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IMPLICATION OF TERMS IN LAW IN SINGAPORE

TEO KEANG SOOD*

This article examines the position in Singapore in relation to the common law category of implication of terms in law. It argues that the test of necessity was indeed laid down for this category by the House of Lords in *Liverpool City Council* and vigorously applied in subsequent House of Lords' decisions. Although a number of reasons may arguably be advanced to support the application of the test of necessity, Singapore courts do not appear to have applied it albeit alluded to in one case. Further, the criterion of reasonableness has also not been considered in all local cases, highlighting the inconsistent approach adopted. It is argued that, ultimately, policy considerations, fairness and justice might be the true principled test for this category in Singapore.

I. INTRODUCTION

At common law, the category of "terms implied in law" was a recent development following the decision of the House of Lords in *Liverpool City Council v. Irwin*.[1] Both case law[2] and academic literature[3] have now recognised this newer category of implied terms as distinguished from the more established category of "terms implied in fact". It has been said that in Singapore, "the category of 'terms implied in law' has now been firmly woven into the tapestry of our local contract law."[4] Nevertheless, it is still unclear, at least in the Singapore context, as to the appropriate test to apply for implication of terms in law—is the test one of necessity or reasonableness,[5] or neither? The local academic literature is not particularly helpful: while there are references to the criterion of "reasonableness",[6] the criterion of "necessity" is also

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* Professor, Faculty of Law, National University of Singapore.

1 [1977] A.C. 239 [*Liverpool City Council*].

2 See *e.g.*, *Scally v. Southern Health and Social Services Board* [1992] 1 A.C. 294 (H.L.) [*Scally*]; *Spring v. Guardian Assurance Plc* [1995] 2 A.C. 296 (H.L.) [*Spring*]. Locally, see *e.g.*, *Forefront Medical Technology (Pte) Ltd v. Modern-Pak Pte Ltd* [2006] 1 S.L.R.(R.) 927 (H.C.) [*Forefront Medical Technology*]; *Jet Holding Ltd v. Cooper Cameron (Singapore) Pte Ltd* [2006] 3 S.L.R.(R.) 769 (C.A.) [*Jet Holding Ltd*].

3 See Edwin Peel, *Treitel: The Law of Contract*, 13th ed. (London: Sweet & Maxwell, 2011) at 222, 229; J. Beatson, A. Burrows & J. Cartwright, *Anson's Law of Contract*, 29th ed. (Oxford: Oxford University Press, 2010) at 151; Mindy Chen-Wishart, *Contract Law*, 4th ed. (Oxford: Oxford University Press, 2012) at 378.

4 *Jet Holding Ltd*, *supra* note 2 at para. 91.

5 See Andrew Phang Boon Leong & Goh Yihan, *Contract Law in Singapore* (The Netherlands: Wolters Kluwer Law and Business, 2012) at 523.

6 *Ibid.* at paras. 1071, 1078.

alluded to at the same time.[7] As will be seen below, the local decided cases do not take a consistent position on the matter either.

II. *Liverpool City Council* and the Test of Necessity

As noted above, the category of terms implied in law was established by the House of Lords in *Liverpool City Council* some 37 years ago. An analysis of the decision shows that the House of Lords categorically laid down the test of necessity for implying terms in law based on policy considerations. The council, a local authority, owned a block of building with some 70 dwelling units in it which were let out. The council, as landlord, had brought an action for possession against the tenants who counterclaimed, *inter alia*, that the council was in breach of their duty to repair and maintain the common parts of the demised building. There was no formal lease of the premises between the parties but merely a document described as "conditions of tenancy" which were signed only by the tenants. As no obligation was imposed on them, the council denied the existence of the duty alleged and any breach of covenant. One of the issues for consideration was whether the council was, nevertheless, subject to an implied obligation to maintain the common parts of the building, such as the lifts, rubbish chutes, stairs, corridors and lights, in a state of repair and working order.

The House of Lords found in favour of the tenants on this issue. In doing so, it rejected Lord Denning's suggestion in the Court of Appeal that the courts have the power to introduce into contracts any terms they think reasonable.[8] Lord Wilberforce, in deciding the test to be applied, was of the view that "such [an] obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity."[9] He opined that the facilities in question were "essentials of the tenancy without which life in the dwellings, as a tenant, is not possible"[10] and "[t]o leave the landlord free of contractual obligation as regards these matters… is… inconsistent totally"[11] with the nature of a landlord and tenant's relationship. He stressed that in the given context, the implied term was necessary as "[t]he subject matter of the lease (high rise blocks) and the relationship created by the tenancy demand, of their nature, some contractual obligation on the landlord."[12] Lord Salmon thought that the courts did not have "any power to imply a term into a contract merely because it seems reasonable to do so"[13] and that "before it is implied much else besides is necessary, for example that without it the contract would be inefficacious, futile and absurd."[14] He found it:[15]

> [D]ifficult to think of any term which it could be more necessary to imply than one without which the whole transaction would become futile, inefficacious and

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7 Andrew Phang Boon Leong, ed., *The Law of Contract in Singapore* (Singapore: Academy Publishing, 2012) at para. 06.069, where it is stated that "the implication of a term 'in law' may indeed be necessary in appropriate circumstances."

8 *Liverpool City Council v. Irwin* [1975] 3 W.L.R. 663 at 670 (C.A.).

9 *Liverpool City Council*, *supra* note 1 at 254.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*.

13 *Ibid*. at 262.

14 *Ibid*.

15 *Ibid*. at 263.

> absurd as it would do if in a 15 storey block of flats or maisonettes, such as the present, the landlords were under no legal duty to take reasonable care to keep the lifts in working order and the staircases lit.

The remaining Law Lords, namely, Lord Cross of Chelsea, Lord Edmund-Davies and Lord Fraser of Tullybelton, delivered judgments to the same effect.

Having decided that the legal test for the implication of a term in law is a standard of strict necessity,[16] the House of Lords held that, having regard to the circumstances, the council did not breach the implied obligation to maintain and repair the common parts. In defining the standard of the obligation implied, the House of Lords took the view that the council was not subject to an absolute obligation which would be unreasonable but only an obligation to take reasonable care to keep the common parts in reasonable repair and usability.

The test of necessity laid down in *Liverpool City Council* has been applied with much vigour in subsequent House of Lords' decisions. In *Scally v. Southern Health and Social Services Board*,[17] Lord Bridge of Harwich, in delivering the judgment of the House of Lords with which the other Law Lords agreed, recognised that Lord Wilberforce in *Liverpool City Council* made it clear that for implication of terms in law the search is "based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship."[18] In the instant case, the plaintiffs, who were doctors employed by the defendant, were required by their contracts of employment to belong to a statutory superannuation scheme and were entitled to its benefits. To qualify for the maximum pension, it was necessary for employees to accumulate 40 years' of service which could be met by their right to purchase "added years" of entitlement. The plaintiffs had not been informed by the defendant of their right to do so and this right was exercisable only for a limited period. Lord Bridge took the view that "it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit."[19] He reiterated that the "criterion to justify an implication of this kind is necessity, not reasonableness."[20] To overcome the difficulty that the formulation of the test would be too wide in its ambit to be acceptable as of general application, he further cautioned that the category of contractual relationship in which the implication will arise must be capable of being defined with sufficient precision. In the case before him, he defined the contractual relationship as the:[21]

> [R]elationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being

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16 *Cf.* A. Phang, "Implied Terms Revisited" [1990] J. Bus. L. 394 at 401, 407.
17 *Supra* note 2.
18 *Ibid*. at 307.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*.

> taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.

In the result, as there was a failure to take reasonable steps to publicise the term, the defendant was in breach of the contracts of employment.

In *Spring v. Guardian Assurance plc*,[22] three of the majority Law Lords[23] also based their decision on a breach of an implied term of the contract on the part of a former employer for supplying an unfavourable reference to a third party. Lord Woolf specified with sufficient precision the circumstances[24] in which it was necessary to imply a term into the contract in relation to the giving of references. He was of the view that the "courts were prepared to imply by necessary implication a term imposing a duty on an employer to exercise due care for the physical [and economic] wellbeing of his employees".[25] In *Malik v. Bank of Credit and Commerce International S.A. (in compulsory liquidation)*,[26] the House of Lords implied a term in law which was a general obligation that an employer will not engage in conduct which is likely to undermine the mutual trust and confidence required "if the employment relationship is to continue in the manner the employment contract implicitly envisages."[27] The House of Lords opined that the doctrine of mutual trust and confidence had proven to be a "workable principle in practice" and was a "sound development."[28] The employer, which carried on its business fraudulently for a number of years and which caused its employees' future employment prospects to be handicapped, was held to be in breach of the implied term.

III. The Local Position—Test of Reasonableness?

There appears to be a shift in approach taken by Singapore cases on the issue of implication of terms in law. The test of necessity is hardly utilised at all as can be seen from a discussion of the Court of Appeal cases below.

In *Jet Holding Ltd v. Cooper Cameron (Singapore) Pte Ltd*,[29] the plaintiffs sued both the first and second defendants (*i.e.* Cameron and Stork respectively) for, *inter alia*, negligent breach of duty in respect of a fractured slip joint on an oil rig owned by the first plaintiff. Cameron had earlier been contracted to refurbish and repair certain slip joints on the oil-rig which were found to be unfit for use. Cameron then subcontracted the refurbishment of the unused parts from the defective slip joints to

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22 *Supra* note 2.

23 Namely, Lord Woolf, Lord Goff of Chieveley and Lord Slynn of Hadley.

24 *Spring*, *supra* note 2, at 353, 354:

> The circumstances are: (i) The existence of the contract of employment or services. (ii) The fact that the contract relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered. (iii) The fact that the employee cannot be expected to enter into that class of employment except on the basis that his employer will, on the request of another prospective employer made not later than a reasonable time after the termination of a former employment, provide a full and frank reference as to the employee.

25 *Ibid*. at 353.

26 [1998] A.C. 20 (H.L.) [*Malik*].

27 *Ibid*. at 35 (Lord Nicholls).

28 *Ibid*. at 46 (Lord Steyn).

29 *Supra* note 2.

Stork, which created the slip joint which had subsequently fractured. Investigations revealed that the component where the fracture had occurred (the riser box) had been over-machined. Cameron failed to provide the requisite dimensional drawings of the riser box to Stork to enable it to carry out the work. On its part, Stork did not conduct any dimensional inspection on the riser box so as to detect and repair any deficiencies found therein. The Court of Appeal held, on the issue of implication, that there was a term implied in law to the effect that Cameron and Stork owed each other a duty to take reasonable care in the performance of the respective parts of the contract they had entered into. However, as the implied term of the refurbishment contract which was breached by Cameron was not a condition precedent, it did not preclude Cameron from claiming an indemnity from Stork for the latter's breach of contract.[30]

What is interesting to note is that, in implying the term in law, the Court of Appeal did not apply the test of necessity laid down in *Liverpool City Council* and recognised in subsequent House of Lords' cases discussed above. In *Jet Holding Ltd*, the Court of Appeal was of the view that "general reasons of justice and fairness as well as of public policy justify the implication of a 'term implied in *law*' in cases such as the present to the effect that each party (here, Cameron and Stork) would owe each other a duty to take reasonable care in the performance of the respective parts of the *contract* they had entered into."[31] For the same reasons of justice and fairness as well as of public policy, the Court of Appeal could similarly have held that it was necessary to imply the term concerned in law. Further, the circumstances for implication were capable of being defined with sufficient precision, namely, the category of refurbishment contracts where one party, being the original equipment manufacturer, had the responsibility to provide the relevant dimensional drawings in order to determine the scope of work to be carried out thereon and a corresponding responsibility on the other party carrying out the refurbishment work to conduct the necessary dimensional inspection in order to detect and repair any deficiencies found to have arisen. No express mention and application of the reasonableness criterion was made by the Court of Appeal in its judgment when considering the process of implication in law. As seen above, the criterion of reasonableness was utilised instead by the Court of Appeal not in determining the existence of the term concerned but only at the subsequent stage when determining the standard of the obligation or duty that was imposed as was also the case in *Liverpool City Council*.

In *Ng Giap Hon v. Westcomb Securities Pte Ltd*,[32] the appellant was a remisier with the first respondent, a stockbroking company, under an agency agreement. He argued, *inter alia*, that there was an implied duty of good faith between him and the first respondent as agent and principal, and that he was entitled to commission due in respect of placement shares in initial public offerings allocated to two customers of the first respondent. The claim by the appellant was dismissed by the High Court.[33] The Court of Appeal also declined to imply in law the term sought for by the appellant. Caution was required when implying terms in law as it "not only involves

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30 *Ibid*. at para. 99.

31 *Ibid*. at para. 92 [emphasis in original].

32 [2009] 3 S.L.R.(R.) 518 (C.A.) [*Ng Giap Hon*].

33 [2008] SGHC 101.

broader policy considerations, but also establishes a precedent for the future."[34] Moreover, the doctrine of good faith, "very much a fledgling doctrine in English and… Singapore contract law",[35] involved a concept "which [was] itself controversial".[36] Hence, it would be inappropriate to endorse an implied duty of good faith in the Singapore context "until the theoretical foundations as well as the structure" of the doctrine were further clarified and settled.[37] There were also academic literature that supported the view that "good faith is inherent in *all* aspects of the law of contract and that there is therefore *no* reason for any term concerning good faith to be *implied* into a contract".[38] Again the test of necessity was not utilised by the Court of Appeal. The same result could have been arrived at on the basis that it was unnecessary to imply the term in law for the reasons above. As in *Jet Holding Ltd*, there was also no express mention and application of the reasonableness criterion in this regard.

While the test of necessity was also not considered and applied in *Chua Choon Cheng v. Allgreen Properties Ltd*,[39] the Court of Appeal appeared to have applied the criterion of reasonableness in the context of fairness and policy. In the instant case, the appellants, who were members of the collective sale committee constituted to represent the consenting majority unit-owners in the collective sale of the development concerned, had instituted proceedings against the respondent, the purchaser, seeking to be discharged from the sale and purchase agreement entered into with the latter. The respondent sought specific performance of the agreement. The consenting majority unit-owners had in due course come to realise that they had, through their own errors, sold the development at an undervalue. In the meantime, the respondent had made additional incentive payments to the objecting minority unit-owners who subsequently withdrew their objections to the application for collective sale. The High Court granted specific performance of the sale and purchase agreement.[40]

On appeal, the appellants argued, *inter alia*, that a term should be implied in law to prohibit the respondent from making incentive payments to the objecting minority

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34 *Supra* note 32 at para. 46.

35 *Ibid*. at para. 47

36 *Ibid*. at para. 46.

37 *Ibid*. at para. 60. *Cf. Wong Leong Wei Edward v. Acclaim Insurance Brokers Pte Ltd* [2010] SGHC 352 at para. 45 [*Wong Leong Wei Edward*], where the High Court, in the employment context, held that the plaintiff employee, who was in a fiduciary position in relation to the defendant employer, was subject to the implied duty of good faith and owed specific duties of honesty, integrity and loyalty to the latter. He was found to be in breach of his fiduciary duties within the context of the insurance industry where obligations of good faith are well accepted and applicable. See also *Man Financial (S) Pte Ltd v. Wong Bark Chuan David* [2008] 1 S.L.R.(R.) 663 at paras. 193, 194 [*Man Financial*], where the Court of Appeal had earlier stated to the same effect but the issue of breach of implied term was not considered as it was unnecessary to do so in light of the decision arrived at. In the subsequent case of *Smile Inc Dental Surgeons Pte Ltd v. Lui Andrew Stewart* [2012] 4 S.L.R. 308 at para. 49, the Court of Appeal reiterated the proposition of law it laid down in *Man Financial* at para. 193, that "there is an *implied* term in the employer's favour that the employee will serve the employer with good faith and fidelity" but that in the circumstances, the respondent employee had not breached the implied duty of good faith and fidelity [emphasis in original].

38 *Supra* note 32 at para. 52 [emphasis in original], referring to J.W. Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 Journal of Contact Law 155 and Elisabeth Peden, *Good Faith in the Performance of Contracts* (Sydney: LexisNexis Butterworths, 2003) at c. 6.

39 [2009] 3 S.L.R.(R.) 724 (C.A.) [*Chua Choon Cheng*].

40 *Wong Lai Keen v. Allgreen Properties Ltd* [2009] 1 S.L.R.(R.) 148 (H.C.).

unit-owners. It was argued that such payments would encourage some unit-owners to hold out in the hope of receiving a premium for their units later and would frustrate the intent of the collective sale regime which was primarily meant to facilitate urban renewal. Further, such payments would lead to heightened tensions and in turn increase the prospects of conflict between the consenting and objecting unit-owners, a consequence which should be prevented.

In holding that such a term could not be implied in law, the Court of Appeal reasoned that it would prevent the consenting majority unit-owners, keen to ensure that the sale was carried through, from incentivising any or all of the objecting minority unit-owners to alter their stances for the wider common good. There would also be situations where even the majority unit-owners would welcome the purchaser's offer of more money to the minority unit-owners to ensure that the deal could be completed,[41] which was the case in *Mohamed Amin bin Mohamed Taib v. Lim Choon Thye*[42] which demonstrated the point that "the making of additional payments to minority owners, in certain circumstances, can be beneficial and consistent with the legislature's intent of achieving urban renewal."[43]

Further, the Court of Appeal was also of the view that, having regard to the relevant parliamentary debates on the *Land Titles (Strata) (Amendment) Bill 1999*[44] and the safeguards provided in the collective sale provisions in the *Land Titles (Strata) Act*,[45] the legislative intent behind the collective sale regime is to "specially protect the minority's interests and not the interest of all [unit-]owners".[46]

It was also not possible to imply in law a continuing duty of good faith on the part of the respondent. In the opinion of the Court of Appeal, the general principle of *caveat emptor* applied as a purchaser did not owe any duty of care or a duty of good faith to a vendor in relation to the price of the property. The Court of Appeal also took the view that, since the *Land Titles (Strata) Act* has expressly provided for the concept of good faith and carefully limited its application in the collective sale scheme, there was no room for any implication of an overarching duty of good faith imposed on any other parties involved in a collective sale. There were also "no pressing policy considerations" that warranted the implication of a term that the respondent had to deal with the majority consenting unit-owners in good faith as their relationship was governed by the terms of the sale and purchase agreement which were settled with the benefit of professional advice given to the collective sale committee.[47]

As for a duty on the part of a purchaser to disclose the making of additional payments to the consenting majority unit-owners, the Court of Appeal did not think it should be implied in law in the context of collective sales. The respondent did not have any special obligations to all the unit-owners which warranted the imposition of such a duty of disclosure. The contract was made at arm's length and there was nothing peculiar about their relationship. Further, the Court of Appeal had

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41 *Supra* note 39 at para. 72.
42 [2009] 3 S.L.R.(R.) 193 (H.C.).
43 *Supra* note 39 at para. 73.
44 See *e.g.*, Sing., *Parliamentary Debates*, vol. 69, col. 604 (31 July 1998) (Ho Peng Kee).
45 Cap. 158, 2009 Rev. Ed. Sing.
46 *Supra* note 39 at para. 76.
47 *Supra* note 39 at para. 85.

already found that there was "no duty of good faith imposed by law on these types of contractual arrangements."[48]

In emphasising that implication of terms in law is concerned with considerations of fairness and policy, the Court of Appeal referred to the House of Lords case of *Scally* and in particular, Lord Bridge's speech as follows:[49]

> In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, Lord Bridge drew the distinction between an implied term in fact and in law in the following manner (at 307):
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> > A clear distinction is drawn … between the search for an implied term necessary to give business efficacy to a particular contract and the search, *based on wider considerations*, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. [emphasis added]

While there is no doubt that implication of terms in law is based on wider policy considerations, it was clear that Lord Bridge's comments were made in the context of the test of necessity. The Court of Appeal should also have additionally emphasised the words "as a necessary incident" therein. As noted above, Lord Bridge reiterated that the "criterion to justify an implication of [terms in law] is necessity, not reasonableness."[50]

The Court of Appeal in considering the criterion of reasonableness further commented as follows:[51]

> In short, the court is really "deciding what should be the content of a paradigm contract … [and] is in effect imposing on the parties a term which is most reasonable in the circumstances": Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract* (Butterworths Asia, 2nd Ed, 2001[52]) at pp 263-264. However, this does not mean that any reasonable term will be implied in a contract: see *Liverpool City Council v Irwin* [1977] AC 239 at 262 (*per* Lord Salmon).

It is respectfully submitted that the case authority which Andrew Phang referred to and relied on for the proposition stated above was *Liverpool City Council*[53] which, as we have seen, categorically dealt with the test of necessity as discussed above.[54] Further, while Lord Salmon did say what was attributed to him, it was precisely to emphasise the point that the courts have no "power to imply a term into a contract merely because it seems reasonable to do so."[55] It has to be "necessary" to do so for implication in law to work. This is obvious from his speech which followed

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48 *Ibid*. at para. 89.

49 *Ibid*. at para. 68 [emphasis in original].

50 *Scally*, *supra* note 2 at 307.

51 *Supra* note 39 at para. 69.

52 The correct year of publication for the 2nd edition should be 1998.

53 See Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd ed. (Singapore: Butterworths Asia, 1998) at 264: "[t]his process received a most instructive application in *Liverpool City Council v. Irwin*."

54 See text accompanying notes 9, 14, 15 above.

55 *Supra* note 1 at 262.

as seen above.[56] In the result, it would seem that the reference to the criterion of "reasonableness" is misplaced in principle.

Applying the test of necessity, the same result can be reached in *Chua Choon Cheng*. Based on policy considerations, fairness and justice, it was unnecessary to imply the term in question. The consenting majority unit-owners were trying to extricate themselves from a bad bargain entered into due to their own errors and the court should not assist them in this regard. Further, the intent and policy of the collective sale regime is to facilitate urban renewal. To imply a term in law to provide for a blanket prohibition on incentive payments would frustrate such intent and policy as seen above. Moreover, in practical terms, it would not be possible to define with sufficient precision the particular category of contracts pertaining to collective sale where such prohibition should apply, as the factual matrix must be considered on a case-by-case basis. In this regard, the Court of Appeal in *Chua Choon Cheng* pertinently observed that "we do not think [that]… it is possible to draw any meaningful distinction between any different varieties of collective sale agreements."[57]

The latest High Court case on the issue of implication of terms in law, *Cheah Peng Hock v. Luzhou Bio-Chem Technology Limited*,[58] appeared to have alluded to the test of necessity when it held that the defendant employer owed the plaintiff employee a duty, implied in law, not to undermine or destroy mutual trust and confidence.[59] The court found that the defendant had "deliberately and systematically undermined" the plaintiff's position in the company as its chief executive officer and thus breached the implied term of mutual trust and confidence.[60] The House of Lords decision in *Malik*, discussed above, was rightly cited as authority and the High Court noted as follows:[61]

> Lord Nicholls aptly observed in *Malik v BCCI* at 35 that the implied term of mutual confidence was a "portmanteau, general obligation" *necessary* for the continuation of the employment relationship "in the manner the employment contract implicitly envisages".

The High Court seemed to suggest that the appropriate criterion to utilise is one of necessity with the result that an implied term of mutual trust and confidence is implied by law into a contract of employment under Singapore law. The criterion of reasonableness, referred to in *Chua Choon Cheng*, was not considered.

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56 See text accompanying notes 14, 15 above.

57 *Supra* note 39 at para. 70.

58 [2013] 2 S.L.R. 577 [*Cheah Peng Hock*].

59 In light of the Court of Appeal case of *Ng Giap Hon*, *supra* note 32, the High Court opined, *ibid*. at para. 58, that the "duty of mutual trust and confidence, through long use, has acquired a clearer meaning and application than that of good faith", and at para. 46, that the "danger of implying a duty of good faith into contracts of employment is to introduce a potentially far reaching concept which may impose positive duties and fetters the freedom of parties… [and] will probably also conflict with written terms." The earlier High Court case of *Wong Leong Wei Edward*, *supra* note 37, was distinguished: *Cheah Peng Hock*, *ibid*. at para. 51. See the cautious approach of the High Court in *Chan Miu Yin v. Philip Morris Singapore Pte Ltd* [2011] SGHC 161 in regard to implying certain terms in law in employment contracts generally.

60 *Cheah Peng Hock*, *ibid*. at para. 124.

61 *Ibid*. at para. 58 [emphasis added].

IV. Some Possible Justifications for the Test of Necessity

A number of reasons may arguably be advanced for applying the strict test of necessity when implying terms in law. First, it is trite that implication in law establishes a precedent for the future. As stated in *Forefront Medical Technology (Pte) Ltd v. Modern-Pak Pte Ltd*:[62]

> There is a *second* category of implied terms which is wholly different in its nature as well as practical consequences. Under this category of implied terms, once a term has been implied, such a term will be implied in *all future* contracts of *that particular type*…
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> … In other words, the decision of the court concerned to imply a contract "in law" in a particular case *establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless of course a higher court overrules this specific decision.

The High Court further observed that, for the reason above, "courts ought to be as—if not more—careful in implying terms on this basis, compared to the implication of terms under the 'business efficacy' and 'officious bystander' tests which relate to the *particular contract and parties only*."[63] These observations in *Forefront Medical Technology* pertaining to implication of terms in law have been approved in the subsequent Court of Appeal cases of *Jet Holding Ltd*[64] and *Ng Giap Hon*.[65] It follows then, it is respectfully submitted, that the legal test for the implication of a term in law should be the strict test of necessity based on policy considerations, fairness and justice. If on a consideration of policy, fairness and justice, it is found unnecessary *i.e.* not crucial or vital, to imply the term in question such that it should not set a precedent for future contracts of that particular type, then there should be no room for any implication in law whatsoever as argued above in regard to, *e.g.*, *Ng Giap Hon* and *Chua Choon Cheng*.

Second, there is unlikely that there is the element of uncertainty arising in the application of the test of necessity. As noted above in *Scally*[66] and *Spring*,[67] Lord Bridge and Lord Woolf respectively cautioned that before the term concerned can be implied in law on account of the test of necessity, the category of contractual relationship in which the implication will arise must be capable of being defined with sufficient precision, be it in general or narrow terms, as the case may be.[68] The meticulous process involved, including detailing the criteria to be applied as illustrated in, *e.g.*, *Scally* and *Spring*, will safeguard against uncertainty such that if the circumstances and category of contractual relationship cannot be determined and defined with sufficient clarity and precision, no implication in law is permissible.

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62 *Supra* note 2 at paras. 42, 44 [emphasis in original].
63 *Ibid*. at para. 44 [emphasis in original].
64 *Supra* note 2 at para. 89.
65 *Supra* note 32 at para. 38.
66 *Supra* note 2 at 307.
67 *Supra* note 2 at 353.
68 See A. Phang, "Implied Terms in English Law—Some Recent Developments" [1993] J. Bus. L. 242 at 247 [Phang, "Implied Terms in English Law"], who criticised that this approach does away with "whatever semblance of generality the concept of a contract 'of a defined type' had in the first place."

Third, the precedent-setting effect of any implication in law as well as the need for certainty and precision of the category of contractual relationship further explain why the courts proceed cautiously and carefully in implying terms in law.[69] As can be seen in *Liverpool City Council*, *Scally* and *Spring*, the courts are prepared to imply a precise term in law only in carefully circumscribed circumstances and adopt a very cautious approach to this issue.[70] In this regard, it is submitted that the courts should be assisted by the test of necessity which plays a critical role in acting as the yardstick to determine if implication in law of the term concerned is crucial or vital so as to be permitted. Thus, in *Ng Giap Hon* and *Chua Choon Cheng*, implication in law of the terms concerned, as argued above, would similarly not have been allowed if one had applied the test of necessity.

Fourth, a term can be implied in law even though it was not pleaded "given its genesis as a matter of law (as opposed to the parties' intentions)".[71] By requiring the stringent threshold of the test of necessity to be satisfied, this will ensure that the term is indeed vital to be implied. In *Jet Holding Ltd*, the facts of which were set out above, the Court of Appeal took the view that "given the *very nature* of such a category of implied terms [in law]… it ought to be recognised by the court *as a matter of law*."[72] The court saw no injustice resulting to the parties as it observed, *inter alia*, that "a duty to take reasonable care in the performance of the contract arising from the implication of a term 'in law' was applicable to *both* Cameron *and* Stork."[73] Further, the crucial issue of the contractual position in relation to the respective claims for an indemnity by Cameron and Stork was raised in the pleadings and could not be ignored. In any event, counsel for both parties were given ample opportunities to argue on the broader indemnity issue of which the argument from implied terms was only a part.

Fifth, the fact that the test of necessity is utilised in both implication in fact and in law is not fatal as the focus of the test is different for the two categories of implied terms. It is trite that for implication in fact, the focus of the test of necessity is

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69 See also, generally, *Forefront Medical Technology*, *supra* note 2 at para. 44; *Jet Holding Ltd*, *supra* note 2 at para. 89; *Ng Giap Hon*, *supra* note 32 at para. 38; Phang, *The Law of Contract in Singapore*, *supra* note 7 at para. 06.069; Phang & Goh, *supra* note 5 at para. 1073.

70 Hence, implication in law was ruled out in *Reid v. Rush & Tompkins Group plc* [1989] 3 All E.R. 228 at 233, 240 (C.A.) where a duty on the part of an employer to advise an employee to obtain specific insurance cover relating to special risks while working overseas could not be implied in law under the test of necessity as it was impossible to formulate the detailed terms applicable to any such contract of employment; *University of Nottingham v. Eyett* [1999] 2 All E.R. 437 at 443 (Ch.) where, given the different circumstances of the case, *Scally* provided no support and thus "the recognition of [a general duty of good faith on the part of an employer to give advice to employees in connection with their pension rights] has potentially far reaching consequences for the employment relationship [and a] degree of caution is therefore required"; *Hagen v. ICI Chemicals and Polymers Ltd* [2002] Industrial Relations Law Reports 31 at para. 68 (H.C.) where *Scally* was distinguished on the facts in regard to the imposition of a general duty to make employees aware of their pension rights and accordingly, "it cannot conceivably be said that there is a duty to be derived from the principles in *Scally* which obliges ICI to provide that information [about pension terms]"; *Crossley v. Faithful & Gould Holdings Ltd* [2004] 4 All E.R. 447 at paras. 50-53 (C.A.) [*Crossley*], where the imposition of an obligation on an employer by way of an implied term of any contract of employment to take reasonable care for the economic well-being of his employee was rejected as it would impose an unfair and onerous burden on the former.

71 Phang & Goh, *supra* note 5 at para. 1071.

72 *Jet Holding Ltd, supra* note 2 at para. 93 [emphasis in original].

73 *Ibid.* [emphasis in original].

on the presumed intention of the parties determined under the "business efficacy" and "officious bystander" tests.[74] For implication in law, in applying the test of necessity, the focus, as can be seen from *Liverpool City Council*, *Scally* and *Spring*, is based on broader policy considerations, fairness and justice.[75] In other words, for the category of implication of terms in law, the concept of necessity is a broader one. Given the difference in rationale and focus, it is not surprising to note that any implication of terms in fact will apply only to the particular contract and parties concerned. For implication of terms in law, as seen above, the decision of the court concerned "*establishes a precedent* for similar cases in the future for *all* contracts of *that particular type*, unless… a higher court overrules this specific decision."[76]

Finally, it is submitted that the courts are in a good position to take broader policy considerations into account when applying the test of necessity. It is possible for the courts to assess the considerations of policy, fairness and justice relevant to the case before them in determining if the term concerned is necessary to be implied in law in a particular category of contractual relationship. A body of principles governing implication of terms in law for particular categories of contractual relationship will be developed over time to guide the courts on the matter. Some of the policy considerations which have been identified and considered are:[77] (i) the party in the best position to bear the loss or insure against it; (ii) the bargaining positions of the parties; (iii) the right of the claimant to be informed of the contractual term given the circumstances; (iv) freedom to contract; (v) the intent and policy of the legislation concerned; (vi) whether alternative remedies are available; (vii) whether the obligation to be imposed will be onerous; (viii) commercial practice and custom; and (ix) the question of fairness in general. The cases discussed above have applied some of these policy considerations, in some instances indirectly, in deciding whether to imply in law the term concerned.[78]

V. Policy Considerations, Fairness and Justice—The True Test?

The test of necessity for implying terms in law has been the subject of trenchant criticisms. These criticisms have been made in academic literature as well as judicially.

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[74] See *The Moorcock* (1889) 14 P.D. 64 (C.A.); *Shirlaw v. Southern Foundries (1926), Limited* [1939] 2 K.B. 206 (C.A.) respectively.

[75] See also *Forefront Medical Technology*, *supra* note 2 at para. 44; *Jet Holding Ltd*, *supra* note 2 at paras. 89, 90; *Ng Giap Hon*, *supra* note 32 at paras. 38, 46; *Chua Choon Cheng*, *supra* note 39 at para. 68.

[76] *Forefront Medical Technology*, *ibid.* at para. 44 [emphasis in original]. See also *Jet Holding Ltd*, *ibid*. at para. 89; *Ng Giap Hon*, *ibid.* at para. 38.

[77] See generally Elisabeth Peden, "Policy Concerns Behind Implication of Terms in Law" (2001) 117 Law Q. Rev. 459.

[78] See *e.g.*, *Liverpool City Council*, *supra* note 1 (parties' bargaining positions and allocation of responsibility); *Scally*, *supra* note 2 (right to be informed given the circumstances and availability of alternative remedies); *Spring*, *supra* note 2, and *Jet Holding Ltd*, *supra* note 2 (commercial practice and custom); *Chua Choon Cheng*, *supra* note 39 (intent and policy of legislation and freedom to contract); *Cheah Peng Hock*, *supra* note 58 (parties' bargaining positions); *Southwark London Borough Council v. Tanner* [2001] 1 A.C. 1 at 17 (H.L.) (freedom to contract), followed in *Overseas Union Enterprise Ltd v. Three Sixty Degree Pte Ltd* [2013] 3 S.L.R. 1 at para. 51 (C.A.).

It has been argued that the test of necessity gives rise to problems of both derivation and terminology as well as problems of application and adverse practical consequences.[79] The concept of a "contract of a defined type" ought to apply to contracts of a similar general type. However, the approach of limiting the term implied to contracts within a specific subcategory does away with the generality of the concept[80] and blurs the distinction between implication in fact and in law.[81] Further, in some instances, a very liberal approach is adopted in ascertaining if a particular contract is a contract of a defined type.[82] The concept of necessity had also given rise to linguistic ambiguity in Singapore.[83]

Some of the concerns above were also ventilated in the English Court of Appeal case of *Crossley v. Faithful & Gould Holdings Ltd*.[84] Dyson L.J., in delivering the judgment of the court, had this to say of the approach taken by the House of Lords in *Scally* and *Spring*:[85]

> In both of these cases, the House of Lords defined the contract of which the implied term was an incident in extremely narrow terms. It seems to me that there is some force in the observation that by sub-dividing relationships into smaller and more numerous categories with terms that have a less general application, the distinction between implication of terms in cases concerning a common relationship (eg employment, sale of goods, contracts for work and materials etc) and implication in those concerning a particular contract becomes blurred: see [Jack Beatson, *Anson's Law of Contract*, 28th ed., (Oxford: Oxford University Press, 2002)], p 150.

He was also of the view that:[86]

> [R]ather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations: see Peden 'Policy concerns behind implication of terms in law' (2001) 117 LQR 459, pp 467-475.

In the local context, *Forefront Medical Technology* had also noted that:[87]

> [T]he test for implying a term "in law" is broader than the tests for implying a term "in fact". This gives rise to difficulties that have existed for some time, but

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79 Phang, "Implied Terms Revisited", *supra* note 16 at 400-411.

80 Phang, "Implied Terms in English Law", *supra* note 68 at 247. See *e.g.*, *Scally*, *supra* note 2; *National Bank of Greece S.A. v. Pinios Shipping Co. No. 1* [1989] 1 All E.R. 213 (C.A).

81 Beatson, Burrows & Cartwright, *supra* note 3 at 157.

82 *El Awadi v. Bank of Credit and Commerce International S.A. Ltd.* [1989] 1 All E.R. 242 at 253 (Q.B.D.) (Lloyd L.J.): "[t]his poses no difficulty because the issue and purchase of traveller's cheques is self-evidently such a contract", illustrated in Phang, "Implied Terms Revisited", *supra* note 16 at 406.

83 See *Bethlehem Singapore Pte Ltd v. Ler Hock Seng* [1994] 3 S.L.R.(R.) 938 (C.A.) [*Bethlehem Singapore*] where the Court of Appeal held that implication in fact was not necessary for business efficacy but relied on the case of *Liverpool City Council*, *supra* note 1, which dealt with implication in law, as authority. The case of *Bethlehem Singapore* is discussed in Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, *supra* note 53 at 269 and Phang & Goh, *supra* note 5 at 522, 523.

84 *Supra* note 70.

85 *Ibid*. at para. 41.

86 *Ibid*. at para. 36.

87 *Supra* note 2 at para. 44.

> which have only begun to be articulated relatively recently in the judicial context, not least as a result of the various analyses in the academic literature (see, for example, the English Court of Appeal decision of *Crossley v Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 at [33]-[46]).

The above observation in *Forefront Medical Technology* was cited with approval in the subsequent Court of Appeal cases of *Jet Holding Ltd*[88] and *Ng Giap Hon*.[89]

Given the various difficulties with the test of necessity as argued and noted above, it has been suggested that the test for implication of terms in law should be that of reasonableness instead[90] because "[u]nlike terms implied in fact, terms implied in law are based upon the much broader rationale of public policy in general and *reasonableness* in particular."

While there is no quarrel with the requirement to have regard to broader policy considerations, fairness and justice when implying terms in law, the local case authority of *Jet Holding Ltd* which was relied on for the above proposition did not refer to the criterion of reasonableness as such. As noted earlier,[91] no express mention and application of the criterion of reasonableness was ever made by the Court of Appeal in its judgment in *Jet Holding Ltd* when considering the issue of implication in law. The same could be seen in *Ng Giap Hon*, another Singapore Court of Appeal case.

The Court of Appeal in *Chua Choon Cheng* did make reference to the criterion of reasonableness as noted above.[92] However, for the reasons discussed above, the reliance on the authorities cited is, it is respectfully submitted, misplaced and cannot be supported.[93] It may be noted that in all the three Singapore Court of Appeal cases considered, namely, *Jet Holding Ltd*, *Ng Giap Hon* and *Chua Choon Cheng*, none applied the test of necessity. Only the High Court in *Cheah Peng Hock* did allude to it but only in the briefest of fashions.

Given the discussion above, it would appear that both the tests of necessity and reasonableness are not indispensable and can be dispensed with as the courts are still able to arrive at a decision one way or the other on the issue of implication of terms in law. Granted that this is so, what then is or should be the test for implication of terms in law in the Singapore context?

It is respectfully submitted that the true test should be based on wider policy considerations, fairness and justice alone. That such an approach is sound, principled and works in practice is borne out by case law. In *Jet Holding Ltd*, the Court of Appeal made it clear that the criteria utilised in implying terms in law "are grounded (in the final analysis) on reasons of public policy."[94] In the result, "general reasons of justice and fairness as well as of public policy",[95] justify, as we have seen earlier, the implication of a term implied in law in cases such as the one before the court to the effect that Cameron and Stork owed each other a duty to exercise reasonable care

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88 *Supra* note 2 at para. 89.

89 *Supra* note 32 at para. 38.

90 Phang & Goh, *supra* note 5 at para. 1071 [emphasis in original]. See also Phang, "Implied Terms in English Law", *supra* note 68 at 246; *Crossley*, *supra* note 70 at para. 36.

91 See Part III above.

92 See the text accompanying note 51 above.

93 See the text accompanying notes 53-56 above.

94 *Supra* note 2 at para. 90.

95 *Ibid*. at para. 92.

in performing the respective parts of the contract they had entered into. Similarly, in *Ng Giap Hon*, the Court of Appeal refused to imply into the contract concerned a term in law pertaining to a duty of good faith as the process of implication involved broader policy considerations which established a precedent for the future for all contracts of the same type.[96] Hence, given the broad implications involved, caution should be exercised in the matter, especially since it involved the concept of good faith which, at that present moment, was itself controversial. In *Cheah Peng Hock*, the High Court in implying the duty of mutual trust and confidence thought that the doctrine had acquired a clearer meaning through long use and was capable of practical application[97] compared to the duty of good faith which was a potentially far reaching concept which might impose positive duties and fetter the parties' freedom to contract. The implied obligation of mutual trust and confidence aimed to ensure fair dealing between employer and employee, *e.g.*, to inform the employee of charges levelled against him, and give him the opportunity to rectify any problems or clarify any misunderstandings.

In *Chua Choon Cheng*, the Court of Appeal referred with approval to the House of Lords' case of *Scally* which emphasised that the process of implication in law is based on wider considerations and reiterated that for this category of implication of terms "the law is concerned with considerations of *fairness and policy* rather than the intentions of the parties *per se*".[98] It was possible for the Court of Appeal in *Chua Choon Cheng* to rule that the implication in law of the terms concerned was not permissible on grounds of policy, fairness and justice without having to make any reference to the criterion of reasonableness. To allow the implication of the term prohibiting the making of incentive payments by the purchaser of the strata development to objecting minority unit-owners would have gone against the intent and policy objective of the collective sale scheme embodied in the *Land Titles (Strata) Act* which is to facilitate, *inter alia*, urban renewal. The legislation was also enacted to protect the interests of minority unit-owners in a collective sale. Moreover, the threshold 80% consent had already been met before the incentive payments were offered by the purchaser.[99] It was also not unfair or unjust to disallow implication of the terms sought as the consenting majority unit-owners were trying to back out of a bad bargain in selling the strata development at an undervalue due to their own errors. They had preferred the comfort of having the certainty of a binding contract with the purchaser to the uncertainty of re-negotiating the sale price upon the ascertainment

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96 *Supra* note 32 at para. 46.

97 The High Court cited at para. 56, *inter alia*, *British Aircraft Corporation Ltd v. Austin* [1978] Industrial Relations Law Reports 332; *Hilton International Hotels (UK) Ltd v. Protopapa* [1990] Industrial Relations Law Reports 316; and *Gogay v. Hertfordshire County Council* [2000] Industrial Relations Law Reports 703 to illustrate that the duty of mutual trust and confidence had been consistently applied even before it was accepted by the House of Lords in *Malik*, *supra* note 26.

98 *Supra* note 39 at para. 68 [emphasis in original].

99 In light of the recent Court of Appeal case of *N K Rajarh v. Tan Eng Chuan* [2014] 1 S.L.R. 694 and that of the High Court in *Ngui Gek Lian Philomene v. Chan Kiat* [2013] 4 S.L.R. 694, it might be possible to argue that a term in law should be implied, based on policy considerations, fairness and justice, to prohibit the making of incentive payments by collective sale committee members and marketing agents to some of the minority unit-owners to secure and achieve the requisite threshold consent. This is because procedural fairness in arriving at the requisite threshold consent is crucial as the remaining minority unit-owners who have not been offered the incentive payments would be obliged to sell their properties without having consented to the collective sale if that threshold is met.

of the actual development charge payable. As the Court of Appeal rightly observed, the *Land Titles (Strata) Act* does not prohibit the making of incentive payments and it is for the collective sale committee to prohibit the making of such payments by expressly providing for it in the sale and purchase agreement entered into with the purchaser.

Support for such a principled approach based on wider policy considerations, fairness and justice alone in implying terms in law may also be found in academic literature. It has been observed that "it might be better for the troublesome criterion of 'necessity' to be jettisoned with regard to terms implied in law and for the governing test to be based on public policy considerations explicitly."[100] There is also the suggestion that "[i]f the criterion of reasonableness is thought unsatisfactory… then some other terminology (such as 'public policy considerations') might be more appropriate."[101] This was in response to the view that "[i]t is true that endorsement of the criterion of reasonableness would be to engender possible undesirable psychological effects (premised on the well-worn but no less significant concept of 'floodgates')."[102] In implying terms in law, the court is, in actual fact, considering how the proposed implied term will sit with existing law, the effect on the parties to the relationship and wider issues of fairness.[103] As Peel in *Treitel: The Law of Contract* succinctly puts it:[104]

> It is submitted that such decisions [on implication in law] are clearly based on considerations of 'justice and policy' and there is much to be said for abandoning 'the elusive concept of necessity'. Decisions on such policy issues are not helped by distinguishing 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.

In advocating for policy considerations, fairness and justice to be the singular test, it is not suggested that the courts be given *carte blanche* to do what they like in implying terms in law. The courts will have to continue to be slow, cautious and careful in the process of implication of terms in law as it will establish a precedent for the future for all contracts of the same type. By taking into account relevant policy considerations[105] in a principled legal analysis,[106] important and limiting strictures will be put in place to help to ensure consistency and certainty of the applicable principles in the implication process.

VI. Conclusion

As demonstrated above, the Singapore courts do not appear to have adopted a consistent approach when it comes to considering whether to apply the common law category of implication of terms in law. The criterion of reasonableness is not explicitly considered in all the cases. The test of necessity is hardly utilised at all

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[100] Phang & Goh, *supra* note 5 at para. 1077.
[101] Phang, "Implied Terms in English Law" *supra* note 68 at 246.
[102] *Ibid*.
[103] Peden, "Policy Concerns Behind Implication of Terms in Law"*, supra* note 77 at 467.
[104] Peel, *supra* note 3 at 231, 232.
[105] See the text accompanying note 77 above.
[106] See generally, *Wee Chiaw Sek Anna v. Ng Li-Ann Genevieve* [2013] 3 S.L.R. 801 at para. 170 (C.A.).

although alluded to in a recent High Court case. In having policy considerations, fairness and justice as the sole and principled test, the courts will not be hamstrung by the need to satisfy the criterion of necessity or reasonableness, as the case may be, in arriving at a decision. This will give the courts the necessary latitude to achieve certainty and consistency in approach as well as in the principles to be applied and at the same time achieve what is fair and just on policy grounds to ensure a sound development of the law in this area.