

## Construction Contracts: terms implied by statute

The terms implied into a construction contract are as critical as the express terms specifically agreed between the contractual parties. However, whether or not a term should be implied into the contract is not always clear, and has led to plenty of litigation on the issue of implied terms.

What is clearer is where and when terms are to be implied into a construction contract by statute – notably under the Housing Grants, Construction and Regeneration Act 1996 (**Construction Act**).

### Terms implied by statute

A construction contract under the Construction Act must comply with the statutory provisions for payment, suspension and adjudication terms. If it doesn't, the **Scheme for Construction Contracts 1998** will be implied piecemeal into the contract, with the parties being unable to opt out.

**Payments:** the Construction Act provides for a statutory payment mechanism. This includes payment notes and an obligation on the payer to pay the notified sum. Where the construction contract has no adequate mechanism for determining what payments become due, or a due date for payment, the due dates, including the final date for payment, will be implied into the contract.

**Suspension rights:** where payment is not forthcoming, a contractor can suspend its performance for all or part of its contractual obligations; and claim a reasonable sum to cover any costs and expenses incurred as a result. The contractor can also claim an extension of time in consequence of exercising its suspension rights. If payment remains unpaid, the unpaid party can give notice of its intention to refer the dispute to adjudication.

**Adjudication:** if there are no written adjudication procedures (for instance, the contract was oral), or they fail to comply with the Construction Act, the right for either party to refer a dispute to adjudication is implied into the contract. Any contractual terms seeking to pre-allocate the adjudication costs will be ineffective

unless they are in writing, and they provide the adjudicator with the power to allocate his fees and expenses between the parties. However, if there is a written agreement to apportion the adjudicator's costs after notice of intention to refer the dispute for adjudication has been issued, the apportionment agreement will be effective.

Where no such written terms exist, the adjudicator has the implied power to apportion payment of his fees and his expenses between the parties.

Other statutory provisions include the **Defective Premises Act 1972** under which it will be an implied term that a new dwelling will be fit for habitation when its construction is completed. In addition, professional consultants, contractors and property developers must work on the construction in a workmanlike manner, using proper materials. The parties cannot opt out of these requirements.

Provisions relating to late payments, including the right to claim interest on late payments from businesses to whom goods and services are provided, will be implied into a construction contract. In some instances, the parties can exclude this statutory right to interest.

The new **Consumer Rights Act 2015** implies some terms into business-to-consumer construction contracts – notably pre-contractual statements: voluntary statements made by the business pre-contract will be implied terms of the contract if they have influenced the consumer to go ahead. Other implied terms include the contractor being paid a reasonable price (if no fixed price is stated), the contractor carrying out the work within a reasonable time, and the work being carried out with reasonable care and skill. It is worth noting that you cannot exclude liability for failing to carry out works with reasonable skill and care.

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We listen, you talk, **we act**

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In the case of business-to-business construction contracts, it is implied under the **Sale of Goods and Services Act 1982** that goods supplied will be of a satisfactory quality, the contractor will carry out the work with reasonable skill and care and within a reasonable time period; and (if no price is agreed) a reasonable amount is payable for the service provided. The parties can exclude, limit or vary liability by express agreement (subject to reasonableness) or through course of dealing. In addition, the **Unfair Contract Terms Act 1977** limits the applicability of disclaimers of liability in a construction contract.

Do be aware that terms implied by statute can 'override' the express terms of a contract. Take expert legal advice if you are unsure whether your express terms or the term/s implied by statute will take precedence.

### How can we help?

If you have any concerns about the terms implied by statute into a construction contract, the experienced commercial solicitors at Herrington Carmichael will provide specialist advice and representation. If you are considering a new construction or other commercial contract, contact us for advice on the terms. We have years of experience advising on all types of commercial contracts and can advise on your contract - and the terms that will be implied into the contract.

Please contact Mark Chapman on 01276 686222 or Cesare McArdle on 0118 977 4045.

For further information or to discuss the issues raised by this update, please contact Herrington Carmichael's Commercial Department on 0118 977 4045 or [corporate@herrington-carmichael.com](mailto:corporate@herrington-carmichael.com).

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