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Demystifying Implied Terms

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Demystifying Implied Terms

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Abstract

Recent years have witnessed significant interest in demystifying the implication of contract terms. Whilst the discussion thus far has elicited some answers, the subject remains notoriously 'elusive'. This article advances discussion in the field. It argues that underlying recent debates are deeper issues that must be brought to the surface. These include theoretical incoherence regarding the nature/purpose of implication tracing back to The Moorcock (1889), and analytical indeterminacy in applying the established 'tests' for implication, as courts vary between conflicting instrumental and non-instrumental approaches. Feeding both issues is inconsistent linguistic use of core terminology. This article helps demystify implication by distilling two 'theses' well-supported by the authorities, and elaborating their details and significance. Whilst the divided state of the authorities precludes instant resolution, the article further contributes a reflection on possible ways forward, including a new possibility raised here that implication may comprise two distinct exercises matching the theses described.

Keywords: implied terms, contract law, interpretation, *Marks and Spencer*, *Belize Telecom*, contracts, UKSC, foundations of law, common law, good faith

I. Introduction

In recent years, significant attention has been invested by Contract scholars[1]

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[1] See e.g. Richard Hooley, 'Implied Terms after Belize Telecom' (2014) 73:2 CLJ 315, 319–323; Hugh Collins, 'Implied Terms: The Foundation in Good Faith and Fair Dealing' (2014) 67 CLP 297, 297–298; Hugh Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2019) 14-006, 14-014; Ewan McKendrick, *Contract Law* (13th edn, Macmillan 2019) 292; Leonard Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553; Gerard McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication, and Rectification* (3rd edn, OUP 2017) ch 9; Andrew Robertson, 'The Foundations of Implied Terms: Logic, Efficacy and Purpose' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (LawBook 2016); Wayne Courtney and John Carter, 'Implied Terms: What Is the Role of Construction?' (2014) 31 JCL 151; John McCaughran, 'Implied Terms: The Journey of the Man on the Clapham Omnibus' (2011) 70 CLJ 607; Wayne Courtney and John Carter, 'Belize Telecom: A Reply to Professor McLauchlan' [2015] LMCLQ 245; David McLauchlan, 'Construction and Implication: In Defence of Belize Telecom' [2014] LMCLQ 203; Paul Davies, 'Interpretation and Implication in the Supreme Court' (2019) 78:2 CLJ 267; Chris Peters, 'The Implication of Terms in Fact' (2009) 68 CLJ 513.

and appellate courts[2] in debates aiming to better understand the phenomenon of terms implied by the common law.[3] These debates led to some questions being answered. But this intriguing area of Contract Law remains notoriously 'elusive'.[4] This article aims to further illuminate the implication of terms. Indeed, it makes a number of contributions to the aforementioned collective aim of more thorough understanding of implication.

First, surrounding and underlying recent debates, I bring to the surface deeper issues. These include a fundamental incoherence regarding the nature and purpose of implication, and an associated analytical indeterminacy over how in practice courts should apply the 'tests' for implied terms. I argue that in order to more fully clarify the law in this area, these deeper issues must be addressed through further discussion in the field and/or future appellate judgments.

Second, in order to help frame further discussion of these deeper issues, I identify among the conceivable resolutions to them two alternative theses which are well-supported by the authorities. I refer to these respectively throughout the discussion as the Preexistent-Clarification Thesis and the Revision-Amelioration Thesis. As I will explain, these should not be confused with the intention-imposition debate in Contract Theory, concerned with the issue of voluntariness. In order to inform wider discussion, and facilitate resolution of these issues, whether through the emergence of a scholarly consensus or through courts taking a decisive position, I elaborate the key elements of each thesis, the fault-lines on which they diverge, and some important stakes that would be entailed in endorsing one thesis or the other.

Third, I explain the difficulty with immediately endorsing here one thesis. I submit that the two are incompatible; yet, both pervade the authorities—so that there is as much weight of authority against each view as for it. Thus, absent decisive new court precedent, a persuasive endorsement necessitates an intermediate step of developing a compelling basis upon which to argue the claim.

Fourth and finally, whilst for these reasons I do not suggest that it is possible to provide here an immediate resolution, I reflect on some possible options regarding ways forward. In light of the dilemma that emerges from the analysis previewed above, I submit that one possibility is that what we refer to with the single name 'implied terms' may actually comprise two different doctrines, resting on contrasting bases that correspond to the alternate theses of

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[2] See e.g. *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor* [2009] UKPC 10; *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor* [2015] UKSC 72; *Wells v Devani* [2019] UKSC 4; *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; *Greys v Société Générale* [2013] 1 AC 523; *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531; *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd & Anor* [2011] EWCA Civ 543.

[3] This article deals only with terms implied by the common law. Terms implied by statute or custom are not discussed in this paper.

[4] *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293 [36].

implication mentioned above. If so, the law may benefit from acknowledging this and separating them. However, I argue that this hypothesis and course of action—and other options—require further future consideration.

In these ways, this article seeks to advance discussion and contribute towards the collective aim of demystifying the implication of contract terms. The article proceeds in four parts. Part I situates the discussion in relation to existing debates, provides context for the issues the paper focuses on, and explains the relationship between the specific discussions in the three later parts. Part II discusses the nature and purpose of implication, including the issue of theoretical incoherence around this. Part III turns to the criteria for implied terms, including the issue of analytical indeterminacy over how courts should apply them. Part IV shows why an immediate resolution to these issues is not possible, but reflects on conceivable options, including recognising implication as two different doctrines accurately captured by the alternate views elaborated here. Each section distinguishes implication-in-fact and implication-by-law, due to their differences.

II. Context

Recent years have witnessed a surge in interest in illuminating terms implied by the common law.[5] Sparked by Lord Hoffmann's judgment in *Belize Telecom*,[6] debate has focused in two areas. One is reasonableness versus necessity as the standard for implication.[7] This longstanding debate first arose in relation to terms implied-by-law a half-century ago in *Liverpool*,[8] pitting Lord Denning in the Court of Appeal against Lord Wilberforce in the House of Lords. The issue is still disputed among scholars,[9] and following *Belize Telecom* the debate was extended to terms implied-in-fact.[10] The other debate spawned by Lord Hoffmann's remarks is whether implication is just an application of the wider task of interpretation.[11] *Belize Telecom* suggested that it was. But in the

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[5] Notes 1-2.

[6] *Belize Telecom* (n 2).

[7] McKendrick (n 1) 295; Beale (n 1) 14-005; Edwin Peel and GH Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2015) 6-045; Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract* (30th edn, OUP 2016) 167; Elisabeth Peden, 'Policy Concerns behind Implication of Terms in Law' (2001) 117 LQR 459, 465; Patrick Atiyah, *Introduction to the Law of Contract* (5th edn, Clarendon 1995) 207.

[8] *Liverpool City Council v Irwin* [1976] QB 319, 330, endorsing necessity over Lord Denning's suggestion of reasonableness in; *Liverpool City Council v Irwin* [1977] AC 239.

[9] See n 7.

[10] See e.g. Peters (n 1) 514; Courtney and Carter, 'Reply to McLauchlan' (n 1); McCaughran (n 1) 617.

[11] See e.g. Davies (n 1); Courtney and Carter, 'Role of Construction?' (n 1); McLauchlan (n 1); Hooley (n 1) 327–334; Paul Davies, 'Recent Developments in the Law of Implied Terms' [2010] LMCLQ 140; McMeel (n 1) ch 9. See also Adam Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63:2 CLJ 384; Stephen Smith, *Contract Theory* (OUP 2004) 280; *Equitable Life Assurance Society v Hyman* (2002) 1 AC 408, 459 (Lord Steyn); *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212 (Lord Hoffmann); *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1985] Ch 103, 138 (Oliver LJ).

later judgment in *Marks and Spencer,*[12] the Supreme Court made 'rather heavy weather' of this.[13]

These debates have elicited some answers: acknowledging the ferment, *Marks and Spencer* directly addressed the questions framing them.[14] Surrounding and underlying those questions, however, I submit that there are deeper issues.

One of these deeper issues is fundamental incoherence about the nature and purpose of implication. The question of whether implication is just an application of interpretation is settled by the Supreme Court holding that they are 'different processes governed by different rules'.[15] It was added that their exact relationship is 'an interesting debating point, but…of little practical significance'.[16] But I contend that the intense interest in this by scholars and judges, catalysed by *Belize Telecom,* must reflect a deeper unease that, in Hugh Collins' words, 'the judicial practice of implying terms into contracts…has never been properly understood.'[17] Dating to *The Moorcock*[18] 130 years ago, uncertain has remained this foundational issue: *What is the nature of implication?* That is, when a court enquires into a potential implied term, *what is it doing and why?* For recent investments in clarifying this area of law to achieve the fullest return, I argue that this deeper issue must be brought to the surface so that it can be resolved by new precedent or scholarly consensus.[19]

To facilitate this, I further identify among the issue's conceivable resolutions two alternative theses for which one could claim strong support by the authorities: A Preexistent-Clarification Thesis sees courts as uncovering, by interpretation and inference, terms unstated but inherent in a contract at the time it was made, as a matter of fact or law. A contrasting Revision-Amelioration Thesis sees courts as revising contracts *ex post* by adding terms to cure defects in the particular contract or broader contract-type. These theses should not be confused with the longstanding debate in Contract Theory about whether implied terms result from party intention or external imposition.[20] The matter there is the voluntariness of terms, and whether terms implied by-law versus in-fact are different categories. Here the matter is rather the time and rationale of implication: was the term discoverable at the time the contract was made, as simply following (whether due to party intention or legal imposition) from what was settled about it, or is there a

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Belize Telecom uses the term construction; 'most lawyers…use the terms "interpretation" and "construction" interchangeably.': Hooley (n 1) 331; see also McMeel (n 1) [1.16], [10.03].

[12] *Marks and Spencer* (n 2).

[13] Hoffmann (n 1) 563.

[14] *Marks and Spencer* (n 2) [24].

[15] ibid [26].

[16] ibid [68] (Lord Cornwath).

[17] Collins (n 1) 301.

[18] *The Moorcock* [1889] 14 PD 64.

[19] The points in this and the succeeding paragraph are argued in Part II of this paper.

[20] Regarding the intention-imposition debate, see e.g. Smith (n 11) ch 8.

judicial power to improve contracts by remedying deficiencies that later emerge? To inform wider discussion enabling the issue to be resolved through new precedent or scholarly consensus, I develop the theses' essential features and distinctions, and highlight significant consequences that would ensue from endorsing either.

Underlying the other recent debate, of reasonableness vs necessity as the standard for implication, is another deeper issue: analytical indeterminacy in applying the traditional tests for implied terms. *Marks and Spencer* answered the reasonableness/necessity question—affirming the standard as necessity for terms implied-in-fact, as *Liverpool* did earlier for terms implied-in-law.[21] But that only goes so far, as in practice, the meaning of necessity in the context of implication is 'elusive'.[22] I demonstrate that courts in fact use in different cases *fundamentally inconsistent instrumental and non-instrumental bases* for saying a term is necessary, in assessing whether the applicable 'tests' for implication are met. Adherence to the familiar tests is therefore only superficially consistent in presenting conclusions, and belies profound analytical inconsistency in reaching the conclusions. Thus, at a practical level, further illuminating this subject requires that courts or scholarly debate settle on *what analytical process should courts follow in assessing whether a term is implied?*[23]

However, this deeper issue is intertwined with the other already mentioned, so it is not possible to prescribe the proper analytical process without first resolving the theoretical incoherence. Moreover, complicating resolution of both issues is remarkable linguistic confusion in the form of imprecise and inconsistent use of core terminology: 'contract' and 'implication' in discussing the nature of implication; and 'necessary' and 'reasonable' in discussing the tests for implied terms.

Altogether, the situation presents a predicament that is not amenable to resolution by immediately endorsing one view and corresponding analytical process. I argue that the alternate theses fundamentally conflict. Yet, they coexist in the authorities. Indeed, often a single discussion vacillates back and forth between them, without explanation, as if they were interchangeable. The pervasiveness of this ambivalence makes it difficult to found a claim on the authorities, which equally support and thus equally undermine the opposing views. Basing a claim on general theory or policy will confront a similar dilemma due to the divided state of the authorities: vast precedent for each account looms over a theoretical objection; and the authorities commonly invoke useful functions associated with each view. Absent decisive new precedent, a persuasive endorsement thus necessitates as an intermediate step the challenge of developing a widely-accepted basis upon which to argue a single view.

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[21] *Marks and Spencer* (n 2) [16-21]; *Liverpool* (n 8) 254.

[22] Note 4.

[23] The points in this paragraph are argued in Part III of this paper.

For these reasons, whilst it would be inappropriate to attempt to provide here an immediate resolution, I offer a preliminary reflection on some possible options of ways forward. Among these are some scholarly constructs that one could use to try to bridge the ambivalence in the authorities. I also raise a new and opposite possibility: that what is described under one name of 'implication' may actually be the longstanding existence of two different Contract doctrines—whose basis and operation are accurately captured by the two theses of implication outlined here. If so, the way forward may be to recognise this and separate them. However, this hypothesis and possible course of action—among other options—require further future consideration.

III. On The Nature & Purpose of Implied Terms

This part of the paper deals with the nature of implication and purpose of its judicial consideration.

A. Theoretical Incoherence

I here discuss the theoretical incoherence around these. To better illuminate implication, this issue must be brought to the surface so that it can be resolved by new precedent or scholarly consensus. To facilitate this, I here identify among conceivable accounts of them two alternative theses that could claim strong support by the authorities. I further develop their key features and distinctions.

i. On the Nature of Implied Terms

I start with the nature of implication.

a. The Preexistent Thesis

One conception of the nature of implication for which one could collect strong support from the cases and commentaries may be referred to as the 'Preexistent Thesis.'

Under the Preexistent Thesis, an obligation is seen as an implied term in that the term, though unexpressed, was somehow *already part of the contract at the time it was made.*[24] This image of implied terms is consistent with statements along the lines that courts 'cannot introduce terms'; 'it is said that the court implies a term…but the implication of the term is not an addition' to the contract.[25] Remarks in this vein are more common for terms implied-in-fact; however, they are also found for terms implied-by-law.[26] Collins, whose

[24] Contract here refers to the full legal agreement, including not just what the parties agreed, but for instance also legal incidents of that, as detailed below.
[25] *Belize Telecom* (n 2) [16–17].
[26] Notes 34, 36.

view is incompatible with this thesis of the nature of implication, submits that 'this conception of an implied term was invented to reconcile the practice of judicial imposition of standardized obligations on market participants with liberal theories of the sources of contractual obligations.'[27]

For terms implied-in-fact, the basis for saying that a term, per the Preexistent Thesis, is already part of the contract is as a matter of the (objectively-determined) intent of the parties. For example, *The Moorcock* described an implied term as an 'implication which the law draws from what must obviously have been the intention of the parties'.[28] In *Philips Electronique*, Lord Bingham similarly suggested that an implied term will be recognised where the court can 'infer with confidence what the parties must have intended'.[29] As *Chitty* explains, 'the court will not make a contract for the parties' but will find an implied term 'if there arises from the language of the contract itself, and the circumstances under which it was entered into, an inference that the parties must have intended the stipulation in question.'[30] It is inferred as being a tacit part of the contract. As further depicted by *Trollope*:

> An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract… it must have been a term that went without saying…a term which, though tacit, formed part of the contract which the parties made for themselves.[31]

Turning now to terms implied-by-law, under the Preexistent Thesis, the implied term forms part of the contract in being a 'legal incident' of that contract-type.[32] Or as *Lister* elsewhere put it, the term is a 'necessary condition of the relation'.[33] This image of terms implied-by-law inhering in a contract was conjured by Lord Wilberforce in *Liverpool*: 'The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied. What then should this contract be held to be?'[34]

In the Preexistent Thesis, the nature of the implication process is one of *discovery*: the court discovers that an obligation unspecified by the parties nevertheless was inherent, as a matter of fact or law, in the contract. Where that is so, the court *recognises* it as an implied term of the contract. Hence, *the court's role is to express the term* that was already tacitly part of the

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[27] Collins (n 1) 305.
[28] *The Moorcock* (n 18) 68.
[29] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481–482.
[30] Beale (n 1) 14-006.
[31] *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, 609.
[32] *Lister v Romford Ice & Cold Storage Co* [1957] AC 555, 579.
[33] ibid 576.
[34] *Liverpool* (n 8) 254.

contract, though left by the parties or by the law as previously only evident by implication.

Under the Preexistent Thesis, a key part of the task of implication is *interpretation*. The court must interpret the parties' intent (for terms implied-in-fact) or contract-type (for terms implied-by-law) and infer whether by implication the contract entailed unexpressed obligations. For example, engaged with terms implied-in-fact, Bowen LJ said in *The Moorcock*: 'The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences'.[35] And concerning terms implied-by-law, Lord Salmon said in *Liverpool*:

> Clearly, there was a contractual relationship between the tenants and the council with legal obligations on both sides. Those of the tenants are meticulously spelt out in the council's printed form which mentions none of the council's obligations. But legal obligations can be implied as well as expressed. In order to discover what, if any, are the council's implied obligations, all the surrounding circumstances must be taken into account.[36]

However, this is not to say that the process is a traditional exercise of contractual interpretation.[37] The aim of the court is *not interpreting the meaning of the contract but determining its contents*—whether it includes obligations it may not have even mentioned. However, construing the meaning of the already-established elements of the agreement of course is vital in trying to determine whether the agreement must entail some other alleged element.[38]

b. The Revision Thesis

As Stephen Smith writes, 'the first, and I suggest, most important issue…is determining when interpretation ends and creation begins.'[39] With that in mind, able to claim strong support from the cases and commentaries, I distil another alternative conception of the nature of implied terms, which may be called the 'Revision Thesis'.

The Revision Thesis does not view an implied term as an unstated but existing part of a contract. Collins suggests that statements supporting the Preexistent Thesis are just a 'rhetorical strategy… to present the proposed

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[35] *The Moorcock* (n 18) 70.
[36] *Liverpool* (n 8) 261.
[37] *Marks and Spencer* (n 2) [27] ('one is not construing words, as the words… are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.').
[38] ibid [26] (referring to the 'scope' of the contract), [28].
[39] Smith (n 11) 314.

implied term as having always been, at least from an objective point of view, an unexpressed ingredient of the intentions of the parties.'[40] By contrast, the Revision Thesis sees implication as *the court adding a term to the contract ex post*, where justified. Within the judiciary, a view overtly compatible with this was held by Lord Denning. Regarding terms implied-in-fact, he submitted that 'when the parties have given no thought to the matter and something occurs for which they have not provided, then the court itself will imply a term…the court decides according to what is fair and reasonable.'[41] Of terms implied in law, Denning MR similarly said:

> The judgments in all those cases show that the courts implied a term according to whether or not it was reasonable in all the circumstances to do so…as matter of law, not as matter of fact. Lord Wright pulled the blinkers off our eyes when he said… "The truth is that the court…decides this question in accordance with what seems to be just or reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The court is in this sense making a contract for the parties—though it is almost blasphemy to say so."[42]

Seldom do judicial statements so clearly embrace a Revision Thesis view of implied terms.[43] Scholars like Collins whose views exemplify the Revision Thesis see this simply as judges wanting to publicly uphold a myth of freedom of contract: 'implied terms permit judicial intervention whilst maintaining the appearance of conformity to the idea of respecting parties' self-determination.'[44] Although rarely overtly espoused by judges, the Revision Thesis image of implied terms is visible in the theoretically ambivalent jurisprudence as pervasively as the opposing Preexistent Thesis.[45] It is reflected, for example, in frequent references to: the *court* rather than the facts or law as doing the implying,[46] discussion of whether courts *should* imply a term, the court having to imply the term *'into'* the contract, etc.[47] Scholars have been less reluctant than judges to argue perspectives on implied terms that we can clearly identify as instances of the Revision Thesis, as we will see.[48] Further, in academic accounts of implied terms that are not intended to argue any personal view, theoretical ambivalence is often present echoing the judicial discussions.

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[40] Collins (n 1) 303.
[41] Quoted in *Trollope* (n 31) 608.
[42] *Liverpool (CA)* (n 8) 330.
[43] Smith (n 11) 306–307 ('we almost never see courts admitting that they have chosen terms for the parties').
[44] Collins (n 1) 297.
[45] Smith (n 11) 302 says 'the judicial report of a…case normally leaves even a close reader unclear on which side of this line the judge ended up.'
[46] ibid 309 (speaking of terms implied by law) says the terms are 'created by 'judicial…action'.
[47] The role of language in contributing to the theoretical ambiguity is discussed in Section B.
[48] Section ii-b.

Under the Revision Thesis, implication is a *discretionary power* of the court. As Stephen Waddams puts it, 'the power to imply terms into contracts is a flexible judicial tool.'[49] Consistent with this, the Supreme Court of Canada has said that there is a 'judicial power to impose obligations or duties on the parties to a contract by implication'.[50] Seen from that perspective, one also appreciates Bingham MR's cautioning that 'it is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.'[51]

By this Thesis, that power is justified by some *deficiency of the contract,* such as incompleteness,[52] lack of business efficacy,[53] or perhaps even 'an agreement that would be unfair'.[54] The sorts of deficiencies that have been argued to trigger the power vary. The power's availability is also *confined to where certain preconditions* are met, concerning the (objective) intention of the parties (for terms implied-in-fact) or the type of contract (for terms implied-by-law). These preconditions are defined by the 'tests' for implied terms.[55] But under the Revision Thesis a court is never obliged to imply a term; rather, it *chooses whether or not to exercise its power* to do so. As Elisabeth Peden submits, this explains why courts frequently are to be found 'asking whether they "should" imply a term.'[56] If the court so decides, it adds the term, and the contract is thus judicially revised.

Under the Revision Thesis, it follows that the nature of implication as a judicial practice is *policymaking.* The sort of policymaking involved ranges based on the deficiency argued as underwriting the power; using the examples above, it could consist in whether and how to remedy incompleteness, make a contract commercially efficacious, or redress unfairness.[57] It is bounded in scope by what would ameliorate the deficiency, and depends on satisfaction of the tests noted as being preconditions to the power's availability; but nonetheless its nature is policymaking. In Waddams' words, the 'business efficacy' test for terms implied-in-fact 'conceals a good deal of judicial lawmaking'[58]; as Peden puts it, terms implied-by-law 'are based on policy'.[59]

The extent of the conflict between the above two hypotheses regarding the nature of implication is further illuminated, along with the significance of endorsing one view or the other, by looking at how each would explain the *purpose* of the judicial enquiry into them. I investigate this next.

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[49] Stephen Waddams, *The Law of Contracts* (LawBook 2017) 343–344.
[50] *Canadian Pacific Hotels Ltd v Bank of Montreal* (1987) 1 SCR 711 [53].
[51] *Philips Electronique* (n 29) 481.
[52] Beale (n 1) 14-016; *Wells* (n 2) [35].
[53] Section III-B-i-a-1.
[54] Waddams (n 49) 348.
[55] Covered in Section III-A.
[56] Peden (n 7) 466, discussing terms implied by law. For terms implied-in-fact, see e.g. *Philips Electronique* (n 29) 481 ('the question of whether a term should be implied, and if so what').
[57] Notes 52-54.
[58]Waddams (n 49) 345.
[59]Peden (n 7) 466–467.

ii. On the Purpose of Judicial Consideration of Implied Terms

For each of the competing accounts of the nature of implied terms, we can develop correlative explanations of the purpose of judicial consideration of them.

a. The Clarification Thesis

Following from the Preexistent Thesis of the nature of implied terms, I spell out a correlative 'Clarification Thesis' of the purpose of judicial consideration of them.

On this view, enquiry into a possible implied term arises in endeavouring *to resolve a dispute as to the contents* of a contract *regarding a question which the express terms do not answer.*[60] If the court determines that there did exist a term unexpressed but which nevertheless inheres in the contract in some way, it recognises the term. By this view, a court is 'concerned only to discover' whether an agreement entails an unexpressed obligation, and if so 'only spells out' what that obligation is.[61] The court cannot add to the contract, even to ameliorate a deficiency: 'the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong.'[62]

By specifying a term that was present by implication despite not having been expressed, the court clarifies the content of the contract concerning a question which the express terms left unanswered. The clarificatory aim overlaps that of contractual interpretation. However, it is not the meaning of the language that needs to be clarified, but whether the contract includes a term that the words, even with their meaning clarified, have not communicated.[63] Hence, it is precisely where interpretation of the express terms cannot answer the question that the enquiry into a possible implied term becomes necessary.

As noted previously, the existence of such a term might be ascertained from the intent of the parties (for terms implied-in-fact) or contract-type (for terms implied-by-law). For terms implied-in-fact, *Shirlaw* identified one reason there might be such a term, observing that 'that which in any contract …need not be expressed is something so obvious that it goes without saying'.[64] *Belize Telecom* added that the obviousness that a term must form part of a contract might not always be that it went without saying, but could be that upon deliberation, no other conclusion would make sense.[65]

The need for court clarification is because it is not always self-evident 'what the parties must have intended when they have entered into a…contract but

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[60] I mean the express terms under their true construction, not the bare text.
[61] *Belize Telecom* (n 2) [16, 18].
[62] *Philips Electronique* (n 29) 481.
[63] Notes 37, 60.
[64] *Shirlaw v Southern Foundries (1926) Ltd* (1939) 2 KB 206, 227.
[65] *Belize Telecom* (n 2) [25].

have omitted to make provision for the matter in issue'. It might be a matter they assumed they would not agree on, or concern an eventuality they hoped would not occur. Nor would it be clear what they must have intended from knowing only that 'had the parties foreseen the eventuality…they would have wished to make provision for it, unless it can also be shown either that there was only one contractual solution or that one…possible solution…would without doubt have been preferred.'[66]

Meanwhile, for terms implied-by-law, the reason that the contract is silent with respect to the term is that it does not derive from what the parties agreed, but by operation of law in the absence of party agreement to the contrary. As Lord Justice Beatson, Lord Burrows and John Cartwright encapsulate, these are default terms ordained by law: 'in certain types of contract, terms have become standardized, and they will be implied in all contracts of that type in the absence of any contrary intention.'[67]

Where investigating the possibility of an implied term, often a court will not find there to be one relevant to the question in dispute. Even in such cases, it may be said that the implication enquiry clarifies the content of the contract, by making clear that it does not contain a term that answers the question. The parties (and their lawyers) are then free to settle the issue. They may further negotiate it if they wish, or resort to mediation or (formal or informal) arbitration. The courts are not called to solve every private dispute including where the law supplies no answer.

b. The Amelioration Thesis

Opposed to the Clarification Thesis of the purpose of implied terms, I identify what may be termed the 'Amelioration Thesis'. The Amelioration Thesis corresponds with the Revision Thesis of the nature of implied terms, from which it is here derived.

Under this view of its purpose, implication is *judicial action for the purpose of fixing problems or bettering shortcomings of contracts*. Provided the preconditions are met for courts' power of implication to arise,[68] then a court can exercise this discretionary power *to cure a defect or ameliorate a problem*.

What counts as an amelioration depends on what deficiency is proposed or assumed to justify the court's intervention; and as mentioned previously, various suggestions about that have been made. If the defect is that the agreement is incomplete,[69] this is ameliorated by the court filling the 'gap'. If a contract has a technical flaw that makes it ineffective as a business instrument or unworkable in a practical sense, the amelioration is to correct the flaw and make the contract more effective or workable as a legal

[66] *Philips Electronique* (n 29) 481–482.
[67] Beatson, Burrows and Cartwright (n 7) 166–167.
[68] Defined by the 'tests' for implied terms: Note 55.
[69] Note 52.

instrument.[70] If the problem is unfairness, then the amelioration is to help rebalance the contract.[71] Other versions of the thesis suggest still other accounts of the purpose of the amelioration pursued by a court in implying a term.

For terms implied-in-fact, the amelioration will target deficiencies related to the parties' intentions. Andrew Robertson sees such cures as aiming to 'make the transaction workable' or 'avoid defeating a purpose' of the contract: a term is implied if it solves such a problem, provided also—consistent with the preconditions mentioned above—that it 'represents an obvious or singularly apt solution to that problem'.[72] More 'controversially', Collins argues that 'the true ground for implying terms into contracts is always good faith and fair dealing.'[73] Waddams similarly appraises fairness as an aim, acknowledging that 'none of these concepts is very precise' but submitting that 'it is evident that the courts in practice do frequently imply terms into contracts for all the[se] purposes…and perhaps for others also.'[74]

For terms implied-by-law, the ameliorative purpose relates to the contract-type. Peden perceives an overall purpose 'to maximise the social utility of the relationship'-type in question.[75] This could be, more specifically, promoting transactional efficiency,[76] or crafting a more rational allocation of risk.[77] It could again be to address concerns of fairness: Peden argues that 'courts are concerned with the balance of the relationship and attempt to devise terms that will enhance the fairness and mutuality of the relationship'.[78] With *Liverpool* in mind, Collins adds that courts may well use implied terms 'to equalize the obligations of the parties, even in the teeth of express terms of standard form contracts, and so pursue ideas of fairness'.[79] As terms implied-by-law have been said to reflect 'wider considerations' than terms implied-in-fact,[80] Peden goes so far as to say their purpose encompasses a 'non-exhaustive list of 12 considerations that appear in judgments'.[81] This fits with Waddams' account of implication as a 'very flexible judicial power.'[82]

It is thus apparent that there are several version of the Amelioration Thesis, which see courts' purpose in implying terms as to remedy one or more type of contractual deficiency.

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[70] Note 53.
[71] Mindy Chen-Wishart, *Contract Law* (6th edn, OUP 2018) 403.
[72] Robertson (n 1) 10, 24.
[73] Collins (n 1) 301.
[74] Waddams (n 49) 104.
[75] Peden (n 7) 460.
[76] Hugh Collins, *The Law of Contract* (4th edn, CUP 2003) 242.
[77] Chen-Wishart (n 71) 403, 414.
[78] Peden (n 7) 467.
[79] Collins (n 76) 246.
[80] *Scally v Southern Health and Social Services Board* (1992) 1 AC 294, 307.
[81] Peden (n 7) 467.
[82] Waddams (n 49) 104.

iii. Possibility of Context-Variable Nature and Purpose

That all terms implied by the common law share the same nature of either being Preexistent or Revisions, and the same purpose of either being Clarifications or Ameliorations, is not the only possibility. A person might believe that, varying with the context, some implied terms are of the first kind, and some of the second. Such views exist. For example a person might argue that the Preexistent/Clarification Theses apply to terms implied-in-fact, but not terms implied in law, which embody the Revision/Amelioration Theses. Views of this kind seem to be adhered to by Smith and Adam Kramer, for instance.[83] Another example would be arguing that even among terms implied-in-fact, there is variability, some founded on the Preexistent/Clarification Theses, others on the Revision/Amelioration Theses. The view of Robertson, for instance, fits that mould.[84]

In Part IV, I explore whether there is greater potential to resolve uncertainty about the nature and purpose of implied terms through mixed accounts like these than through 'pure' accounts. For present purposes, what matters is that the existence of such views does not alleviate the issue of theoretical incoherence; it just shows that it has more than two potential resolutions. Indeed, the fact that multiple different conclusions have been reached, including mixed views and pure views that fall wholly under the Preexistent/Clarification or Revision/Amelioration theses, reveals the extent of uncertainty in the field. Arguably, the extent of the theoretical incoherence is even more powerfully demonstrated by the much larger number of authorities in which no view is clearly embraced, and the discussion oscillates without evident cause or explanation between language which suggests the Preexistent/Clarification Theses and language suggesting rather the Revision/Amelioration Theses.

The above sections show that whilst existing debate has told us that implication and interpretation are 'different processes', the nature of implication is obscured by a fundamental incoherence. Statements reflecting two conflicting visions pervade the authorities and trace back 130 years. That being so, either new precedent or the emergence of a scholarly consensus not yet present, is needed to resolve the incoherence. To further this, the preceding discussion put this issue in focus, and elaborated the defining features and distinctions between alternative theses of implied terms that can claim strong support by the authorities. I now further address the stakes in endorsing a view.

iv. Some Stakes of Significance in Choosing Among Conceptions

[83] Kramer (n 11); Smith (n 11) 280 (for terms 'implied-in-law, courts are involved in the much different process of addition-of making a contract for the parties').
[84] Robertson (n 1).

An immediate practical consequence of endorsing one thesis of implied terms is this will dictate the sort of exercise a court should engage in: drawing out inferences, or correcting deficiencies. Indeed, Part III shows how, correspondingly, courts presently use inconsistent analytical processes in different cases in applying the established tests for implied terms.

Beyond judicial process, choosing among the different conceptions of implication has significance for contracting parties. For example, if the Preexistent-Clarification thesis is endorsed, this would mean that courts are powerless to correct a contractual deficiency, and it would be up to the parties to negotiate further or seek (formal or informal) arbitration (assuming the defect falls short of being a case of mistake or frustration). It would also mean that implication would not be available to prevent a party taking advantage of an oversight by its counterpart.[85]

On the other hand, if the Revision-Amelioration thesis is endorsed, it might be difficult to delimit the contracts that merit judicial revision. For instance, is remedying unfairness a valid justification, and if so how much is enough? As Part III will show, even business efficacy is a matter of degree.[86]

B. Linguistic Confusion as a Contributing Factor

As mentioned earlier, contributing to the theoretical incoherence is unusual linguistic confusion: imprecise and inconsistent use of the key words 'implication' and 'contract' in discussions of the nature and purpose of implication feed into this incoherence. I now expose this aspect.

i. 'Implication'

Ambivalence on the nature and purpose of implied terms is unsurprising in light of contrasting use in the authorities of the very term 'implied'/'implication' itself, summarised below.

a. 'Implied' as Implicit & 'Implication' as Necessary Inference

One way in which this terminology is used casts the situation as being that a contract contains an *'implied term' in the sense of an implicit term*. The term is depicted as being already present in the contract, although unexpressed. It is in this sense that implied terms are contrasted with the expressed or express terms of a contract. This fits with the ordinary meaning of 'implied'—doubly confirmed by the definition's reference to legal usage, including an implied (warranty) term:

> ***implied, adj.***

[85] A concern emphasised by Collins (n 1).
[86] Section III-B-i-a-1.

> Contained or stated by implication; involved in what is expressed; necessarily intended though not expressed…Often in legal phrases as *implied contract…*, *implied trust, implied warranty*, etc.[87]

The definition's mention of what is 'necessarily intended' is likewise consistent with discussions of implied terms which use *'implication' in the sense of necessarily following from already established aspects* of the contract such as the express terms and admissible background or context. In the same vein, the definition also refers to what is 'stated by implication' and 'by implication' is defined as similarly extending from 'what is implied though not formally expressed' to what is entailed by 'natural inference.'[88] With respect to what it means to imply a term by law or fact, as the authorities speak of, the word 'imply' is also defined consistently with the discussion here, in saying: 'to involve or comprise as a necessary logical consequence'.[89] This is the sense in which, for example, the Supreme Court recently said in *Wells* that 'the contract is made on the terms of the words used and what those words imply.'[90]

The authorities' usage of 'implied', 'implication,' and 'imply' in the ways just noted—that is, with their ordinary meaning—suggests the Preexistent/Clarification Thesis as the proper conception of implied terms. Indeed, the definitions depict how an unexpressed term could be inherent in a contract, in referring to 'the condition of being involved, entangled, twisted together, intimately connected or combined' and to 'the fact of being…involved, without being plainly expressed.'[91]

b. 'To be Implied' & 'Implication' as Possible Inference ('Impliable')

A contrasting way in which the same key terminology is used is where the authorities speak not of implied terms, but of *terms 'to be' implied or 'to imply' into a contract*. The use of the future tense signals that the term is not already part of the contract, so that if it becomes part of the agreement, it must be by the court adding the term. In the same vein are discussions which must tacitly assume the word 'possible' as a qualifier for 'implication', used to refer to terms only *potentially following from already established aspects*, rather than necessarily following. Parallel discussions likewise must tacitly assume the word 'possibly' as a qualifier of 'imply' with respect to terms that the settled aspects of the contract *suggest as only possibly* consequent. In such cases, before the term can become part of the contract, the court has to accept the suggestion, thus turning what was merely a possibility into a reality. The active role of the court in deciding whether to accept the suggestion or give favour to the possibility may explain language which points to *the court as doing the*

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[87] OED Online, *(Sub Verbo 'Implied')*.
[88] ibid, *(Sub Verbo 'Implication')*.
[89] ibid, *(Sub Verbo 'Imply')*.
[90] *Wells* (n 2) para 33.
[91] Note 78.

implying, rather than the facts or law. Such discussions in the authorities are consistent with the definition not of 'implied' but of 'impliable':

> ***impliable, adj.***
> Capable of being implied.[92]

Phrases sometimes found that do not embody instances of how the words implied and implication are employed in ordinary speech—such as of a court *'making' an implication* or of a term being *implied 'into'* a contract by a court—might be intelligible as attempts to reconcile recognition of the active role played by the court with legal doctrine's description of the terms as implied by fact or by law.

The usage of the terminology of 'implication' and its derivatives in this section (in contrast to the last section) point to the Revision/Amelioration Thesis as the correct view of implied terms. The definitions of the words and their use as described further suggest that if the Revision/Amelioration Thesis is correct, implied terms may be more accurately described as impliable terms. After all, the terms would by fact or law only be impliable: the judge's choice to accept this mere possibility or suggestion of their implication, and thus add them to the contract, is what renders them implied after-the-fact.

c. Inconsistency of Above Linguistic Uses

It might be argued that these two sets of usages are not actually incompatible, as they represent only differences in the relative degree of certainty (necessarily follows versus potentially follows; implicit in versus suggested by) that an implied term could be said to follow from what was settled concerning a contract. Practical aspects of legal procedure further narrow the gap between them, one might observe. For one thing, even if an unexpressed term definitely inheres in a contract, it still requires a court to declare that. Further, not all cases are as clear: it is a fact-dependent question (even for terms implied-by-law), and legal facts unlike scientific facts need only be established on a balance of probabilities. Hence, to say (per the usage of 'implication' from Section a) that the presence of an unexpressed term necessarily follows from established aspects of the contract is really to say that a court must find it more likely than not that the term necessarily follows. Compared to saying (per the language in Section b) that the term only potentially follows from established aspects, the marginal difference in probability in hard cases might not be very great. As Smith suggests, 'the line between interpretation and addition is a fine one'.[93] In light of that, it might be supposed that in practice, no firm line divides what the differing terminological uses describe, so that it is unproblematic to use them interchangeably.

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[92] OED Online, *(Sub Verbo 'Impliable').*
[93] Smith (n 11) 302.

That conclusion, however, is not sustainable. Although a court is involved either way, and although in hard cases the difference in probability that an implied term follows from the settled aspects of a contract might be modest in numeric terms, the nature and purpose of the exercise fundamentally differ in the two cases. The language from Section a, corresponding to the Preexistent/Clarification Theses, describes a non-instrumental fact-interpretive and inferential reasoning process. By contrast, the language from Section b, corresponding to the Revision/Amelioration Theses, describes a policy decision. It is true that the latter requires satisfaction of a fact-interpretive precondition (that the term could be said to be suggested by or potentially follow from the contract's established elements). But satisfaction of that condition only makes a term 'impliable': it gives discretion to the judge to decide whether or not to 'imply the term.' Moreover, that discretion exists for the sake of, and is governed by, instrumental considerations (remedying defects, redressing unfairness, etc.), as discussed.[94] Because in practice the distinction is a fine one for the reasons noted in the last paragraph, it may not obviously raise or lower the bar for implied terms in practice. Nonetheless, as Lady Arden observed in *Stena Line*, '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.'[95]

d. Complication of the Issue of Incoherence Re: the Nature & Purpose of Implied Terms

Not only does the inconsistent usage of the key terminology of 'implied' and 'implication' sustain and perpetuate the theoretical incoherence concerning the nature and purpose of implied terms, it also obscures the co-existence of these ambivalent positions through the confusion it causes. This is because frequently it is unclear whether the one or the other of the alternate usages being employed was deliberately chosen in contemplation of which conception of implied terms it suggests, or whether because both usages are so common in the literature at large, the usage employed was arbitrary without any intent to lend support to the associated vision of implied terms. In fact, very commonly a single discussion will oscillate back and forth between the different usages without explanation or evidence of conscious distinction between them, as if they were interchangeable. This is hardly surprising, as the pervasiveness of both usages in the literature results in either usage being read as familiar, and in that sense proper, so that one ceases to notice the variation at all. The result of all of this is a general conflation of the two usages of the terminology in the literature on implied terms.

Meanwhile, this terminology is central to discussions of the topic—its very name. As a result, the competing conceptions of the nature and purpose of

[94] Section A-ii-b.
[95] *Stena Line* (n 2) para 36.

implied terms which correspond to the different uses of 'implied' and 'implication' also become conflated. Fundamentally inconsistent theories of implied terms thus frequently appear to unconsciously be used interchangeably. In the ordinary example of this which follows, drawn from the recent synopsis of implied terms by the Board in *Ali*,[96] language consistent with the Preexistent Thesis is underlined, whilst language which corresponds to the Revision Thesis is in italics:

> It is not necessary here to rehearse…when *the court may properly imply a term into a contract… [I]mplying a term into the contract* must not become the re-writing of the contract in a way…which the court prefers to the agreement which the parties have negotiated… Necessity is not established by showing that the contract would be improved *by the addition.* The fairness…of a suggested implied term is…not a sufficient pre-condition for inclusion. And if there is an express term…inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.[97]

Similarly or more evidently ambiguous passages are ubiquitous in discussions of implied terms. The pervasiveness of this linguistic confusion conceals the theoretical incoherence, complicating the task of resolving it. Even more problematically, the literature's contamination with this conflation compromises its own utility as an authoritative source of guidance in resolving the theoretical incoherence. In these important ways, the inconsistent use of the key words 'implied' and 'implication' contribute to the challenge of clarifying the nature and purpose of implied terms. Next to be addressed are similar concerns in usage of the key word 'contract'.

ii. 'Contract'

Imprecise usage, including potentially inconsistent but undifferentiated uses, of 'contract' are another source of confusion complicating resolution of the incoherence regarding the nature and purpose of implied terms.

a. 'Contract' as the Substance of the Legal Agreement

One usage of this terminology is 'contract' in the sense of the *substance of the legal agreement*, as opposed to the contractual document which serves as a record of that agreement. For the law to speak of 'implied' terms at all is to recognise that these may differ. Where discussions of the topic say that a contract includes an implied term, present though unexpressed, it can only be

[96] *Ali* (n 2).
[97] ibid [7].

that the word 'contract' refers to the substantive legal agreement.[98] Likewise where it is remarked, for example, that courts have no power to alter the contract, this must again have in mind the substantive legal agreement, since it is well-accepted that the doctrine of rectification allows courts to alter the contractual document.[99] Such statements are among those found in discussions of implied terms which use the word 'contract' in a way which suggests the Preexistent/Clarification Theses of the nature and purpose of implied terms.

b. 'Contract' as the Document, Formality or Record of the Agreement

The other common usage of 'contract' is in reference to *the contractual document or formality which serves as the record of the agreement* rather than the substantive agreement itself. In discussions of implied terms, statements are found to the effect that a contract is silent on a subject or says nothing about it, prior to the discussion then turning to consider whether there might be an implied term that addresses it. Or if a party contends that some obligation is an implied term of a contract, the court might confirm that it is absent from the contract before going on to consider whether that obligation is an implied term of the contract. What is to be made of such statements?

If 'contract' here again refers to the substantive agreement, then these statements might be interpreted as lending credence to the Revision/Amelioration Theses of implied terms. However, if 'contract' in such instances refers to the formality—the contractual document or other record of the agreement, not the agreement itself—then these statements would make sense as descriptions of the enquiry prescribed by the Preexistent/Clarification Theses of implied terms.

c. Complication of the Issue of Incoherence Re: the Nature & Purpose of Implied Terms

Using the word 'contract' without specifying whether in reference to the substantive agreement or the document which purports to record that agreement is far from limited only to discussions of implied terms. However, it produces particular confusion within discussions of these. Unless clear from the context (and it seldom is), it is impossible to know from the word 'contract' alone whether commonly-found statements such as those described in Section b constitute important evidence supporting the Revision/Amelioration theses or whether, properly understood, they are also consistent with the Preexistent/Clarification theses. If an author of such a statement uses 'contract' having in mind the document, it will yet happen that many readers assume that 'contract' referred to the substantive agreement, and thus will

[98] Section A-i-a. By 'legal agreement', I mean not limited to matters agreed by the parties, but including terms implied-by-law: Note 24.
[99] ibid.

mistakenly conclude that the discussion supported the Revision/Amelioration Theses of implied terms. The result will be the same also where a reader, like the writer in omitting to specify which meaning of 'contract' was intended, conflates the two. When the reader of one authoritative such discussion then becomes the author of another, the confusion is compounded, as the second author describes implied terms to subsequent readers from a perspective that is overtly that of the Revision/Amelioration theses, unconsciously relying on a mistaken assumption that that was what the original authority meant to say. Conversely, if the original writer *did* mean the substantive agreement in using the word 'contract,' there might still be readers who take it as referring rather to the contractual document. The result would be to restrict the proportion of readers who would otherwise have recognised the discussion as supporting the Revision/Amelioration theses, had that intended usage of 'contract' been specified.

In sum, imprecise use of the above key terms invites misunderstandings of important statements that bear on the nature and purpose of implication, worsening the issue of theoretical incoherence. As such misunderstandings compound, the water is muddied, so that it is of limited help to ask which contrasting theory of the nature and purpose of implication is more prevalent or preeminent in authoritative discussions. And as will be discussed in Part IV, with the authoritative discussions themselves ambiguous, on what widely-accepted basis could one claim which thesis is correct? For these reasons, the previously unrecognised linguistic confusion around key terms revealed here complicates resolution of the theoretical incoherence.

IV. On the Criteria Governing Implied Terms

Per the plan of discussion, the article now turns to the criteria governing implication in practice.

A. Indeterminacy of the Analytical Process for Assessing Implied Terms

I here discuss the second deeper issue argued as underlying recent debates on implied terms: the indeterminacy of the analytical process judges should follow to assess whether a term is implied.[100] The jurisprudence has well-established tests for implied terms. However, as I show below, courts may employ interpretive and inferential reasoning, or instrumental reasoning and policy-driven discretionary decision-making in reaching conclusions.[101] Moreover, scholars have noted that the analytical process followed may not accord with what the tests ordain.[102] As I explain, all of this is tied to the issue of theoretical incoherence discussed in Part II. To strengthen this area of law, this issue must be brought to the surface so that it can be resolved by new precedent or

[100] I thank Roger Brownsword for his assistance in clarifying what is at stake in this issue.
[101] Sections II-A, II-B-i-c.
[102] Section A, below.

scholarly consensus. At a practical level, legal subjects need predictability. But for the reasons mentioned, as Sir Kim Lewison observes, 'the implication of terms is often difficult to predict'.[103]

i. The 'Tests' for Terms Implied-in-fact

a. The Business Efficacy Test

One prevailing test for terms implied-in-fact is the 'business efficacy test,'[104] which holds that an implied term must be necessary in order to give business efficacy to the contract.[105] Despite its authoritative status, it is unclear what the test requires and hence the process courts should follow. One reason for this is that the meaning of the expression 'business efficacy' is uncertain, and as discussed later, has been recast in varying ways.[106] In *Marks and Spencer*, even after submitting that it *is* clear, the majority recast it, suggesting that 'a more helpful way of putting [the] requirement is [that] without the term, the contract would lack commercial or practical coherence.'[107] In another case, Viscount Simonds stated: 'If I were to try to apply the familiar tests where the question is whether a term should be implied in a particular contract in order to give it what is called business efficacy, I should lose myself in the attempt to formulate it with the necessary precision.'[108] The difficulty of doing so is unsurprising given the theoretical incoherence discussed earlier: how could the law articulate precisely what a term must be necessary for, whilst it is uncertain whether the purpose of the enquiry is to clarify what a contract provides or to ameliorate its perceived deficiencies? What the element of 'necessity' requires is also uncertain, as *Marks and Spencer* acknowledges that it does not mean 'absolute necessity' and that in fact it 'involves a value judgment.'[109] For these reasons, the business efficacy test does not provide a determinate analytical process for assessing whether a term is implied-in-fact, and doing so consistently with what the test states and with a coherent position regarding the nature and purpose of implied terms.

b. The Obviousness Test

The other leading test for terms implied-in-fact, recognised by *Marks and Spencer* as an alternative to business efficacy, is the 'officious bystander test'.[110] By this test, the implied term must have been something so obvious

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[103] Kim Lewison, *The Interpretation of Contracts* (5th edn, 2011) 6.08.
[104] *The Moorcock* (n 18) 68.
[105] *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* (1918) 1 KB 592, 605; *Trollope* (n 31) 609.
[106] Section B; Peters (n 1).
[107] *Marks and Spencer* (n 2) [21].
[108] *Lister* (n 32) 576.
[109] *Marks and Spencer* (n 2) [21].
[110] ibid; *Reigate* (n 105) 605; *Shirlaw* (n 64) 227.

that it went without saying; something that if an officious bystander had asked the parties what would happen in X case, both would have replied 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'[111] Here too, despite the test's authoritative status, it is uncertain what it requires and hence what process courts should follow. The capacity to know this is severely hampered firstly by the test's reliance on such artificiality as 'hypothetical consultations with an "officious bystander"'.[112] Additionally, what is required by the element of being so obvious as to go without saying is not so obvious, for as *Belize Telecom* explained:

> The need for an implied term not infrequently arises when the draftsman of a complicated instrument has…not fully thought through the contingencies…even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances… the actual parties might have said to the officious bystander "Could you please explain that again?"[113]

If the test thus accepts terms that were not too obvious to mention, but are obvious implications of the rest of the contract and relevant background, how obvious must that be? *Need the term inhere* in what was agreed, or might it be merely suggested by that, whilst also the only compatible way of correcting some deficiency in the contract? This is currently indeterminable, because of the subsisting theoretical incoherence regarding the nature and purpose of implied terms. For the foregoing reasons, the officious bystander test falls short of prescribing a determinate analysis for courts to assess whether a term is implied-in-fact.

ii. The 'Test' for Terms Implied-by-law

a. The Necessary Incident Test

The prevailing test for terms implied-by-law is the 'necessary incident' test, by which the term must be a necessary incident of a definable category of contractual relationship.[114] Once again, despite this test's clear authority, what it requires and what process courts should follow is unclear. Within this test, the meaning of necessity is 'elusive' and 'somewhat protean'.[115] For instance, if the term was truly necessary, it would hardly make sense for parties to be able to exclude it, as the law lets them expressly do. Peden writes that '[w]hile courts recite the test of "necessity", commentators are convinced

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[111] *Reigate* (n 105) 605.
[112] Peters (n 1).
[113] *Belize Telecom* (n 2) [25].
[114] *Scally* (n 80) 306; *Liverpool* (n 8) 250, 254–256, 266. 270; *Lister* (n 32) 579.
[115] *Crossley* (n 4) [36, 34].

that the courts are really applying a test of 'reasonableness'.[116] Ewan McKendrick concludes that what is applied in practice is 'some less stringent test which reflects the court's perception of the nature of the relationship between the parties and whether such an implied term is suitable or 'reasonable' for incorporation in all contracts of the particular type'.[117] In such case, as Peden concludes, '[h]ow the courts are meant to carry out this process is unclear. This…perhaps explains why sometimes judgments state the legal test and then their conclusion, avoiding any discussion of the reasoning process'.[118] It seems to me that it cannot be made clear so long as theoretical incoherence beclouds the underlying nature and purpose of implied terms: must it be possible to say the term was incident to that type of contract at the time it was made, or could it be incident as a legal response that ameliorates only subsequently recognised deficiencies? As with the tests for terms implied-in-fact, the 'necessary incident' test fails to provide judges a determinate analytical process for assessing the possibility of terms implied-by-law.

As alluded to earlier, contributing to the indeterminacy of the process for assessing whether a term is implied in a contract, and obfuscating the criteria for implication more generally, is remarkable linguistic confusion around key terminology. I now develop this aspect of the issue.

B. Linguistic Confusion as Contributing Factor

In discussing the criteria for implied terms, the key terms 'necessary' and 'reasonable' are used imprecisely; that is, without specifying further details essential for them to define a clear standard and play a defined role. Relatedly, 'necessary' and 'reasonable' are (as with 'implication' and 'contract,' per Part II) subjects of inconsistent usage. Below I show how this contributes to the indeterminacy of the analytical process for assessing whether a term is implied, starting with necessary, before turning to reasonable.

i. 'Necessary'

Insufficient context for the word necessary is evident in how, as John McCaughran notes, 'the question is left open…necessary for what?'[119] The discussion that follows (looking first at terms implied-in-fact and then terms implied-by-law) reveals variable answers given to that question. I break these down into instrumental and non-instrumental reasons. These represent fundamentally differing analytical processes, which I link below to the theoretical ambivalence from Part II. I then reveal additional imprecision in the usage of 'necessity' itself, which is not always used with a plain or ordinary meaning.

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[116] Peden (n 7) 465.
[117] McKendrick (n 1) 295.
[118] Peden (n 7) 465–466.
[119] McCaughran (n 1) 612.

a. Terms Implied-in-fact

Starting with terms implied-in-fact, I demonstrate below the confusion that results from imprecision around necessity, by drawing out what it is that various explanations of the tests suggest a term must be necessary for in order to be implied.

1. Necessary for Instrumental Reasons

An answer suggested by a number of formulations of the test for terms implied-in-fact is that the term must be *necessary to the instrumental efficacy of the contract,* being a legal instrument.[120] Because the context is often commercial, authorities refer to its efficacy as a business instrument. This answer can be traced back to *The Moorcock*'s explanation that the 'object [is] giving efficacy to the transaction'.[121] That answer is echoed by subsequent authorities. *Reigate* cast the test as that 'a term can only be implied if it is necessary in the business sense to give efficacy to the contract.'[122] Similarly, *BP Refinery* said that 'for a term to be implied…it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it'.[123]

However—and crucially—efficacy is not always binary: for many contracts, there could be varying degrees of efficacy. As Robertson notes, it can be measured 'restrictively or expansively and this makes it an uncertain and unpredictable standard.'[124] The Singapore Court of Appeal has recognised this issue: 'The efficacy of a contract or a transaction invariably straddles a spectrum. Many contracts might, to some degree, be efficacious and inefficacious at the same time.'[125] The imprecision resulting from reliance on 'efficacy' is apparent from versions of the test that differ in the degree of efficacy they suggest is required.

A minimal degree of efficacy, creating an inversely high threshold for implication, is suggested by formulations akin to Lord Clarke's phrasing of the test: 'is the proposed implied term *necessary to make the contract work*?'[126] This version boasts authority from *Liverpool*, where Lord Wilberforce explained that, 'the courts are willing to add a term on the ground that without it, the contract will not work—this is the case, if not of *The Moorcock*…at least of the doctrine of *The Moorcock* as usually applied.'[127] The *Marks and Spencer*

[120] Some cases concerned legal instruments other than contracts: e.g. *Belize Telecom* (n 2); and *Equitable Life* (n 11).
[121] *The Moorcock* (n 18) 68.
[122] *Reigate* (n 105) 605.
[123] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) ALJR 20, 26.
[124] Robertson (n 1) 13–14.
[125] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43 [86].
[126] *The Reborn* (n 2) [18]; *Marks and Spencer* (n 2) [77].
[127] *Liverpool* (n 8) 253.

majority conveyed an equivalent standard in observing that 'it may well be that a more helpful way of putting [the necessity] requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.'[128] A minimum degree of efficacy was alluded to again in *Wells*, where Lord Kitchin said the term 'was required to give the agreement business efficacy, and would not go beyond what was necessary for that purpose.'[129]

A higher degree of efficacy, and thus lower corresponding threshold for implication, is suggested where the test is cast as the term being *necessary to the efficacy the parties intended*. As Richard Hooley explains, this 'is not a question of whether the contract will work at all without the implied term but of whether…it will work in the way that the parties might reasonably have expected.'[130] This version also draws authority from *The Moorcock*, which said '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'.[131] *Belize Telecom* interpreted as an equivalent standard Lord Steyn's formulation of the test in *Equitable Life* as: 'The implication is essential to give effect to the reasonable expectations of the parties.'[132] In these versions of the test, the degree of efficacy might vary case-by-case with the presumed intent or reasonable expectations of the parties. However, in all cases, one would surely presume that the parties must have intended or reasonably expected their contract to have more than the minimum degree of efficacy to make it work or avoid it being instrumentally incoherent.

The foregoing answers differ in the degree of efficacy necessary for a term to be implied, but have in common the *instrumental* efficacy of the contract as the measure of the term's necessity, and hence of the kind of analysis to pursue in assessing whether a term is implied.

2. Necessary for Non-Instrumental Reasons

A different kind of answer as to what a term must be necessary for in order to be implied-in-fact can be derived from the officious bystander test. This formulation suggests that the term is *necessary as a logical consequence of what is settled regarding the contract*. *Shirlaw,* for instance, said that 'that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'.[133] *Reigate* colourfully depicted this logical deduction as whether the negotiating parties would have told an observer who asked what will happen in X case 'of course, so and so

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[128] *Marks and Spencer* (n 2) [21]. That there was argument on how the requirement should be put supports the submission here that it is insufficiently clear.
[129] *Wells* (n 2) [29].
[130] Hooley (n 1) 339.
[131] *The Moorcock* (n 18) 68.
[132] *Equitable Life* (n 11) 459.
[133] *Shirlaw* (n 64) 227.

will happen; we did not trouble to say that; it is too clear.'[134] *The Moorcock* cast this logical deduction as a legal presumption that the parties would not intend an absurd result: 'The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of…preventing such a failure of consideration as cannot have been within the contemplation of either side'.[135] Although it thus presents the implication as being for the purpose of avoiding absurdity, the simultaneous legal presumption that the parties would not intend absurdity means this explanation, like those quoted from *Reigate* and *Shirlaw*, constitutes a *non-instrumental* reason for saying that an implied term is necessary. This is a different kind of reason than in the preceding section, following from a different sort of analysis used to determine whether a term is implied.

It is true that a term that is necessary as a logical consequence of established aspects of a contract might also be necessary for the sake of its efficacy as a business instrument. Indeed, since the fact that such a contract is a business instrument which the parties presumably hoped would be efficacious is part of what is settled about it, these alternate reasons for saying a term is necessary will often overlap. However, that will not always be so. A term might be a necessary consequence of settled aspects of a contract without being necessary to its efficacy as a business instrument. For example, absent any contrary indication, it may obviously follow that a domestic selling agent of an English publisher should receive their commission in pound sterling rather than Swedish krona, although it is not necessary to the business efficacy of the contract. Converse scenarios are likewise possible. A matter necessary to a contract's efficacy as a business instrument might be so wholly overlooked by the parties that the settled aspects of the contract offer no hint of what the parties would have provided in regard to it.[136] In the example above, the parties may overlook for instance which of them should pay the agent's phone bills for sales calls. Even where not wholly overlooked, the settled aspects may give conflicting or ambiguous suggestions as to what the parties would have provided.[137] In the example given, this could occur if the contract did not specify whether the agent was exclusively to represent the publisher, and both parties knew that that publisher typically preferred exclusive representation and that that agent typically preferred non-exclusive representation. Such possibilities may be why efficacy and obviousness are presented as alternate tests for implication, rather than as redundant.[138]

But regardless of the extent of their overlap, there is a fundamental distinction between concluding based on instrumental versus non-instrumental analyses that a term is necessary. This distinction is connected to the issue in Part II of theoretical incoherence concerning the nature and

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[134] *Reigate* (n 105) 605.
[135] *The Moorcock* (n 18) 68.
[136] *Liverpool (CA)* (n 8) 330.
[137] *Philips Electronique* (n 29) 481–482.
[138] *Marks and Spencer* (n 2) [21].

purpose of implied terms: whereas a clarificatory purpose would recognise a term as implied only if it inhered necessarily as a logical consequence of what was expressly agreed, an ameliorative purpose could allow for terms to be added to the agreement that do not follow necessarily from the settled aspects but would remedy deficiencies in the contract's efficacy as a business instrument.

3. The Meaning of 'Necessity' Itself

Beyond differing accounts of what an implied term must be necessary for, a further layer of linguistic confusion lies in the intended meaning of the word 'necessity' itself. It is not seen as having its ordinary meaning in the tests for terms implied-in-fact. As Lord Neuberger PSC acknowledged in *Marks and Spencer,* 'it is rightly common ground on this appeal that the test is not one of "absolute necessity"' and that the actual standard 'involves a value judgment.'[139] This leaves uncertain what would more accurately describe the requirement in practice. Meanwhile, other cases have insisted the test truly *is* necessity: 'the legal test for the implication of such a term is a standard of strict necessity…the question is whether the implication is strictly necessary.'[140] Indeed, Lewison submits that the most common reason implied terms are rejected by courts is if they are not absolutely essential.[141] This uncertain usage both reflects and compounds the indeterminacy of the analytical process for assessing whether a term is implied.

b. Terms Implied-by-law

Turning to terms implied-by-law, confusion around what it is that the term must be necessary for is again evident in discussions of the test.

1. Necessary for Non-Instrumental Reasons

As noted earlier, a common formulation of the test for terms implied-by-law suggests that the term in question is *necessary as an incident of that contract-type.*[142] *Lister* conveyed this by saying that the term is a 'necessary condition of the relation'.[143] The oft-cited speech of Lord Wilberforce in *Liverpool* likewise refers to terms implicitly required by the nature of the contract: 'such obligation should be read into the contract as the nature of the contract implicitly requires, no more, no less: a test, in other words, of necessity'.[144]

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[139] ibid [21].
[140] *Equitable Life* (n 11) 459; see also *The Reborn* (n 2).
[141] Lewison (n 103) 6.08.
[142] Section A-ii-a.
[143] *Lister* (n 32) 576.
[144] *Liverpool* (n 8) 254.

Scally also depicts a term implied-by-law as a 'a term which the law will imply as a necessary incident of a definable category of contractual relationship'.[145]

As is apparent from these formulations, saying a term is necessarily incidental to a contract-type constitutes a non-instrumental reason for saying that a term implied-by-law is necessary. It follows from a non-instrumental analysis identifying the terms as necessarily entailed by the contract-type, as standardised terms that supply supplemental default rules for that contract-type[146] (as for some types might alternatively occur via legislation.[147]) Some connection might also be drawn between this reason for saying that terms implied-by-law are necessary and saying terms implied-in-fact under the bystander test are necessarily entailed by their particular facts.

It might be wondered, to the contrary, whether the necessarily incidental formulation reflects instrumental reasons—and a standard of reasonableness rather than necessity also—because of it being said that 'in deciding whether or not to lay down such a [default] rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert.'[148] However, what that addresses is why the incidents of a certain type of relation are what they are. The question here is rather the law's reason for holding that a given obligation is part of a contract. And the law's explanation for that, dealt with in this section, is the claim that it is a legal incident of the contract-type—regardless of what made it an incident.[149] The separability of these questions can be attacked, arguing that to call the term an incident is really just to state the conclusion that the term is implied, rather than to explain the basis for its implication. That view is best understood as an instance of an alternate claim, addressed later, that a term is implied-by-law if it is reasonable in an instrumental sense.[150]

2. Necessary for Instrumental Reasons

It may be questioned whether terms implied-by-law are necessary incidents of the contract-type, since parties can exclude them.[151] The High Court of Australia has employed a moderated account, comprising whether the term is '*necessary for the reasonable…operation of the contract'-type.*[152] This approximates Patrick Atiyah's view of the test's application in *Liverpool.*[153] Atiyah noted that 'it is not necessary to have lifts in blocks of flats ten storeys

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[145] *Scally* (n 80) 306.
[146] *Malik v Bank of Credit & Commerce International SA* [1998] AC 20, 45; Beatson, Burrows and Cartwright (n 7) 166–167.
[147] See e.g. Sale of Goods Act 1979 ss 12–14.
[148] *Liverpool* (n 8) 257–258 (Lord Cross).
[149] Explored in CA Riley, 'Designing Default Rules in Contract Law' (2000) 20:3 OJLS 367.
[150] Section ii-b-1.
[151] *Mears v Safecar Security Ltd* [1983] QB 54, 78.
[152] *Hawkins v Clayton* (1988) 164 CLR 539, 573 (Deane J); *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.
[153] Atiyah (n 7) 207 (' 'necessary' really seems to mean 'reasonably necessary'").

high, though it would no doubt be exceedingly inconvenient not to have them.'[154] This explanation of what the term must be necessary for bears similarities to the view of terms implied-in-fact that they must be necessary for the instrumental efficacy of the contract. Both are concerned with the ability of the contract to fulfil its aims as a legal instrument used by parties intending a definable relationship. A distinction for terms implied-by-law is that the term must achieve the aim not just in the particular contract before the court, but in every contract of the same type.[155]

The alternate instrumental and non-instrumental accounts of what a term implied-by-law must be necessary for result from fundamentally differing instrumental and non-instrumental analyses. Here again for terms implied-by-law, these can be linked to the issue of theoretical incoherence regarding the nature and purpose of implied terms: the Preexistent Thesis elicits non-instrumental reasons, whilst the Revision Thesis accommodates instrumental ones.

A distinct claim of instrumental necessity is saying that a term is *necessary for reasons of fairness*, *justice or policy*. *Scally*, for example, said it was 'not merely reasonable, but necessary, in the circumstances' for the employer to give the employee adequate notice of the opportunity to enjoy a collectively-bargained benefit.[156] *Crossley* also recognised concerns of fairness and policy, although qualifying the necessity element as 'protean' and 'elusive'.[157] *Liverpool*'s consideration in the Supreme Court of Canada by McLachlin J also involved an element of fairness: 'while the tenancy agreement could have continued without this term, it was necessary in a practical sense to the fair functioning of the agreement.'[158] The view that the necessity is for reasons of fairness, justice or policy is also common in academic commentary. Peden, for instance, highlights the role of 'considerations of justice and policy',[159] Collins says that such terms are to prevent one party taking 'unfair advantage of the other's error' of omission,[160] and Guenter Treitel and Edwin Peel submit that 'decisions are clearly based on considerations of "justice and policy".'[161]

Most of these sources add that although necessity is the word used, its meaning is uncertain in the context of a term being necessary for reasons of fairness, justice or policy. That brings us back, now for terms implied-by-law, to the issue of the meaning of 'necessity' in describing the criteria.

3. The Meaning of 'Necessity' Itself

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[154] ibid.
[155] Note 117.
[156] *Scally* (n 80) 307.
[157] Note 115.
[158] *Machtinger v HOJ Industries Ltd* (1992) 1 SCR 986, 1010.
[159] Peden (n 7) 459.
[160] Collins (n 1) 319.
[161] Peel and Treitel (n 7) 6-045.

The test for terms implied-by-law is not applied using a plain and ordinary meaning of necessity.[162] Its meaning in practice is 'elusive'.[163] Courts insist that the standard is not whether the term is reasonable, but commentators doubt this.[164] In Atiyah's view, 'there does not seem to be much difference between what is necessary and what is reasonable.'[165] Treitel and Peel similarly submit that, 'between what is reasonable and what is necessary; in the context of terms implied in law, the distinction appears to be no more than one of degree.' Choosing between them does not make the requirement clear. Pointing to the role of policy factors, Treitel and Peel submit that 'decisions on such policy issues are not helped by distinguishing between what is reasonable and what is necessary.' [166] In short, the meaning of necessity is unknown. And hence, Justice Andrew Phang concludes, we have no way of 'detailing the criteria that ought to be applied in order to ascertain…whether a term should be implied' by law.[167] The enquiry called for is not determinable.

Linguistic confusion likewise surrounds usage of the key word 'reasonable,' discussed next.

ii. 'Reasonable'

As shown by the preceding discussion, courts' declaration that the test for implication is necessity has not made clear when a term is implied. Further, academic commentaries still suggest that reasonableness plays a role.[168] What role it plays is obscured by imprecision. As with necessity, instrumental and non-instrumental bases for saying a term is reasonable must be distinguished. That distinction can be linked again to the issue of theoretical incoherence. The divergences can also be understood as inconsistent usage of reasonable itself. These issues are surveyed below.

a. Terms Implied-in-fact

1. Reasonable Based on Instrumental Considerations

Some discussions of a reasonableness requirement for terms implied-in-fact contemplate whether a term is *reasonable in the sense of being useful or fair*. The reasonableness of the term is analysed based on instrumental considerations of enhancing the contract's utility or fairness. In *BP Refinery,* Lord Simon included such a requirement: 'it must be reasonable and

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[162] Section A-ii-a.
[163] *Crossley* (n 4) [36].
[164] Note 116.
[165] Atiyah (n 7) 207.
[166] Peel and Treitel (n 7) 6-045.
[167] Andrew Phang, 'Implied Terms in English Law - Some Recent Developments' [1993] JBL 242, 247.
[168] Notes 10, 61; Section i-b-2.

equitable'.[169] The *Shirlaw* version of the bystander test alludes to whether a term is reasonable in the sense of being useful: 'if…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!"'.[170] This is cited as good authority;[171] however, it is not *sufficient* 'that the implied term expresses what it would have been reasonable for the parties to agree to'.[172] That it *is* sufficient was the misreading of *Belize Telecom* that *Marks and Spencer* sought to dispel.[173] Qualification was also expressed regarding *Equitable Life*'s remark that 'implication is essential to give effect to the reasonable expectations of the parties'.[174] Although reasonableness in an instrumental sense is not sufficient, it may be necessary:

> a term should not be implied…merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term. However…it is questionable whether Lord Simon's first requirement, reasonableness and equitableness, will usually, if ever, add anything.[175]

Whether reasonableness in this sense is even a requirement is thus unclear, since it is 'questionable' that it ever adds anything.

2. Reasonable Based on Non-Instrumental Considerations

In other discussions, reasonableness has a different meaning. There, the question is whether the term is *reasonable in the sense that it follows by reason from what is settled regarding the contract*. This is analysed based on non-instrumental considerations, such as the facts, their interpretation, and inferences to be drawn from them. *Belize Telecom*'s reference to reasonableness as a criterion appears to contemplate this. It rejects reasonableness in an instrumental sense, observing that a court 'cannot introduce terms to make [an instrument] fairer or more reasonable'.[176] Then it adds that:

> in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.[177]

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[169] *BP Refinery* (n 123) 26.
[170] *Shirlaw* (n 64) 227.
[171] *Marks and Spencer* (n 2) [16].
[172] *Belize Telecom* (n 2) [22].
[173] *Marks and Spencer* (n 2) [23-24].
[174] ibid [23]; *Equitable Life* (n 11) 459.
[175] *Marks and Spencer* (n 2) [21].
[176] *Belize Telecom* (n 2) [16].
[177] ibid [23].

Although it is puzzling to speak of what an instrument 'means' in respect of things it did not say,[178] the passage may have in mind inferences to be drawn from the instrument and relevant background. Thus, 'reasonably' here means what can be inferred by a process of reason from an objective understanding of what is settled. Provided the continued authority of the traditional tests and certain clarifications, *Marks and Spencer* called this proposition 'quite acceptable'.[179] Support for such a criterion is notably also found in *The Moorcock*'s statement that an implied term 'really is in all cases founded on the presumed intention of the parties, and upon reason.'[180] Consonant with that was its reference to the 'implication which the law draws from what must obviously have been the intention of the parties'.[181]

The role played by a criterion of reasonableness in this non-instrumental sense is also unclear, as *Belize Telecom* viewed it as encompassing the traditional tests, whilst *Marks and Spencer* was not prepared to go that far.

The inconsistency shown above, between saying that an implied term must be 'reasonable' based on an instrumental analysis versus based on a non-instrumental analysis, mirrors the ambivalence in the theories of implied terms' nature and purpose. Requiring that a term be reasonable in the sense of enhancing contractual fairness or utility supports the Revision/Amelioration Theses. Conversely, if the term is reasonable in the non-instrumental sense that it follows 'upon reason' from settled aspects of the contract, this is consistent with the Preexistent/Clarification Theses.

b. Terms Implied-by-law

After *Liverpool's* emphatic rejection of reasonableness as a standard for terms implied-by-law, courts seldom reference such a criterion.[182] However, as discussed earlier, commentators continue to suppose that in reality it does influence decisions.[183] If a term should indeed be reasonable, on what basis?

1. Reasonable Based on Instrumental Considerations

One account of what a term implied-by-law must be necessary for was noted earlier as being for the reasonable operation of the contract-type. This incorporates a reasonableness analysis, addressed to instrumental concern with the functional effectiveness of the contract.

Also discussed was an alternative account that the term must be necessary 'for reasons of fairness, justice or policy.' For purposes of that account, the

[178] *Marks and Spencer* (n 2) [24, 27, 31].
[179] ibid [23].
[180] *The Moorcock* (n 18) 68.
[181] Discussed in Section i-a-2.
[182] Note 114.
[183] Note 116.

meaning of necessity was seen as 'elusive,' with little point in 'distinguishing between what is reasonable and what is necessary.'[184] The prior conclusion that this is an instrumental measure flowing from an instrumental analysis thus carries over to where scholars suggest the standard is more accurately described as 'reasonable' rather than 'necessary'.

But compounding the indeterminacy, the role of reasonableness differs in the two cases above: in the first, it is an additional element, whereas in the second, it is a substitute for necessity.

2. Reasonable Based on Non-Instrumental Considerations

A more fundamentally different account of the necessity requirement for terms implied-by-law was that a term be a 'necessary incident' of a given contract-type. This was a non-instrumental basis for saying that the term forms part of the contract. Here again, it was observed that 'while courts recite the test of "necessity", commentators are convinced that the courts are really applying a test of "reasonableness".'[185] As with the non-instrumental basis for saying that a term implied-in-fact is reasonable, the question could be framed as whether a reasonable person would infer the inclusion of such a term from settled aspects of the contract.[186] Since terms implied-by-law are just incidents of the contract-type, the real question is what type of contractual relation can, by reason from its settled aspects, be inferred as before the court?

The possible role of reasonableness in this sense is unclear, as it has not been directly addressed.

These conflicting instrumental and non-instrumental analyses of whether a term implied-by-law is reasonable correlate once more to alternate theories of the nature and purpose of implied terms. If a term should be reasonable in the instrumental sense of supporting the functional effectiveness, fairness or policy concerns arising from a contract-type, this supports the Revision/Amelioration Theses. Conversely, if reasonable is meant in the non-instrumental sense that the term is incidental to a contract-type that it follows by reason of its settled aspects is before the court, this fits with the Preexistent/Clarification Theses.

The foregoing shows how linguistic confusion around the key terms 'necessary' and 'reasonable' in discussing the criteria for implied terms contributes in multiple ways to the issue of the indeterminacy of the analytical process for assessing whether a term is implied.[187] And because the meaning of the authorities is obfuscated by this imprecision and inconsistency pervading them, it is not readily apparent what would provide a reliable basis to clear up the indeterminacy. The discussion also showed that inconsistent use of terms in instrumental and non-instrumental ways is linked to the

[184] Section i-b-3.
[185] Note 116.
[186] Section a-2.
[187] Section A.

conflicting theories of the nature and purpose of implied terms. This suggests that the practical issue of the indeterminacy of the analytical process for assessing implied terms cannot be cleared up without the emergence first of a scholarly consensus or a new precedent that resolves the theoretical incoherence.

V. Barriers to Resolution & Some Possible Ways Forward

Altogether, the situation above presents a predicament that is not amenable to resolution by immediately endorsing one view. The two theses for which can be found strong support in the authorities, as described here, fundamentally conflict, so that a claim in favour of either is undermined by the significant authority supporting the other. A general theoretical argument that judicial revision of contracts is incompatible with foundations of Contract Law in party intention would confront similar difficulty of the longstanding and voluminous precedent on implied terms describing them as such. An instrumental policy argument would again encounter trouble due to the divided state of the authorities: under both theses, implied terms fulfil a useful function; and both functions are commonly invoked by the authorities under the name 'implied terms'. Thus, the argument would really be about which function is properly labelled implication, and which must find a different label. This is best answered by customary usage, which as noted is equivocal.

It is true, as mentioned earlier, that besides 'pure' views endorsing either the Preexistent-Clarification thesis or the Revision-Amelioration thesis, there are 'mixed' views: one might hold, for example, that terms implied-in-fact embody the Preexistent-Clarification Thesis, whilst terms implied-by-law rest on the Revision-Amelioration Thesis.[188] These mixed views do not, however, escape from the predicament. As demonstrated throughout the paper, even within these categories, the authorities are divided in their accounts of the nature of the implied term. And indeed, even within a single authority—with examples given in this paper extending from the recent judgment in *Ali* all the way back to the seminal *Moorcock*—the language used in it often vacillates, alternately suggesting both of the opposing theses.[189]

For these reasons, it would be inappropriate to purport to claim here some immediate resolution. Absent decisive new court precedent, a persuasive endorsement of one view necessitates as a challenging intermediate step the development of a widely-acceptable basis upon which to repose that claim. However, informed by the discussion above, it *is* possible to offer here a preliminary reflection on some conceivable options of ways forward.

One possible strategy would be to try to build on constructs by some scholars that could potentially bridge the two alternate accounts that are pervasively reflected in the authorities. An example would be Kramer's 'pragmatic

[188] Section II-A-iii.
[189] Section III-B-i-d.

inference' notion.[190] Leaving aside its details for the moment, what matters for present purposes is that it allows for a hybrid conception which could collapse the divide between inferential reasoning and conservative versions of policy reasoning. If accepted, this could make for a solution that helpfully tidies up the present incoherence. On the other hand, there might be a risk that it is an artificial solution—an elusive concept inside of which the incoherence and analytical determinacy would continue to live on. Another example would be Robertson's foundational trifecta of 'logic, efficacy and purpose'.[191] If accepted, the versatility of this approach equips it to explain a range of scenarios of implied terms. In its case, the risk would be that it may not add much to what the tests for implied terms already tell us about them. Notably, it does not tell us *why* terms can be implied for those three reasons (and not for others).

A different possibility, I suggest, is that what we refer to with the single name 'implied terms' may actually be the longstanding existence of two different Contract doctrines resting on different bases accurately captured by the alternate theses of implication detailed in this paper. This could explain the duality evident from this article's analysis of the topic, including even within categories such as implied-in-fact and implied-by-law. As well, this hypothesis could explain the vacillation present in a number of authorities dating back to *The Moorcock*, because an alleged term's inclusion in a contract could in many cases be supported on both bases. That is, a term that necessarily follows from the established elements of a contract may also be necessary to correct a deficiency that would otherwise exist.

For example, in *Liverpool*, one could focus as Lord Wilberforce did on the fact that obligations of the landlord had to exist although they were unstated; or one could focus as Lord Denning did on the situation being 'appalling' so that it would help for the court to add the terms.[192] Likewise, in *Belize Telecom*, Lord Hoffmann held that provisions for removal of the directors had to exist, but also explained how purposes of the instrument would fail to be attained without the provisions.[193]

But this will not always be the case. For instance, suppose that, due to changes in the fire code, lifts in *Liverpool* had been installed after the contract was made (and without consideration, so that there was no modification to the contracts). In that case, there could be no contractual obligation to maintain the lifts on the basis of—call it a doctrine of implicit terms—embodying the Preexistent-Clarification thesis elaborated above. But if, embodying the Revision-Clarification thesis set out here, there was a separate doctrine of—call it impliable terms—and if it was typical in leases for flats in comparable tower blocks that landlords had such an obligation, then an argument could be made under that doctrine that such a term should be added and is consistent with the rest of the lease in establishing obligations on the landlord

[190] Kramer (n 11).
[191] Robertson (n 1).
[192] *Liverpool* (n 8); *Liverpool (CA)* (n 8).
[193] *Belize Telecom* (n 2).

to maintain the premises. Likewise, in *Belize Telecom*, if there had been a provision stating that apart from the stipulations listed regarding removal of directors, under no other circumstances could directors be removed, and expressly excluding the existence of any other unlisted removal provision, the doctrine of implicit terms might not be applicable. But it could still be argued on the basis of the doctrine of impliable terms that there was a defect in the instrument, and that the court should correct it by adding terms governing the removal of directors in the unforeseen circumstances in question.

If it *is* the case that unexpressed terms can be part of a contract by virtue of two different doctrines, it would surely benefit the law to recognise this. Instead of revealing theoretical incoherence, analytical indeterminacy, and linguistic confusion around implication, the observations throughout this paper would describe two doctrines fairly well-defined in their basis, the analysis prescribed, and which way of using the core terminology would be accurate for each doctrine. For example, the meaning of 'necessity' would no longer be so elusive: we would know that under the doctrine of implicit terms, a term need not be 'necessary' for any purpose, but must necessarily follow from the established elements of the contract; whereas, under the doctrine of impliable terms, the term must be necessary to realise an accepted ameliorative purpose.

As the last point shows, recognising the existence of two doctrines would not tell us everything. Under a doctrine of impliable terms, we would still need to know for instance which of the various ameliorative purposes argued by different scholars authorise adding terms in which contexts.[194] Besides ascertaining the limits of this judicial power, another significant challenge would be identifying a widely-acceptable justification for its existence as an abridgment of party autonomy. The traditional inclination has been to try to rationalise things as still a matter of party intention—stretching the concept beyond objective intention, for example by making more out of overarching intentions, hypothetical intentions, and presumptive intentions absent contrary express terms.[195] Collins, as noted, criticises this exercise as artifice, arguing that the real justification is good faith: to prevent a party taking advantage of a contractual deficiency where this would be inequitable.[196] This would add to other scenarios in which good faith has increasingly been granted a role to play in contracts; however it remains a controversial figure in English Law.

In short, recognising implied terms as encompassing two doctrines, and separating them, is a possible way forward in making the law in this area more coherent, rational and predictable. However, this hypothesis and possible course of action—as well as other options—require further future consideration.

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[194] Discussed in Section II-A-ii-b.

[195] For example, the overarching intent that a contract be efficacious, the hypothetical intent invoked by the officious bystander, and the default inclusion of terms-implied-by-law.

[196] Collins (n 1).

Conclusion

As shown by this article, surrounding and underlying recent debates on implied terms, there lie important deeper issues. These include a longstanding and pervasive theoretical incoherence over the nature and purpose of implication, and an analytical indeterminacy over how in practice courts should apply the tests and criteria for assessing whether a term is implied. These issues were shown to be linked, as the analytical process reflects the theory. Further, both issues were complicated by remarkable linguistic confusion via the authorities' imprecise and inconsistent use of core terms ('contract' and 'implied' in discussing the nature of implication; and 'necessary' and 'reasonable' in discussing the criteria). Beyond the answers already elicited by recent debates, to more fully illuminate this area of law, it was argued that these deeper issues must be brought to the surface so that they can be resolved through new precedent or the emergence of scholarly consensus.

To facilitate this, the article identified among conceivable resolutions two alternative theses that could claim strong support from the authorities: A Preexistent-Clarification Thesis saw courts as uncovering, by interpretation and inference, terms unstated but entailed by the settled aspects of the contract from the time it was made, as a matter of fact or law. A Revision-Amelioration Thesis rather saw courts as revising the contract *ex post* by adding terms to cure deficiencies either in the particular contract or broader contract-type, through a judicial power to do so. To inform wider discussion that would allow for resolution of these issues, the alternate theses' essential elements and distinctions were elaborated, and important stakes of endorsing either thesis were highlighted. Thus, for instance, if the Preexistent-Clarification Thesis is endorsed, parties will have to sort between them any defect in their contract; whilst if the Revision-Amelioration Thesis is endorsed it will be crucial to delimit which deficiencies authorise the judicial revision of contracts.

These alternative theories were then linked to the use in different cases of inconsistent instrumental and non-instrumental analyses in applying the criteria and tests for implied terms: consonant with the Preexistent-Clarification Thesis, courts sometimes approach the enquiry as whether the term is necessarily entailed by the express terms and relevant background (for terms implied-in-fact) or contract-type (for terms implied-by-law); other times, consistent with the Revision-Amelioration Thesis, they approach the enquiry as whether the term is necessary to correct some deficiency in the particular contract (for terms implied-in-fact) or contract-type (for terms implied-by-law). Practical interest in clarifying the proper analytical process is therefore not likely possible without resolving the theoretical incoherence noted above as calling for wider discussion or new precedent.

The article also made clear why it would be problematic to immediately endorse here one thesis: the authorities are pervaded by evidence supporting two incompatible views. A policy-based claim would be similarly problematic,

as both theses see implied terms fulfilling a useful function, and both functions are commonly referred to by the authorities under the name 'implied terms'. Thus, absent decisive new precedent, a persuasive endorsement would necessitate the intermediate step of developing a widely-acceptable basis upon which to argue the claim.

However, the article offered a preliminary reflection on some possible options of ways forward. One possibility was to try to build on constructs by some scholars to try to bridge the ambivalence in the authorities. Another possibility, raised here in consideration of the analysis in the paper, was whether 'implied terms' may actually refer to two different doctrines, accurately captured by the alternative theses in the paper. If under that single name, two overlapping but conflicting doctrines have been conflated by the authorities going back to *The Moorcock*, it would benefit the law to recognise this and separate them. We would then know each's basis, the analysis each prescribes, and the use of core terminology that is accurate in discussing each. However, it was argued that this hypothesis and possible way forward—and others—require further future consideration.

In these ways, this article has sought to advance discussion and contribute to the collective aim of more thoroughly illuminating the implication of contract terms. The recent investments of attention in this may then achieve their best return in clarifying this long-'elusive' area of Contract Law.