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IMPLIED OBLIGATIONS OF NON-HINDRANCE AND CO-OPERATION IN CONSTRUCTION CONTRACTS

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Introduction

Claims for loss and expense are commonplace in the construction industry. They usually depend upon express or implied terms dealing with co-operation, the provision of information and acts of prevention or hindrance. Although many modern contracts make express provision for such matters, some do not, especially at subcontract level and below. Even where express provisions do apply, they may often leave room for the operation of implied terms, either by an express reservation or in residual matters not expressly dealt with.

In these circumstances, it is perhaps not surprising that there are a number of authorities which consider the nature and extent of the implied terms necessary to support a claim for loss and expense. This judicial attention has not, however, resulted in a settled view of the law: a number of inconsistent positions have emerged, both within and across different jurisdictions. Moreover, there would appear to have been very little academic consideration to date of this area of the law in the United Kingdom.

The purpose of this paper is to review the construction-related authorities concerning implied terms of co-operation and non-hindrance and to contrast the different approaches in law taken to implying such terms. It is hoped that, by paying close attention to the general principles under which terms may be implied, a clearer picture of the law will emerge than presently exists in the cases.

In a paper of this length it is not possible to consider all the issues which arise with regard to co-operation and non-hindrance. Precedence is given to an overview of the applicable authorities, both with regard specifically to construction and (insofar as relevant) to implying terms generally. This forms

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[1] This article is derived from an essay awarded first prize in the Society of Construction Law Hudson Prize essay competition 2009.

the first and second sections of the paper. The remaining two sections briefly consider two debates of some importance which arise on the present authorities: firstly, whether such terms ought to protect the 'regular and orderly' performance of construction contracts; and secondly, whether they ought to impose liability for matters beyond the control of the parties.

The authorities

There is considerable diversity within the construction-related cases about implying terms as to non-hindrance and co-operation. The 1999 Court of Session decision in *Scottish Power v Kvaerner Construction (Regions)* represents for the most part the greatest extent to which terms of this sort have been implied.[2] Taken therefore as a 'high water mark', it provides a useful point of departure from which to consider the other authorities.

Scottish Power concerned a mechanical and electrical subcontract which afforded 'no guarantee of continuous work' and required the subcontractor to 'carry out the Sub-Contract Works in accordance with any timetable specified in [the Appendix] and in such stages and sequences as the Main Contractor may from time to time require'. Despite these provisions, Lord Macfadyen implied the following three terms into the subcontract:

1. The main contractor will not hinder or prevent the subcontractor from carrying out its obligations or from executing the subcontract works in a regular and orderly manner, subject to the main contractor's express power to regulate the timing and continuity of the subcontract works (the Non-Hindrance Term).
2. The main contractor will take all steps within its power reasonably necessary to enable the subcontractor to carry out its obligations and to execute the subcontract works in a regular and orderly manner, subject to the main contractor's express power to regulate the timing and continuity of the subcontract works (the Co-operation Term).
3. The main contractor will provide or arrange for the provision of such full, correct and co-ordinated information concerning the subcontract works as is known or ought reasonably to have been known by the main contractor to be required by the subcontractor, in such a manner and at such times as is reasonably necessary to enable the subcontractor to carry out its obligations under the subcontract (the Information Term).

The cases deal with variant forms of these three implied terms, which this paper refers to in their generic sense by the names above (substituting 'employer' and 'contractor' for 'main contractor' and 'subcontractor' where necessary).

2 *Scottish Power plc v Kvaerner Construction (Regions) Ltd* 1999 SLT 721 (CSOH).

Turning first to the Non-Hindrance Term, the authorities conflict over whether protection should be given to the 'regular and orderly', or in other cases 'expeditious' or 'economic', carrying out of the works. It appears to be accepted that some form of Non-Hindrance Term ought to be implied where express terms permit; however, the more conservative authorities restrict the scope of the term to hindrance merely of contractual performance or of the execution of the works,[3] rather than of 'regular and orderly' performance.

In favour of including protection for 'regular and orderly' performance is the leading English authority, *London Borough of Merton v Leach*,[4] and those cases which follow it.[5] The point was also conceded in *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (No 2)*.[6] There are, however, a number of decisions opposing such an extension,[7] including dicta, albeit brief, from the Court of Appeal on an application for permission to appeal.[8] The objection these decisions raise is usually that such a widely defined implied term presupposes rights or obligations as to the regular and orderly performance of the contract which do not exist.[9] In a number of other cases, claimants appear to have voluntarily limited the scope of their pleaded Non-Hindrance Term, despite the decision in *London Borough of Merton v Leach*.[10]

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3 It is sometimes said that there is a material difference, when considering the Non-Hindrance Term, between performance of 'the contract' and of 'the work', although Judge Thayne Forbes QC rejected this argument in *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 55 BLR 1 (OR) at 57.

4 *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 BLR 51 (Ch).

5 *Allridge (Builders) Ltd v Grand Actual Ltd* (1997) 55 Con LR 91 (OR) at 121; and *Scottish Power* (note 2).

6 *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (No 2)* (unreported, Official Referees' Business, 22 April 1998) at para 168 (reported on other points at (1998) 14 Const LJ 329).

7 *The Jardine Engineering Corporation v Shimizu Corporation* (1992) 63 BLR 96 (High Ct of Hong Kong) at 117; *Nala Engineering v Roselec* [1999] CILL 1534 (TCC); *Floods of Queensferry Ltd v Shand Construction Ltd* (unreported, TCC, Judge Humphrey LLoyd QC, 30 March 1999) at para 45 (other parts of the judgment reported at [1999] BLR 319).

8 *Nala Engineering v Roselec* (unreported, Court of Appeal (Civil Division), Sedley LJ, 20 October 1999), referring to the first instance decision of Judge Wilcox QC: '… reduced, as it now is, from the overlarge implied term which the judge, I think quite rightly, rejected to the much narrower implied term which he accepted …'.

9 See, for example, Kaplan J in *Jardine v Shimizu* (note 7) at 117: 'To include the words I have omitted could well lead to an internal conflict in this clause. The time for performance is that provided for by the contract provisions and nothing else.'.

10 See for example *Glenlion Construction Ltd v The Guiness Trust* (1987) 11 Con LR 126 (OR) at 131; *Davy Offshore* (note 3) at 55; and *J&J Fee Ltd v The Express Lift Co Ltd* (1993) 34 Con LR 147 (OR) at 157.

Even among those authorities which protect 'regular and orderly' performance in their Non-Hindrance Terms, there is a divergence of opinion as to whether 'regular and orderly' (or some such similar language) should be allowed within the Co-operation Term. *London Borough of Merton v Leach* appears to suggest that such words ought *not* to be included.[11] However, the decision is less than clear on this point and subsequent cases have interpreted it in opposite directions.[12]

Aside from the inclusion of 'regular and orderly' performance, there appears also to be a question mark over whether a Co-operation Term ought generally to be implied at all. Although such a term has been implied in a number of cases,[13] it was rejected by Judge Humphrey LLoyd QC in *Floods of Queensferry v Shand Construction*.[14] The concern would appear to be that to imply a term requiring co-operation generally, with respect to all matters touching the contract, may go beyond what the parties had intended.[15] Thus in *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd (No 2)* Judge LLoyd noted:

> 'The degree of co-operation that is required depends in each case on the obligation undertaken and not on what is reasonable …'.[16]

The Information Term has been said to be merely one particular application of the Co-operation Term.[17] That said, there is no small divergence over how it should be formulated. In *Neodox v Borough of Swinton and Pendlebury*, Diplock J (as he then was) held that the term required information to be

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11 Vinelott J in *London Borough of Merton v Leach* (note 4) at 80:'However, the courts have not gone beyond the implication of a duty to co-operate whenever it is reasonably necessary to enable the other party to perform his obligations under a contract.'.

12 Contrast *Allridge (Builders) v Grand Actual* (note 5) at 121 with *Floods of Queensferry* (note 7) at para 43. See also the claimants' submission in *Bernhard's Rugby Landscapes* (note 6) at para 170.

13 *London Borough of Merton v Leach* (note 4) at 81; *Davy Offshore* (note 3) at 59; *Allridge (Builders) v Grand Actual* (note 5) at 121; and *Scottish Power* (note 2). And in addition admitted in *Holland Hannen & Cubitts (Northern) Ltd v Welsh Health Technical Services Organisation* (1981) 18 BLR 80 (OR) at 117; and *J&J Fee* (note 10) at 157.

14 *Floods of Queensferry* (note 7) at para 45.

15 The principle in *Mackay v Dick* (1881) 6 App Cas 251 (HL Sc) (discussed further below) strictly applies only to matters agreed to be done which can only be effectually done if both parties concur in doing them. The general requirement of the Co-operation Term to do all things necessary to enable performance may go further than this principle, but is said to be justified on the basis that construction contracts of their nature require close co-operation in general: see *London Borough of Merton v Leach* (note 4) at 81.

16 *Bernhard's Rugby Landscapes* (note 6) at para 175.

17 *London Borough of Merton v Leach* (note 4) at 81.

provided at a time which was in all the circumstances reasonable, taking into account the point of view of the contract administrator, his staff and the employer, as well as the point of view of the contractor.[18] Such a broad formulation has been criticised,[19] and was not followed in either *J&J Fee v The Express Lift Co*[20] or *Scottish Power*,[21] where information was required at such times as was reasonably necessary for the performance of the contract.[22] The version of the Information Term adopted in *Scottish Power* also required information to be 'full' and 'co-ordinated', in accordance with the actual or reasonably assumed requirements of the contractor.[23]

All three types of implied term potentially touch upon conduct which may not be within the control of the parties to the contract. This is particularly the case with subcontracts. The cases on this issue, as on others, do not speak with one voice. The main contractor in *Jardine v Shimizu* was held strictly liable under a Non-Hindrance Term for delay caused to subcontractors by the employer.[24] Non-Hindrance and Co-operation Terms implied in a number of other cases were, however, limited to matters within the control of the party concerned.[25] The decision in *Scottish Power* in addition distinguished between the Information Term on one hand, to which strict liability applied, and the Non-Hindrance and Co-operation Terms on the other, which were limited to actions within the main contractor's control.

One final point concerns the effect of express terms which touch upon the subject-matter of implied terms. The approach adopted in *Scottish Power*, as set out above, is to imply a term insofar as it is not inconsistent with the express terms. That is the approach adopted in most of the authorities, and arguments to the contrary – that an express entitlement or obligation not

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18 *Neodox Ltd v Borough of Swinton and Pendlebury* (1958) 5 BLR 34 (QB) at 41ff.

19 See Stephen Furst QC and Hon. Sir Vivian Ramsey (eds), *Keating on Construction Contracts* (8th edition Sweet & Maxwell, London 2006) para 3-053, cited from the first supplement to the 4th edition in *Glenlion Construction* (note 10) at 137.

20 *J&J Fee* (note 10) at 158.

21 *Scottish Power* (note 2); formulation set out above.

22 The principle from *Neodox* was however adopted in *Allridge (Builders) v Grand Actual* (note 5) at 121.

23 Requirements for 'full', 'co-ordinated' and 'comprehensive' information were initially pursued in *London Borough of Merton v Leach* and *J&J Fee v The Express Lift Co*, but were withdrawn by consent: note 4 at 81 and note 10 at 157 respectively.

24 *Jardine Engineering v Shimizu* (note 7) at 116ff. See also *London Borough of Merton v Leach* (note 4) at 81, where Vinelott J considered that a building owner would be liable for any breach of the Co-operation Term by its architect.

25 *Ductform Ventilation (Fife) Ltd v Andrews-Weatherfoil Ltd* 1995 SLT 88 (CSOH) at 91; *Allridge (Builders) v Grand Actual* (note 5) at 121; *Scottish Power* (note 2) at 726; *Nala Engineering* (note 7) at 1535.

entirely covering the subject prevents any implication at all – have not met with success.[26] Thus, in *Jardine Engineering v Shimizu* an express entitlement to extend time did not prevent the implication of a Non-Hindrance Term permitting the recovery of damages for delay.[27]

The basis for implying terms

As with any consideration of implied terms, it is necessary first to examine the basis upon which terms may be implied. Unfortunately, the authorities discussed above do not follow a consistent pattern even at this level, perhaps prompting one judge to note:

> '[*such terms*] are regularly put forward, not always with regard to the criteria by which a term is to be implied in a contract'.[28]

For present purposes, the distinction of most importance is that between terms implied by law and those implied in fact, or 'ad hoc', as is sometimes said. The former class of term is implied into all contracts of a particular class and will apply unless the express terms of the given contract or the surrounding circumstances suggest otherwise. Such terms are said to arise as a 'legal incident' of the contract entered into. An 'ad hoc' implication, on the other hand, must be found to arise on the circumstances of the particular case, either to satisfy the demands of 'business efficacy' or because the term is so obvious as to go without saying.

One of the leading cases on terms implied by law is *Liverpool City Council v Irwin.*[29] There Lord Wilberforce characterised such implied terms as a 'fourth category', distinct from those implied by reference to 'business efficacy' or obviousness. For this category the judge considered that 'the court … is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what

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26 Save perhaps in *Rosehaugh Stanhope (Broadgate Phase 6) plc v Redpath Dorman Long Ltd* (1990) 50 BLR 69 (CA) at 87, where a loss and expense provision permitting acts of prevention to be valued, certified and added to the contract sum was thought to be sufficient to displace any right to damages through breach of an implied Non-Hindrance Term.

27 *Jardine v Shimizu* (note 7) at 116ff. See also *London Borough of Merton v Leach* (note 4) at 82ff (Information Term implied to supplement the express JCT provision); *Davy Offshore* (note 3) at 59 (Co-operation Term implied to supplement an express co-operation provision); also Lord Macfadyen in *Scottish Power* (note 2) at 725I: '… I see no reason to exclude the possibility that they chose to express only so much as was necessary to modify to the extent desired the provision which would have been taken to apply if they had remained wholly silent'.

28 Judge Humphrey LLoyd QC in *Bernhard's Rugby Landscapes* (note 6) at para 174; also in *Floods of Queensferry* (note 7) at para 44.

29 *Liverpool City Council v Irwin* [1977] AC 239 (HL).

must be implied.' It is clear that in considering what must be implied along these lines, Lord Wilberforce had in mind a different kind of necessity than the business efficacy of the *Moorcock* doctrine.[30] He adopted in particular the distinction made by Viscount Simonds in *Lister v Romford Ice and Cold Storage Co*:

> '... between a search for an implied term such as might be necessary to give 'business efficacy' to the particular contract and a search, based on wider considerations, for such a term as the nature of the contract might call for, as a legal incident of this kind of contract.'[31]

Lord Cross also adopted Viscount Simonds' distinction:

> 'When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type … some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a *prima facie* rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert. Sometimes, however, there is no question of laying down any *prima facie* rule applicable to all cases of a defined type but what the court is being in effect asked to do is to rectify a particular … contract by inserting in it a term which the parties have not expressed. Here … the court … must be able to say the insertion of the term is necessary to give – as it is put – 'business efficacy' to the contract …'[32]

It is apparent that whilst both judges adopted the distinction made by Viscount Simonds in *Lister*, there is some tension between their views over how a term comes to be implied by law, Lord Wilberforce emphasising necessity and Lord Cross emphasising reasonableness. It nonetheless appears to be clear from the speeches in *Irwin* that once a term comes to be implied by law it will apply in all cases, subject only to the express terms of the contract and the surrounding circumstances.[33] Questions about whether it is necessary or reasonable to imply the term in any given case appear to fall away.[34]

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30 *The Moorcock* (1889) 14 PD 64 (CA).

31 *Irwin* (note 29) at 255A, Lord Wilberforce referring to *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL) at 579 (Viscount Simonds).

32 *Irwin* (note 29) at 257Hff.

33 *Irwin* (note 29): Lord Wilberforce at 256F: '… unless the obligation to maintain is, in a defined manner, placed upon the tenants … the nature of the contract, and the circumstances, require that it be placed on the landlord.'; Lord Cross of Chelsea at 260C: 'If local authorities wish to avoid any contractual liability to their tenants with regard to the repair and lighting of the common parts … they must expressly exclude it.'); and Lord Edmund-Davies at 266F (talking of the *Moorcock* doctrine of necessity and of reasonableness): '… had such continued to be the case presented on the appellants' behalf to your Lordships' House, for my part I should have rejected it. … As an alternative … an obligation is placed upon the landlords in all such lettings of multi-

This peculiar character of terms implied by law is usefully illustrated by the example cited in *Hudson* of a building contractor employed and relied upon both to design and construct works.[35] The editor notes that whilst such a contract is subject to an implication by law of a warranty of fitness for purpose, such a term is in practice often resisted and may not therefore reflect the intention of the parties in any given transaction.[36]

The authorities discussed in the previous section, as mentioned, do not approach the basis for implying terms in a consistent manner. For example, each of the Non-Hindrance, Co-operation and Information Terms implied in *London Borough of Merton v Leach* was there held to be implied by law within Lord Wilberforce's 'fourth category'.[37] On the other hand, there is Court of Appeal authority for subjecting a suggested Non-Hindrance Term to the test of business efficacy,[38] and there are decisions to the same effect with

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storey premises as are involved in this appeal by the general law, as a legal incident of this kind of contract …'.

34 See also Hugh Beale (General Editor), *Chitty on Contracts* (30th edition Sweet & Maxwell, London 2008) at para 13-003 (page 887): 'The court is, in fact, laying down a general rule of law that in all contracts of a defined type … certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement. Such implications do not depend on the intentions of the parties, actual or presumed, but on more general considerations'.

35 In Duncan Wallace, *Hudson's Building and Engineering Contracts* (11th edition Sweet & Maxwell, London 1995) paras 1.181-1.182.

36 The editors of *Keating on Construction Contracts* (note 19) at para 3-038 appear to limit the category of terms implied by law to those implied by statute, such as under the Housing Grants, Construction and Regeneration Act 1996. The principle of implication by law enunciated in *Irwin* (note 29) is grouped together with terms implied under the *Moorcock* doctrine under the heading 'Necessary Implication' (para 3-048). Both types of implication are suggested to be subject to tests of necessity and reasonableness in any given case. It is submitted, with respect, that this overlooks the distinction made in *Irwin*.

37 *London Borough of Merton v Leach* (note 4) at 77, 80 and 83. See also Lawton LJ in *Martin Grant & Co Ltd v Sir Lindsay Parkinson & Co Ltd* (1984) 29 BLR 31 (CA) at 41: 'There is … by implication of law, an obligation to co-operate with one another', although the implication was there excluded by express terms. And Judge Humphrey LLoyd QC in *Floods of Queensferry* (note 7) at para 44: 'A term as to co-operation arises as a matter of law …'.

38 Bingham LJ in *Rosehaugh Stanhope* (note 26) at 87: note that although *Mackay v Dick* (note 15) is referred to, the term proposed – at 85 – was simply to not hinder or prevent performance. The Non-Hindrance Term was also considered by reference to business efficacy in *Jardine v Shimizu* (note 7) at 109 and by Judge Thayne Forbes QC in *Davy Offshore* (note 3) at 48: 'I accept that none of the alleged implied terms are 'legal incident terms' and I accept the submission that each of the alleged implied terms must satisfy the conditions specified … in *BP Refinery*.' [Lord Simon in *BP Refinery v Shire of Hastings* (1978) 52 AJLR 20 (PC) at 26].

regard to Co-operation[39] and Information[40] Terms. The decision in *Scottish Power* is notable in that the court was prepared to justify the implication of a Non-Hindrance Term both by law and on business efficacy grounds.[41]

Despite this divergence among the construction-related authorities, the general law as to implied terms of non-hindrance and co-operation is somewhat clearer. The principle of non-hindrance in particular is, according to the Court of Appeal in *Barque Quilpué Ltd v Brown,* implied by law in every contract where it is not expressly excluded:

> '… in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract, in the same way as you import into every contract a stipulation that the various things which are to be done by the one party or the other are, if no time is specified, to be done within a reasonable time. In each of these cases that may be called an implied contract. It must not, however, be supposed that the law readily implies any special affirmative contract; I think the law very rarely indeed does or ought to imply such a contract.'[42]

The 'special affirmative contract' distinguished by Vaughan Williams LJ in this passage needs itself to be differentiated from cases where a contract cannot be effectively carried out without co-operation by both parties: the so-called '*Mackay v Dick*' term.[43] Where both parties have agreed that something is to be done which in fact cannot be done unless they both act, then it is implied by law that both *will* act (i.e. the subject of a portrait must give sittings to the artist).

An implied obligation of co-operation under the principles of *Mackay v Dick* is therefore of its nature restricted to co-operation with regard to the express terms of the contract. It is not a freestanding obligation to co-operate, or to preserve for the other party the benefit of the contract. This much was made clear in *Luxor (Eastbourne) Ltd v Cooper*,[44] the House of Lords holding, on

39 *Davy Offshore* (note 3) at 48.

40 Diplock J in *Neodox* (note 18) at 41: 'It is clear … that to give business efficacy to the contract …'; also *J&J Fee* (note 10) at 153ff.

41 *Scottish Power* (note 2) at 725.

42 Vaughan Williams LJ (with whom Romer and Stirling LJJ agreed) in *Barque Quilpué Ltd v Brown* [1904] 2 KB 264 (CA) at 271-272. See also Asquith LJ in *William Cory & Sons Ltd v London Corporation* [1951] 2 KB 476 (CA) at 484.

43 *Mackay v Dick*: note 15.

44 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 (HL).

the facts, that there was no implied term to the effect that a principal would not prevent its agent earning a commission. The agent's commission depended upon the completion of a sale which the contract did not oblige the principal to complete. By contrast, it was an express condition of payment in *Mackay v Dick* that the machine there to be delivered was first to be tested on a 'properly opened up face' of a railway cutting. For certain reasons the purchaser failed to allow such a test and was therefore in breach of its implied obligation to co-operate.

This appears to be the extent to which terms as to non-hindrance and co-operation will be implied by law into construction contracts.[45] Any implied term which seeks to go further must, it seems, be justified on other grounds, such as business efficacy or obviousness. Such additional terms might be said to be truly positive in nature. For example, the Co-operation Term set out at the beginning of this paper, taken from *Scottish Power*, requires the taking of positive steps to secure the regular and orderly execution of the works. On the facts of *Scottish Power*, such a term went beyond mere co-operation with any express obligations undertaken by the subcontractor. The term was therefore truly positive or freestanding and would appear to be the sort of 'special affirmative contract' referred to by Vaughan Williams LJ in the quotation above from *Barque Quilpué*.[46]

Such truly positive implied terms are, as mentioned, usually to be implied in fact by reference to business efficacy or obviousness. Achieving this is however notoriously difficult, as *Mona Oil Equipment and Supply Company Ltd v Rhodesia Railways Ltd* makes clear. In rejecting the implied term pleaded – that the defendants would do nothing to prevent or obstruct the fulfilment of a specific condition of payment – Devlin J noted:

> '… the principal, if not the only, criterion by which this implication should be judged, is whether, in the absence of the proposed term, the performance of a condition by the other party, generally the one involving his right to payment, could be prevented with impunity. … The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be

45 There would appear to be some uncertainty whether the principle in *Stirling v Maitland and Boyd* (1864) 5 Best and Smith 840 (KB) – that a party shall do nothing of his own motion to put an end to a state of affairs necessary to give effect to a contract – is implied by law. The principle was quoted in support of an implied obligation upon an employer to secure the re-appointment of a contract administrator in *Bernhard's Rugby Landscapes* (note 6) at para 174. The House of Lords in *Southern Foundries (1926) Ltd v Shirlaw* [1940] 1 AC 701 was divided over whether the principle applies as a matter of law or is to be implied only insofar as the circumstances of the case require: compare Viscount Maugham at 712 with Lord Atkin at 717. See also *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) at paras 113, 114 and 125.

46 *Barque Quilpué*: note 42.

considered in relation to the business efficacy of the contract. But it is not necessarily the most important and it is certainly not the only matter. There are many decided cases in which it has not prevailed.'[47]

'Regular and orderly' performance?

The analysis above leads to a number of conclusions with regard to the debate over protection for 'regular and orderly' performance. To begin with, a term protecting 'regular and orderly' performance does not appear to have been implied by law before *London Borough of Merton v Leach*.[48] The decision in *Barque Quilpué*,[49] upon which the finding in *Merton* appears to have been based, does not support such an implication in law. Vaughan Williams LJ in *Barque Quilpué* refers to performance itself, not to regular or orderly performance.[50]

A term protecting the 'regular and orderly' performance of a contract could therefore be implied, it seems, only by reference to the tests of business efficacy and obviousness. However, implying a term on that basis is difficult. If the express terms of the contract do not entitle or require the contractor to carry out the works in a regular and orderly manner, then it is hard to see why there will ordinarily be the sort of business necessity required to support a term implied in fact. It would seem to be sufficient in ordinary circumstances for the parties to, in the words of Devlin J, 'rely on the desire that both of them usually have that the business should get done.'[51]

This position nonetheless has the potential to operate harshly, as *Nala Engineering* illustrates.[52] There a sub-sub-subcontractor was faced with a grossly disorganised worksite and found itself without sufficient available

47 *Mona Oil Equipment and Supply Company Ltd v Rhodesia Railways Ltd* (1949-50) 83 Lloyds LR 178 (KB) at 186. This historically stringent approach to terms has perhaps been ameliorated somewhat by the Privy Council's decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11. There Lord Hoffmann, giving the court's judgment, cautioned against a strict application of the five well known tests in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (PC), including business efficacy and obviousness, noting that the overriding test in every case is 'whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean'.

48 *London Borough of Merton v Leach*: note 4.

49 *Barque Quilpué*: note 42.

50 This point appears to have been appreciated in *Scottish Power* (note 2) at 725, where Lord Macfadyen stopped short of extending the principle in *Barque Quilpué* (note 42) to imply the words 'regular and orderly', preferring instead to imply those words on the grounds of business efficacy.

51 *Mona Oil* (note 47) at 187.

52 *Nala Engineering*: note 7.

work. Nine weeks after the contractual completion date, it felt compelled for these reasons to determine the contract and seek damages. The implied term alleged sought to protect the 'efficient and economic' carrying out of the works, but was rejected by the court as not meeting the test of business efficacy. The delay and disruption encountered, whilst exceptional and loss-making, did not allow the strict requirements for implying terms in fact to be met.

An alternative approach, which might have assisted the claimant in *Nala Engineering*, could have been to rely upon the Non-Hindrance Term implied by law which was found in *Barque Quilpué*.[53] Although such a term does not directly protect the 'regular or orderly' carrying out of work, it does protect against delay in general terms. In *Barque Quilpué*, the plaintiff's ship was delayed by the defendant making additional engagements with other ships to load at its colliery. The plaintiff alleged this amounted to a breach of the Non-Hindrance Term implied by law and claimed for delay. The Court of Appeal dismissed the claim, but not by reference to any limitation in the term to be implied. Rather, it held that the term was to be applied by reference to the circumstances known to both parties at the time the contract was made, which in that case included an awareness that delay of the sort complained of was likely. Vaughan Williams LJ (with whom Romer and Stirling LJJ agreed) described his approach to the application of the implied term as follows:

> 'I think we ought in such a case to take into consideration the facts which were in the knowledge of both parties. In *Carlton Steamship Co v Castle Mail Packets Co*, Rigby LJ … said:
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> > 'I do not think that a delay which arose from a contingency the probability of which must have been perfectly well known to and contemplated by the shipowners when they entered into the charterparty, can be considered unreasonable.'[54]
>
> In the present case it is, in my opinion, plain that, at the time when the shipowners entered into this charterparty, under which they were to load in 'regular turn,' meaning thereby the regular colliery turn, they must have known, not only that the charterers would have prior engagements which might delay the colliery turn of this particular ship, but also that a delay of the ship for loading for a number of days – from forty to fifty days – was not impossible or even unusual in loading at this port from the collieries which exclusively supply it. The plaintiffs must have contemplated that there would very probably be such a delay.'[55]

53 *Barque Quilpué*: note 42.

54 [editor's footnote] *Carlton Steamship Co v Castle Mail Packets Co* [1897] 2 QB 485 (CA) at 494.

55 *Barque Quilpué* (note 42) at 272-273.

This, it is submitted, marks a significant difference in approach from that taken to claims based upon terms implied in fact. For such claims, the court must consider whether the contract would fail to have business efficacy without the term proposed. Delays which are not contemplated by the parties may well be held, upon such an analysis, to fall within the business risks accepted by the parties, and so not deserving of special protection by an implied term. Such was the finding in *Nala Engineering*.[56] By contrast, the term implied by law referred to in *Barque Quilpué* is always to be implied; but its content, insofar as delay is concerned, is limited to matters which were not contemplated by the parties. Accordingly, the fact that one party has caused a delay which was not contemplated at the time of contract is, of itself, irrelevant to a claim based upon terms implied in fact, but is the very essence of a claim based on the term implied by law in *Barque Quilpué.*

This difference in approach manifests itself also in the rule that terms implied by fact must be capable of clear or certain expression. For example, in *Trollope & Colls v North West Metropolitan Regional Hospital Board* four possible variants of a proposed term were identified, meaning that none enjoyed the certainty and clarity of expression required to imply a term in fact.[57] Terms implied by law, however, are intended to avoid such difficulties of formulation and operate instead with flexibility. This contrast was illustrated in *Irwin*,[58] where Lord Wilberforce noted that the Court of Appeal had been faced with five alternative formulations of the proposed term and for that reason rejected all of them. The judge considered that, for terms sought to be implied by law, such an approach was not 'the end, or indeed the object, of the search'.[59] Similar remarks were also made by the Lords in *Lister*, where Viscount Simonds noted that, were he to attempt to apply the tests for implying terms in fact, he 'should lose [him]self in the attempt to formulate [the term] with the necessary precision'.[60]

The difference between these two approaches shows that a claim for delay based upon terms to be implied in fact will often depend upon the inclusion of certain words within the term, such as 'regular', 'orderly', 'expeditious' and 'economic'. If these words do not meet the requirements of business efficacy, as was the case in *Nala Engineering*,[61] the claim will fail. Such debates fall

56 *Nala Engineering*: note 7.

57 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 (HL) at 609Gff.

58 *Irwin*: note 29.

59 *Irwin* (note 29) at 255.

60 *Lister* (note 31) at 576.

61 *Nala Engineering*: note 7.

away for claims made under the term implied by law in *Barque Quilpué*.[62] For those claims, attention is instead to be directed toward whether the circumstances which have occurred were within the contemplation of the parties. In *Nala Engineering*, the original contract period had more than doubled at the time of the sub-sub-subcontractor's purported determination. Whether such delay could have founded a breach of the term implied by law depends upon the circumstances surrounding the making of the subcontract in that case. However, the above analysis suggests that one might reasonably expect there to come a point where continued delay amounted to breach of the term implied by law, notwithstanding the absence of any term, or of any breach of a term, implied in fact.

Strict liability?

An additional obstacle for the sub-sub-subcontractor in *Nala Engineering v Roselec*[63] was that its immediate counter-party, the sub-subcontractor, was not itself to blame for the disruption that had occurred. This provided a defence, as the court held that the Non-Hindrance Term was limited to matters within a party's control.

The court's decision appears to have been based upon considerations of business efficacy.[64] Such a finding was also made in *Scottish Power*,[65] where Lord Macfadyen considered that a term implying strict liability, whilst potentially reasonable, was not necessary in the business sense. One can well understand that the parties may hold different views over liability for matters not within their control.

Whether such a position applies in relation to a term implied by law is however a different question. Such terms are not subject to the test of business efficacy and there would appear to be sound reasons why the term referred to in *Barque Quilpué*[66] might apply to matters outside a party's control. Firstly, contractors and subcontractors, generally speaking, receive access or information through their immediate contractual counter-party and it is difficult to think why acts of others which cause such a counter-party to prevent or hinder performance should not in principle constitute a breach. Secondly, unless the counter-party has agreed different terms in its superior contract, it ought to be indemnified for the breach on the same basis.[67]

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62 *Barque Quilpué*: note 42.

63 *Nala Engineering*: note 7.

64 Judge Wilcox QC in *Nala Engineering* (note 7) at 1535: 'There is no necessity in terms of commercial efficacy to further imply the words …'.

65 *Scottish Power* (note 2) at 726.

66 *Barque Quilpué*: note 42.

67 *Scottish Power* (note 2) at 726.

Thirdly, any facts known to both parties which bear upon the issue – such as an express exclusion of liability in the superior contract – can be taken into account to prevent the implication.

Such an approach appears to gather support from the House of Lords in *Young & Marten v McManus Childs*.[68] That case concerned warranties of quality and fitness for purpose, implied by law, in circumstances where an employer had nominated the supplier of certain materials. In accepting that the contractor ought to be strictly liable for deficiencies in quality, the House placed reliance on the contractual chain of liability which usually exists for construction activities:

> 'Under our principles of jurisprudence … the practical business effect and just solution to this type of breach of contract is that each vendor or contractor of labour and materials should warrant his supply of materials against patent and latent defects so that by the well-known chain of third party procedures the ultimate culprit, the manufacturer, may be made liable for his defective manufacture.'[69]

The Lords accepted that this general rule was subject to the express terms of the contract and the surrounding circumstances. As Lord Reid noted:

> 'It would make a difference if that manufacturer was only willing to sell on terms which excluded or limited his ordinary liability under the Sale of Goods Act, and that fact was known to the employer and the contractor when they made their contract. For it would then be unreasonable to put on the contractor a liability for latent defects when the employer had chosen the supplier with knowledge that the contractor could not have recourse against him.'[70]

This approach toward the implication of terms by law appears to be consistent with that in *Barque Quilpué*[71] where, as already mentioned, the term implied by law was made subject to the facts known to both parties at the time the contract was entered into. In *Nala Engineering*,[72] it does not appear from the report that any relevant superior contract excluded liability for delay, or otherwise contained express terms inconsistent with the implied term referred

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68 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454 (HL).

69 Lord Upjohn in *Young & Marten* (note 68) at 475. See similar comments at 466 (Lord Reid), 470 (Lord Pearce, with whom Lord Pearson agreed) and 479 (Lord Wilberforce).

70 *Young & Marten v McManus Childs* (note 68) at 467A. See similar comments at 471B (Lord Pearce, with whom Lord Pearson agreed), at 474C (Lord Upjohn) and at 478E (Lord Wilberforce). See also *Gloucestershire County Council v Richardson* [1969] 1 AC 480 (HL).

71 *Barque Quilpué*: note 42.

72 *Nala Engineering*: note 7.

to in *Barque Quilpué*. Had therefore the delay encountered otherwise amounted to a breach of that term, there would appear to be little reason why the breach ought to be excused due to a lack of control. On such a hypothesis, a similar claim might then have been made up the contractual chain against the subcontractor ultimately responsible for the delay.

Conclusions

The analysis above suggests that one way in which the divergence of authority in this area of the law might be resolved is through a closer examination of the principles under which terms may be implied into contracts. In particular it would appear that the difference between terms implied by law and terms implied in fact or 'ad hoc' may result in real differences in the way in which claims for loss and expense are established.

One key difference between terms implied by law and those implied by fact is that the former rely for their precise operation upon the circumstances surrounding the making of the contract in question. Such terms therefore operate with a flexibility which is not applicable to terms implied in fact, which in order to be implied must be capable of clear and certain expression.