Cambridge Law Journal, **73(2)**, July 2014, pp. 315–349
doi:10.1017/S0008197314000415

IMPLIED TERMS AFTER *BELIZE TELECOM*

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ABSTRACT. *It is five years since Lord Hoffmann delivered the advice of the Privy Council in* Attorney-General of Belize v Belize Telecom Ltd. *In that landmark decision, Lord Hoffmann assimilated contractual interpretation and implication with the result that when implying a term in fact the court must ask a single question: "is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" It might have been thought that five years was enough time for the English courts to come to terms with this approach.* Belize *is regularly cited in the courts, but the judges appear to struggle with its application. There remains uncertainty as to the roles (if any) to be afforded to the traditional "business efficacy" and "officious bystander" tests, and the requirement of "necessity". This article seeks to re-evaluate* Belize *five years on. It concludes that* Belize *provides a doctrinally coherent and workable basis for identifying and giving effect to the intention of the parties through the implication of terms. However, the article questions whether it remains necessary, or even helpful, to continue to make reference to tests based on "business efficacy" or the "officious bystander", as the tests distract from the central idea advanced by Lord Hoffmann and have led to uncertainty in its application.*

KEYWORDS: *Implied terms, business efficacy, officious bystander, necessity, interpretation, reasonableness.*

I. INTRODUCTION

The decision of the Judicial Committee of the Privy Council in *Attorney-General of Belize v Belize Telecom Ltd.*[1] is both significant and controversial. It is significant because it seeks to assimilate contractual interpretation and implication. Lord Hoffmann, giving the advice of the Board, said that "the implication of a term is an exercise in the construction

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[1] [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [16]–[27], hereafter referred to as *Belize*.

of the instrument as a whole".[2] It is controversial because, following Lord Hoffmann's approach, it seems that the implication of terms in fact is no longer to be regarded as a separate process with its own rules and restrictions, which have traditionally been associated with the application of the "business efficacy" and "officious bystander" tests.[3] After *Belize*, there is only one question for the court to answer: "is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"[4]

In *The Reborn*,[5] which gave the Court of Appeal an early opportunity to consider *Belize*, Lord Clarke M.R. predicted that Lord Hoffmann's analysis "will soon be as much referred to as his approach to the construction of contracts in *Investors Compensation Scheme v West Bromwich Building Society*".[6] The prediction was accurate.[7] A Westlaw UK search of *Belize* reveals around 160 English cases in which the decision was cited.[8] But the reception that *Belize* has received from the courts has been mixed.[9] The judges appear to struggle with the roles (if any) to be afforded to the traditional "business efficacy" and "officious bystander" tests and, in particular, whether there is still a requirement of "necessity" which restricts the implication of terms in fact. In *Stena Line Ltd. v Merchant Navy Ratings Pension Fund Trustees Ltd.*,[10] Arden L.J. took the view that the *Belize* decision was one "which the courts are probably still absorbing and ingesting". This is no doubt true but more worrying is her Ladyship's additional observation that "[t]he implications of *Belize* on the case law on implied terms, which puts forward the different formulae referred to above, *is not wholly clear*".[11] This level of uncertainty means, as Cooke J. has observed, that the application of *Belize* principles "often gives rise to major issues".[12]

Belize has also polarised opinion amongst the academic commentators. Some have welcomed the decision as bringing clarity to the various tests for implied terms in fact,[13] or see it as merely encapsulating

[2] Ibid., at [19].
[3] This assumes that *Belize* is only concerned with terms implied in fact and not those implied by law or by custom and usage. The legitimacy of this assumption is considered later in this article.
[4] Ibid., at [21].
[5] *Mediterranean Salvage & Towage Ltd. v Seamar Trading & Commerce Inc., The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 at [8].
[6] [1998] 1 W.L.R. 896, 912–3 (H.L.).
[7] *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm) at [63] (Cooke J.).
[8] Search conducted on 1 September 2013.
[9] Vos J. has said that the cases after *Belize* "do not entirely speak with one voice": *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [2012] 2 All E.R. (Comm.) 480 at [52], affd. [2012] EWCA Civ 1368, [2013] 1 All E.R. (Comm.) 287.
[10] [2011] EWCA Civ 543, [2011] Pens. L.R. 223 at [36].
[11] Ibid., at [44] (emphasis added).
[12] *Wuhan Ocean Economic & Technical Cooperation Co Ltd. v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273 at [15].
[13] K. F. K. Low and K. C. F. Loi, "The Many 'Tests' for Terms Implied in Fact: Welcome Clarity" (2009) 125 L.Q.R. 561, 565. See also C. Peters, "The Implication of Terms in Fact" [2009] C.L.J. 513.

existing law.[14] Others have taken the opposite view and consider *Belize* to have taken the law into a new direction where the power to decide whether a term is to be implied has been removed from the contracting parties themselves and given to the reasonable observer, in other words, the court.[15] Paul Davies has even gone so far as to describe Lord Hoffmann's approach in *Belize* as "dangerous" because it "suggests that the subjective intentions of a party are now irrelevant, and that the only matter of importance is what the reasonable observer would understand the contract to mean".[16]

The controversy and uncertainty that surrounds both the principles which underpin Lord Hoffmann's approach, and the practical application of those principles, demands a re-examination of *Belize*. This article attempts to do this. It begins in Part II by addressing the reasons for and against the implication of terms on grounds of intention of the parties, before moving on, in Part III, to review the various "tests" for implying terms in fact as they stood before *Belize*. Part IV sets out and analyses what Lord Hoffmann said in *Belize*, while Parts V–VIII seek to answer a series of questions which lie at the heart of a proper understanding of the decision: Is implication an exercise in interpretation? What is meant by necessity? Is there still a role for reasonableness? Does *Belize* really make a difference to the way that terms are implied in fact?

The article argues that Lord Hoffmann was right. There is a clear linkage between interpretation and implication. Whether you are interpreting the express words of a contract, or whether you are interpreting the gaps between the words of the contract as a whole, you are, in both cases, seeking to identify and give effect to the meaning or intention of the parties. Interpretation is the process by which the court identifies the common intention of the parties. This is an objective process. Interpretation is a necessary prerequisite before implication can take place. Implication of terms is a means (but not the only means) by which effect is given to the parties' intention once identified by the court.[17] The basic principle that runs through interpretation and implication is the same: the need to identify and give effect to the meaning or intention of the parties. There is then the question whether it remains necessary, or even helpful, to continue to make reference to tests based on "business efficacy" or the "official bystander". It is argued that continued reference to these tests distracts from the central

[14] Lord Grabiner Q.C., "The Iterative Process of Contractual Interpretation" (2012) 128 L.Q.R. 41, 58–61.

[15] John McCaughran Q.C., "Implied Terms: The Journey of the Man on the Clapham Omnibus" [2011] C.L.J. 607, 614.

[16] P. S. Davies, "Recent Developments in the Law of Implied Terms" [2010] L.M.C.L.Q. 140, 144; and also in "Construing Commercial Contracts: No Need for Violence", in M. Freeman and F. Smith (eds.), *Law and Language: Current Legal Issues 2011*, vol. 15 (Oxford 2013), 434, 439–42. See also E. Macdonald, "Casting Aside 'Officious Bystanders' and 'Business Efficacy'?" (2009) 26 J.C.L. 97; N. Andrews, *Contract Law* (Cambridge 2011), [13.11].

[17] See J. W. Carter, *The Construction of Commercial Contracts* (Oxford 2013), [2–42], [3–15], pointing out that characterisation of a term as a condition, a warranty or an intermediate term is another means of giving effect to the intention of the parties and, therefore, turns on interpretation.

idea advanced by Lord Hoffmann and has led to uncertainty as to its application.

II. The Case for a Cautious Approach to the Implication of Terms in Fact

It is right that a court should be able to imply terms into a contract on the ground that such terms give effect to the parties' intention. The process can be justified on at least three grounds. First, it saves the parties time during the process of negotiation if terms which are necessary to make the contract work, or otherwise would obviously have been agreed, can be taken as read into the contract. Secondly, it reduces the costs entailed by drafting an exhaustive contract. These costs may relate to the time saved by the parties themselves in negotiations (the first point), but they more often relate to costs saved in not having to employ lawyers to draft contracts that specify what is to happen in every possible contingency. It is simply more efficient for the law to complete contracts when the extra detail is needed.[18] Thirdly, there are limits to the extent of human foresight. It would be impossible for a contract to provide expressly for every event that may happen.[19] There is always the risk that unforeseen problems will arise during the life of the contract. Low and Loi identify the important role played by implied terms in these circumstances: "[g]ap-filling is quite simply essential for contracting to work. It would be intolerable for the courts to declare contracts void simply because some unforeseen possibility had not been considered by the parties at the time of contracting, thus rendering the contract void for uncertainty".[20]

Nevertheless, English judges have also consistently stressed the need for caution when invited to imply a term into a contract. We have been warned that the power must be "exercised with care",[21] or "sparingly and cautiously used".[22] This is for good reason. First, the courts are always mindful that they must not rewrite the parties' bargain.[23] To do otherwise would undermine the principles of freedom of contract and autonomy of the parties. Given the rules which restrict evidence of the parties' intention when negotiating a contract, it may be doubtful whether the omission was the result of

[18] S. A. Smith, *Contract Theory* (Oxford 2004), 8.1.2 and 8.3.4. This argument is probably at its strongest when used in the context of terms implied by law, which operate as default rules across defined types of contractual relationship. See also C. J. Goetz and R. E. Scott, "The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms" (1985) 73 California L.R. 261; I. Ayes and R. Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules" (1989) 99 Yale L.J. 729; J. S. Johnson, "Strategic Bargaining and the Economic Theory of Contract Default Rules" (1990) 100 Yale L.J. 615.

[19] *Yam Seng Pte Ltd. v International Trade Corporation Ltd.* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 at [139] (Leggatt J.).

[20] Low and Loi, note 13 above, 565–6.

[21] *Shirlaw v Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227 (McKinnon L.J.).

[22] *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459 (Lord Steyn).

[23] *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108 at 137 (Lord Wright); *Charter Reinsurance Co Ltd. v Fagan* [1997] A.C. 313, 388 (Lord Mustill).

the parties' oversight or of their deliberate decision.[24] Silence is inherently ambiguous.[25] The courts must only intervene where "confident" that an implied term is warranted,[26] and most of the time it is not.[27] The parties must be left at liberty to take their chance. Mason J. made the point in *Codelfa Construction Pty Ltd. v State Rail Authority of New South Wales* as follows:

> For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue.[28]

Secondly, anything less than a stringent approach to the implication of terms would also increase the level of transactional uncertainty. The danger of judicial intervention would be ever present. Thirdly, the sparing and cautious attitude of the courts to implication gives the parties a real incentive to use express terms. The best way to deal with uncertainty is to remove the reason for having it by introducing a clear and unambiguous express term into the agreement.[29]

III. Tests for the Implication of Terms in fact Before *Belize*

Terms implied in fact are implied by the court on an ad hoc basis. They fill the gaps left by the parties in individual contracts.[30] It is said that a term is implied because it represents the unexpressed intention of the parties.[31] There is no consistency in the case law as to whether the basis for implication is "actual",[32] "inferred",[33] "imputed"[34] or "presumed"[35] intention; in fact, the issue is a sterile one because, at least for the purposes of

[24] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472, 482 (Sir Thomas Bingham M.R.).
[25] Davies [2010] L.M.C.L.Q. 140, 145.
[26] *Reigate v Union Manufacturing Co* [1918] 1 K.B. 592, 605 (Scrutton L.J.).
[27] As recognised by Lord Hoffmann in *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [17]. *The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 provides a good example of this.
[28] (1981–82) 149 C.L.R. 337, 346.
[29] This assumes that the courts will be reluctant to interpret clear and unambiguous terms in a broad contextual way: see Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900 at [23], and other cases discussed by Davies in "Construing Commercial Contracts", note 16 above, 454. See also *Kudos Catering (U.K.) Ltd. v Manchester Central Convention Complex Ltd.* [2013] EWCA Civ 38, [2013] 2 Lloyd's Rep. 270 at [20] (Tomlinson L.J.).
[30] *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459 (Lord Steyn).
[31] *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108 , 137 (Lord Wright).
[32] See, e.g., *Greaves & Co. (Contractors) Ltd. v Baynham Meikle & Partners* [1975] 1 W.L.R. 1095, 1099 (Lord Denning M.R.).
[33] See, e.g., *Hawkins v Clayton* (1988) 164 C.L.R. 539, 570 (Deane J. in High Court of Australia).
[34] See, e.g., *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108, 137 (Lord Wright).
[35] See, e.g., *The Moorcock* (1889) 14 P.D. 64, 68 (Bowen L.J.); and, recently, *Yam Seng Pte Ltd. v International Trade Corp Ltd.* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526 at [131] (Leggatt J.).

implication,[36] the classification of intention seems to have no practical significance.[37] Terms implied in fact can be contrasted with terms implied by law.[38] Terms implied by law are implied by the court into *all* contracts of a defined type, such as a contract between a landlord and tenant[39] or an employer and employee.[40] They are standardised terms that are implied not because of the intention of the parties but because of policy considerations, including those based on reasonableness, fairness and justice.[41] Such terms are often approved by Parliament.[42] They have been described as "general default rules" that apply to contracts of a defined type,[43] unless excluded by the parties themselves.[44] It is not entirely clear whether terms implied because of custom or usage are implied in fact or implied by law.[45]

Prior to *Belize*, two (of several) tests were regularly deployed by the courts when deciding whether to imply a term in fact.[46] The first formulation, the "business efficacy" test, was adopted by Bowen L.J. in *The Moorcock*.[47] A shipowner and the owner of a jetty contracted to allow a steamship to be discharged and loaded at the jetty. Both parties knew that the ship could not use the jetty unless it was grounded on the riverbed

[36] By contrast, the classification of intention remains important in the context of common intention constructive trusts over the family home: see *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [60]–[61] (Lady Hale), and [18]ff (Lord Walker); cf. at [125] (Lord Neuberger); *Jones v Kernott* [2011] UKSC 53, [2012] 1 A.C. 776 at [34], [47] (Lady Hale and Lord Walker) and [64] (Lord Collins); cf. at [72] (Lord Kerr) and [89] (Lord Wilson).

[37] Carter, note 17 above, [3–21]. But contrast, H. Collins, *The Law of Contract*, 4th ed. (Cambridge 2003), 223, 245–6 (arguing that the objective test for determining the content of contractual obligations severs any connection with the intention of the parties).

[38] A. Phang, "Implied Terms Revisited" [1990] J.B.L. 394 and "Implied Terms in English Law – Some Recent Developments" [1993] J.B.L. 242 argues that there should be no distinction between the two categories of implied term. But contrast E. Peden, "Policy Concerns Behind Implication of Terms in Law" (2001) 117 L.Q.R. 459, 463, adopted by Mance L.J. in *Crossley v Faithful & Gould Holdings Ltd*. [2004] EWCA Civ 293, [2004] 4 All E.R. 447; and see also *Liverpool City Council v Irwin* [1977] A.C. 239, 257–58 (Lord Cross); *Geys v Société Générale* [2012] UKSC 63, [2013] 1 A.C. 523 at [55] (Baroness Hale).

[39] See, e.g., *Liverpool City Council v Irwin* [1977] A.C. 239.

[40] See, e.g., *Lister v Romford Ice and Cold Storage Co Ltd.* [1957] A.C. 555; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294; *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20.

[41] *Crossley v Faithful & Gould Holdings Ltd.* [2004] EWCA Civ 293, [2004] 4 All E.R. 447 at [33]–[46]. See, generally, Peden, note 38 above, 467–75.

[42] See, e.g., the Sale of Goods Act 1979, ss. 12–15.

[43] *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 458 (Lord Steyn); *Malik v Bank of Credit and Commerce International SA* [1998] A.C. 20, 45 (Lord Steyn). See also T. Rakoff, "The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense'" in J. Beatson & D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford 1995), 191; C. A. Riley, "Designing Default Rules in Contract: Consent, Conventionalism, and Efficiency" (2000) 20 O.J.L.S. 367.

[44] Exclusion is subject to statutory controls, e.g., the Unfair Contract Terms Act 1977, s. 6 (regarding terms implied by the Sale of Goods Act 1979, ss. 12–15).

[45] E. Peel, *Treitel's Law of Contract*, 13th ed. (London 2011), [6–046].

[46] G. McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification*, 2nd ed. (Oxford 2011), [11.39] identifies four tests traditionally employed for the implementation of terms in fact: it "goes without saying"; "business efficacy"; the "officious bystander" and a five-stage test advanced by Lord Simon in *BP Refinery (Westernport) Pty Ltd. v Hastings Shire Council* (1977) 180 C.L.R. 266 (P.C.), 282–3. But the precise number of tests depends on whether they are seen as alternative, cumulative or overlapping.

[47] (1889) 14 P.D. 64.

at low tide. But when aground the ship was damaged by a ridge of hard ground on the riverbed. The Court of Appeal held that the parties must have intended to contract on the basis that the ground was safe for the vessel at low tide, and therefore a term was implied that the jetty owner would take reasonable care to ascertain that the mooring was safe for the purposes of loading and unloading.[48] The defendants were held liable for breach of this implied term. Bowen L.J. said that:

> the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties . . . [49]

It is often said that the test is that of "necessity", the necessity referred to being what is required "to render the contract workable".[50] The test is a restrictive one: a term is only to be implied if the contract will not work without it. In *The Moorcock* the contract could not work if the mooring was unsafe.

The second formulation, the "officious bystander" test, was set out by MacKinnon L.J. in *Shirlaw v Southern Foundries (1926) Ltd.* as follows:

> Prima facie that which in any contract is left to be implied and need not be expressed is 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!". . .[51]

The "officious bystander" test, like the business efficacy test, emphasises the intention of the parties at the time of contracting. The intention must be of both parties, and a term will not be implied if this reflects the intention of only one of the parties.[52] Thus, in *Spring v National Amalgamated Stevedores and Dockers Society (No. 2)*,[53] the court declined to imply a term into an agreement between a trades union and its member because at the time of contracting the member had no idea what the proposed

[48] The jetty owner did not own the riverbed and so could not have undertaken to make it safe.
[49] Ibid., at 68.
[50] *Associated Japanese Bank (International) Ltd. v Credit Du Nord SA* [1989] 1 W.L.R. 255, 263 (Steyn J.). See also, e.g., *Concord Trust v The Law Debenture Trust Corp* [2005] UKHL 27, [2005] 1 W.L.R. 1591 at [37] (Lord Scott).
[51] [1939] 2 K.B. 206, at 227 (C.A.). The origins of the test can be traced back to the judgment of Scrutton L.J. in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd.* [1918] 1 K.B. 592, 605 (C.A.): A. Phang, "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] J.B.L. 1 at 17ff.
[52] *Liverpool City Council v Irwin* [1977] A.C. 239, 266 (Lord Edmund-Davies); *Hughes v Greenwich LBC* [1994] 1 A.C. 170, 179 (Lord Lowry).
[53] [1956] 1 W.L.R. 585.

term was about, and so the term could not be said to represent the intention of *both* of the parties.[54]

Both tests have come in for heavy criticism over the years. The business efficacy test has been criticised on the ground that "necessity" is a slippery and uncertain concept,[55] and that the word "has a degree of imprecision about it" with the consequence that "the implication of terms is often difficult to predict".[56] One party may say that the contract works perfectly well without the implied term, the other may say that it does not. The officious bystander test has been ridiculed by Lord Hoffmann as constituting "an entire music hall act" and a "little pantomime" because of the make-believe exchange between the officious bystander and the contracting parties.[57] This raised doubts as to whether the law relating to implied terms in fact was really fit for purpose in the twenty-first century.

There has also been much uncertainty as to the precise relationship between the two tests. On one view, the tests are cumulative.[58] Both tests must be satisfied before a term can be implied in fact. In some cases, the courts have said that all implied terms are subject to the requirement of necessity.[59] If that is correct, "necessity" is made a requirement of the officious bystander test as well as the business efficacy test and all cases covered by the officious bystander test must also fall within the business efficacy test if a term is to be implied.[60] But this seems to require too much, for if it can be established that the parties regarded the term as obvious, and would have accepted it, that should be enough for the purpose if such implication is simply to give effect to the intention of the parties. On another view, the tests are alternative.[61] A term may be implied when it satisfies either the business efficacy test or the officious bystander test. The difficulty with this approach is that a term could be implied on the ground that it was necessary to make the contract work even though there is clear evidence that one or other of the parties (or even both of them) would not have agreed to the term. In order to avoid this happening,

[54] But see note 96 below for an explanation of this case which, arguably, fits better with Lord Hoffmann's approach in *Belize*.

[55] *Crossley v Faithful & Gould Holdings Ltd.* [2004] EWCA Civ 293, [2004] 4 All E.R. 447, at [36]: Dyson L.J. (in context of implied terms by law) said necessity was an "elusive concept".

[56] Sir Kim Lewison, *The Interpretation of Contracts*, 5th ed. (London 2011), 608.

[57] Lord Hoffmann, "Anthropomorphic Justice: The Reasonable Man and his Friends" (1995) 29 Law Teacher 127, 138–40. See also Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings" (1997) 117 S.A.L.J. 656, 662.

[58] See, e.g., *Stubbes v Trower, Still and Keeling* [1987] I.R.L.R. 321, 324 (Mustill L.J.).

[59] See, e.g., *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108, 125 (Lord Russell); *Hughes v Greenwich LBC* [1994] 1 A.C. 170, 179 (Lord Lowry).

[60] M. Furmston *et al*. (eds.), *Butterworths Common Law Series: The Law of Contract*, 4th ed. (London 2010), [3.20].

[61] See, e.g., *Mosvolds Rederi A/S v Food Corporation of India, The Demoder General TJ Parke and King Theras* [1986] 2 Lloyd's Rep. 68, 70 (Steyn L.J.); *Marcan Shipping (London) Ltd v Polish Steamship Co, The Manifest Lipkowy* [1989] 2 Lloyd's Rep. 138, 143 (Bingham L.J.).

it has been suggested that business efficacy is merely a practical test for determining the intention of the parties: "in most cases, it can be assumed that they would have agreed to a term which is necessary to make their agreement work".[62] On this approach the business efficacy test is made a sub-set of the officious bystander test, which would allow the implication of "obvious" terms even if they were not needed to make the contract work.[63] Sometimes, of course, the business efficacy and the officious bystander tests may both point to the implication of a term and, in this sense, "may overlap",[64] but it is submitted that without a proper explanation of the theory which underpins the implication of terms through the use of these tests – a theory later presented by Lord Hoffmann in *Belize* – this observation adds little to our understanding of the application of the tests themselves.

One simple point that emerges from this discussion is that the law as to the implication of terms in fact was unsettled and uncertain before *Belize*. Lord Hoffmann was not rocking a stable boat. But there is a second point also to be made. It is that whatever the uncertainty about the application of the business efficacy test or the officious bystander test, or about the relationship between those tests, it was well-established that the tests were applied stringently[65] and, in particular, that it was not enough merely to show that a term was reasonable to include in the contract, or that it would improve the way that the contract operated.[66]

IV. *A-G* OF *BELIZE V BELIZE TELECOM LTD.*[67]

The articles of association of Belize Telecommunications Ltd. provided that the holder of a "special share" in the company had the right to appoint or remove two directors of the company so long as that special shareholder also held a specified class of ordinary shares (called C shares) amounting to 37.5% or more of the issued share capital of the company. The first defendant, holding both the special share and 37.5% in C shares, appointed two directors to the board. However, within a year, because of financial difficulties, the first defendant, although still holding the special share,

[62] E. Peel, *Treitel's Law of Contract*, 12th ed. (London 2007), [6-031]: the submission is not made in the 13th ed., 2011, where it is said (at [6-036]) that, after *Belize*, "the precise relationship between [the two tests] may be regarded as a somewhat sterile debate".

[63] J. Morgan, *Great Debates in Contract Law* (Basingstoke 2012), 107. Cf. A. Phang, "Implied Terms Revisited" [1990] J.B.L. 394 at 397 (officious bystander test is a practical application of the business efficacy test), although he later revised this view in "Implied Terms, Business Efficacy and the Officious Bystander – A Modern History" [1998] J.B.L. 1 at 17ff (the tests are complementary).

[64] *BP Refinery (Westernport) Ltd. v Shire of Hastings* (1977) 180 C.L.R. 266 (P.C.), 283, per Lord Simon, although he appears to present them as cumulative requirements.

[65] J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract*, 29th ed. (Oxford 2010), 151.

[66] *Liverpool City Council v Irwin* [1977] A.C. 239, 258 (Lord Cross), 266 (Lord Edmund-Davies); *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472, 482 (Sir Thomas Bingham M.R.).

[67] [2009] UKPC 10, [2009] 1 W.L.R. 1988.

ceased to hold 37.5% in C shares. The articles of association made no provision for the removal of directors appointed by the holder of the special share when their shareholding in the other category fell below the stated percentage.[68]

Reversing a decision of the Court of Appeal of Belize, the Privy Council held that there was an implied term that directors would vacate office when there was no longer any shareholder with a shareholding appropriate to authorise their appointment. The Board said that the implied term was "required to avoid defeating what appears to have been the overriding purpose of the machinery of appointment and removal of directors, namely to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles".[69]

The advice of the Board was delivered by Lord Hoffmann. It is easy to forget that it was the advice of a unanimous Board which also included Lords Rodger, Carswell and Brown, together with Baroness Hale. The principles set out by Lord Hoffmann can be summarised as follows:

(1) A court has no power to improve the instrument it is asked to construe whether to make it fairer or more reasonable. It is concerned only to discover what the instrument means.
(2) That meaning is what the instrument would convey to a "reasonable person" or "reasonable addressee" having all of the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.[70] This objective meaning of the instrument is what is conventionally called the intention of the parties or of whoever is the deemed author of the instrument.
(3) The question of implication arises where an instrument does not expressly provide for what is to happen when some 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.
(4) In some cases, however, the "reasonable addressee" of the instrument will conclude that the *only* meaning which the instrument can have, consistent with its other terms and the relevant background, is that

[68] Article 90(E) provided that directors were to hold office "subject only to Article 112" (which dealt generally with the circumstances in which the office of director was vacated, e.g., on bankruptcy or conflict of interest), but there was nothing in Art. 112 providing for what was to happen if the holding of the special shareholder fell below the stated percentage. Lord Hoffmann (ibid., at [31]) dealt with an argument that Art. 112 prevented the implication of a term, because this would be inconsistent with the express term, by interpreting the express term narrowly.

[69] Ibid., at [32].

[70] In *Belize*, [2009] UKPC 10, [2009] 1 W.L.R. 1988 , at [36], Lord Hoffmann acknowledged that because articles of association of a company are registered, and available to anyone who wishes to inspect them, the admissible background for the purposes of construction had to be limited to what any reader would be supposed to know, and did not include extrinsic facts known only to some of the people involved in the formation of the company (applying *Bratton Seymour Co Ltd. v Oxborough* [1992] B.C.L.C. 693).

something *is* to happen in response to the particular event that has not been expressly provided for in the instrument's terms. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs.

(5) Nevertheless, that process does not add another term to the instrument; it 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.

(6) It follows that in every case of implication, the *single* question for the court is whether the implied term would spell out in express words what the instrument, read as a whole against the relevant background, would reasonably be understood to mean.[71]

Lord Hoffmann went on to make two further points.[72] First, he said that the single question could be reformulated in several ways which a court might find helpful in providing an answer – including that the implied term must "go without saying", or it must be "necessary to give business efficacy to the contract" – but these were not to be treated as different or separate tests. They were simply different ways of expressing the central idea that the proposed implied term must spell out what the contract actually means. Secondly, he said that use of the word "necessary" (as in "necessary to give business efficacy to the contract") was intended to convey that the court cannot imply a term simply because it expresses what the court considers it would have been reasonable for the parties to agree to if it is not satisfied that the term is what the contract actually (or necessarily) means.

A number of initial observations can be made about Lord Hoffmann's approach. First, *Belize* may have been about whether a term should be implied into the articles of association of a company, but it is clear from what Lord Hoffmann said that he intended his approach to apply equally to contracts and indeed for any written instrument.[73] Secondly, it is submitted that Lord Hoffmann's approach should be restricted to the implication of terms in fact. There is nothing in his speech to suggest that he intended his

[71] [2009] UKPC 10, [2009] 1 W.L.R. 1988 , at [16]–[21]. See also the summary of Lord Hoffmann's approach provided by Aikens L.J. in *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [38]–[39]. Lord Clarke has said that Lord Hoffmann's analysis in *Belize* "repays detailed study" (*The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639, at [9]) and Arden L.J. has said that the whole speech "needs careful study" (*Eastleigh BC v Town Quay Developments Ltd.* [2009] EWCA Civ 1391, [2010] P. & C.R. 2 at [32]).

[72] [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [21]–[27].

[73] Ibid., at [16] "whether it be a contract, a statute or articles of association". In *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066, at [37], Aikens L.J. said that Lord Hoffmann's principles were also relevant to contracts which were partly oral and partly in writing, as well as those wholly oral, with any necessary modifications; Sir Andrew Morritt C. at [71] doubted that the same principles could be easily adapted to contracts implied from conduct, citing his own judgment in *Grisbrook v MGN Ltd.* [2010] EWCA Civ 1399, [2011] Bus. L.R. 599 at [31] (but contrast *Hamsard 3147 Ltd. (t/a "Mini Mode Childrenswear") v Boots UK Ltd.* [2013] EWHC 3251 (Pat) at [65], Norris J.).

approach to apply to terms implied by law.[74] Moreover, if one accepts that terms implied in fact are based on intention of the parties, with a rebuttable presumption against implication, and that terms implied by law are based on competing policy considerations, with a rebuttable presumption in favour of implication into certain defined types of contract,[75] there is a strong case for restricting Lord Hoffmann's approach in *Belize*, focused as it is on meaning and intention, to the former and not extending it to the latter. Baroness Hale seems to agree. She was a member of the Board in *Belize*, and later of the Supreme Court in *Geys v Société Générale*,[76] where she cited *Belize* and then drew a clear line between the different bases for implying terms in fact and implying terms in law. Thirdly, no one should have been at all surprised that Lord Hoffmann took the line he did. In 1995, when delivering a lecture at the Inns of Court School of Law,[77] he said that "the implication of terms into a contract is in essence a question of construction like any other" and, in 1997, in his speech in *South Australia Asset Management Corporation v York Montague Ltd.*,[78] he repeated that "[a]s in the case of any implied term, the process is one of construction of the agreement as a whole in its commercial setting". We can even go further and say that *Belize* readily fits into Lord Hoffmann's general approach to contract law, and is entirely consistent with his judgments in *Investors Compensation Scheme*[79] and *The Achilleas*,[80] when he puts intention of the parties (objectively ascertained) at the very centre of the contractual stage.[81] Fourthly, and finally, there is nothing in what Lord Hoffmann said in *Belize* to suggest that he considered himself to be radically reformulating the law relating to the implication of terms.[82] Quite the reverse. Two points made by Lord Hoffmann illustrate the essentially cautionary, even conservative, nature of his approach.

[74] The context and Lord Hoffmann's reference to the "business efficacy" and "officious bystander" tests support this view (and see *Treitel's Law of Contract*, note 45 above, 223, n. 174); cf. *Anson's Law of Contract*, note 65 above, 153, n. 139, whose authors ask whether Lord Hoffmann's approach should also apply to the implication of terms by law without giving any reason why it should.

[75] Carter, *Construction of Commercial Contracts*, note 17 above, [3–20].

[76] [2012] UKSC 63, [2013] 1 A.C. 523, at [55].

[77] Lord Hoffmann, "Anthropomorphic Justice: The Reasonable Man and his Friends", note 57 above, 139 (the 24th Lord Upjohn Lecture at the Inns of Court School of Law, delivered on 12 May 1995). See also Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings", note 57 above, 662.

[78] [1997] A.C. 191, 212.

[79] [1998] 1 W.L.R. 896 (H.L.).

[80] *Transfield Shipping Inc. v Mercator Shipping Inc., The Achilleas* [2008] UKHL 48, [2009] 1 A.C. 61 at [11] and [26]. See also Lord Hoffmann, "The *Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Edinburgh L.R. 47, 59–61. In *John Grimes Partnership Ltd. v Gubbins* [2013] EWCA Civ 37, [2013] B.L.R. 126 at [24], the Court of Appeal used objectively assessed intention of the parties, and the implication of contract terms, to explain remoteness in contract following *The Achilleas* (see main text to note 222 below).

[81] H. Collins, "Lord Hoffmann and the Common Law of Contract" (2009) 5 E.R.C.L. 474.

[82] Almost a year after delivering his speech in *Belize*, and after he had retired as a Law Lord, Lord Hoffmann said, in a conversation with Kate Gibbons of Clifford Chance, published at [2010] L.F.M.R. 242, 245, that he felt he was "tidying things up" in *Belize* because, despite the four or five tests for the implication of terms found in the textbooks, "there is no basic principle as to why one should imply a term". He added (at 247) "I see myself as a conservative, but whose job it is to try

First, he acknowledged that a court cannot improve upon the bargain made by the parties, or "introduce terms to make it fairer or more reasonable".[83] Secondly, he said that although the question of implication arose when the instrument did not expressly provide for what was to happen when some event occurred, "[t]he most usual inference in such a case is that nothing is to happen … the loss lies where it falls".[84] There is nothing heterodox about either of these statements.

V. Is Implication an Exercise in Interpretation?

A. Competing Theories

In an article published in the Cambridge Law Journal in 2004, Adam Kramer provides the theoretical underpinning of the case for subsuming the implication of terms in fact within a broad doctrine of interpretation.[85] Relying on research in the field of linguistics, Kramer argues that communication is based upon the process of "pragmatic inference". This means that when we use express words to communicate we leave it to the person we are communicating with to supplement the linguistic meaning of the words we use by drawing on shared background knowledge and broader context.[86] In other words, the process of pragmatic inference lies at the heart of what we call "interpretation". Kramer stresses that a communicator can intend what goes without saying and what does not cross his mind.[87] This still represents the communicator's "true intention" for he intends his utterances to be interpreted against the background of social norms, understandings and "reasonable expectations". Kramer illustrates the process of pragmatic inference by using an example of Ludwig Wittgenstein:[88] "when someone asks me to 'show the children a game', the unspoken inference is that they do not intend me to show them how to gamble with dice".[89]

Kramer argues that just as matters can be inferred from express words, e.g., from "show the children a game", they can also be inferred from silence. Here the process of pragmatic inference is being used to fill gaps in the communication. But the strictness of the test for supplementing the contract is said to vary according to how "primary" (i.e., independent of the expressed

and explain the law as clearly as possible and what its implications are. *Belize* is a good example of that …".

[83] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [16].

[84] Ibid., at [17].

[85] A. Kramer, "Implication in Fact as an Instance of Contractual Interpretation" [2004] C.L.J. 384.

[86] A. Kramer, "Common Sense Principles of Contract Interpretation (and how we have been using them all along)" (2003) 23 O.J.L.S. 173. Cf. Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings", note 57 above.

[87] Kramer submits ([2004] C.L.J. at 399) that once this is recognised then the distinction identified by Glanville Williams in "Language and the Law – IV" (1945) 61 L.Q.R. 384, 401, between an intention that was presumed to be actually held and a hypothetical intention that the parties would have held if they had foreseen and considered the matter, "fades away".

[88] A. Kramer, "Common Sense Principles", note 86 above, 192.

[89] L. Wittgenstein, *Philosophical Investigations*, 3rd ed., trans. G.E.M. Anscombe (Oxford 1972), 33.

information) that supplemental information is. Kramer argues that the test for implying wholly new terms into a contract (primary information) should be stricter than when one is supplementing express terms with details (secondary information) through ordinary interpretation.[90] Nevertheless, in both cases the basic process is still the same: the objective determination of the tacit intention of the parties.[91] This leads Kramer to make the following submission:

> As the primariness of information sits on a spectrum, the strictness of the test for supplementation should be a question of degree. Thus the separate category of implied in fact terms should be abolished, and all supplementation should take place through the basic test of interpretation that asks what it was reasonable to understand as going without saying. This test should take account of the primariness of the information to be implied, maybe using the officious bystander and business efficacy tests as rules of thumb when the supplementation is by way of very primary information (i.e., new terms). [92]

Not everyone is convinced that Lord Hoffmann and Adam Kramer are right to assimilate implication within interpretation. Paul Davies is their most forceful critic.[93] Lord Hoffmann is accused of "stretching the boundaries of interpretation too far to suggest that implication is not an addition to the instrument, or that it simply gives effect to what the instrument means".[94] Moreover, Davies considers that Lord Hoffmann's approach is contrary to the decision in *Spring*,[95] because it removes subjective intentions of the parties from the enquiry.[96] Kramer's attempt to draw inferences from silence is said to "[blur] the boundaries between seeking to ascertain the intentions of the parties from all possible evidence, and seeking to determine what intentions the parties have objectively manifested in the written document".[97] In Davies's opinion, interpretation and implication

[90] [2004] C.L.J. at 401–2.
[91] But because terms implied in law are implied in a different way, Kramer says that they should be labelled "imposed", "constructed" or "constructive" terms: ibid., 402, n. 58.
[92] Ibid., 385.
[93] Davies, "Recent Developments", note 16 above; and also in "Construing Commercial Contracts", note 16 above, 439–42.
[94] [2010] L.M.C.L.Q. at 144.
[95] [1956] 1 W.L.R. 585.
[96] [2010] L.M.C.L.Q. at 144. In response to Davies, it is submitted that, following *Belize*, the proposed term would not be implied in *Spring* because the term was not necessary to give effect to the reasonable expectations of the parties. The claimant union member had done nothing to lead a reasonable person in the position of the defendant union to believe that he agreed to be bound by the Bridlington Agreement, when the union knew, or ought to have known, that he had not even heard of it. The presumption against implication would have applied. Moreover, *Belize* does not remove subjective intention from the process of implication. Uncommunicated actual (or subjective) intention cannot "trump" an objective approach, but communicated intention affects the other party's knowledge and that knowledge is relevant to the reasonable expectations of someone in the position of that other party (see D. McLauchlan, "The Contract That Neither Party Intends" (2012) 29 J.C.L. 26, 28, 30–34). This must not be confused with the separate question relating to what evidence is admissible when applying the objective approach (see A. Burrows, "Construction and Rectification" in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford 2007), 77, 82–3).
[97] [2010] L.M.C.L.Q., at 144.

are distinct concepts and should be kept separate.[98] Express words require interpretation, but silence, being inherently ambiguous, does not.[99] Davies points the finger of blame at the wide scope given to the doctrine of interpretation following *Investors Compensation Scheme*:[100] "[a] strict approach to both interpretation and implication is preferable; this would further aid the certainty with which parties can interpret contracts and rely on their contents".[101] Davies is particularly concerned that Lord Hoffmann's approach in *Belize* leaves the court with greater room to alter the bargain made in an attempt to "improve" an agreed contract. Davies concludes:

> Although, Lord Hoffmann stated that this should not be done, it may be difficult to control the scope given to the term "reasonableness" and its objective nature. Reasonable policy factors may be appropriate for implication of terms in law, but not for implication in one particular, individualised instance.[102]

For Davies, the sanctity of the parties' written contract is everything; contracts should be left undisturbed and terms should not be readily implied. It is for this reason that he argues that the traditional tests should be preferred over what he regards as Lord Hoffmann's liberal approach: "[a] term should be implied only if the parties would actually have agreed to the inclusion of that term at the time of contracting, or if that term is necessary to avoid the contract being a nonsense".[103]

The main criticisms made by Davies were adopted by the Court of Appeal of Singapore in *Foo Jong Peng v Phua Kiah Mai*,[104] which rejected the *Belize* principle that implication is an exercise in interpretation. Andrew Phang J.A., delivering the single judgment of the court, said that interpretation had much in common with implication inasmuch as both entailed an objective approach, but he was of the view that it was incorrect to conflate the tests and techniques that accompanied these separate processes.[105] Phang J.A. accepted that the process of the implication of terms did involve interpretation, but considered it to be "a *specific form or conception of interpretation* which is *separate and distinct from the more general* process of interpretation (in particular, interpretation of the *express* terms of a particular document)".[106] He preferred the "specific as well as concrete guidance" of the traditional tests of "business efficacy"

[98] Ibid., at 145.
[99] Ibid., at 145.
[100] Ibid., at 145.
[101] Ibid., at 145.
[102] Ibid., at 145.
[103] Ibid., at 149.
[104] [2012] S.G.C.A. 55, [2012] 4 S.L.R. 1267 (Andrew Phang Boon Leong J.A., V.K. Rajah J.A. and Woo Bih Li J.). See also G. Yihan, "Terms Implied in Fact Clarified in Singapore" [2013] J.B.L. 237.
[105] [2012] S.G.C.A. 55, [2012] 4 S.L.R. 1267, at [31].
[106] Ibid., at [36] (emphasis as in original judgment).

and "officious bystander" over an abstract test of the reasonable person which "does not, in and of itself, tell us *how* a particular term ought – or ought not – to be implied (*ex hypothesi*, on an *objective* basis)".[107] More importantly, Phang J.A. said that underlying both the "business efficacy" and the "officious bystander" tests was a criterion that was not necessarily present when applying the broader concept of interpretation, namely that of necessity. The "business efficacy" and "officious bystander" tests were said to give "practical meaning" to the criterion of necessity.[108] Both tests, premised as they were upon the concept of necessity, were said to be "*an integral as well as indispensible part of the law relating to implied terms in Singapore*".[109] It would seem, therefore, that the Court of Appeal of Singapore has taken a pragmatic approach to the implication of terms in fact and rejected Lord Hoffmann's approach because, in its opinion, that approach was perceived as being at too high a level of abstraction and did not provide the court with the "concrete guidance" that was necessary to avoid uncertainty.

The decision in *Foo Jong Peng* is unsatisfactory for two reasons. First, save for passing recognition that the law relating to implied terms in fact was "not entirely certain in its precise ambit of application",[110] the court failed properly to acknowledge that the "business efficacy" and "officious bystander" tests have been mired in controversy and uncertainty themselves, not least surrounding the relationship between the two tests.[111] In particular, Phang J.A.'s statement that "necessity" underlies both the business efficacy and the officious bystander tests results in all cases covered by the officious bystander test having to fall within the business efficacy test if a term is to be implied.[112] This is unsatisfactory because it leaves no room for the implication of a term on the ground that it was obviously intended by the parties without it also having to be necessary in a business sense to give efficacy to the contract. Secondly, the court placed implication of terms in fact into the straitjacket of two "practical" tests without giving proper recognition to the theoretical underpinning of those tests through the intention of the parties as revealed by the process of interpretation. It sought to distinguish two types of interpretation: one that applies to the more general process of the interpretation of express terms and the other a "specific form or conception" that applies in the case of implication. It is submitted that this distinction is unjustified, and seems to have been adopted merely to allow the "business efficacy" and "officious bystander" tests to retain the

[107] Ibid., at [33] (emphasis as in original judgment).
[108] Ibid., at [33].
[109] Ibid., at [36] (emphasis as in original judgment).
[110] Ibid., at [27].
[111] Phang J.A. simply said (at [28]) that the two tests were "complementary, rather than alternative or cumulative: the official bystander test is the practical mode by which the business efficacy test is implemented". For criticism of the two tests, see main text to note 55 above.
[112] See main text to note 60 above.

primacy that Phang J.A. thought they merited. A similarly artificial distinction was later made by the Singaporean Court of Appeal in *Sembcorp Marine Ltd. v PPL Holdings Pte Ltd.*,[113] where Sundaresh Menon C.J., delivering the judgment of the court, distinguished interpretation from implication and also from "construction", which he said was a "composite process" that encompassed both interpretation and implication.[114] But this is a nonsensical distinction as interpretation and construction are synonymous in this context.[115] In an attempt to "bridge the gap" between his own approach and that taken by Lord Hoffmann in *Belize*,[116] Menon C.J. gave "construction" a meaning that was clearly never intended by Lord Hoffmann,[117] and one that would come as a considerable surprise to most lawyers, who almost invariably use the terms "interpretation" and "construction" interchangeably.[118]

B. Promoting Internal Coherence

Prior to *Belize* the established orthodoxy was that implication was different from interpretation and that the two processes should be kept separate. The reason for the distinction was given by Sir Thomas Bingham M.R. in *Philips Electronique Public SA v British Sky Broadcasting Ltd.*:

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have themselves expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters which, *ex hypothesi*, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power . . . [119]

Other judges have been prepared to take a less extreme view.[120] Lord Steyn was willing to accept that "[t]he processes of interpretation and implication

[113] [2013] S.G.C.A. 43 (Sundaresh Menon C.J., Chao Hick Tin J.A. and Judith Prakash J.).
[114] Ibid., at [31], relying on a generalised dictum of Lord Steyn in *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459E ("The inquiry is entirely constructional in nature. . .").
[115] R. Calnan, *Principles of Contractual Interpretation* (Oxford 2013), 2, n. 5. Cf. E.W. Patterson, "The Interpretation and Construction of Contracts" (1964) 64 Col. L.R. 833, 835.
[116] [2013] S.G.C.A. 43, at [79].
[117] Lord Hoffmann was never consistent in his terminology. In *Investors Compensation Scheme* [1998] 1 W.L.R. 896, he made reference to both construction (at 912F) and interpretation (at 912G) without distinguishing between them. Admittedly, he used the term "construction", and not "interpretation", in *Belize* ([2009] UKPC 10, [2009] 1 W.L.R. 1988 at [16], [19], [25]), but given his extra-judicial statement that "the implication of a term into a contract is an exercise in interpretation like any other" (Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings", note 57 above, 662), it is highly unlikely that he was seeking to redefine what he meant by construction for these purposes without at least drawing attention to what he was doing.
[118] McMeel, note 46 above, [1.16], [10.03].
[119] [1995] E.M.L.R. 472, 481.
[120] *Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 606 (Lord Pearson left the question open).

of terms are closely linked, but as a matter of legal analysis they need to be kept separate".[121] Clark J. has emphasised the "close relationship between the process of construction and the process of implication".[122] One advantage of this approach is that it is more consistent with the case law prior to *Belize*.[123]

Interpretation and implication are said by some to be "shades on a continuous spectrum". The idea was first expressed in this way by Lord Wilberforce in *Liverpool City Council v Irwin*.[124] At one end of the spectrum the court is merely stating the logical consequence of the term expressly agreed. This can be illustrated by Wittgenstein's example, considered earlier in this article,[125] of what is intended when someone is asked to "show the children a game". Sometimes the court describes this process as one of "constructional implication",[126] but it is, in effect, no more than an exercise in the interpretation of express terms. As one moves further along the spectrum, the court is making explicit that which is implicit, not in a logical sense, but in a practical or commercial sense, in the parties' bargain. Lord Justice Lewison writing, extra-judicially, has identified the problem with this approach.[127] When interpreting the express terms of a contract the courts often stress the reasonableness of the interpretation whereas, in considering when a term should be implied, the court repeatedly stresses that the touchstone is necessity, not reasonableness. Thus, as Lewison L.J. observes, at some point on the continuous spectrum there is a "radical change" in approach, but "[t]he location of that point is uncertain".[128]

At what point on the continuous spectrum does this radical change occur? Brandon Kain has suggested that "interpretation ends, and implication begins, when the effect of the court's process is to recognize a new right

[121] *National Commercial Bank of Jamaica Ltd. v Guyana Refrigerators Ltd.* (1998) 53 W.I.R. 229, 232; *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459; and, writing extra-judicially, see J. Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5, 11; J. Steyn, "Interpretation: Legal Texts and their Landscape" in B. Markesinis (ed.), *The Coming Together of the Common Law and the Civil Law: The Clifford Chance Millennium Lectures* (Oxford 2000), 79, 84–85.

[122] *C Itoh & Co Ltd. v Companhia De Navegaçao Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd., The Rio Assu* [1999] 1 Lloyd's Rep. 115, 120, affd. at 122. See also *Aberdeen City Council v Stewart Milne Group Ltd.* [2011] UKSC 56, [2012] S.L.T. 205 at [32]–[33], where, despite distinguishing between interpretation and implication, Lord Clarke took a similar approach to the two processes when it came to business common sense. Cf. D. McLauchlin and M. Lees, "More Construction Controversy" (2012) 29 J.C.L. 97, 118–119.

[123] Carter, *Construction of Commercial Contracts*, note 17 above, [3–27].

[124] [1977] A.C. 239, 254. See also Glanville Williams, "Language and the Law – IV", note 87 above, 401, who said that the various types of implied term "merge imperceptibly into each other".

[125] See main text to note 89 above.

[126] See, e.g., *Bratton Seymour Service Co Ltd. v Oxborough* [1992] B.C.L.C. 693, 698 (Steyn L.J.); *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd.* [2004] UKHL 54, [2004] 1 W.L.R. 3251 at [25] (Lord Steyn).

[127] Lewison, *Interpretation of Contracts*, note 56 above, 274.

[128] Ibid., at 275.

or obligation that is not express (and not, e.g., a new way of applying a right or obligation that is express)".[129] He sees this new line of demarcation as creating a principled rationale for applying a more rigorous test of business necessity (in the *Moorcock* sense) in cases of implication than interpretation. But it may be no less easy for a court to determine whether a right or obligation is "new" or results from the interpretation of an express term.[130] The difficulty with Kain's approach is that it turns one difficult question into another and brings no greater degree of certainty.

The better approach is for the court to jettison the distinction between interpretation and implication. Lord Hoffmann did this in *Belize* when he decided that the implication of terms is, in essence, an exercise in interpretation.[131] By doing this Lord Hoffmann has placed the common intention of the parties centre stage. This is what links interpretation and implication. It is the common thread. Interpretation is used to identify the common intention of the parties and implication gives effect to that intention. There is no other basis for implying terms in fact into the contract.[132] The whole process is informed by objectivity, which means that the "same background material that is admissible and relevant in aid of construction of the express terms of the [contract] may also be admitted in aid of the determination of the existence of an implied term".[133] The advantage of this approach was identified by Arden L.J. in *Stena Line Ltd. v Merchant Navy Ratings Pension Fund Trustees Ltd.*, when she said that:

> This development promotes the internal coherence of the law by emphasising the role played by the principles of interpretation not only in the context of the interpretation of documents *simpliciter* but also in the field of the implication of terms. Those principles are the unifying factor. The internal coherence of the law is important because it enables the courts to identify the aims and values that underpin the law and to pursue those values and aims so as to achieve consistency in the structure of the law.[134]

[129] B. Kain, "The Implication of Contractual Terms in the New Millennium" (2011) 51 C.B.L.J. 170, 181–2.

[130] S. Grammond, "Implied Obligations from a Comparative Perspective" (2012) 52 C.B.L.J. 113, 119.

[131] See also *WX Investments Ltd. v Begg* [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849 at [28] (Patten J.: "The implication of a term is essentially a process of construction of the contract."); *Meridian International Services Ltd. v Richardson* [2007] EWHC 2539 (Ch) at [62] (Ham Q.C., deputy H.C. Judge: "The implication of a term is part of the process of interpretation of contracts. . ."), and on appeal see [2008] EWCA Civ 609 at [16], [34].

[132] *F & C Alternative Investments (Holdings) Ltd. v Barthlemy (No. 2)* [2011] EWHC 1731 (Ch), [2012] Ch. 613 at [272] (Sales J.).

[133] *Golden Fleece Maritime Inc. v ST Shipping and Transport Inc., The Eli* [2007] EWHC 1890 (Comm), [2008] 1 Lloyd's Rep. 262 at [24] (Cooke J.); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm), at [67] (Cooke J.). See also Steyn, "Interpretation: Legal Texts and their Landscape", note 121 above, 85.

[134] [2011] EWCA Civ 543, [2011] Pens. L.R. 223, at [36].

Implication and interpretation are not entirely identical processes.[135] Lord Hoffmann never said they were. There is a key difference between them. Lord Hoffmann acknowledged this in *Belize* when he said:

> In the case of an implied term, however, the question 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.[136]

In other words, implication fills in the gaps between the words by interpreting the contract as a whole, rather than merely interpreting the meaning of the words themselves.[137] But, at the end of the day, the same question has to be answered whether interpreting the express words or the gaps between the words: "What did the parties mean?".[138] This unified approach means that it is no longer necessary to search for that point on the continuous spectrum where an exercise in interpretation turns into one of implication.

VI. What is Meant by Necessity?

There has been some uncertainty as to whether a requirement of "necessity" has survived *Belize*. Lord Hoffmann did refer to necessity in his speech but he did not stress the requirement as forcefully as the courts had done in the past.[139] His concern was to stress that a term cannot be implied on grounds of reasonableness alone.[140] Where does this leave necessity? The question has troubled the English courts post-*Belize*. To say that there is a requirement of necessity may elicit the response that this actually reinforces the division between implication and interpretation as it reintroduces a requirement that was always present in cases of implication but not in cases of interpretation. So what is meant by "necessity"? Does it mean that a term will only be implied where it is necessary to make the contract work, or does necessity mean something different, perhaps that the terms is necessary to give effect to the meaning of the contract or, in other words, the intention of the parties?

In *The Reborn*,[141] charterers chartered a ship on a voyage charter and nominated a berth for the ship to load in Lebanon. The ship's hull was damaged during loading by a hidden underwater projection. There was no express term in the contract dealing with the safety of the berth

[135] That there remain two separate, but linked, processes seems to be implicit in Akenhead J.'s statement that Lord Hoffmann has "dovetailed" considerations relating to implied terms into the context of contractual interpretation: *TSG Building Services plc v South Anglia Housing Ltd.* [2013] EWHC 1151 (TCC) at [44]; *Aspects Contracts (Asbestos) Ltd. v Higgins Construction plc* [2013] EWHC 1322 (TCC) at [16].

[136] [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [34]. See also *Codelfa Construction Prop Ltd. v State Rail Authority of New South Wales* (1981–82) 149 C.L.R. 337, 345 (Mason J.)

[137] Lord Hoffmann, "The Intolerable Wrestle with Words and Meanings", note 57 above, 662.

[138] Lord Hoffmann, speaking in a conversation with Kate Gibbons of Clifford Chance, note 82 above, 245.

[139] The point is well made by McMeel, note 46 above, at [11.03] and [11.28].

[140] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [23].

[141] [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639.

nominated by the charterers, and so, prima facie, the loss would lie where it fell, i.e., with the shipowners. However, the owners argued that a term should be implied obliging the charterers to ensure that they nominated a safe berth. The Court of Appeal refused to imply the term. Lord Clarke M.R. said that "if the parties had intended the charterers to warrant the safety of the loading berth, they could and would have said so, as is very common in voyage charterparties".[142]

Lord Clarke began by stating that, after *Belize*, "the implication of a term is an exercise in the construction of the contract as a whole".[143] But later in his judgment he said two things that seem to contradict a complete acceptance of Lord Hoffmann's approach. First, Lord Clarke said:

> as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable.[144]

Secondly, after citing passages from the judgment of Lord Wilberforce in *Liverpool City Council v Irwin* and that of Sir Thomas Bingham M.R. in the *Philips Electronique* case, including where the Master of the Rolls stressed that the implication of contract terms "involves a different and altogether more ambitious undertaking" than occurs with interpretation,[145] Lord Clarke said that:

> The significance of both *Liverpool City Council v Irwin* and the *Philips Electronique* case is that they both stress the importance of the test of necessity. Is the proposed implied term necessary to make the contract work? That seems to me to be an entirely appropriate question to ask in considering whether a term should be implied on the assumed facts in this case.[146]

Davies argues that Lord Clarke thereby undermines Lord Hoffmann's argument that implication is part of the process of interpretation.[147] Furthermore, in *Groveholt Ltd. v Hughes*,[148] Arden L.J. appeared to be dismissive of *Belize*, endorsing Counsel's submission that Lord Hoffmann had imposed "the 'superstructure of interpretation' on the conditions necessary for the implication of a term on the ground of business

[142] Ibid., at [11].
[143] Ibid., at [9].
[144] Ibid., at [15], and see also [18]; applied in *Fitzhugh* v *Fitzhugh* [2012] EWCA Civ 694, [2012] 2 P. & C. R. 14 at [15].
[145] [1995] E.M.L.R. 472, 481.
[146] Ibid., at [18].
[147] [2010] L.M.C.L.Q. 140, 146. Davies also regards Rix L.J. (at [48]) as being "little more than lukewarm" regarding *Belize*, and points out that Carnwath L.J. (at [63]) emphasised that an implied term must be necessary.
[148] [2010] EWCA Civ 538 at [45].

efficacy" but that, in the light of *The Reborn*, "nothing in that approach affects those conditions".[149]

There seems to be one difference between Lord Clarke and Lord Hoffmann with regard to the application of the "officious bystander" test and whether it is the response of the parties to the question, or the officious bystander's own knowledgeable view of the meaning of the contract, that is significant.[150] Unfortunately, Lord Clarke misapplied the traditional test when he had the officious bystander answer, rather than pose, the relevant question.[151] Nevertheless, despite this error, it is submitted that there is no fundamental difference between the approach taken by Lord Clarke in *The Reborn* and that taken by Lord Hoffmann in *Belize*. The facts of *The Reborn* are similar to *The Moorcock*. In the former, the court refused to imply a term relating to the safety of the berth; in the latter the term was implied. This may seem strange if the same test is being used in both cases. But the difference can be explained if one accepts that in *The Reborn* the Court of Appeal applied Lord Hoffmann's broader approach in *Belize* and did not restrict itself to a pure "business efficacy" test as applied in *The Moorcock*. In other words, it is submitted that there is acceptance and not rejection of Lord Hoffmann's approach in *The Reborn*.

In *SNCB Holding v UBS AG*,[152] Cooke J. felt that, by stressing the element of necessity, Lord Clarke had provided "a gloss"[153] and "a more focused approach"[154] to what Lord Hoffmann had said in *Belize*. Nevertheless, his Lordship considered that, despite some difference in emphasis between them, "the question of necessity which Lord Clarke stresses tallies with Lord Hoffmann's statement".[155] Cooke J. took a much broader view of necessity than simply whether the implied term was necessary to make the contract work. He accepted that a contract might be workable in the sense that both parties could perform their express obligations without the implication of the term, but added that implication could still be necessary in order to give effect to the reasonable expectation of the parties in the situation in question, "because this is what the contract taken as a whole must, on its proper reading, be taken to mean".[156]

[149] See also *Consolidated Finance Ltd. v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133 at [43], where Arden L.J. (obiter) accepted Counsel's submission that the test of necessity "is still part of the law and unaffected by *Belize*."

[150] See Lord Hoffmann in *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [25] and Lord Clarke in *The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639, at [18], by reference to the authorities cited therein, as identified by Cooke J. in *SNCB Holding v USB AG* [2012] EWHC 2044 (Comm), at [68]. See also McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus", note 15 above.

[151] Lord Clarke made the same error both before (*The Rio Assu* [1999] 1 Lloyd's Rep. 115, 120) and since (*Aberdeen City Council v Stewart Milne Group Ltd.* [2011] UKSC 56, [2012] S.L.T. 205, at [33]).

[152] [2012] EWHC 2044 (Comm).

[153] Ibid., at [58].

[154] Ibid., at [63].

[155] Ibid., at [65].

[156] Ibid., at [65].

In *Jackson v Dear*,[157] Briggs J. took a similar view to that taken by Cooke J. He did not consider that Lord Clarke (in *The Reborn*)[158] had "rowed back" from Lord Hoffmann's analysis (in *Belize*), and added that, although Lord Clarke had described the business efficacy/necessity test as an "entirely appropriate question to ask in considering whether a term should be implied", he had done so specifically on the assumed facts of that case, rather than by way of suggesting that this particular type of necessity had to be demonstrated in *every* instance of the implication of terms.[159] Briggs J. was prepared to give "necessity" a broader meaning than that given to it in *The Moorcock*. Briggs J. summarised the effect of the cases post-*Belize* and included in his summary a key proposition:

> (vi) Although necessity continues (save perhaps in relation to terms implied by law) to be a condition for the implication of terms, necessity to give business efficacy is not the only type of necessity. The express terms of an agreement may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. In such a case an implied term is necessary to spell out what the contract actually means.[160]

Jackson v Dear went on appeal to the Court of Appeal.[161] The dispute turned on whether a term should be implied into a shareholders' agreement. Under the express terms of the agreement Dear and Griffiths agreed that they would exercise the voting rights of a holding company they controlled so as to ensure that Jackson was appointed as a director of one of that company's subsidiaries and then reappointed at every AGM thereafter, unless and until one of five "termination events" occurred. However, the articles of association of the subsidiary company gave its directors the power to remove a fellow director by written notice given by all the other directors. This power was not restricted by any express terms in the shareholders' agreement. The power in the articles of association was invoked by the directors of the subsidiary (including Dear and Griffiths) to remove Jackson from office as a director of the subsidiary. Jackson argued that it was an implied term of the shareholders' agreement that Dear and Griffiths must not vote to remove him as a director.

The parties agreed with the judge's summary of the case law,[162] save for point (vi) because Dear and Griffiths submitted that this proposition, "smacked of a potential rewriting of contracts to achieve what the court

[157] [2012] EWHC 2060 (Ch).
[158] Or Arden L.J. in *Groveholt Ltd. v Hughes* [2010] EWCA Civ 538, at [45].
[159] [2012] EWHC 2060 (Ch), at [42].
[160] Ibid., at [40]
[161] [2013] EWCA Civ 89.
[162] The Court of Appeal (ibid., at [18]) said that Briggs J.'s summary was "sufficient and helpful", and was applied in *Grainmarket Asset Management LLP v PGF II SA* [2013] EWHC 1879 (Ch) at [40].

perceived to be a 'sensible' or reasonable commercial result".[163] McCombe L.J., with whom Lewison and Laws L.JJ. agreed, said that it was not "necessary for the purposes of this appeal to resolve that conundrum".[164] Nevertheless, McCombe L.J. did say (obiter) that, even taking proposition (vi) as read, "I would take the proper touchstone of that proposition to be the consequences would contradict what '*any*' (rather than 'a') reasonable person would understand the contract to mean.[165] As for commercial common sense enabling a choice between alternative interpretations, opinions as to commercial common sense in any given situation may also differ between reasonable people. In such circumstances, there is no room for implication."[166] McCombe L.J. felt that the question to be asked was would "all reasonable people" agree that "commercial common sense" must dictate the addition of the suggested implied term to the express words of the shareholders' agreement?[167] He had substantial doubts whether all reasonable people would agree that the continued availability of the power to remove contained in the articles would contradict what the agreement meant. He also doubted whether all would agree that "commercial common sense" must dictate a choice of Jackson's proposed implied term over the express words of the agreement.[168] The shareholders' agreement could reasonably and commercially stand as written, with the power of removal contained in the articles unaffected. It did not seem to McCombe L.J. that the *only* meaning consistent with the other provisions of the agreement, against the relevant background, was that terms had to be implied.[169] McCombe L.J. added that the shareholders' agreement had been drawn up by lawyers and negotiated by legally advised parties (and also drawn up after litigation had been about to start), and so he could not readily assume that the express terms of the contract failed to represent the parties' true intentions.[170] The Court of Appeal rejected the implied term.[171]

This line of cases shows clear support for Lord Hoffmann's approach in *Belize*. There is no fundamental division of opinion between Lord Hoffmann in *Belize* and Lord Clarke in *The Reborn*. It is submitted that it would be better if necessity were simply seen as part and parcel of the single question approach advanced by Lord Hoffmann in *Belize* and not

[163] [2013] EWCA Civ 89, at [16].
[164] Ibid., at [18].
[165] Ibid., at [22].
[166] Ibid.
[167] Ibid., at [23].
[168] Ibid.
[169] Ibid., at [26] (emphasis added).
[170] Ibid., at [30]. See also *Eastleigh BC v Town Quay Developments Ltd.* [2009] EWCA Civ 1391, [2010] P. & C.R. 2, at [33] (Arden L.J.); *Fitzhugh v Fitzhugh* [2012] EWCA Civ 694, [2012] 2 P. & C.R. 14, at [20] (Rimer L.J.)
[171] Laws and Lewison L.JJ. agreed with McCombe L.J. Lewison L.J. added (at [43]) that it is "more difficult to sustain an argument that terms are to be implied into an agreement made by the contracting parties in one capacity [as shareholders] which result in fetters on his powers to act in another capacity [as director]".

as an additional requirement.[172] Arden L.J. said much the same in *Eastleigh BC v Town Quay Developments Ltd.*,[173] when she said that "Lord Hoffmann made it clear that the process of testing necessity for the purposes of an implied term is not an exercise to be carried out in a manner detached from the reasonable expectations of the parties to the particular agreement being interpreted". The language of necessity was even used by Baroness Hale (obiter) in *Geys v Société Générale* where, after citing *Belize*, she said that terms are only implied in fact "where it is necessary to give business efficacy to the particular contract in question".[174] At the very least this dictum shows that Baroness Hale saw no conflict between the single question approach in *Belize* and the continued reference to the requirement of necessity.

Necessity must be given a wider meaning than simply saying that a term can only be implied where necessary to make the contract work when otherwise it would not work at all, although necessity in that sense still falls within the broader definition.[175] Other facts that emerge from an examination of the contract against the commercial background may indicate that the term must be implied to give effect to what the parties' intended.[176] In other words, it is not a question of whether the contract will work at all without the implied term but of whether, without the implied term, it will work in the way that the parties might reasonably have expected it to.[177] But such cases will be rare. Usually the presumption against implication applies, a presumption that is all the stronger where the contract is an arm's length commercial agreement that is drawn up by lawyers and negotiated by legally advised parties.[178] The implied term must also be consistent with the express terms of the contract.[179] For example, where an express term is construed in such a way that shows that the parties did not intend to fetter the exercise of a contractual right contained elsewhere in the contract, the court will not imply a term to

[172] See *Thomas Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066, at [37], per Aikens L.J.: "the oft-expressed requirement that an implied term must not just be reasonable but be 'necessary' simply reflects the requirement that the court has to be satisfied that the term must be implied because that is what the contract must mean".

[173] [2009] EWCA Civ 1391, [2010] P. & C.R. 2, at [31].

[174] [2012] UKSC 63, [2013] 1 A.C. 523, at [55].

[175] See Lord Hoffman's statement in *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [27] that the business efficacy and officious bystander tests are simply different ways of expressing the central concept.

[176] See, e.g. *Eastleigh BC v Town Quay Developments Ltd.* [2009] EWCA Civ 1391, [2010] P. & C.R. 2, at [37], [39] (Arden L.J.); *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273, at [25] (Cooke J.).

[177] Lewison, *Interpretation of Contracts*, note 56 above, at 296, n. 136, says that this approach is more consonant with the source of the principle: "*such* business efficacy *as must have been intended* . . . by both parties" (*The Moorcock* (1889) 14 P.D. 64, 68).

[178] *Jackson v Dear* [2013] EWCA Civ 89, at [30] (McCombe L.J.); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm), at [8] (Cooke J.); *Torre Asset Funding Ltd. v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch) at [151] (Sales J.).

[179] *BP Refinery (Westernport) Pty Ltd. v Shire of Hastings* (1977) 180 C.L.R. 266, 282–3 (P.C.) (Lord Simon).

fetter the exercise of that right.[180] This principle applies even where the express term proves to be ineffective for it still represents the intention of the parties.[181] Before a term will be implied, the court (acting as the reasonable addressee) must consider that the *only* meaning consistent with the other provisions of the contract, read against the relevant background, is that something is to happen. Where there are several ways in which the agreement could be performed, the court will not consider it necessary for the contract to be performed in the one way suggested by the implied term.[182] Moreover, the court has to know what the clause actually is and the words in which it is expressed, so the fact that it is put in several ways will throw doubt upon whether or not there is a reliable implied term that would meet the *Belize* test.[183]

VII. A Role for Reasonableness?

There is a fear that Lord Hoffmann's approach to implied terms will inevitably lead to the court taking into account a range of reasonable policy factors when deciding whether to imply a term in fact, when such factors are more appropriate to the implication of terms in law. If reasonableness and not intention becomes the driver for the implication of terms in fact there is a danger that the court would end up making the contract for the parties.[184]

In *Shirlaw*[185] the question is put by the officious bystander and answered by the contracting parties. The courts have not always taken a consistent approach with this and in some cases the question is deemed to have been asked by the parties and answered by the bystander.[186] It is this reversal of the question and answer process which is criticised by John McCaughran, who argues that because of *Belize* the focus is now on the reasonable person (the man on the Clapham omnibus) and not on the parties themselves.[187] Davies fears that the introduction of a reference to

[180] *TSG Building Services plc v South Anglia Housing Ltd*. [2013] EWHC 1151 (TCC), at [51] (Akenhead J.); *Mid Essex Hospital Services N.H.S. Trust v Compass Group UK and Ireland Ltd. (trading as Medirest)* [2013] EWCA Civ 200 at [154] (Beatson L.J.), and also at [92], [95] (Jackson L.J.) and at [140] (Lewison L.J.).

[181] *Consolidated Finance Ltd. v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133, at [36]: loan agreement had an ineffective purpose clause but this was held to prevent implication of different purpose.

[182] Ibid., at [38].

[183] Ibid., at [40]. See also the *Philips Electronique* case [1995] E.M.L.R. 472, at 482 (Sir Thomas Bingham M.R.); *Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609–10 (Lord Pearson), 612–614 (Lord Cross).

[184] Davies, "Recent Developments", note 16 above; Davies, "Construing Commercial Contracts", note 16 above, 441.

[185] [1939] 2 K.B. 206.

[186] Steyn J. in *Mosvolds Rederi A/S v Food Corp of India* [1986] 2 Lloyd's Rep. 68, 70 and also in *Associated Japanese Bank (International) Ltd. v Credit du Nord SA* [1989] 1 W.L.R. 255, 263–64; Clarke J. in *The Rio Assu* [1999] 1 Lloyd's Rep. 115, 121 and (based on the citation of *Irwin* and *Trollope & Colls*) in *The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639, at [18].

[187] Note 15 above, 614

reasonableness may lead judges to attempt to improve an agreed contract.[188] There is the danger, identified by Catherine Mitchell, that Lord Hoffmann's agreement-centred and interpretative approach might be no more than "a smokescreen that suggests party autonomy but sanctions judicial activism in the commercial sphere by allowing reasonable outcomes to be imposed on the parties".[189]

These concerns seem misplaced. Lord Hoffmann went out of his way in *Belize* to make clear that a court "has no power to improve upon" the contract, nor to "introduce terms to make it fairer or more reasonable".[190] He stressed the use of the word "necessary" was designed to convey that it is not enough for a court to consider that the implied term expressed what it would have been reasonable for the parties to agree to.[191] Does this leave any role for reasonableness when implying a term in fact?

Reasonableness still performs several functions. First, the express terms of the contract must be construed in a reasonable and commercial manner in order to see whether the term need be implied.[192] This is a sensible basis upon which to interpret express terms, although the courts have recently been quick to point out that reliance on commercial common sense should not be overplayed.[193] Secondly, the term itself must be reasonable: "the implication of an unreasonable term is of course impossible".[194] But it does not follow that the term must be implied for that reason alone.[195] The courts have consistently said that a term ought not to be implied merely because it would be a "reasonable and sensible one".[196] A term implied for reasonableness alone would lose all connection with the intention of the parties and simply reflect the court's assessment of what was reasonable. Thirdly, implication of a term may be necessary "to give effect to the reasonable expectation

[188] [2010] L.M.C.L.Q. 140, 145.

[189] C. Mitchell, "Obligations in Commercial Contracts: A Matter of Law or Interpretation?" (2012) 65 C.L.P. 455, 474.

[190] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [16].

[191] Ibid., at [23]. It is suggested in *Treitel* that the requirement of necessity "is perhaps best confined to a role in contradistinction to reasonableness": *Treitel's Law of Contract*, note 45 above, 225, n 298.

[192] *Hamlyn & Co v Wood & Co* [1891] 2 Q.B. 488, 491 (Lord Esher M.R.); *Liverpool City Council v Irwin* [1977] A.C. 239, 266 (Lord Edmund-Davies).

[193] *Jackson v Dear* [2012] EWHC 2060 (Ch), at [40] (proposition (vii) of Briggs J., which was agreed by the parties and approved by the court on appeal: [2013] EWCA Civ 89, at [18]); *BMA Special Opportunity Hub Fund Ltd. v African Minerals Finance Ltd.* [2013] EWCA Civ 416 at [24] (Aikens L.J.); *Fons HF (In Liquidation) v Corporal Ltd.* [2013] EWHC 1801 (Ch) at [49], and on appeal [2014] EWCA Civ 304 at [16] (Patten L.J.).

[194] *Beazer Homes Ltd. v County Council of Durham* [2010] EWCA Civ 1175 at [24] (Lloyd L.J.). See also, e.g., *Young and Marten Ltd. v McManus Childs Ltd.* [1969] 1 A.C. 454, 465 (Lord Reid); *Liverpool City Council v Irwin* [1977] A.C. 239, 262 (Lord Salmon).

[195] *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd.* [2013] EWHC 1279 (Ch) at [36] (Morgan J.): "It is a necessary (but not a sufficient) condition for the implication of any term that the suggested term be a reasonable term".

[196] *National Commercial Bank of Jamaica Ltd. v Guyana Refrigerators Ltd.* (1998) 53 W.I.R. 229, 233 (Lord Steyn). See also, e.g., *The Reborn* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639, at [15]; *Stena Line Ltd. v MNRPFT* [2011] EWCA Civ 543, [2011] Pens. L.R. 223, at [41] (Arden L.J.).

of the parties".[197] The more reasonable the term the more likely it is that it will give effect to the parties' reasonable expectations, but it cannot be said that both parties would necessarily have agreed to inclusion of the term just because it is reasonable. Similarly, the more unreasonable the contract without the term then the more likely it is that the term gives effect to the parties' reasonable expectations, but it does not decide the question of implication. The proposed term, though reasonable, must not be inconsistent with express terms of the contract.[198] The reasonable expectations of the parties are most readily evident in the terms they have actually agreed upon which is why those terms must be dominant.[199] The more the parties expressly provide for in their agreement, the less scope there is for a court to substitute its own view of reasonableness.[200] Fourthly, the "reasonable expectations of the parties" are part of the context against which the intention of the parties is to be objectively assessed.[201] In this context, the court uses reasonableness to filter the expectations of the parties. Only where the parties' expectations are deemed reasonable (and not unreasonable) will the courts look to imply a term, so long as it is "necessary" to give effect to those expectations in this way. It is submitted, on similar reasoning, that this would also mean that a court would be unlikely to imply a term into a contract that was itself unreasonable, even though the term was necessary to give the contract "business efficacy" in the *Moorcock* sense.[202] Finally, in *Belize*, Lord Hoffmann said that the meaning of the contract, or "intention of the parties", was that which the instrument would convey to a "reasonable person" or "reasonable addressee" having all the background knowledge which would have been reasonably available to the parties.[203] Here reasonableness

[197] *Equitable Life v Hyman* [2002] 1 A.C. 408, 459 (Lord Steyn), cited with approval by Lord Hoffmann in *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [23].

[198] See, e.g., *Holding and Management (Solitaire) Ltd. v Ideal Homes North West Ltd.* [2005] EWCA Civ 59.

[199] Note E. Farnsworth, *Contracts*, 2nd ed. (Boston 1990), para 7.7: "It is therefore to these expectations, rather than to the concern of the philosopher or semanticist, that we must turn in the search for the meaning of contract language".

[200] C. Mitchell, "Obligations in Commercial Contracts", note 189 above, 471. But Mitchell (at 478) is concerned that "reasonable expectation" is a "substantively empty" category of analysis because so much can be justified as falling within its scope: see further C. Mitchell, "Leading a Life of its Own? The Roles of Reasonable Expectation in Contract Law" (2003) 23 O.J.L.S. 639.

[201] In *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [23], Lord Hoffmann referred, with evident approval, to Lord Steyn's statement in *Equitable Life v Hyman* [2002] 1 A.C. 408, at 459, that an implication was necessary "to give effect to the reasonable expectations of the parties". See also *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685 at [36] and [42] (Dyson L.J.); *McKillen v Misland (Cyprus) Investments Ltd.* [2013] EWCA Civ 781 at [84] (Arden L.J.). But the reference to "reasonable expectations" in the context of implied terms in fact is criticised by Andrews, note 16 above, at [13.11], on the grounds that it might conflate the settled distinction between terms implied in fact and terms implied in law and "become an empty formula apt to mask a more interventionist and prescriptive approach to the implication of terms in fact". See also note 200 above.

[202] See Lewison, *Interpretation of Contracts*, note 56 above, 292.

[203] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [16] and [18].

is fulfilling another function. It is being used to indicate that "objectivity" informs the whole process of interpretation and implication.

VIII. Practical Implications of *Belize*

Does *Belize* really make a difference? The English courts continue to approach a suggestion that a new term should be implied into a contract with caution.[204] The presumption against intervention remains a strong one.[205] Perhaps nothing has really changed at all, so that it is still the case that a term will only be implied in fact when it is obviously one that the parties would have agreed to, or where it is needed to make the contract work. This must be right if one strictly adheres to Lord Hoffmann's observation that the different tests are merely "a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so".[206] But there remains the risk that by continuing to focus on the traditional officious bystander and business efficacy tests, the wider interpretative approach to implied terms might be lost sight of, and the court get sidetracked into a "barren argument" over how the parties would have reacted to the proposed term,[207] or consider that it was not necessary to imply a term because the contract worked in the sense that both parties could perform their express obligations without the implication of the term. By focusing on the traditional tests for the implication of terms in fact, there is a danger that the court will fail to give sufficient weight to the background or context against which the parties' intentions are to be assessed.

There is evidence from the case law that the broader contextual approach to implied terms advanced in *Belize* has allowed the courts to imply terms in fact that probably would not have passed either the officious bystander test or business efficacy test. Two recent cases illustrate the point.[208] In *Yam Seng Pte Ltd. v International Trade Corp Ltd.*,[209] Leggatt J. said,

[204] This is exemplified by *Consolidated Finance Ltd. v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133, at [35], where Arden L.J. stressed that "the court looks very critically at arguments that terms have to be implied into agreements. Such terms may … impose additional obligations on the parties and so that is something about which the court exercises caution".

[205] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [17]; and see also main text to notes 178 above and 235 below.

[206] Ibid., at [27].

[207] Ibid., at [25].

[208] In the *pre-Belize* case of *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, the House of Lords implied a term, which restricted the directors' apparently unlimited discretion as to bonuses, on the ground that it reflected the reasonable expectation of the parties. The term would not have passed the officious bystander test but, as Lord Hoffmann later noted in *Belize* at [22]–[23], the House took account of the business purposes of the parties which would have been frustrated if the term had not been implied. This entailed a broader understanding of what was meant by "necessity" than had previously been thought to emerge from *The Moorcock* (see Grabiner (2012) 128 L.Q.R. 41, 55–58).

[209] [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526.

obiter, that a distributorship agreement giving exclusive rights to distribute certain branded goods contained an implied term of good faith in its performance. The judge implied the term by relying on "shared values and norms of behaviour", which formed part of the admissible background, or context, against which the parties' intentions were to be assessed.[210] However, Leggatt J. went even further and argued in favour of the implication of a term requiring good faith "in *any* commercial contract based on the presumed intention of the parties".[211] There seems to be little doubt that, whilst a requirement of subjective honesty would pass both the officious bystander and the business efficacy tests,[212] a broader requirement of good faith performance which imposed objective standards of behaviour, would probably not.[213] Nevertheless, reliance on the broader context, one that extended beyond facts known to both parties and included "shared values and norms of behaviour", allowed the judge to imply the term so as to reflect the reasonable expectations of the parties to the contract.[214] The decision has been rightly criticised.[215] First, there was no need for the judge to imply such a wide duty of good faith when a narrower implied term requiring honesty in the provision of information from one party to another would have been enough to give effect to the common intention of the parties to the distributorship agreement in issue.[216] Secondly, the judge's argument in favour of a general requirement of good faith in performance of a commercial contract does not square with English law's well-established rejection of a general legal doctrine of good faith.[217] However, it is submitted that the judge's willingness to draw on the broader context, including the "unstated shared understanding" of the parties,[218] when implying a term, is a proper application of *Belize*. Moreover, there could be little complaint if the judge's general comments

[210] Ibid., at [134].
[211] Ibid., at [131] (emphasis added).
[212] As Leggatt J. stated at ibid. [137].
[213] Leggatt J. did not claim it would, merely stating at ibid. [138] that "[i]n addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document".
[214] Ibid., at [148].
[215] See S. Whittaker, "Good faith, implied terms and commercial contracts" (2013) 129 L.Q.R. 463; E. Granger, "Sweating over an implied duty of good faith" [2013] L.M.C.L.Q. 418. The courts have also been lukewarm towards the decision and have refused to see it as providing a principle of general application to all commercial contracts: *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd. (t/a Medirest)* [2013] EWCA Civ 200, at [105], [150]; *TSG Building Services plc v South Anglia Housing Ltd.* [2013] EWHC 1151 (TCC), at [45]–[46]; *Hamsard 3147 Ltd. (t/a "Mini Mode Childrenswear") v J.S. Childrenswear Ltd.* [2013] EWHC 3251 (Pat), at [86].
[216] *Yam Seng* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, at [156]. The claimant submitted that this specific duty formed part of "the relevant content" of the duty of good faith performance in this case and Leggatt J., after emphasising (at [144] and [154]) that the content of the duty to perform a contract in good faith was dependent on context, stated (at [155]) that this specific term was "clearly implied" into the distributorship contract and concluded (at [173]–[174]) that its breach justified the claimant's termination of the contract.
[217] Whittaker, note 215 above, 469.
[218] *Yam Seng* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, at [133].

meant no more than that it was always open for a court to find an implied term as to good faith in a *particular* contract if that is what the parties' intended.[219]

In *John Grimes Partnership Ltd. v Gubbins*,[220] a property developer brought a counterclaim for damages against a company that provided consulting engineer services on the ground that the company's failure to complete the work on time had resulted in a reduction in the market value of the development because of a fall in the property market. The Court of Appeal had to consider the remoteness test in contract as explained by Lord Hoffmann in *The Achilleas*.[221] It held that the company could reasonably be regarded as having assumed responsibility for a fall in market value caused by the delay. Sir David Keene, delivering the leading judgment in the Court of Appeal, said the following:

> If there is no express term dealing with what types of losses a party is accepting potential liability for if he breaks the contract, then the law in effect implies a term, to determine the answer. Normally, there is an implied term accepting responsibility for the types of losses which can reasonably be foreseen at the time of contract to be not unlikely to result if the contract is broken. But if there is evidence in a particular case that the nature of the contract and the commercial background, or indeed other relevant special circumstances, render that implied assumption of responsibility inappropriate for a type of loss, then the contract-breaker escapes liability. Such was the case in *The Achilleas*.[222]

Belize was not mentioned by name. Sir David's statement that "*the law* in effect implies a term to determine the answer" might suggest a term implied by law and not one implied in fact,[223] but his language in the third sentence of this passage undoubtedly reflects that of Lord Hoffmann in *Belize*. Furthermore, Sir David recognised that "[t]he essence of *The Achilleas* was an emphasis upon the presumed intention of the parties at the time of contract".[224] Intention of the parties is the basis for implication of terms in fact and not implication of terms by law.[225] On the other hand, there must be real doubt that a term limiting liability to reasonably

[219] Beatson L.J. seems to have interpreted Leggatt J.'s words in this narrower way in the *Mid Essex* case, [2013] EWCA Civ 200, at [150].
[220] [2013] EWCA Civ 37, [2013] B.L.R. 126.
[221] [2008] UKHL 48, [2009] 1 A.C. 61.
[222] Ibid., at [24]. Sir David Keene said he agreed with the summary of the law provided by Toulson L.J. in *Supershield Ltd. v Siemens Building Technologies FE Ltd.* [2010] EWCA Civ 7, [2010] 2 All E.R. 1185 at [43], adding "although I would put it in slightly different language".
[223] S. Sabapathy, "Falling Markets and Remoteness" [2013] L.M.C.L.Q. 284, 287.
[224] [2013] EWCA Civ 37, [2013] B.L.R. 126, at [19].
[225] Although note Lord Hoffmann's reference to *Liverpool City Council v Irwin* [1977] A.C. 239, in *The Achilleas* [2008] UKHL 48, [2009] 1 A.C. 61, at [11], and also his later statement, that appeared in an article written after his retirement as a Law Lord, that *The Achilleas* was concerned with "a default term implied in a contract of a certain type, in this case a time charter" (Lord Hoffmann, "The *Achilleas*: Custom and Practice or Foreseeability?" (2010) 14 Edinburgh L.R. 47, 61).

foreseeable losses would be necessary to give the contract "business efficacy" in *The Moorcock* sense, or that the parties would have readily agreed to such a term if put to them by an officious bystander.[226] This is not the place to enter into the debate whether the rules of remoteness in contract function by operation of law rather than by implementation of the parties' intentions.[227] Nevertheless, the case illustrates that an approach to the implication of terms that focuses more openly on an objective assessment of the intention of the parties allows the court to imply terms which probably not would have been applied using the officious bystander and business efficacy tests.

Belize allows the court to take into account a wide range of admissible evidence as to background, or context, against which the parties' intentions can be objectively assessed.[228] This enables the court to answer the central question: "What did the parties mean?" The critics say that this approach is an unworkable concept; that the clear guidance provided by the business efficacy and officious bystander tests have been replaced by a generalised concept that gives the court little assistance when it comes to its application to the facts and circumstances of a particular contract.[229] But the application of this approach to the implication of terms creates no more uncertainty than is inherent in the process of contractual interpretation itself.[230] Nevertheless, the concern expressed by some is that this will lead to a relaxation of the strict rules that previously restricted the implication of terms,[231] and that the courts will be tempted to imply terms in fact because it seems reasonable to do so.[232] But this fear seems to have been overstated.[233] *Yam Seng* and *John Grimes Partnership v Gubbins* should be regarded as exceptional cases, which is illustrated by the mixed, even hostile, reception that they have received.[234] First, and foremost, there is a rebuttable presumption that no term is to be implied into a contract as

[226] J. Goodwin, "A Remotely Interesting Case" (2013) 129 L.Q.R. 485, 487.

[227] As argued, e.g., by E. Peel in "Remoteness Revisited" (2006) 125 L.Q.R. 6. As a matter of authority, it is worth noting that the argument that a defendant cannot be held liable for an "extraordinary" or "unusual" loss, unless there is an implied term in the contract to that effect, was rejected by the House of Lords in *The Heron II* [1969] A.C. 350, 422 (Lord Upjohn).

[228] See Lord Hoffmann in *Investors Compensation Scheme* [1998] 1 W.L.R. 896, 912–3 (H.L.), 912–13, as further explained in *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2002] 1 A.C. 251 at [39].

[229] See Carter, note 17 above, [3–27] (construction determines what terms are implied but "because the content of the implied term is worked out simply by construing the contract, any term which is implied must be largely formal or even redundant"); Calnan, note 115 above, [8.09] (Lord Hoffmann's formulation sets out what needs to be achieved but "it does not give any assistance in deciding how to do it").

[230] The uncertainty inherent in the process of interpretation was recognised by Leggatt J. in the *Yam Seng* case [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, at [152].

[231] McCaughran, note 15 above, 617.

[232] Davies [2010] L.M.C.L.Q. 140, 145.

[233] J. Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge 2013), 238.

[234] See, e.g., comments by Whittaker, note 215 above, and Granger, note 215 above, on *Yam Seng*, and those by Sabapathy, note 223 above, and Godwin, note 226 above, on *John Grimes Partnership v Gubbins*.

a matter of fact, unless the court can be confident that this is the only way that effect can be given to the intention of the parties.[235] Lord Hoffmann referred to this as the "usual inference";[236] Aikens L.J. has described it as the "default position".[237] The presumption is all the stronger in the case of a detailed, written contract.[238] Secondly, the court must be confident that the implied term is essential to give meaning to the *common* intention of the parties. A term will not be implied just because it represents the intention of only one of the parties; it must represent the intention of *both* of them.[239] However, because the parties' intentions are objectively assessed, and do not always represent their subjective intentions, it may be possible, in an exceptional case, for a court to imply a term even though one party's subjective intention was against implication, so long as that intention had not been communicated to the other party,[240] although even then the power will only be sparingly and cautiously used and the implication must be "strictly necessary".[241] Thirdly, the term must be "necessary" in order to give meaning to the parties' intention. Moreover, this must be the *only* meaning which the agreement can have.[242] Where there are several ways in which the agreement could be performed, the court will not consider it necessary for the contract to be performed in the one way suggested by the implied term.[243]

IX. Conclusion

Belize has brought doctrinal coherence to interpretation and implication. This is to be welcomed. Implication of terms in fact should be seen as an exercise in interpretation. Implication gives effect to the intention of the parties that has been identified by interpretation. There is no other basis for implying a term in fact unless it is needed to give effect to the intention of the parties as objectively identified by the court. It may seem that the processes differ. Through interpretation the court gives meaning to express terms, whereas through implication the court introduces terms to fill the silence left by the parties. But the distinction is only superficial. In

[235] *Luxor (Eastbourne) Ltd. v Cooper* [1941] A.C. 108, 137 (Lord Wright).
[236] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [17].
[237] *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066, at [38].
[238] *Phillips Electronique v British Sky Broadcasting* [1995] E.M.L.R. 472, at 481–82 (Sir Thomas Bingham M.R.); *Codelfa Construction v State Rail Authority of NSW* (1981–82) 149 C.L.R. 337, 346 (Mason J.).
[239] See, e.g., *Shell UK Ltd. v Lostock Garages Ltd.* [1976] 1 W.L.R. 1187 (C.A.); *Daniel Stewart & Co plc v Environmental Waste Controls plc* [2013] EWHC 1763 (QB) at [58] (Picken Q.C., deputy H.C. judge).
[240] For the different effect of communicated and uncommunicated subjective intention, see note 96 above.
[241] *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, at 459 (Lord Steyn). Cf. *Spring v NASDS* [1956] 1 W.L.R. 585, note 53 and the main text thereto above, and see also note 96 above.
[242] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [18].
[243] *Consolidated Finance Ltd. v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133, at [36]. Cf. McCaughran [2011] C.L.J. 607, 618.

both cases the court seeks to identify and give effect to the intention of the parties through interpretation of the contract as a whole against the relevant background or context. Even an express term cannot be viewed in isolation for its meaning must take account of context, including the other terms of the contract.

Nevertheless, the courts remain mindful that silence is inherently ambiguous. The judges are right to act sparingly and with caution. The presumption is clear: no term is to be implied. It will be particularly strong in the case of a professionally drafted commercial contract. The court must be able to say with confidence that the parties intended something different before that presumption will be rebutted. It is at this point that the traditional "business efficacy" and "officious bystander" tests may still have a role to play. Post-*Belize*, the courts continue to refer to these tests.[244] This is not surprising. The tests are of long standing. The judges are familiar with them. Lord Hoffmann said they could be "helpful".[245] Some see the tests as providing more specific and concrete guidance to the courts than offered by Lord Hoffmann's approach in *Belize*.[246]

It is submitted that whatever their apparent utility in terms of offering familiar guidance to the courts,[247] it would be better to avoid further reference to "business efficacy" and the "official bystander" altogether.[248] Both in terms of their language and application they are relics of the past; and, in so far as they suggest that the implication of a term operates by some free-standing principle of law,[249] they are misleading.[250] More importantly, abandoning the "tests" would avoid any misunderstanding and uncertainty

[244] See, e.g., *Jackson v Dear* [2013] EWCA Civ 89, at [27] (McCombe L.J.); *Aspects Contracts (Asbestos) Ltd. v Higgins Construction plc* [2013] EWHC 1322 (TCC), at [24] (Akenhead J.); *Torre Asset Funding Ltd. v Royal Bank of Scotland plc* [2013] EWHC 2670 (Ch), at [152(vi)] (Sales J.). But with increasing caution: see, e.g., *SNCB Holding v USB AG* [2012] EWHC 2044 (Comm), at 62 (Cooke J. warned of the "dangers in taking them as the litmus test"); *Unique Pub Properties Ltd. v Broad Green Tavern Ltd.* [2012] EWHC 2154 (Ch) at [34] and *Straw v Jennings* [2013] EWHC 3290 (Ch) at [100] (Warren J., in both cases, said that "[t]hese formulations are not legislation and are not to be allowed to take on a life of their own".)

[245] *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [21].

[246] *Foo Jong Peng v Phua Kiah Mai* [2012] S.G.C.A. 55, [2012] 4 S.L.R. 1267, at [33] (Sing. C.A.); *Sembcorp Marine Ltd v PPL Holdings Pte Ltd.* [2013] S.G.C.A. 43, at [100] (Sing. C.A.).

[247] See, e.g., H. Beale *et al*. (eds.), *Chitty on Contracts*, 31st ed. (London 2012), vol. 1, [13–005] "guidance"; Lewison, *Interpretation of Contracts*, note 56 above, at 290 "useful guidance"; McMeel, *Construction of Contracts*, note 46 above, at [11.51] "practical guidance".

[248] As did, e.g., Andrew Smith J. in *ENE Kos v Petroleo Brasileiro SA, The Kos* [2010] 1 Lloyd's Rep. 87 at [41–42], revsd. on other grounds [2010] 2 Lloyd's Rep. 409; Cooke J. in *Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273, at [15]; Akenhead J. in *TGS Building Services plc v South Anglia Housing Ltd.* [2013] EWHC 1151 (TCC), at [44]; Norris J. in *Hamsard 3147 Ltd. (t/a "Mini Mode Childrenswear") v Boots UK Ltd.* [2013] EWHC 3251 (Pat), at [82–85]. In *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd.* [2013] EWHC 1279 (Ch), Morgan J. applied the *Belize* approach at [35], and then considered the business efficacy and officious bystander tests at [37], but it is clear that he based his decision on the *Belize* approach at [39].

[249] As, e.g., in the speech of Lord Atkin in *Shirlaw's* case, [1939] 2 K.B. 206, 717.

[250] *F & C Alternative Investments (Holdings) Ltd. v Barthelemy (No. 2)* [2011] EWHC 1731 (Ch), [2012] Ch. 613, at [272] (Sales J.).

over their relationship with the single question approach taken by Lord Hoffmann in *Belize.* The uncertainty surrounding the current role and meaning of "necessity" would also be avoided because the term could be given a broader meaning. Lord Hoffmann was forced to clarify the meaning of "business efficacy" and the "official bystander" in *Belize*. The tests are compatible with Lord Hoffmann's approach but they distract from the central idea represented by it.[251]

[251] In *Belize* [2009] UKPC 10, [2009] 1 W.L.R. 1988, Lord Hoffmann (at [25]) said that the requirement that the implied term must "'go without saying' . . . runs the risk of diverting attention from the objectivity that informs the whole process of construction".