CHAPTER 10 IMPLIED TERMS

SECTION 4: TERMS IMPLIED BY THE COURTS

(a) TERMS IMPLIED IN FACT

Pages 345 – 346 (dealing with the relationship between interpretation and implication and the test for implication of a term into a contract as a matter of fact)

See also *Duval v 11 - 13 Randolph Crescent Ltd* [2020] UKSC 18, [2020] 2 WLR 1167 where Lord Kitchin (giving the judgment of the Supreme Court) stated

25. The parties therefore disagree fundamentally about the proper interpretation of the terms in the leases which Dr Duval and Mrs Winfield hold. Accordingly, the starting point must be to construe those terms in context, that is to say to ascertain the meaning which they would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties to each lease in the situation in which they were when the terms of those leases were agreed.

26. Once the process of construing the express words is complete, the issue of an implied term falls to be considered. The rationale for this two-stage approach was explained by Lord Neuberger of Abbotsbury in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742, paras 27 and 28: until one has worked out what the parties have expressly agreed, it is difficult to see how one can decide whether a term should be implied into a contract and, if so, what it is…..

51. The correct approach to the implication of terms was recently stated by Lord Neuberger…in *Marks and Spencer plc v BNP Paribas*, paras 14-32. It is sufficient for present purposes to note first, that the express terms of the contract must be construed before one can consider any question of implication; secondly, that the term to be implied must be necessary to give business efficacy to the contract or so obvious that "it goes without saying"; and thirdly, that the term to be implied must be capable of clear expression. A way of assessing whether a term is necessary to give business efficacy to a contract is to consider whether, without the term, the contract would lack commercial or practical coherence.

CHAPTER 19 DURESS

SECTION 4: ECONOMIC DURESS

Times Travel (UK) Ltd v Pakistan International Airlines Corporation [2019] EWCA Civ, [2019] 3 WLR 445 (see **page 627** of the textbook)

The Supreme Court has granted leave to appeal from the decision of the Court of Appeal. No date has, as yet, been set for the appeal to be heard.

CHAPTER 25 DAMAGES

SECTION 8,

PART (a) REMOTENESS (pages 847-872)

In *Attorney-General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18 Lord Hodge reviewed some of the leading cases on remoteness of damage in contract (*Hadley v Baxendale* (1854) 9 Exch 341 (**page 848**), *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 (**page 851**) and *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (**page 854**)) and concluded as follows:

'From this brief review of the main authorities, the position may be summarised as follows.

31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.

32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.

33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.

34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually

contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.

35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as the result of a breach of their contract is a factual one.'

One interesting aspect of the judgment of Lord Hodge is the way in which he distinguished the decision of the House of Lords in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 (**page 862**). He stated that it was a case concerned with 'the recoverability of damages caused by unusual volatility in the market or questions of market understanding' (which was very different from the facts of the present case) and, more significantly, that the assumption of responsibility test was 'a further limitation on contractual damages' or 'a further restriction on recoverability' (see paragraphs [26] and [29] respectively of the judgment). This seems to suggest that it is a test which is distinct from the test to be applied when considering whether a loss is too remote a consequence of the breach. As such, it is doubtful that it is consistent with the intent of the judgments of Lord Hoffmann or Lord Hope in *The Achilleas*.

On the facts of the case the parties entered into two contracts relating to a proposed water reclamation treatment plant. The first contract was a Design Build Agreement ('DBA') under which the contractor agreed to design and build the plant for the government (the employer). The second contract was a Management, Operation and Maintenance Agreement ('MOMA') under which the government engaged the contractor to manage, operate and maintain the plant at the site. The government breached the terms of the DBA by refusing to provide an appropriate site for the plant so that it was not built. The contractor brought a claim for damages which included its loss of profit under the MOMA. The issue before the court was whether that loss was too remote.

The Privy Council concluded that it was not too remote. The factors relied upon in reaching this conclusion included the following. First, the two contracts were entered into between the same parties on the same day and they both related to the same plant. On this basis the losses under the MOMA were losses that could reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it and so fell within the second limb of the rule in *Hadley v Baxendale*. Second, the government when it entered into the DBA knew and intended that the performance of each party's obligations under the DBA would lead to the commencement of the MOMA. Third, the Design Build Documents which were incorporated into the DBA were the same documents as had been incorporated into the MOMA. Fourth, there was no express term in the DBA which limited the government's liability in damages to the contractor's loss of earnings under the DBA and there had been no finding in earlier proceedings that such a term was to be implied into the DBA. The losses were therefore not too remote a consequence of the breach of contract.