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The Officious Bystander Test Revisited; Special Reference to Implied Terms in PAM and PWD 203A Standard Form Contracts

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Abstract: For a term to be implied by law, the conditions and requirements must be clear and known to the people. Under the Officious Bystander Test, a term which is left to be implied and need not be expressed must be something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'. Due to the practices in construction industry where parties entered contracts by adopting the standard form contracts, there will be issues where after the contract was entered, the parties realized there are certain terms which they presumed and assumed covered in the contract but were not expressly stated. This paper discusses the application of Officious Bystander Test in the building contract and whether the application of implied term should be by an inference or implication of the courts. Research methodology that has been adopted in this paper is doctrinal and statutory analysis.

Key words: Implied Term · Building Contracts · Malaysia

INTRODUCTION

According to the Supreme Court, the law on implied terms must be obvious as to go without saying or simplified can be known as officious bystander test and business efficacy test [1]. There is a misinterpretation of the decision in the case of *Belize and others v Belize Telcom Ltd (Belize)* which is not properly can be regarded as authoritative for aguide in law making. However, even the facts of the case relate to a property transaction, the basic of the test will be taken as guidance in implying terms into various contracts especially in the contract of employment [2].

In the Belize case, the test for implying terms has been decided into two tests that commonly used in determining the contract either it is should be implied or not which are:

- Business Efficacy Test; the term that has been proposed will be implied if it is fitted to the test in the contract available like in the case of *Moorcock*.
- Officious Bystander Test; the term that has been proposed will be imposed if it has shown the obvious on the terms proposed or in other words, the proposed terms must be firmed without further explaination which later that will be questionable among the parties involved, like the case of *Shirlaw v Southern Foundries*.

To ensure that the rights and parties involved, the mentioned test will be carried to justify their case. These two tests have been applied in the standard form of contracts but however, there are few issues that need to be taken seriously as the requirements and rules changed accordingly which have been imposed by the government and authority.

As general information, standard form of contract can be known as a pre-prepared contract which legally binding between two parties, the Employer and the Contractor. It is in printed form and published by an authority or body of the industry, which is recognized by both parties. The standard form can be considered as non-negotiated contract because all the terms and conditions of the contract has been set out earlier and are not subject to further negotiation or amendment. As the standard of work is concerned in line with the application of standard form of contracts, the contractor's basic obligation is to comply with the terms of the contract. Most of formal building or engineering contracts contain an initial express obligation of the contractor in some such

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words as to "carry out and complete the works in accordance with the contract". This is in fact, dual obligations that are both to carry out and to complete the works [3].

The terms of contract include both express terms such as the requirement of contract that work shall be of the standards described in the bills and implied terms, referring to the principle that all materials shall be of 'satisfactory quality'[4] . It was too often that contractors believe that liability is limited to what is written in the contract which is a crucial misconception. There are many areas of contractual liability which are implied and not expressed [5]. Practically, this implied contractual liability might be the contractor's obligation to perform its work in a good workmanlike manner. Therefore, even when dealing with contractual liability, the contractor is often subject to a scope of liability which is usually different from, the written contract and often more comprehensive.

DISCUSSION

In a construction contract, a contractor undertakes to do works and supplies materials impliedly, including [6]:

- To do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner
- To use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind and free from defects. (In the case of goods not described, or not described in sufficient detail, there will be reliance on the contractor to that extent, and the warranty
- Below will apply); c) that both the workmanship and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is additional to that in (a) and (b), and will only become relevant, for practical purposes in any dispute, if the contractor has fulfilled his obligations under (a) and (b)).

In addition to the principal express or implied obligation to complete the construction, there are express reference to "substantial completion" or "practical completion" in formal English-style contracts which often used as definitions in formal contracts to donate the begin of the maintenance or defect liability period. This is also significant to secure the release to the contractor of the first portion of any "retention moneys". The law relating to implied terms is now well established in local case law. There are in fact two main categories of implied terms at common law, viz, "terms implied in fact" and "terms implied in law", respectively. Such terms are "gap-fillers" by which the courts fill in gaps in contracts on the basis that, in the case of a "term implied in fact", the contracting parties would have intended the particular gap in question to be filled, and, in the case of a "term implied in law", the gap concerned ought to be filled on broader policy grounds.

In general, what is contemplated by these expressions is a state of apparent completion free of known defects which will enable the employer to enter into occupation and make use of the project, with the result that they will usually bring any possible liability of the contractor for liquidated damages for delay to an end. The scheme of this type of contract thus contemplates the commencement of a period when the employer enters into occupation but at the end of which any then known omissions or defects will be made good by the contractor [6].

In Malaysia, the architect may be derives his powers relying on two documents which are the Standard Forms of Building Contracts and also the agreement that will be excuted him with the employer [7]. The architect will be appointed by the only one of the parties that involved in the construction contract and simultaneously, he must bound all of the terms in his contract of employment but, he assumedly needs to be more independent duties to both parties even in the beginning he just signed the agreement only for the purpose of the construction contract itself. This obligations must be followed even he has no any legal relationship between the contractor and other third parties. In this case, he can be considered to oblige the obligation to the employer and owes a duty of care to other persons who were under the contacts which are involved in the construction project and he will be assumed that he will accept the responsibility voluntarily [8].

According to the standard form of construction contract, sub-clause 15.1 of PAM 2006 form of contract specifies that the works shall be deemed to be practically completed if the architect is of the opinion that all necessary works specified by the contract have been completed and the defects existing in such works are "de minimis" [9] . Clause 45(a) of JKR 203 form of contract specifies that the contractor is responsible for any defect, imperfection, shrinkage, or any other fault which appears during the Defects Liability Period, which will be six (6) months from the day named in the Certificate of Practical Completion issued, unless some other period is specified in the Appendix [10].

The need for caution when implying a term into a contract is important. Too low a standard would undermine the principles of freedom of contract and the contracting parties' autonomy. Another case can be an example for implying a term as written contract which is the case of *Taki Engineering Sdn Bhd v Dynasty Streams Sdn Bhd* [11]. The court held that on the issue of whether there were one or two contracts, the Court found to be sound the trial judge's reasoning and reliance on trite law that where there is a written agreement, the parties are accordingly bound. Such a written agreement could not be varied by oral evidence, but only by mutual consent and in written form. The best practice will be in having a detailed written contract in place and agreed between the parties to avoid the issues faced by Taki. In fact it will be shocking to know how often in reality contractors actually commence and sometimes even complete the works pursuant to a simple letter of appointment, with the agreed formal contract, if any, is signed between the parties at a later date.

The facts in Belize, though interesting, are relatively unimportant, and shall not be treated in detail here. What is most important about the case is the general approach that the Privy Council took to the implication of contractual terms in fact [12]. Lord Hoffmann, in a characteristically lucid judgment, sought to resolve several contentious issues that have frequently shadowed this area of the law. The summaries of lord Hoffmann's reasoning are as follows:

- The court has no power to improve upon an instrument it is asked to construe, whether that instrument is a contract, a statute or a company's articles of association. The court thus cannot introduce terms to make the instrument fairer or more reasonable. Instead, it concerned only to discover what the instrument means.
- That meaning is not necessarily what the actual parties to the instrument would have intended. Rather, it is the objective meaning which the instrument would convey to a reasonable person having all of the background knowledge which would reasonably be available to the audience to whom the instrument is addressed. This objective meaning is conventionally called the intention of the parties or of Parliament.
- The question of implication arises where an instrument does not expressly provide for what is to happen when an event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.
- Occasionally, the reasonable addressee of the instrument will conclude that the only meaning which the instrument can have is that something is to happen in response to the relevant event. In that case, the court is said to imply a term as to the response.
- However, the implication of the term is not an addition to the instrument, but only spells out what the instrument means. In other words, the 'implication of a term is an exercise in the construction of the instrument as a whole. This is supported by both logic (since a court has no power to alter what an instrument means) and authority.
- It follows that in every case of implication, the single question is whether the implied provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.
- This single question has been expressed through various formulations in the past, including whether the implied term is: (1) 'necessary "to give…. . business efficacy to the [contract.'" (as per The Moorcock) [13]; (2) "so obvious that it goes without saying" (as per the "officious bystander" test from *Shirlaw v. Southern Foundries (1926) "Ltd.)* [14]; or (3) together with these two tests, "reasonable and equitable," "capable of clear expression" and does "not contradict any express term of the contract" (as per *B.P. Refinery (Westernport) Pty Ltd. v. Shire of Hastings*[15]*)*. However, these formulations should not be regarded as separate tests, but simply a collection of different ways for expressing the single question framed above [16].'

Lord Hoffmann warned against the dangers of treating the "officious bystander" test as something more than an alternative way asking what a reasonable person would understand the instrument to mean. In his view:

> "Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926) Ltd* [17] is celebrated throughout the common

law world…. . But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant" [18].

There is an authority in the local context which suggests that the 'business efficacy' and [the] 'officious bystander' tests can be utilized interchangeably, thus signaling that there is no real difference in substance between the two tests this authority suggesting that these two tests are cumulative for example, the Malaysian Federal Court decision of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [19]. It might well be that the approach from complementarity may be very close, in practical terms, to this suggested approach. However, the former could nevertheless still lead to different results and, in any event, does not comport with the background described briefly above. Finally, there is some authority suggesting that both the 'business efficacy' and the 'officious bystander' tests are not only different but that the criterion of 'necessity' is only applicable to the former test (see the Malaysian High Court decision of *Chua Soong Kow & Anak-Anak Sdn Bhd v Syarikat Soon Heng* (sued as a firm) [20].

In other terms, it can be stated that a few of the cases above indicate that a person performing professional services may be liable concurrently in contract and in negligence unless the terms of the contract precluded the tortious liability. There was no sound basis for reading an implied term into every contract to the effect that the relationship of the parties was to be governed by the law of contract only. However, the parties may, by virtue of the terms of their contract, exclude or modify the common law duty. Any contractual exclusion of a duty of care needs to be explicit or to emerge in the contract as a matter of necessary implication.

The broad view is that where persons have entered into a contractual relationship their liability is to be governed by the terms of the contract and nothing else. Such a view was based on the notion that the parties intended or must be presumed to have intended, that the contractual terms which they agreed to would be definitive of their liability one against the other.

CONCLUSION

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

So that, it can be said that it is an important judgment which re-states the law on implied terms and is therefore relevant to drafting contracts or contractual disputes.

This case in Belize reinforces the current judicial trend against implying in terms into a contract unnecessarily. The judgment confirms that courts and litigants can safely argue for an implied term on the basis of "business efficacy" or the "officious bystander" test, without inciting an appeal about the correct formulation for finding an implied term.

Therefore, there should be no granted that all of the terms may be considered as an implied terms such in line with the reasonableness, certainty and notoriety. Besides, terms may be implied through common law or statutes and lastly, through courts, there are business efficacy test and officious bystander test to determine the status of the term. In short, it can be said that the officious bystander test is actually should be the inference to the court because there is the last resort to overcome the problem occurs.

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