensus between all aforementioned cases—and the one highlighted by the present section—is that "interpretation" is the ascertainment of the 'objective meaning of the language which the parties had

[10] *Prenn v Simmonds* [1971] 1 WLR 1381 (HL); *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570 (HL).

[11] [1998] 1 WLR 896 (HL).

[12] ibid 912.

[13] Seminal cases succeeding *ICS* include *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38; *Re Sigma Finance Corp* [2009] UKSC 2; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; *Arnold v Britton* [2015] UKSC 36; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

[14] See Hugh Beale and others (eds), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) [13-043] ("*Chitty*").

[15] *Wood* (n 13) [15].

[16] E.g. *BSI Enterprises Ltd v Blue Mountain Music Ltd* [2016] ECC 11 [38]–[39]; *Teeside Gas Transportation Ltd v Cats North Sea Ltd* [2020] EWCA Civ 503 [55]–[56]; *Systems Pipework Ltd v Rotary Building Services Ltd* [2017] EWHC 3235 [16].

chosen to express their agreement.'[17] Passages from almost all seminal cases cited above can be read in direct support of this proposition.[18]

B. Implication—belize telecom

Like what the authorities preceding it had done for interpretation, the Privy Council's seminal *Belize* ruling engrains within the process of implication the ascertainment of objective contractual meaning. As will be discussed, the weight *Belize* places on the parties' objective intentions is, in fact, not novel—and its roots can be perceived in the settled law dating over a century back.

At a high level of abstraction, the traditional legal tests habitually employed by the courts to determine whether implication is possible are recognised to be twofold.[19] The first is where the proposed term is necessary to give 'such business efficacy to the transaction as must have been intended at all events by both parties who are business men.'[20] The second is where the implied term is so obvious as to go '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!"'[21]

Crucially, within the traditional tests, there is a strong emphasis on the parties' objectively ascertained intentions. The editors of *Chitty* observe that both the "business efficacy" and "officious bystander" tests for implication are 'predicated to depend on the presumed intention of the parties,'[22] a view also reflected in the courts, both in the business efficacy[23] and officious bystander[24] contexts. Indeed, where one party lacks any knowledge of a proposed term for instance, there can be no mutual intention to include it. In *Spring v National Amalgamated Stevedores and Dockers Society*,[25] the obviousness (officious bystander) test failed on this basis—instead of responding, "Oh, of course!" to the proposed term, in all likelihood

[17] *Wood* (n 13) [10]–[11].

[18] *Reardon Smith* (n 10) 574H; *ICS* (n 11); *Chartbrook* (n 13) [33]; *Re Sigma* (n 13) [12]; *Rainy Sky* (n 13) [14]; *Arnold* (n 13) [77].

[19] More recent authorities have furnished tests for implying terms, perhaps most notably *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 (PC) wherein Lord Simon of Glaisdale advanced a five-stage test incorporating the two traditional tests just mentioned. Additional factors include: (i) whether implication would be 'reasonable and equitable,' (ii) whether the proposed term is 'capable of clear expression,' and (ii) whether any express term is liable to be contradicted by it.

[20] *The Moorcock* (1889) 14 PD 64, 68.

[21] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227.

[22] *Chitty* (n 14) [14-006].

[23] *Liverpool City Council v Irwin* [1977] AC 239, 266E.

[24] *Hughes v Greenwich LBC* [1994] 1 AC 170, 179A–B.

[25] [1956] 2 All ER 221.

the claimant would have responded, "What's that?" to the subject matter of the term. Sir Leonard Stone V-C was prepared to reject the implied term on this basis alone.[26]

Because of the considerable import of the parties' presumed intentions, it is submitted that *Belize* assumes a critical place in the patchwork of the law on implied terms preceding it. *Belize*'s approach to implied terms is holistic in nature. Lord Hoffmann's advice on the Board's behalf cautioned against treating the previous tests advanced as having a life of their own, including the familiar "business efficacy" and "officious bystander" formulations. Undue fixation on those tests would, for the Board, detract from the overarching question of implication courts are to answer: 'whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.'[27] The many tests for implied terms are therefore not to be regarded as independent hurdles 'to be surmounted,' but rather as differing expressions of the same central idea.[28] The centrality of contractual meaning within both interpretation and implication is what knots the two processes together. As pithily put by Lord Pearson, implied terms, 'though tacit, formed part of the contract which the parties made for themselves.'[29]

Marks & Spencer[30] is generally seen to have heralded a return to the law pre-*Belize*,[31] centred strictly on the two traditional tests and certain ancillary rules, such as those derived from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[32] and detached from the central question of the objective meaning of contracts. The error of this approach is discussed in Part III of this article.

C. One raison d'être

Incorporating implication within the 'superstructure of contractual interpretation'[33] enables a more nuanced understanding of the two processes—that the *raison d'être* of implication, like interpretation, is to give effect to the parties' objectively understood intentions. Two points are pertinent.

Firstly, implication is an exercise in ascertaining a contract's meaning. Sir Thomas Bingham MR (as he then was) famously observed that courts are not

[26] ibid 231D.
[27] *Belize* (n 4) [21].
[28] ibid [28].
[29] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609 (Lord Pearson).
[30] *Marks & Spencer* (n 5).
[31] See e.g. Yihan Goh, 'Lost but found again: the traditional tests for implied terms in fact' (2016) 3 JBL 231.
[32] See (n 19) above.
[33] As expressed by counsel in *Groveholt Ltd v Hughes* [2010] EWCA Civ 538 [45].

performing the 'usual role in contractual interpretation'[34] when implying terms. Indeed this holds true, but only insofar as the courts are not '[attributing] the true meaning to the language in which the parties *themselves* expressed their contract.'[35] Instead, the courts are manifesting the contract's 'true meaning' into words on the parties' behalf. This notion breathes life into Sir Bingham MR's subsequent description of implication as an exercise in 'interpolation'[36]—if the express terms are graphical points on an axis of meaning, the courts will blot additional points along the trajectory highlighted by those express terms and the admissible background. Points are never added based on fairness, but only to give effect to the interpretation with the most apparent fidelity to the graphical trajectory of the contract, because that is the best the law can do.

Because the object is thus to understand the instrument's meaning and not to improve it, the implied term is seen to represent the parties' unexpressed intentions.[37] As early as 1888,[38] this focus on reasonably understood, objective meaning has been the justificatory basis for implying terms in fact (what Kramer calls 'licence to supplement'[39]). It is immaterial that "objective" meaning contains an element of fiction when failing to align with parties' actual subjective intentions. In the English objectivity-driven law of contracts,[40] subjective intentions are not accorded the same materiality as their objective counterparts. They are fluctuating and fleeting, and there is a limit to human recollection of subjective intentions in the months or years following contract creation. Though beset by occasionally controversial consequences,[41] objective interpretation is a 'legal construction that

[34] *Philips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472, 481 (CA).

[35] ibid. Added emphasis.

[36] ibid.

[37] *Luxor* (n 7) 137 (Lord Wright).

[38] *The Moorcock* (1888) 13 PD 157, 158-159. Aff'd (1889) 14 PD 64, 64 (CA).

[39] Adam Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 CLJ 384, 396.

[40] See generally Gerard McMeel, 'The Objective Principle of Construction' in Gerard McMeel, *McMeel on the Construction of Contracts* (OUP 2017).

[41] See e.g. Paul Davies, 'Recent Developments in the Law of Implied Terms' [2010] LMCLQ 140, 144 contending that a wholly objective approach is 'dangerous' for suggesting that the 'only matter of importance is what the reasonable observer would understand the contract to mean' and that 'subjective intentions of a party are now irrelevant.' But any assertion that subjective intentions ought to be material during the construction of contracts must overcome the settled rationale for the inadmissibility of subjective intentions for that purpose, namely, that all meaningful certainty of the words of the parties' agreement would be destroyed, not least because parties pursue and agree to objective terms with differing degrees and subjects of emphasis: see *Prenn v Simmonds* [1971] 1 WLR 1381, 1385 (HL) (Lord Wilberforce). It must also demonstrate why the law should insist on according materiality to subjective intentions at the interpretation stage, when a mechanism insulating against injustice created by mechanical disregard for subjective intentions already exists—the power in equity to rectify a contract to give effect to actual subjective intentions where proper evidence can be presented of a 'real intention and a real mistake in expressing that intention': see *Inland Revenue Commissioners v Raphael* [1935] AC 96, 143 (HL).

reflects the needs of society,'[42] as seemingly accepted in leading English authorities[43] and also reflected in the German law concept of 'constructive' interpretation to fill gaps in contractual instruments.[44]

As an enquiry into the objective meaning of a contractual instrument, implication is properly described as 'an exercise in the construction of the contract as a whole.'[45] Sales J has rightly preferred the "contractual meaning" rationale over certain old cases, such as *Shirlaw v Southern Foundries (1926) Ltd*,[46] which instead took terms implied in fact to operate based on 'some free-standing principle of law.'[47] Indeed, if implication did not give effect to contractual meaning, the courts would be in want of some alternative justification for it. The fundamental rationale of implication in fact is at stake. Unlike terms implied in law, the terms courts can imply in fact are not limited by long-established custom[48] or statutory guidelines.[49] Implication in fact necessarily constitutes an *ad hoc* licence for the courts to modify contracts. It is difficult to see how such intrusive power is justified unless the modification is the product of a genuine attempt to ascertain what the parties meant themselves. After all, if judicial rewriting of contracts is so forbidden,[50] what are the courts to do but interpret the parties' own contract?

The second critical point to be understood is that implication and interpretation are not identical procedures. The Board in *Belize* itself acknowledged an important difference between the two: the question for implied terms 'is not what any particular language in the instrument means but whether, without it having been expressly stated, that is the meaning of the instrument.'[51] In a legal document, which can be expected to provide expressly for all material contingencies, the implied term's textual absence is the very reason Sir Bingham MR considers implication more 'ambitious' than interpretation.[52] The law mustn't allow this 'extraordinary power'[53] to generate mischief. Thus, there is generally seen

[42] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 148. See also Adam Kramer, 'Common Sense Principles of Contract Interpretation (And How We've Been Using Them All Along)' (2003) 23(2) OJLS 173, 176–177.

[43] E.g. *Marks & Spencer* (n 5) [21] (Lord Neuberger), [66] (Lord Carnwath); *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 (Lord Steyn).

[44] Hugh Beale and others, *Cases, Materials and Text on Contract Law* (Oxford: Hart 2010) 749.

[45] *The Reborn* [2009] EWCA Civ 531 [9] (Lord Clarke).

[46] See [1940] AC 701, 717.

[47] *F & C Alternative Investments (Holdings) Ltd v Barthlemy (No 2)* [2012] Ch 613 [272] (Sales J) (HC).

[48] E.g. *Shell UK Ltd v Lostock Garages Ltd* [1977] 1 All ER 481, 487.

[49] E.g. s.14(3) Sale of Goods Act 1979.

[50] *Synochem International Oil (London) Co Ltd v Mobil Sales and Supply Corp* [2000] 1 Lloyd's Rep 339 [29].

[51] [2009] UKPC 10 [34].

[52] Leonard Hoffmann, 'Language and lawyers' (2018) 134 LQR 553, 563.

[53] *Philips* (n 34).

to be a "necessity" threshold before terms may be implied.[54] The standard is not 'absolute necessity' but one of necessity to give a contract 'commercial or practical coherence,'[55] often expressed as 'business efficacy.'[56] Indeed, it may even be said that the standard is necessity to give effect to the parties' presumed intentions, faithful to the central question in *Belize*. As Lewison observes in his leading text,[57] the origin of the "necessity" principle was expressed as giving 'business efficacy to the transaction as *must have been intended* … by both parties.'[58] Nevertheless, implication may thus differ from interpretation insofar as the necessity test does not exist within the latter.

One criticism levelled at *Belize* is that a central question fixated on what a contract 'would reasonably be understood to mean'[59] creates the unduly lenient standard of "reasonableness" instead of "necessity."[60] It would seem such a concern is misplaced. Indeed, the Board in *Belize* emphasized from the outset that, bad as bargains may be, the courts have no general power to improve upon contracts to make them fairer or more reasonable.[61] A score of seminal rulings succeeding *Belize* affirm that the *Belize* principles kept the "necessity" requirement intact.[62] Even if it is true that *Belize* incorporates necessity as one of many factors to assess what the parties objectively meant, it must remain fatal to the implied term if it is not necessary to imply.

Moreover, contrary to what Davies suggests,[63] the presence of a necessity test does not remove implication from the umbrella of interpretation. On the contrary, *Belize* reveals that the necessity test goes further than merely asking whether a term is "necessary" to give the contract "business efficacy," i.e. to make the contract work. It also invites the court to assess whether the term is "necessary" to give effect to the contract's *objectively ascertained meaning*.[64] This is well illustrated by *The Reborn*.[65] The owners of a vessel entered a voyage charterparty with the defendant charterers. The charterparty conferred upon the charterers a sole discretion to nominate a

[54] *Luxor* (n 7) 125 (Lord Russell); *Hughes v Greenwich LBC* [1994] 1 AC 170, 179 (HL).
[55] *Marks & Spencer* (n 5) [21].
[56] *The Moorcock* (1889) 14 PD 64, 68.
[57] Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell 2011) 296.
[58] *The Moorcock* (n 56) 68 (Bowen LJ). Added emphasis.
[59] *Belize* (n 4) [21].
[60] E.g. Elizabeth MacDonald, 'Casting Aside 'Officious Bystanders' and 'Business Efficacy'?' (2009) 26 JCL 97, 99.
[61] *Belize* (n 4) [16].
[62] *The Reborn* (n 45) [15], [18]; *Geys v Société Générale* [2013] 1 AC 523 [55]; *Arnold* (n 13) [112]; *Marks & Spencer* (n 5) [62], [77].
[63] Davies (n 41) 146.
[64] *Belize* (n 4) [23].
[65] [2009] EWCA Civ 531.

port berth for the vessel to lie within.[66] During loading, the vessel was damaged by a hidden underwater projection at a nominated port berth, and the owners claimed breach of an implied term for the charterers to nominate a safe berth. The court accepted that the term was not necessary to 'make the contract work,'[67] i.e. to achieve business efficacy. For instance, a logical result could be reached via clause 20 of the charter by which the owners might be taken to agree they would take the loss if they failed to investigate the loading port's dangers.[68] Supporting that result, the word, 'safely,' was struck out by mutual agreement from clause 1 that the vessel would 'safely get and lie always afloat' at the loading port wherein it was damaged.[69] Importantly, to conclude that the implied term should be rejected, the court expressly asked Lord Hoffmann's question of what the charterparty *objectively meant*, i.e. whether the charterers 'agreed to take the risk' of the berth's unsafety,[70] and concluded, "no."

Hooley attributes the difference in outcome between *The Reborn* and the very similar case of *The Moorcock*[71] to the latter having no access to *Belize*'s "contractual meaning" approach.[72] In *The Moorcock*, the claimant's vessel was damaged by an underwater projection at the defendants' berth. To achieve business efficacy, the Court of Appeal deemed it necessary to imply a term that the defendants would take reasonable care to ascertain the safety of the riverbed. This result was owed, *ratio*, to the claimant's inevitable susceptibility to underwater dangers—the claimant was powerless during the vessel's operations to avoid contacting the ground at the defendants' berths.[73] Likewise, the charterers in *The Reborn* had sole discretion to elect at the agreed port any possible berths of their choosing, and the owners were inevitably susceptible to dangers at those berths.[74] Like the charterers in *The Reborn*, the defendants in *The Moorcock* did not have the riverbed vested in them and had no control over its state,[75] but this did not bar the implied term. In *The Reborn*, if those critical express clauses inconsistent with the proposed implied term—clauses 1 and 20, to name a couple—simply did not exist, nor the parties' motivations behind those express clauses, the proposed term may well have been readily implied. Donaldson J in *The Evaggelos Th* said, if he was faced with a 'simple' charter which 'provided that the vessel was only to go to such port or place … as might be nominated by the charterer, … I should have no hesitation in implying a

66 ibid [6], [43].
67 ibid [45].
68 ibid [42].
69 ibid [5].
70 ibid [45].
71 (1889) 14 PD 64.
72 Richard Hooley, 'Implied terms after Belize Telecom' (2014) 73(2) CLJ 315, 336.
73 *The Moorcock* (n 56) 64.
74 [2009] EWCA Civ 531 [43].
75 *The Moorcock* (n 56) 64.

qualification that the port or place had to be safe.'[76] Of course, such blindness to clauses 1, 20, and the parties' knowledge of the facts on which the implied term is based, is quite unrealistic. Presumed intention depends fundamentally on the parties' minds regarding what the transaction was to them.[77] Often the clearest and most accessible objective records of the parties' knowledge and intentions are the express provisions themselves.

The importance of express language reveals a strength of considering implication to be an exercise in contractual interpretation: it places the parties' contract front and centre. Donaldson J, above, immediately continued that he was '*not faced with a simple charter*. Any suggested implied term has to be considered against the general business background to the transaction *and the express terms of the charter*.'[78] Nor was the charter in *The Reborn* "simple." If the implied term that the nominated berths were safe was declared "necessary," fulfilling what may have been deemed "business efficacy," the result would have contradicted the charter's reasonable meaning. *Inter alia*, the omission of the warranty of safety under clause 1 pointed to a lack of any express warranty of safety, and the owners of the vessel apparently assumed the risks of damage under clause 20.

If implied terms are only justified because they give shape to the parties' objective meaning, then even an ideal as foundational as "business efficacy" must give way to the parties' objectively interpreted intentions. Interpreting contractual meaning is (or should be) the core objective within the necessity threshold itself.

D. The concept of unspoken meaning

Not every scholar is receptive to the categorization of implication within the umbrella of interpretation. Recently, it was expressed that interpretation concerns 'what is there'[79] whereas implication concerns 'inserting what is not there.'[80] Lord Sumption argues extrajudicially that '[i]mplication *fills a gap* in the written

[76] [1971] 2 Ll Rep 200, 204 (QB).

[77] *The Moorcock* (n 56) 68. See also the main text surrounding *Spring* (n 25).

[78] *The Evaggelos Th* (n 76). Emphasis added. This passage also reads in full support of the "iterative" approach to implication advocated for in Section III(b) of this article.

[79] *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) [12].

[80] *Byron v Eastern Caribbean Amalgamated Bank* [2019] UKPC 16 [22].

instrument. It is not possible to identify by a process of construction something which *ex hypothesi* is not in the agreement at all.'[81]

Whilst it is true that implied terms operate as '*ad hoc* gap fillers,'[82] it is only a gap in the express contractual wording being filled, not the contract's contextual meaning arrived at when the express terms are read in their proper commercial context. Instead of deriving meaning solely from the express terms of a document, there is a seamless bed of context from which the parties' true objective intentions may be ascertained. No acontextual statement has ever been made.[83] Because of contextual considerations, words contained within a document, whether a literary novel or a formal contract, are always capable of evoking meaning beyond the prosaic or "natural" meaning they carry. To some, the phrase, "Macbeth is unworthy," might mean that the regicidal usurper in the Shakespearean tale is unfit for the throne. But to the shipowner who named his vessel, "SS Macbeth," the phrase might have a nuanced contextual meaning—that his ship is unseaworthy. If the shipowner himself makes it known to the owner of a dockyard that "Macbeth is unworthy," his words carry a connotation that he intends to contract for repairs. The full extent of his meaning is not captured by the prosaic sense of his language.

Lord Sumption's above assertion that it is impossible to construe what is textually absent seemingly isolates the textual meaning in a contractual instrument and excludes contextual meaning, placing the latter altogether beyond the reach of construction. This does not reflect reality. Take for example the 'officious bystander' test,[84] where a bystander asks of both parties during negotiations, "Did you mean to include term *x*?" Term *x* is spelled out by the courts as an implied term if the parties respond, "But of course, term *x* goes without saying." Naturally, the parties *meant* that term *x* should have effect without having to record it expressly, as without the future conflict having arisen, the context so obviously supports it. That is contextual meaning, the fact that 'one can intend something without it crossing one's mind'[85] or without transcribing it.

Indeed, without context, words lack autonomous meaning altogether. Asking, "What is the acontextual meaning of language?" likely drums up images of dictionaries and grammar books. However, the law has always recognized dictionaries and grammars as 'only part of the material needed for interpretation.'[86] What a speaker *really* means may not be understood simply by parsing dictionary

[81] Jonathan Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (2017) 17(2) Oxford University Commonwealth Law Journal 301, 311. Added emphasis.

[82] *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 459 (Lord Steyn).

[83] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] RPC 9 (HL) [64].

[84] *Shirlaw v Southern Foundries* (n 21).

[85] Kramer (n 39) 399.

[86] Hoffmann (n 52) 560.

definitions together. In contracts, like in wider society, the admissible background assists in determining 'speaker meaning'[87] and not just word meaning. To use Wittgenstein's example, when asking someone to 'show the children a game,' this presumably does not mean 'show them how to gamble,' even if gambling is a game by definition.[88] Implied terms spell out the parties' unspoken meaning, even if parties provide no words to convey spoken meanings.

A commonly cited criticism of this theory is made by Davies: '[s]ilence is inherently ambiguous; there should be no interpretation of silence.'[89] But this is not wholly accurate. Silence may be ambiguous *ab initio*, but ambiguity does not unconditionally render interpretation inappropriate. By contrast, the facts of the case can sufficiently cure the ambiguity in silence to justify implying a term, or such justification can even be presumed in the absence of contrary evidence. For instance, when a court interprets a contract, especially a professionally drafted one, silence will usually indicate that no term is to be implied, as the drafters could reasonably have been expected to provide for all material contingencies.[90] But where, for example, an express term states that an obligation must be performed to a single party's satisfaction, the court's hesitation in the face of ambiguity is readily overturned by the sensible presumption that satisfaction will not be capriciously withheld, and the court is satisfied to imply a term to that effect.[91] Likewise, it will be an exceptional case where the very act of contracting does not give rise to an implied term that neither party may obstruct performance by the other.[92] Hence, where a contractor could not begin construction until the other party supplied him with the relevant plans, it was readily implied that the other party would supply the materials within a reasonable period to enable completion of the work by the time agreed.[93] And where a footballer was transferred by one football club to another, with a portion of the transfer price made conditional on the footballer scoring twenty goals for the receiving club, the receiving club impliedly undertook to give the footballer a reasonable opportunity to score twenty goals.[94] It will be noticed that the implied terms in such cases are comfortably of the type that would satisfy the test of "necessity" at common law, that is, they are needed to give the

87 ibid.

88 Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe tr, Oxford 1972) 33.

89 Paul Davies, 'Recent developments in the law of implied terms' [2010] LMCLQ 140, 145.

90 *Belize* (n 4) [17].

91 *Dallman v King* (1837) 4 Bing NC 105 (CtCP); *Braunstein v Accidental Death Insurance Co* (1861) 1 B & S 782 (KB).

92 *Mackay v Dick* (1881) 6 App Cas 251, 263 (HL); *Sprague v Booth* [1909] AC 576, 580 (PC); *Colley v Overseas Exporters* [1921] 3 KB 302, 309.

93 *Roberts v Bury Commissioners* (1870) LR 5 CP 310, 325.

94 *Bournemouth and Boscombe Athletic Football Club v Manchester United Football Club* (CA, 22 May 1980).

contract business efficacy and would assuredly have "gone without saying" at the negotiating table. They are valid meanings which plainly figure in the court's objective interpretation of the parties' unspoken intentions.

Moreover, there is little danger that the ambiguity in silence would produce a liberal or artificial interpretation which deviates unduly from the parties' objective intentions. Courts may only imply a term where it is 'confidently' justified upon satisfaction of the strict "necessity" threshold,[95] and are powerless to 'improve upon' contracts on grounds of reasonableness or fairness.[96] Even when interpreting express terms, 'probably 999 times out of 1000,' departure from the parties' wording is not warranted.[97] Sir Bingham MR emphasizes that implication is tangibly more stringent still,[98] and thus there is no obvious basis for imposing an additional barrier against interpretation of silence. The parties' meaning under the contract may not be express, but is ascertainable, nonetheless.

III. Addressing Marks & Spencer

Lord Neuberger delivers the majority judgement. His Lordship goes further than merely considering implication more 'ambitious'[99] than interpretation; the two are, for Lord Neuberger, altogether 'different processes governed by different rules.'[100] As a consequence, courts following the approach in *Marks & Spencer* resort to the traditional tests for implied terms preceding *Belize*, but these tests will effectively have lives of their own, no longer employed as tools for ascertaining the meaning of a contractual document,[101] as that is no longer the central question. This section provides rebuttals to Lord Neuberger's argument. An account of implication in fact as an "iterative process" is advanced—a methodical and principled exercise of putting rival constructions of a contract's (con)textual meaning against the

[95] *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605 (Scrutton LJ).
[96] *Belize* (n 4) [16] (Lord Hoffmann).
[97] *Per* Lord Hoffmann in a conversation with Kate Gibbons of Clifford Chance, reported at Kate Gibbons, 'A Conversation with Lord Hoffmann' (2010) 4 LFMR 242, 243.
[98] *Philips* (n 34) (Sir Thomas Bingham MR).
[99] ibid.
[100] *Marks & Spencer* (n 5) [26].
[101] See generally Goh (n 31).

express terms and material background considerations—and the proper way to understand the process.

A. No words to construe?

Briefly, Lord Neuberger presents a contention correspondent to that of Lord Sumption: 'the words to be implied are *ex hypothesi* not there to be construed.'[102] The breadth of this argument was addressed above, but Lord Neuberger adds that speaking of construing the contract as a whole 'begs the question as to what construction actually means in this context.'[103] With great respect, this curiously circular argument appears to ignore the point of the approach in *Belize*. *Belize* provides a functional account of construction in the context of implication. As a tool of interpretation, implication supplements a contractual instrument with implied terms which manifest its objectively interpreted, unspoken meaning. It is difficult to see why this commits the question-begging fallacy at all, even more so because implication fits squarely into Lord Neuberger's own conception of interpretation as an "iterative" process, to which discussion now turns.

B. The iterative process of implication in fact

The crux of Lord Neuberger's contention against assimilating implication with interpretation figures in the following proposition: the two processes are sequential and thus separate, in that a court cannot practically decide whether a term should be implied until it decides 'what the parties have expressly agreed' via interpretation.[104]

Courts must indeed have due regard to the express terms before terms may be implied,[105] not least because it is well-established that implied terms may not contradict express terms,[106] and thus the court must comprehensively understand the latter before considering the former. Even so, there should be no bright line between the two processes. It has long been considered important to ascertain the commercial purpose of a contract, against which rival constructions

[102] ibid [27].
[103] ibid.
[104] ibid [28].
[105] E.g. *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, 491 (Lord Esher MR); *Re Sigma Finance Corp* [2008] EWCA Civ 1303 [98] (Lord Neuberger, dissenting), aff'd [2009] UKSC 2.
[106] *Marks & Spencer* (n 5) [28].

of the contract can be compared.[107] Lord Neuberger himself emphasized that interpretation is 'something of an iterative process, namely checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences.'[108] This dictum was advanced in a dissenting speech which has proven influential, 'wholeheartedly endorse[d]' in the High Court[109] and approved in both the Court of Appeal[110] and Supreme Court.[111] Considering an implied term to simply represent another 'iterative' meaning reads Lord Neuberger's 'iterative process' theory full-circle. A court will imply a term where it is satisfied that the term represents the parties' intentions 'with confidence,' in a manner which the express terms simply fail to achieve.[112] The sequential approach and iterative approach are not mutually exclusive; implication can at once take both forms. When all relevant express terms have been construed, and deemed to plainly defy a contract's commercial purpose, implied terms serve as last-resort iterations of meaning. The court must test the implied term's meaning against, *inter alia*, commercial sense, the admissible background, and of course—the other express provisions to ensure they are not conflicted against. Indeed, the implied term can be "fashioned" to accord with express terms,[113] with the newly fashioned term being *ex hypothesi* another "iterative" meaning. The implied term is properly an iteration of meaning, but it is an intrusive iteration; hence it must be considered last.

The crucial advantage of the "iterative" approach is procedural. The value lies in encouraging the court to pay due heed to *both* of the two major considerations Lord Neuberger identified: (i) all relevant express terms, and (ii) the commercial consequences of the rival constructions.[114] Ideal interpretations of a contract will produce results aligning insofar as possible with both. There is no magic in the court's handling of the contract when such attractive interpretations are achieved.

[107] *Prenn* (n 10) 1385B (Lord Wilberforce); *Reardon* (n 10) 995H (Lord Wilberforce).

[108] *Re Sigma* (n 13) [98].

[109] *Bank of New York Mellon (London Branch) v Truvo NV* [2013] EWHC 136 (Comm) [43], [78].

[110] *Napier Park European Credit Opportunities Fund Ltd v Harbourmaster Pro-Rata Clo 2 BV* [2014] EWCA Civ 984 [31]–[32].

[111] *Arnold v Britton* [2015] UKSC 36 [77]; *Wood v Capita Insurance* [2017] UKSC 24 [12].

[112] *City Alliance Ltd v Oxford Forecasting Services Ltd* [2001] 1 All ER (Comm) 233 (CA) [13].

[113] *Dymoke v Association for Dance Movement Psychotherapy UK Ltd* [2019] EWHC 94 (QB) [60].

[114] *Re Sigma* (n 13) [98]. "Commercial consequences" can be said to include (i) the overall purpose of the clause and the document, (ii) the facts and circumstances known or assumed by the parties at the time of contracting, and (iii) commercial common sense, but (iv) disregarding subjective evidence regarding the parties' intentions: *Arnold v Britton* [2015] AC 1619 (SC) [15].

They are very often produced by diligent analyses of rival meanings, repeated until a permissible construction is found.

There have been unfortunate occasions where a court, relying on the commercial background, side-lines the express provisions in favour of an inconsistent but attractive implied term. An illustration is *Equitable Life Assurance Society v Hyman* ('*Equitable Life*').[115] In that case, the defendant and fellow policyholders entered retirement policies with the Society under which the policyholder's pension would be calculated with reference to a guaranteed annuity rate (GAR) as opposed to the market rate at the relevant time. However, the final bonus, a significant limb of the pension, was not expressly subject to the GAR but instead, under article 65 of the Society's articles of incorporation, purported to be modifiable under the absolute, sole discretion of Equitable Life's directors. Exercising this discretion, the directors lowered the GAR policyholders' bonuses to equalize with other non-GAR policyholders, intending to reflect the fact that both GAR and non-GAR policyholders contributed the same amounts initially to the pension pot.[116] At first instance, before Sir Richard Scott V-C, it was common ground that the directors' discretion was 'very wide' but not absolute: for instance, the discretion would be exceeded if the directors modified the bonuses based on irrational, improper or irrelevant factors.[117] Sir Richard Scott V-C accepted that the policyholders had a reasonable expectation that the bonus would reflect the GAR held by the policyholders, but that 'a reasonable expectation does not become a contractual right.'[118] The 'policyholders' reasonable expectations' (PRE) is a concept having wider significance in the pensions industry and for the purposes of the case, it was 'no more than one of the factors to be taken into account by the directors,' not the court.[119] Having reviewed the PRE and the contractual documents, the judge held that the directors had *not* breached their wide discretion in modifying the bonus. The manner of exercising the discretion was not deemed irrational nor improper, nor were the factors accounted for irrelevant.[120]

On appeal, however, a majority in the Court of Appeal[121] and a unanimous House of Lords[122] reversed the decision. In the House of Lords, it was accepted

[115] [2002] 1 AC 408 (HL).
[116] *Equitable Life* [1999] PLR 297 (Ch) [46], [66].
[117] ibid [100].
[118] ibid [103].
[119] ibid.
[120] ibid [110].
[121] [2000] 2 WLR 798.
[122] [2002] 1 AC 408.

that no breach of any express prohibition relating to the discretion occurred.[123] Nevertheless, the House of Lords implied a term under article 65 of the Society's articles of incorporation preventing the discretion from being exercised to bring the GAR pension below market rates. For the court, the 'self-evident commercial purpose'[124] of the GAR was to secure the policyholder from a fall in market rates, and thus the GAR policyholders' reasonable expectations would be frustrated if the pensions' value was equalized with market-based non-GAR pensions when the market rate fell below the guaranteed rate.

The term implied by the House of Lords seems to distort the natural meaning of the contractual wording, nothing of which expressly prevented the variation of the bonuses. Under the policy, the bonus was made expressly subject to allocation 'under the rules and regulations of the Society,'[125] which encompassed the broad discretion reserved by the directors 'to apportion the amount … on such principles, and by such methods, as they may from time to time determine.'[126] As Lord Grabiner writes extrajudicially, the contract 'plainly produced a workable result.'[127]

Lord Steyn's judgement did stress that the 'legal test for the implication of [a term in fact] is a standard of strict necessity.' However, as McCaughran rightly notes, Lord Steyn's statement is incomplete: strict necessity *for what?*[128] Lord Steyn's assessment of 'strict necessity' concluded that the 'implication is essential to give effect to the reasonable expectations of the parties.'[129] *Equitable Life* is the first case to place such reliance on "reasonable expectations" in satisfying the necessity threshold, and this reliance is submitted to be at odds with the rest of the law. Consider, for instance, the "officious bystander" test, which was not applied in *Equitable Life*. It may perhaps be conceded that the GAR policyholders would have responded, "Of course," to the proposed term preventing Equitable Life from lowering the bonus below market value. However, it is far from likely, let alone obvious, that Equitable Life would have responded in kind. The "reasonable expectations" concept is shaped by one party's interests and usually involves a concession by the other. "Necessity" to give effect to "reasonable expectations"

[123] ibid 452D.
[124] ibid 459F.
[125] ibid 418C.
[126] ibid 415C.
[127] Anthony Grabiner, 'The iterative process of contractual interpretation' (2012) 128(Jan) LQR 41, 58.
[128] John McCaughran, 'Implied terms: the journey of the man on the Clapham omnibus' (2011) 70(3) CLJ 607, 612.
[129] *Equitable Life* (n 122) 459H.

from what is beneficial for *one* party differs from "necessity" to give effect to *both* parties' presumed intentions, such that they would surely have agreed to the term if proposed by a bystander.[130] In so treating the 'strict necessity' requirement, the "necessity" element becomes hollow, because it is only employed to achieve what is "reasonable" from the perspective of one party's interests.

It is also improper to explain away the House of Lords' analysis as evaluating what is "necessary" to give effect to what the contract would 'reasonably be understood to mean.'[131] It is critical to understand that "reasonable understanding" here refers to fidelity to the contract's objective meaning and not to commercial reasonableness—and what the contract "reasonably meant" appears clear: the modification of bonuses fell within the directors' wide discretion reserved in article 65. Instead of deriving the contract's commercial purpose from a mixture of the express words and the commercial background as the iterative approach would require, the House of Lords in *Equitable Life* expressly set the express terms aside and considered solely the background factors surrounding the policies.[132] This formulation is apt to mislead, setting "fairness" or "reasonableness" as the touchstone instead of "necessity to make the contract work." For precisely this reason, Lord Grabiner warned of the 'temptation … [for] the court to look for (and 'find') the commercial purpose not in those clear words, but in the background to the transaction or in broader notions of (supposed) commercial common sense.'[133]

By contrast, the iterative approach to implication discourages the displacement of a contract's meaning by an abstract assessment of what is commercially fair or reasonable in the mind. The process requires that the contract be read as a whole and the way provisions interact be properly understood.[134] A brief reminder can be had to Lord Neuberger's formulation of interpretation as an iterative process, and the implication of terms in fact shall squarely be placed into this framework. When interpreting express terms, the court's inevitable point of departure is the language of the provision itself.[135] The court is subsequently prepared to conduct the iterative exercise of evaluating suggested interpretations against (i) the natural meaning of the clause and other relevant express provisions, and (ii) the commercial consequences of the rival interpretations.[136] If all competing constructions of the express terms are deemed to plainly contradict the contract's reasonably understood meaning, the court may consider the appropriateness of

[130] McCaughran (n 128) 612.
[131] *Belize* (n 4) [21].
[132] *Equitable Life* (n 122) 449E.
[133] Grabiner (n 127) 49.
[134] Konrad Rogers and Joe-han Ho, 'TAEL One Partners: contractual interpretation as an iterative process' [2015] JBL 393, 400.
[135] *Re Sigma Finance Corp* [2008] EWCA Civ 1303 [98].
[136] ibid. For detail on the types of considerations constituting the "commercial consequences," see (n 114) above.

an implied term as a last-resort iteration of meaning.[137] When a court puts the proposed implied term against the other express provisions and the commercial consequences, one of two scenarios neatly follows, and both scenarios enshrine the parties' contract as both the starting point and the guiding compass:

(i) Where the contract does provide expressly on a topic, it will seldom be the case that a term will be implied, the co-existence of an implied and express term on a single subject being an unlikely phenomenon.[138] Indeed, courts have 'no power to improve upon the instrument,'[139] a prohibition which is fully forceful when the parties' express terms elicit a clear result, even if that result lacks fairness or wisdom.

(ii) Where the contract is silent on a topic, likewise, the 'most usual inference is that nothing is to happen.'[140] Even if a term is nevertheless declared necessary to imply, there is little risk of a judicially creative result because no implied term can contradict any express term in the contract. This is not only a matter of logic, as implied terms plainly contradicting express terms will not figure in a reasonable interpretation of the document, but of authority.[141]

The iterative process is underscored by a single enquiry: mindful of the express terms, and with the commercial background properly characterised, what is the objectively interpreted meaning of the parties' contract? Where an implied term is at issue, the court takes assistance from our notional "officious bystander," the "business efficacy" concept, the strict test of "necessity," and other analytical tools developed by the common law.[142] But these are employed as *tools*, nothing more ambitious, in order to answer the single decisive enquiry of what the terms *actually are*, detached from the court's view of what they ought to be. This approach harmonizes with the widely accepted proposition that the modern approach to interpretation is underscored by guiding principles, not rigid rules.[143] As opposed to wooden rules, which might lead to opposite results depending on

[137] The need to consider an implied term as an iterative meaning will likely be obvious with little deliberation where the conditions necessary for implying a term are present.

[138] *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch) [48], aff'd [2019] EWCA Civ 1290 [33].

[139] *Belize* (n 4) [16]. See also *Trollope* (n 29) 609 (Lord Pearson).

[140] ibid [17].

[141] E.g. *Marks & Spencer* (n 5) [28]; *BP Refinery* (n 19) 26; *Duke of Westminster v Guild* [1985] QB 688, 700.

[142] E.g. whether implication would be 'reasonable and equitable,' whether it is 'capable of clear expression,' and not contradictory to any express term: *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–83 (Lord Simon of Glaisdale).

[143] See *Chitty* (n 14) [13-042].

which rule is preferred,[144] principles guide the court through the increasingly labyrinthine considerations surrounding contemporary commercial disputes, drawing upon the manner 'which any serious utterance would be interpreted in ordinary life.'[145] Considering an implied term to be another "iterative meaning" and an 'interpretative technique'[146] keeps intact the significance of textual fidelity and allows the court to apply red ink to a contract only when it is assuredly obvious that the parties must have intended the effect of the term. Such guiding principles underpinning implication in fact indeed seem to be paradigms of "good interpretation."

IV. Conclusion

Progress for a truly principled account of the implication of contractual terms is made in earnest if it is considered in light of the objectives it endeavours to achieve. Unlike in torts, all contractual liability is voluntarily undertaken.[147] The implication of terms in fact is a valid enterprise only because it is a means of putting the parties' objective intentions into practice. When cast into the throes of complex factual and legal matrixes surrounding modern contract law litigation, there are two cementing principles advocated by this article from which the courts may draw assistance.

First, a court is thoroughly a *reader*, not an author, of contracts, and it must approach the task of implying terms in fact accordingly. It ought to be concerned only with discovering the parties' objective intentions by analysing the express contract, the admissible evidence, and notions of commercial sense in a process properly described as 'an exercise in the construction of the contract as a whole.'[148] No matter how tempting the result, the court will exceed its remit if it implies a term on grounds of fairness or reasonableness,[149] which is part of the trouble of erroneously considering implication in fact to be justified by free-standing principles of law.[150] On the contrary, implication in fact is an inevitably intrusive, necessarily *ad hoc* licence for the courts to modify contracts. The soundest justification for implication in fact which can overcome its ambitious nature is instead its capacity, as an instance of contractual interpretation, to fulfil the

[144] ibid.
[145] *ICS* (n 11) 912G.
[146] *Marks & Spencer* (n 5) [71] (Lord Carnwath).
[147] *The Achilleas* [2008] UKHL 48 [12] (Lord Hoffmann).
[148] *The Reborn* [2009] EWCA Civ 531 [9] (Lord Clarke). See Part II(C).
[149] See Part II(C) and Part III(B).
[150] See Part II(C).

parties' own objectively interpreted intentions.[151] In treating implication in fact as a process of contractual interpretation, the court should be confident that it is not only possible, but proper, for implication in fact to involve an interpretation of a contract's unwritten contextual meaning where the express terms are silent on a critical issue.[152] Never should an obligation which did not arise from the parties' own hands crystallize as a term implied in fact.

Second, the implication of terms in fact ought to be an "iterative process,"[153] just as the interpretation of express terms is widely accepted to be. The iterative process knows only a single trajectory.[154] The process demands that all relevant express terms are accounted for and the interplay between them understood. It demands that the commercial background to transactions and commercial sense are properly characterised and that their subordination to the express terms is appreciated as a plain fact. With this, the context is set. Rival interpretations of a contract's express terms are considered against this context for their suitability. Should all competing interpretations of express terms be deemed inappropriate, the court considers an implied term as a last-resort, but true, iteration of meaning, faithful to the same interpretative, iterative exercise. The iterative account should be celebrated as a formula which properly conceptualizes all competing considerations before the court on its seldom uncomplicated, often laborious, and always solemn task of implying terms in fact.

The judgement of the Privy Council in *Belize* represents a welcome endeavour giving practical substance to the doctrinal justification of terms implied in fact. It has, peripherally, also provided a well-considered, enjoyable, and empowering framework upon which this article's central thesis and the analysis of implication in fact as an iterative process in Part III was constructed, for which the author is grateful. Only time will tell if the venture in *Belize* strikes home, and whether a court of law will again declare that implication in fact and interpretation are, in truth, kindred.

[151] ibid.

[152] See Part II(D).

[153] See Part III(B).

[154] As much as it is 'an iterative process,' interpretation is also 'essentially one unitary exercise': *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (SC) [21], [28]; *Arnold v Britton* [2015] AC 1619 (SC) [76]–[77].