SUPREME COURT OF QUEENSLAND

CITATION:	*Impact Healthcare Pty Ltd v St Vincent's Private Hospitals Ltd* [2026] QCA 21
PARTIES:	**IMPACT HEALTHCARE PTY LTD** ACN 084 694 726 (appellant/cross respondent) **v** **ST VINCENT'S PRIVATE HOSPITALS LTD** ACN 083 645 505 (respondent/cross appellant)
FILE NO/S:	Appeal No 2686 of 2025 SC No 844 of 2025
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2025] QSC 117 (Hindman J)
DELIVERED ON:	17 February 2026
DELIVERED AT:	Brisbane
HEARING DATES:	18 November 2025; 1 December 2025
JUDGES:	Bowskill CJ, Bond JA, Sullivan J
ORDERS:	**1. The appeal is allowed.** **2. The cross-appeal is dismissed.** **3. The declaration and orders made on 2 June 2025 are set aside.** **4. In lieu of those orders:** **(a) Make a declaration that the agreement between the appellant and the respondent entitled "Agreement for the operation of Holy Spirit Northside Emergency Centre" is not subject to an implied term that the respondent can terminate it on the giving of reasonable notice.** **(b) The respondent pay the appellant's costs of the proceeding below.** **5. The respondent pay the appellant's costs of the appeal and the cross-appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED

TERMS – GENERALLY – where a new hospital needed an emergency centre and approached an experienced doctor to assist – where the doctor's company, the appellant, and the hospital entered into an agreement under which the appellant would provide professional services in the management and operation of the emergency department – where the hospital subsequently assigned its rights and obligations under the agreement to the respondent – where the agreement contemplated an indefinite period, and had no end date – where the respondent contended that the agreement includes an implied term entitling the respondent to terminate the agreement on the giving of reasonable notice, there being no express term in the agreement to that effect – where the learned primary judge found that the agreement did include such a term on the basis of implication by law or, alternatively, in fact – whether the primary judge erred in concluding that term was implied by law into the agreement – whether the primary judge erred in concluding that the term was implied in fact into the agreement – whether the primary judge erred in failing to find that the agreement included a broader implied term as contended by the respondent

Australian Blue Metal Pty Ltd v Hughes [1963] AC 74; [1962] UKPC 23, cited
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266; [1977] UKPCHCA 1, cited
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; [1995] HCA 24, considered
Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337; [1982] HCA 24, applied
Commonwealth Bank of Australia v Barker (2014) 253 CLR 169; [2014] HCA 32, considered
Crawford Fitting Co v Sydney Valve & Fittings Pty Ltd (1988) 14 NSWLR 438, considered
Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361, cited
Hughes Aircraft Systems International v Airservices Australia [No 3] (1997) 76 FCR 151; [1997] FCA 558, considered
Liverpool City Council v Irwin [1977] AC 239; [1976] UKHL 1, cited
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, cited
Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd [1955] 2 QB 556, cited
Re Spenborough Urban District Council's Agreement [1968] Ch 139, cited
University of Western Australia v Gray (2009) 179 FCR 346; [2009] FCAFC 116, considered
Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] AC 173, cited

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[1] **THE COURT:** About 25 years ago, a hospital was proposed to be constructed in Chermside by the Holy Spirit Northside Private Hospital Ltd (**HSNPH**). The hospital needed an emergency centre. HSNPH approached Dr Kay, who had considerable expertise and experience in establishing and managing emergency centres, to assist in this regard. In 2001, the engagement was formalised when HSNPH entered into an agreement with the appellant, **Impact** Healthcare Pty Ltd (Dr Kay's company). The agreement was expressed to commence on 1 October 2000, contemplated an indefinite period, and therefore had no end date. In 2019, the Hospital assigned its rights under the agreement to the respondent, St Vincent's Private Hospitals Ltd (the **Hospital**).

[2] In about 2024, a dispute arose between the parties when Dr Kay proposed to sell some of his shares in Impact to another company.[1] Subsequently, the Hospital contended that the agreement includes an implied term entitling the Hospital to terminate the agreement on the giving of reasonable notice (there being no express term in the agreement to that effect) (the **disputed term**). Impact applied to this Court for a declaration that the agreement does not include, and is not subject to such a term. For reasons given on 26 May 2025, the learned primary judge found that the agreement did include the disputed term, either on the basis of an implication by law or, alternatively, in fact.[2] On 2 June 2025, the court below declared that:

> "… on the proper construction of the written contract between [Impact] and [the Hospital] entered into in 2001 titled 'Agreement for the Operation of Holy Spirit Northside Emergency Centre' the contract is subject to an implied term that [the Hospital] can terminate the contract on the giving of reasonable notice to [Impact]."

[3] Impact appeals against that order, on the grounds that:

1. First, the primary judge erred in concluding (Reasons at [93]) that the agreement was subject to the implied term as a matter of law, because:

   (a) the agreement was neither a contract of a particular class which, nor one which by its inherent nature, required the implication of the implied term as a matter of law;

   (b) further or alternatively, the parties objectively intended that the agreement was indefinite and perpetual, such intention being apparent from each of the following matters:

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1 See *Impact Healthcare Pty Ltd v St Vincent's Private Hospitals Ltd* [2024] QSC 62.
2 See *Impact Healthcare Pty Ltd v St Vincent's Private Hospitals Ltd* [2025] QSC 117.

(i) the terms of the agreement and, in particular, clauses 2.2, 4.13 and 7;

(ii) the objective background facts, known to both parties, referred to in the Reasons at [30], [31], [32] and [65]; and

(iii) the fact, recorded in the Reasons at [32(c)] and [32(d)], that the parties had united in rejecting a term that the agreement be subject to rolling five-year terms.

2. Second, the primary judge erred in concluding (Reasons at [140]) that the agreement was subject to the implied term as a matter of fact, because:

(a) the implied term was inconsistent with the terms of the agreement and, in particular, clauses 2.2, 4.13 and 7 of the agreement;

(b) further or alternatively, the implied term was not so obvious so as to go without saying;

(c) further or alternatively, the implied term was not necessary to give business efficacy to the agreement in circumstances where:

(i) the agreement was capable of operating reasonably and effectively without the implied term;

(ii) the agreement, in particular by clauses 3.1 and 3.2, strictly regulated the manner in which the appellant was to perform its obligations under the agreement;

(iii) the respondent could, in the event that the appellant defaulted in its obligations mentioned in subparagraph (c)(ii), terminate the agreement for breach; and

(d) further or alternatively, the parties objectively intended that the agreement was indefinite and perpetual such intention being apparent from each of the matters set out in ground 1(b).

[4] The Hospital has filed both a notice of contention, and a notice of cross-appeal, in effect, contending the primary judge erred in not deciding that, as a matter of its proper construction, the agreement included an implied term that:

(a) each party has the right to terminate the agreement on the giving of reasonable notice;

(b) in the case of termination by Impact, the period of reasonable notice must be a minimum of six months;

(c) the right to terminate on the giving of reasonable notice may not be exercised for a reasonable period following entry into the agreement.

This is a different term from the one which the Hospital pressed to be implied at first instance.

[5] By its notice of contention, the Hospital also contends that the decision of the primary judge should be affirmed on the basis that the extrinsic evidence of Dr Kay, held to be admissible but of limited weight by the primary judge, is inadmissible.

[6] The issues to be determined on this appeal are logically organised as follows:

(a) Was the primary judge's conclusion in relation to the admissibility of the extrinsic evidence of Dr Kay, and therefore as to the objective facts known to both parties, correct?

(b) What is the proper construction of the express terms of the agreement, in particular, clauses 2.2(1) and (3)?

(c) Did the primary judge err in concluding that the disputed term was implied by law into the agreement (ground 1)?

(d) If so, did the primary judge err in concluding that the disputed term was implied in fact into the agreement (ground 2)?

(e) Did the primary judge err in failing to find that the agreement included the broader implied term now contended by the Hospital (cross-appeal)?

[7] For the following reasons, it was legally incorrect to conclude that the disputed term was implied by law, or in fact, into the agreement, and there is no basis, in law or fact, to imply the broader term now sought by the Hospital. We therefore allow the appeal, and dismiss the cross-appeal.

Objective framework of facts

[8] Before addressing the issue of implication of the disputed term, it is first necessary to consider the express terms of the agreement,[3] to work out whether there is a gap to be filled and because no term will be implied, by law or in fact, if it is inconsistent with the express terms of the contract or with the intention of the parties as gathered from those provisions.[4]

[9] In some important respects, the parties press for quite different constructions of two provisions of the agreement (clauses 2.2(1) and (3)). The resolution of this difference impacts on the question of implication.

[10] The relevant principles of construction are not controversial. The agreement is to be construed objectively, by reference to its text, context and purpose. Where there is a constructional choice, recourse may be had to objective events, circumstances or things external to the agreement.[5] As articulated by Mason J in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352:

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3 ***Codelfa*** *Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 346.

4 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 422-3; *Biki v Chessells* [2004] VSCA 70 at [25]-[26]; ***Castlemaine*** *Tooheys Ltd v Carlton & United Breweries Ltd* (1987) 10 NSWLR 468 at 487.

5 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at [46]-[49].

> "… [w]hen the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this setting."[6]

[11] Justice Mason went on to identify one circumstance in which it may be permissible to have regard to evidence of the subjective intention of the parties in aid of construction of their bargain. Where the parties have refused to include in their contract a provision which would give effect to something which is subsequently suggested to be the presumed intention of persons in their position, evidence of that refusal is admissible with a view to negativing the alleged presumed intention.[7]

[12] The primary judge found the following, as the framework of facts within which the agreement came into existence:

> "[29] In about late 1999 or early 2000, Dr Kay was approached by the State manager of HSNPH, Mr Read. Mr Read asked Dr Kay whether he would be interested in establishing and operating the emergency department at what is now known as the St Vincent's Private Hospital in Chermside that was then under construction.
>
> [30] Mr Read explained to Dr Kay that:
>
> (a) HSNPH was in the process of establishing the hospital;
>
> (b) it was a condition of HSNPH's tender that the hospital operate an emergency department;
>
> (c) only one doctor had expressed any interest in doing so, but that doctor was too inexperienced;
>
> (d) HSNPH was concerned about the emergency department because it lacked experience in operating one.
>
> [31] Dr Kay was not initially interested; Mr Read pressed Dr Kay further. Negotiations between Dr Kay and HSNPH ensued. There is no doubt that the pre-contractual negotiations demonstrate that HSNPH was very keen to secure the services of Dr Kay, that Dr Kay was eminently qualified, and finding a suitable alternate candidate to Dr Kay was likely to be very difficult, if not practically impossible.
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> [32] In the course of those negotiations:
>
> (a) Dr Kay explained to Mr Read that:
>
> (i) he required indefinite perpetual tenure;

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6 Underlining added.

7 *Codelfa* at 352-353; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at [9] per Kiefel, Bell and Gordon JJ; *Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2025] QCA 50 at [51] per Bond JA, Mullins P and Crow J agreeing.

(ii) one of the reasons that was required was because he needed to recruit appropriately qualified emergency medicine specialists to work fulltime within the emergency department;

(iii) most emergency medicine specialists, which were in short supply, worked in the public sector on long-term fixed employment contracts with no expiry;

(iv) the only way to entice those specialists to work in the emergency department would be to offer them similar contracts,

(b) Dr Kay also explained that the establishment of the emergency department would involve significant expenditure;

(c) Mr Read, initially, suggested that the agreement have five-year rolling terms;

(d) Dr Kay rejected that proposal and explained the reasons why such an arrangement was not acceptable to him."

[13] The primary judge referred to a meeting that took place between Dr Kay and Mr Read on 23 August 2000 (Reasons at [33]) which was followed by an email exchange around 30 August and 4 September 2000. Her Honour noted that:

"[34] … In that exchange:

(a) Mr Read explained that HSNPH's board was only interested in a 'three year contract with options';

(b) Dr Kay rejected that proposal and reiterated some of the matters he had earlier told Mr Read;

(c) Mr Read responded by telling Dr Kay he would discuss the matter with HSNPH's board.

[35] Of particular importance in the matters reiterated, in respect of the need to recruit suitable doctors in the current environment Dr Kay said:

> Two exceptional people in particular that I already have in mind already have excellent positions from which they would have to be strongly encouraged to leave. I think the Board needs to view this in the same way as they would a radiology agreement, i.e. once contracted they are there forever unless their performance clauses are not met.
>
> I also, am not prepared to do all the early hard yards and then have the arrangement expire just as the centre is starting to reap the rewards of this effort.
>
> If the hospital wants only a short term deal then they will have to offer an absolute fortune to cover the risks.

> None of my docs are prepared to commit to a job share and then maybe lose it and not be able to go back to full time secure position.
>
> …
>
> There are two major issues which need to be brought to the Board
>
> 1 If they want us to do it then we want a very long term deal
>
> …
>
> If you want to revise the board's terms then we can get on with it, and finalise the deal very soon. Otherwise I will regretfully withdraw from negotiations as I am not prepared to put my name to a sub-standard result.

[36] After that exchange, Dr Kay met with HSNPH's board. Dr Kay told the board some of the same things he had told Mr Read, including that he was only interested in the project if he had absolute tenure.[8] He explained that the terms of the draft agreement provided for that.

[37] On 30 October 2000, Mr Read wrote to Dr Kay passing on some concerns about the amounts payable under the proposed agreement. In doing so, he mentioned that 'we are signing up for an indefinite period'. That appears to have, at least, acknowledged the parties' specific decision not to include HSNPH's floated proposals for an agreement with 3 or 5 year rolling terms.

…

[39] Impact and HSNPH ultimately entered into the Agreement in early 2001…"

[14] By ground 2 of its notice of contention, the Hospital seeks to support the conclusion reached by the primary judge as to implication of the disputed term on the basis that parts of Dr Kay's evidence, which includes evidence relied on to make the findings, ought to have been ruled inadmissible.

[15] Having regard to the relevant principles, the primary judge made no error in admitting the evidence of these aspects of the antecedent negotiations between the parties. Such evidence is admissible insofar as it may be regarded as directed to one of the legitimate aspects of surrounding circumstances, but inadmissible if merely directed to identifying the actual intentions of the negotiation parties.[9] Although the line between legitimate and illegitimate use of such evidence is often difficult to

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8 Footnote 8: "Precisely what 'absolute tenure' meant in the particular circumstances is not clear. Tenure is a word often used in association with academic positions at higher educational institutions, colloquially meaning a job for life."

9 *Franklins Pty Ltd v Metcash Trading Limited* (2009) 76 NSWLR 603 per Allsop P at 619 [24]; *Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2025] QCA 50 at [50] per Bond JA, Mullins P and Crow J agreeing.

identify,[10] in this case, the legitimate use of the evidence was to shed light on the objective framework of facts within which the agreement came into existence, in particular because that framework demonstrated the objective commercial aim of the transaction, and evidenced the parties' refusal to include in their contract a provision which refusal could be used to negate submissions made about the parties' presumed intention and to shed light on whether a term should be implied in fact. We reject ground 2 of the notice of contention.

[16] The admissible extrinsic evidence demonstrated:

(a) HSNPH proposed to build a new hospital on a greenfield site. The new hospital required an emergency services department;

(b) HSNPH was keen to secure the services, of Dr Kay specifically, due to his expertise in relation to hospital emergency services departments;

(c) Dr Kay was initially not interested, but Mr Read of HSNPH kept pressing him to change his mind;

(d) in the course of their negotiations, Dr Kay told Mr Read that the success of the project depended on the ability to recruit appropriately qualified emergency medicine specialists from the public sector, and, because they were on long-term fixed employment contracts with no expiry, the only way to entice them would be to offer them similar contracts;

(e) Dr Kay told the HSNPH board he required "absolute tenure" for this purpose;

(f) HSNPH initially proposed three or five-year "rolling terms", but that was rejected by Dr Kay, because he would not be able to recruit the specialists required with that limitation in place;

(g) in the face of that rejection, HSNPH agreed to "sign up for an indefinite period" and the parties agreed on an arrangement without any fixed term; and

(h) to perform the services contemplated by the agreement, Dr Kay/Impact had to incur substantial capital costs to set up the emergency department.

[17] The admissible extrinsic evidence established that the commercial aim of the transaction was to secure the services of Dr Kay specifically to establish and operate the emergency services department in the proposed new hospital, by offering him long term security of tenure. The relevant refusal was the parties' refusal to include in fixed or rolling terms in their bargain.

Express Terms of the Contract

[18] The agreement is a comprehensive and detailed document, which was prepared by lawyers. It is expressed to commence on 1 October 2000 (clause 1.1); but has no term, and no end date (clause 2.2(1)).

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10 *Kimberley Securities Limited v Esber* [2008] NSWCA 301 per Allsop P and Macfarlan JA at [4]-[5]; *Franklins Pty Ltd v Metcash Trading Limited* (2009) 76 NSWLR 603 per Allsop P at 619 [24]; *Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd* [2025] QCA 50 at [50] per Bond JA, Mullins P and Crow J agreeing. See also *Prenn v Simonds* [1971] 1 WLR 1381 per Lord Wilberforce at 1384-1385.

[19] By clause 3.1 of the agreement, Impact (as the Consultant) was engaged to provide "at its own cost and expense (except where this agreement expressly provides otherwise)" the following Services to the Hospital (as the Principal):

> "(1) develop, establish and manage a comprehensive emergency centre at the Hospital to be operated in line with world's best practice to ensure that patients of the Emergency Centre receive emergency care of high standard;
>
> (2) provide advice and make recommendations with respect to the design, construction and commissioning of a comprehensive emergency centre at the Hospital;
>
> (3) institute an effective and efficient marketing program and management process;
>
> (4) recruit and employ medical personnel with appropriate experience and expertise capable of applying for and being granted appropriate visiting rights by the Principal, to work in the Emergency Centre at the Hospital;
>
> (5) facilitate applications by all medical personnel who it is desirous of employing to work in the Emergency Centre to the Principal for the appropriate visiting rights;
>
> (6) educate and train personnel employed by the Principal to work in the Emergency Centre and its own personnel in the operation of the Emergency Centre;
>
> (7) develop, install, maintain and monitor medical and financial (including billing), operating and reporting systems in the Emergency Centre capable of generating comprehensive daily, weekly, monthly and annual medical and financial reports acceptable to the Principal;
>
> (8) upgrade the medical and financial operating and reporting systems in line with world's best practice or as required by the Principal;
>
> (9) develop, install, maintain and monitor a quality assurance system incorporating appropriate performance indicators (eg ACHS) to ensure that quality standards consistent with worlds best practice and the Principals requirements are maintained, legislative requirements are complied with and the Emergency Centre at all times provides emergency care of a high standard;
>
> (10) develop an annual business plan and budget at the same time as the Hospital's budgeting and business planning process occurs, and with the agreement of the Principal, implement the business plans and budgets;
>
> (11) provide services necessary and incidental to the services specified in paragraphs 3.1(1) to 3.1(10) in order to:
>
> (a) ensure the Emergency Centre is operated in line with world's best practice and provides its patients with emergency care of a high standard;

(b) ensure its meets and, where possible exceeds budget requirements;

(c) ensure it outperforms all competitors located within a 10 kilometre radius from the Hospital;

(d) when the capacity of the Hospital permits, ensure that it achieves an annual referral rate to the Hospital of 10,000 bed days per annum; and

(e) ensure it is established in such a way as to:

(i) minimise losses, dislocation and stress on the Hospital's existing services and facilities;

(ii) develop appropriate casemix;

(iii) achieve agreed growth projections;

(f) on an annual basis, provide the Hospital with admission rates for triage category statistics to confirm that the Principal's emergency admissions are in line with national benchmark criteria;

(g) develop a schedule of fees to be charged to patients of the Emergency Centre and vary such schedule as it considers appropriate from time to time; and

(h) in providing the services set out in this clause, the Consultant will be responsible for meeting the payments identified in the Payment Responsibility section of the Schedule."[11]

[20] In contrast, the services to be provided by the Hospital were modest, involving the provision of nursing staff, a system for efficient movement of patients, some office equipment and supplies and financial and administrative services (clause 4.4).

[21] In addition to the standard of "world's best practice" built into clause 3.1, clause 3.2 required Impact to perform the Services:

"(1) In a manner consistent with the moral teachings of the Catholic Church;

(2) with due care skill and diligence;

(3) in a proper, competent and professional manner;

(4) having regard to the best interests of the Principal; and

(5) in compliance with all laws relevant to the performance of the Services."

[22] Each of Impact's obligations was made a condition of the agreement, the failure to perform which gave the Hospital a right to give notice to terminate (clause 7.2).

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11 Underlining added.

[23] The agreement included, as a schedule, Impact's "principles and management philosophy" (clause 3.7(1)); but it was agreed those principles and management philosophy would be modified, where necessary, to reflect the "mission, values and philosophy of" the Hospital (clause 3.7(2)). Clause 4.12 also gives the Hospital the right to require Impact to remove any personnel who, in the reasonable opinion of the Hospital, are "not suitably qualified or experienced … or have been guilty of any misconduct or disruption of the [Hospital's] business, or act in a way which is inconsistent with the mission and values of the [Hospital] or the teachings of the Catholic Church".

[24] The payment responsibilities of each party were clearly set out in a "payment responsibility schedule" annexed to the agreement. This records, among other things, that Impact is responsible for paying for all "key personnel" (doctors, practice manager, nurse manager, marketing associate and the recruitment costs associated with them) and the Hospital is responsible for paying for other personnel (nurses, receptionists, orderlies, and the recruitment costs associated with them).

[25] The remuneration payable to Impact for the Services is set out in a schedule to the agreement (clause 6.1). The remuneration is in three parts:

(a) part one – a monthly payment of $12,000 per month (excluding GST) during the "set-up period", expected to be from 1 November [2000] until 30 July 2001;

(b) part two – comprising an increased monthly fee of just over $41,000 (excluding GST), commencing from 1 August 2001, adjusted annually by reference to the CPI, together with "top up of billings in Emergency of a target of $75,000 per month minus fees raised"; and

(c) part three – being a royalty payment, of 1% of Generated Hospital Revenue (defined in the schedule by reference to revenue generated from patients admitted to the Hospital, or another hospital owned by the Principal, within 24 hours of having received treatment at the emergency medicine centre), from January 2003 "until the cessation of the agreement".

[26] Clause 7 deals with "early determination" of the agreement, as follows:

> "7.1 **Early Determination by the Principal**
>
> The Principal may by notice in writing to the Consultant (to be served in any of the modes set out in this agreement) determine this Agreement forthwith if:
>
> (1) the Consultant should suffer or permit execution to be levied against it or a receiver (or receiver and manager) or controller of the whole or any part of its property or undertaking to be appointed;
>
> (2) an administrator is appointed under Sections 436A, 436B or 436C of the Corporations Law;
>
> (3) commences to be wound up or ceases to carry on business;

(4) enters into a compromise or arrangement with its creditors or any class of them;

(5) or any of the Approved Personnel identified in the Schedule acting in the discharge of their duties is guilty of any fraudulent act or wilful misconduct.

7.2 **Notice of Breach of Obligations**

If the Consultant fails to perform its obligations under this agreement then:

(1) the Principal may give notice in writing to the Consultant ('the notice') of its intention to terminate this agreement at the expiration of not less than twenty-one (21) days from the date of delivery of the notice to the Consultant in the event that the Consultant fails to remedy the breaches identified in the notice within that time or some other time as may be agreed upon by the parties in writing;

(2) in the event that the Consultant fails to remedy the breaches specified in the notice within the time specified in the notice or such further time as may have been agreed upon by the parties in writing, then the Principal may terminate this agreement by further written notice to the Consultant and the agreement will automatically terminate upon the delivery of such further notice to the Consultant;

(3) If the Consultant alleges a notice purportedly given under this clause has not been properly delivered, does not specify with sufficient particularity the alleged breach or the Consultant believes alleged the breach has not occurred, the Consultant may invoke the dispute resolution provisions set out in clause 19 and in that case the notice will be deemed to be stayed pending the conclusion of the dispute resolution process.

7.3 **Early Determination by Consultant**

The Consultant may by notice in writing to the Principal (to be served in any of the modes set out in this agreement) terminate this agreement forthwith if the Principal should fail to make a payment to the Consultant under clause 7 of this agreement by the due date therefore and such default shall continue for a period of fourteen (14) days after the Consultant has requested payment in writing indicating an intention to invoke this clause if payment is not received.

7.4 **Principal's Obligation to pay upon termination**

If this agreement is terminated under Clauses 7.1 or 7.2 hereof then the Principal shall pay to the Consultant any part of the Consultant's remuneration which has accrued prior to the

termination but has not been paid which shall be accepted by the Consultant in full satisfaction of all claims for fees and reimbursable expenses which the Consultant may have against the Principal under this agreement.

7.5 **Post Termination Obligations**

Upon the termination of the agreement for whatever reason, the parties will return to each other all material in their possession which belongs to the other party and the Consultant may, at its own cost and expense, remove from the Emergency Centre all books, documents, papers, computer hardware and software, communication devices and medical instruments which it has provided in connection with implementation of the project and in so doing, will ensure that minimal damage and disruption is caused to the physical layout of the Emergency Centre and its continued operation. The cost of reinstating the Emergency Centre after the Consultant removes its possessions, will be the responsibility of the Principal."

[27] Another provision which contemplates termination is clause 12, which provides:

"12. **ASSIGNMENT**

12.1 **Assignment by the Principal**

The Principal must as soon as it forms an intention to assign its rights and obligations under this agreement, advise the Consultant in writing of such intention and provide the Consultant with details of the party or parties to whom the Principal intends assigning such rights and obligations and the Consultant may, within 14 days of receipt of such notice, at its own election and without penalty, terminate this agreement by notice in writing to the Principal.

12.2 In the event that the Principal decides to sell, assign or otherwise part with control of the operation of the Hospital, the Principal must immediately give written notice of such intention to the Consultant and the Consultant may within 14 days of receipt of such notice, as its own election and without penalty, by notice in writing to the Principal, terminate this agreement.

12.3 In the event that the Consultant does not terminate this agreement pursuant to this clause, the Hospital will use its best endeavours ensure that it is a term of any contract between the Principal and the party or parties to whom the Principal intends selling, assigning or otherwise parting with control of the operation of the Hospital or the Emergency Centre that such party agrees to an assignment of the Principal's rights and obligations under this agreement. Failure on the part of the Principal to procure that the party or parties to whom the Principal sells, assigns or otherwise parts with control of the operation of the Hospital accepts an assignment of this agreement will mean this agreement will, upon the settlement

of the sale or otherwise of the Hospital, come to an end and the Principal will pay to the Consultant the Early Termination Costs within 30 days of the Agreement coming to an end under this clause."

[28] "Early Termination Costs" is defined in clause 1.1 to mean "costs which the Consultant incurs, as a consequence of the early termination of this agreement pursuant to Clause 12.3 and which it would not have incurred but for the early termination of this agreement including but not limited to redundancy payments and equipment lease payouts". No other provision in the agreement provides for the payment of "early termination costs".

[29] Clause 4.13 does not provide a right of termination as such, but identifies a particular circumstance in which Impact will be in breach of the agreement, entitling the Hospital to terminate, as follows:

"4.13 **Change in Control**

(1) Should Dr Phillip Kay:

(a) cease to be a director of the Consultant;

(b) sell his shares in the Consultant; or

(c) cease to manage the Emergency Centre

without the Principal's prior informed approval (unless he dies or becomes so ill or incapacitated as to be unable to perform his role as director and manager), the Consultant will be in breach of its obligations under this agreement.

(2) The Principal will not unreasonably withhold its approval to:

(a) the sale by Dr Kay of his shares in the Consultant;

(b) his ceasing to be a director of the Consultant; or

(c) his replacement as a manager of the Emergency Centre

after the Emergency Centre has been operating for 3 years continuously.

(3) In any case where Dr Kay ceases to manage the Emergency Centre, the Consultant must replace him with someone of at least equivalent ability, experience and expertise approved by the Principal and (except where the replacement is consequent upon the death of Dr Kay) the Consultant must ensure that there is a proper handover which will involve Dr Kay training his replacement and both of them working together in the Emergency Centre for a period of at least four weeks."

[30] A key provision for the purposes of this dispute is clause 2, which provides as follows:

"2. **APPOINTMENT AND TERM**

2.1 **Appointment**

> The Principal acknowledges having engaged the Consultant, and the Consultant acknowledges having accepted the engagement, for the provision of the Services.
>
> 2.2 **Term**
>
> (1) The engagement of the consultant shall be deemed to have commenced on the 1st October 2000 and shall continue, unless terminated as hereinafter provided by clauses 4.13 or 7.
>
> (2) The parties acknowledge the current volatility in the healthcare industry and hereby agree to renegotiate the appropriate clauses in the event of major changes induced by the Government or Health funds which by its nature causes serious immediate detriment to either party such as Medicare schedules, Health Fund legislation.
>
> (3) The parties may terminate this contract by mutual agreement or if the consultant wishes to terminate, for whatever reason, a minimum of six months notice shall apply."[12]

[31] As the primary judge observed (Reasons [98]), clause 2.2(1) does not exhaustively list the ways in which the agreement may be brought to an end under the express terms of the agreement. Other provisions dealing with termination are, within clause 2 itself, clause 2.2(3), and clause 12. The Hospital relies upon this, to submit that clause 2.2(1) should be construed as though it read:

> "The engagement of the consultant shall be deemed to have commenced on the 1st October 2000 and shall continue, unless terminated. ~~as hereinafter provided by clauses 4.13 or 7.~~"

[32] On the other hand, Impact submits that clause 2.2(1) should be construed as though it read:

> "The engagement of the consultant shall be deemed to have commenced on the 1st October 2000 and shall continue, unless terminated as hereinafter provided by the clauses in the contract that expressly provide for termination ~~clauses 4.13 or 7~~."

[33] In contending for this construction, Impact submits that clause 2.2(1) may reflect infelicitous drafting, but the objective intention of the provision was to provide for the engagement to continue indefinitely, and only be capable of being brought to an end under one of the express provisions of the agreement.

[34] Having regard to the text of clause 2.2(1), read in the context of the rest of clause 2 and the agreement as a whole, and by reference to the objective framework of facts in which the agreement came into existence, Impact's submission is accepted. The construction contended for by the Hospital is circular, and gives no meaning to the provision. It runs contrary to the presumption against redundant words, or

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12 Underlining added.

surplusage. There is no purpose to a provision which says "this agreement will continue unless terminated". There is a purpose to the inclusion of the phrase the Hospital seeks to make redundant. Having regard to the objective framework of facts, the presumed intention of including the words "unless terminated as hereinafter provided by clauses 4.13 or 7" was to capture the parties' agreement that the engagement was for an indefinite period, and could only be terminated in one of the ways expressly provided for in the agreement.[13] It is reasonable to infer that the parties intended to include in clause 2.2(1) all the provisions under the contract by which the engagement could be terminated, but, through drafting error, failed to do so comprehensively.

[35] Turning then to clause 2.2(3), there is no controversy about the first part, by which the parties agreed they may terminate the agreement by mutual agreement. The controversy arises in relation to the next part: "or if the consultant wishes to terminate, for whatever reason, a minimum of six months notice shall apply". The primary judge construed this second part of clause 2.2(3) as providing a right of termination by Impact (Reasons at [28(c)] and [100]). Impact submits that is the proper construction of clause 2.2(3). The Hospital submits that the second part of clause 2.2(3) should not be construed as conferring a right on Impact to terminate the agreement, without cause; but should instead be construed as providing only for the notice period which is to apply in any case in which Impact wishes to exercise its right to terminate under one of the other provisions of the agreement (or even, the argument seemed to be, if Impact has a right to terminate at general law, such as for the Hospital's repudiation).

[36] The Hospital's proposed construction of clause 2.2(3) cannot be reconciled with, and indeed is directly inconsistent with, other parts of the agreement: for example, clause 7.3, which provides for Impact to terminate "forthwith" if the Hospital fails to make a required payment, and clause 12.2, which provides for Impact to terminate the agreement within 14 days of receipt of a notice of the Hospital's intention to sell, assign or otherwise part with control of the operation of the Hospital. The Hospital's argument in this respect is rejected.

[37] Properly construed:

(a) by clause 2.2(1) of the agreement, the parties agreed that the engagement of Impact as the Consultant would commence on 1 October 2000 and would continue, indefinitely, unless terminated under one of the clauses in the agreement that expressly provides for termination; and

(b) the second part of clause 2.2(3) confers a right on Impact to terminate the agreement, without cause, giving at least six months' notice. In the context of the next issue to be discussed, it is significant that no equivalent right of termination is conferred on the Hospital.

Implication by Law

[38] The distinction between terms implied into a contract by law, or in fact, is now well established. The requirements for a contractual term to be implied by law were

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[13] Subject to rights to terminate available under the general law, which were not expressly excluded by the agreement (for example repudiation, frustration or force majeure).

most recently addressed by the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169.

[39] A term implied by law is "a legal incident of a particular class of contract";[14] whereas a term implied in fact is one which is necessary to give business efficacy to the particular contract.[15]

[40] In *Codelfa* (at 345), Mason J referred to the distinction drawn between the two categories of implied terms by Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576, where the following was said:

> "… this appeal raises a question of general importance. For the real question becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction or course of business; we have to take a wider view, for we are concerned with a general question, which, if not correctly described as a question of status, yet can only be answered by considering the relation in which the drivers of motor-vehicles and their employers generally stand to each other. Just as the duty of care, rightly regarded as a contractual obligation, is imposed on the servant, or the duty not to disclose confidential information … or the duty not to betray secret processes… just as the duty is imposed on the master not to require his servant to do any illegal act, just so the question must be asked and answered whether in the world in which we live today it is a necessary condition of the relation of master and man that the master should, to use a broad colloquialism, look after the whole matter of insurance. … the solution of the problem does not rest on the implication of a term in a particular contract of service but upon more general considerations."[16]

[41] Those observations were endorsed by Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239 at 254-255, where he said, in the context of considering the implication, by law, of a term in contract between landlord and tenant:

> "The necessity to have regard to the inherent nature of a contract and of the relationship thereby established was stated in this House in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555. That was a case between master and servant and of a search for an 'implied term'. Viscount Simonds, at p 579, makes a clear distinction between a search for an implied term such as might be necessary to give 'business efficacy' to the particular contract and a search, based on wider considerations, for such a term as the nature

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14 *Liverpool City Council v Irwin* [1977] AC 239 at 255; *Codelfa* at 345 per Mason J; *Commonwealth Bank of Australia v* ***Barker*** (2014) 253 CLR 169 at [20], [21] and [36] per French CJ, Bell and Keane JJ, [56] per Kiefel J and [113]-[114] per Gageler J.

15 *Codelfa* at 345 and 347; ***BP Refinery*** *(Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Breen v Williams* (1996) 186 CLR 71 at 103 per Gaudron and McHugh JJ; *Barker* at [21]-[22] per French CJ, Bell and Keane JJ, at [56] per Kiefel J and at [113] per Gageler J.

16 Underlining added; references omitted.

> of the contract might call for, or as a legal incident of this kind of contract…"[17]

[42] For an implication by law, it is necessary to identify a particular class or type of contract, of which the putative implied term is a legal incident, in all cases of that class or type of contract.[18] Implication by law does not arise from, and is not an exercise of, construction of the particular contract in question. In the context of this legal analysis, the reference to "more general considerations" is not an alternative to identifying a particular class or type of contract; rather, it is an explanation of the distinction between, to use the language adopted by Gageler J (as his Honour then was) in *Barker*:

(a) contractual terms implied in fact, which are "individualised gap fillers, depending on the terms and circumstances of a particular contract", and which are founded on what is "necessary" to give "business efficacy" to the particular contract; and

(b) contractual terms implied by law, which are "in reality incidents attached to standardised contractual relationships" operating as "standardised default rules", and are founded on "more general considerations", which take into account "the inherent nature of the contract and of [the] relationship thereby established".[19]

[43] The conclusion reached below, that the disputed term was to be implied, by law, into the agreement was incorrect. That error flowed from an error of principle. In fairness to the primary judge, it appears the application at first instance came on for hearing quickly, and the parties did not provide the detailed analysis of the cases which was provided to this Court. There appears to have been only passing reference, buried in one footnote in the respondent's submissions below, to the High Court's decision in *Barker*.[20]

[44] The error of principle begins in the Reasons at [87], where the primary judge said:

> "A term is implied on that basis (in law) where:
>
> (a) the implied term is a legal incident of the type of contract; or
>
> (b) wider considerations, having regard to the inherent nature of the contract, implicitly require the implied term."[21]

[45] The first point is correct; but the second, posited as an alternative, is not.

[46] The next error of principle appears in the Reasons at [91] and [92], where it is said that the question whether there is a term implied, by law, is a matter of construction of the contract itself. That is not correct. For a term to be implied by law, there

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17 Underlining added. See also *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 237; *Barker* at [23], [28], [56] and [113].

18 Ibid, note 14; see also *Castlemaine* at 487 and *University of Western Australia v* ***Gray*** (2009) 179 FCR 346 at [136].

19 *Barker* at [113], references omitted.

20 AB Book 2, vol 1, p 61 (footnote 6).

21 Underlining added.

needs to be a particular class or type of contract, into which the particular term is implied as a necessary incident of the nature of the contract and the relationship established by it. Such an implication does *not* depend upon construction of the particular contract.

[47] There are some well-established types of contract, into which particular terms are implied by law (including, for example, contracts of sale and contracts of employment, contracts between landlord and tenant, or between doctor and patient). But the particular classes or types of contract are not closed.[22] The cases recognise that, over time, an implication by law may evolve from repeated implications in fact.[23] As French CJ, Bell and Keane JJ said in *Barker* at [28]:

> "An implication in law may have evolved from repeated implications in fact. As Gaudron and McHugh JJ observed in *Breen v Williams*,[24] some implications in law derive from the implication of terms in specific contracts of particular descriptions, which become 'so much a part of the common understanding as to be imported into all transactions of the particular description'.[25] The two kinds of implied terms tend in practice to 'merge imperceptibly into each other'.[26] That connection suggests, as is the case, that the 'more general considerations' informing implications in law are not so remote from those considerations which support implications in fact as to be at large. They fall within the limiting criterion of 'necessity', which was acknowledged by both parties to this appeal. The requirement that a term implied in fact be necessary 'to give business efficacy' to the contract in which it is implied can be regarded as a specific application of the criterion of necessity. The present case concerns an implied term in law where broad considerations are in play, which are not at large but are not constrained by a search for what 'the contract actually means'."[27]

[48] Each of the judgments of the High Court in *Barker* referred to what McHugh and Gummow JJ had earlier said, in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, about the test of necessity which applies. In their joint reasons, at [29], French CJ and Bell and Keane JJ said:

> "In *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ emphasised that the 'necessity' which will support an implied term in law is demonstrated where, absent the implication, 'the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, be seriously undermined'[28] or the contract would be 'deprived of its substance, seriously undermined or drastically devalued'.[29] The criterion of 'necessity' in this context

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22 *Castlemaine* at 487.

23 See, for example, *University of Western Australia v Gray* (2009) 179 FCR 346 at [136].

24 (1996) 186 CLR 71.

25 (1996) 186 CLR 71 at 103, quoting ***Byrne*** *v Australian Airlines Ltd* (1995) 185 CLR 410 at 449 per McHugh and Gummow JJ.

26 (1996) 186 CLR 71 at 103, quoting Glanville Williams, 'Language and the Law – IV', *Law Quarterly Review*, vol 61 (1945) 384, at p 401.

27 Underlining added.

28 (1995) 185 CLR 410 at 450.

29 (1995) 185 CLR 410 at 450. See also *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78] per McHugh, Gummow and Hayne JJ.

> has been described as 'elusive'[30] and the suggestion made that 'there is much to be said for abandoning'[31] the concept. Necessity does, however, remind courts that implications in law must be kept within the limits of the judicial function. They are a species of judicial law-making and are not to be made lightly. It is a necessary condition that they are justified functionally by reference to the effective performance of the class of contract to which they apply, or of contracts generally in cases of universal implications, such as the duty to co-operate. Implications which might be thought reasonable are not, on that account only, necessary.[32] The same constraints apply whether or not such implications are characterised as rules of construction."[33]

[49] Their Honours also said, at [36] that:

> "… this Court must determine the existence of the implied duty [in this case, an implied duty of mutual trust and confidence] by reference to the principles governing implications of terms in law in a class of contract. That requires this Court to determine whether the proposed implication is 'necessary' in the sense that would justify the exercise of the judicial power in a way that may have a significant impact upon employment relationships and the law of the contract of employment in this country. The broad concept of 'necessity' discussed earlier in these reasons may be defined by reference to what 'the nature of the contract itself implicitly requires'.[34] It may be demonstrated by the futility of the transaction absent the implication.[35] It is not satisfied by demonstrating the reasonableness of the implied term.[36]"[37]

[50] In separate reasons, Kiefel J (as her Honour then was) expressly adopted the test of "necessity" articulated by McHugh and Gummow JJ in *Byrne*, saying, at [60]:

> "… Their Honours explained that many of the terms now said to be implied by law in various categories of cases reflect the concern of the courts that, without the term, the enjoyment of the rights conferred would be 'rendered nugatory, worthless, or … seriously undermined'.[38] It is in this sense that the word 'necessity' is used. In their Honours' view, the notion of necessity has been crucial in modern cases when the law has implied a term as a matter of law for the first time. In *Breen v Williams,*[39] Gaudron and McHugh JJ observed that the notion of necessity is central to the rationale for an implication of this kind. The requirement of necessity has been

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30 *Crossley v Faithful and Gould Holdings Ltd* [2004] ICR 1615 at 1627 [36].
31 Peel, *Treitel: The Law of Contract*, 13th ed (2011), p 231 [6-043].
32 *University of Western Australia v Gray* (2009) 179 FCR 346 at 376-377 [139]-[142].
33 Underlining added.
34 *Liverpool City Council v Irwin* [1977] AC 239 at 254 per Lord Wilberforce.
35 *Liverpool City Council v Irwin* [1977] AC 239 at 255 per Lord Wilberforce, citing *Miller v Hancock* [1893] 2 QB 177 at 181 per Bowen LJ.
36 *University of Western Australia v Gray* (2009) 179 FCR 346 at 376 [139] and authorities there cited.
37 Underlining added.
38 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450, referring to *Nullagine Investments Pty Ltd v Western Australia Club Inc* (1993) 177 CLR 635 at 647-648, 659.
39 (1996) 186 CLR 71 at 103.

> confirmed by a number of decisions of this Court since *Byrne* and *Breen*.[40]"

[51] Justice Kiefel also said, at [85]:

> "… The requirement of necessity for the implication of a term in a contract, or a contract of a particular kind, cannot be brushed aside as 'elusive'. It is fundamental to the basis for implications. It is not uncertain. It has the meaning referred to in *Irwin* and in *Byrne*. It has the advantage of providing objectivity to the test employed by the courts."

[52] Justice Gageler also adopted what was said by McHugh and Gummow JJ in *Byrne*, but with a subtly different emphasis: His Honour said, at [114]:

> "Determination by a court of whether or not a new term should be implied in law into a particular class of contracts has often itself been described as involving the application of a 'test' of 'necessity'. The sense in which 'necessity' is used in this context is that of 'something required in accordance with current standards of what ought to be the case, rather than anything more absolute'.[41] The requisite inquiry is informed by a consideration of what is needed for the effective working of contracts of that class.[42] But the inquiry is not exhausted by that consideration;[43] it does not exclude considerations of justice and policy.[44] Couching the ultimate evaluation in terms of necessity serves usefully to emphasise this and no more: that a court should not imply a new term other than by reference to considerations that are compelling."[45]

[53] The observations of Finn J in *Hughes*, and the Full Federal Court in *Gray*, cited by Gageler J for the proposition that considerations of justice and policy remain relevant, connect the test of "necessity" with the identification of "more general considerations" as a distinguishing feature between implications by law and in fact.

[54] For example, in Hughes at 194-195, Finn J said:

> "It doubtless is the case that the 'necessity test' – and its preoccupation with whether, absent the implication, the enjoyment of contractual rights could be rendered nugatory, worthless or seriously undermined – addresses the broad range of instances where the issue of such an implication ordinarily arises…
>
> Having acknowledged this, I do not understand that test, at least so narrowly conceived, to provide a complete account of the reasons for

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40 *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44 at 68 [78]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at 596 [59]; *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at 305-306 [92].

41 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 261; *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225 at 240.

42 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450.

43 *Castlemaine* at 489.

44 ***Hughes*** *Aircraft Systems International v Airservices Australia [No 3]* (1997) 76 FCR 151 at 194-197; *University of Western Australia v Gray* (2009) 179 FCR 346 at 377 [142].

45 Underlining added.

> which an implication of law can be made… it clearly is the case that considerations of public policy can and do have an overt part to play in some instances in determining whether it is necessary that an obligation should be implied as a matter of law in a contract. The contractual obligation of secrecy imposed on professionals in virtue of their relationship with their clients and its varying scope from profession to profession are, I consider, illustrations of this…
>
> Perhaps the most significant illustration of the role considerations of public policy can have in the matter is to be found in Viscount Simonds' speech in *Lister v Romford Ice & Cold Storage Ltd* [at 576, being the passage set out in paragraph [40] above.]"

[55] A similar point was made by the Full Court in *Gray* at [142]-[143].

[56] The primary judge did not identify the agreement as forming part of a particular class or type of contract; nor was the question of necessity addressed.

[57] In this Court, the Hospital says that the particular class of contract is "commercial contracts of indefinite duration". The Hospital submits that the primary judge identified this in the Reasons at [84], where her Honour said:

> "The Agreement is a commercial contract with no end date. It contains no express ability of the Hospital to terminate the Agreement on the giving of reasonable notice, or without some form of cause or specific circumstances existing as detailed in its express terms."[46]

[58] This paragraph simply contains a description of the agreement, it does not purport to identify a class of contract. The primary judge did also say, at Reasons [88]:

> "The types of contracts where an implied term allowing termination of the contract on the giving of reasonable notice has been implied in law are often ones where the contract relies upon trust and confidence between the parties, personal relations between the parties, or co-operation between the parties. Contracts that tend to have such features often involve partnerships or joint ventures, agency or service/employment."[47]

[59] This seems to have been the "class" pressed for by the Hospital below, although that position was not maintained on the appeal.

[60] In any event, for this proposition the primary judge cited two cases, *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 at 580 and *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 204. Neither of these cases concerned implication of the term by law into a particular class of contract; both were cases in which, as a matter of the construction of the particular contract concerned, it was found that there should be implied a term allowing for a party to unilaterally bring the agreement to an end, on reasonable notice. This is made particularly clear in the reasons of Lord MacDermott in the *Winter Garden Theatre* case who made reference (at 204) to

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46 Underlining added.

47 Underlining added.

"the profusion and diversity of licences and the freedom of contract regarding them [being] such as to discourage any unnecessary formulation of general propositions" (about terms to be implied, by law) and who (at 205) invoked the principles in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137, in which the business efficacy test for implication in fact was first articulated, to determine what term should be implied.

[61] Another case referred to by the primary judge, *Australian Blue Metal Pty Ltd v Hughes* [1963] AC 74 at 98 (see Reasons at [90]), is also directly at odds with the notion of implication by law, including as it does the statement that "a question of this sort [that is, whether to imply a provision that the agreement may be terminable only upon reasonable notice] depends entirely on the facts of the particular case". The key point about implication by law is that, when considering whether the disputed term is to be implied, it does *not* depend on the facts of the particular case. This is to be contrasted with the separate question, if the conclusion reached is that the term is implied by law, whether such term is displaced by the express terms of the particular agreement, which plainly does depend on the facts of the particular case.

[62] The Hospital acknowledges that no previous case has identified "commercial contracts of indefinite duration" as a particular class of contract into which a term, such as the disputed term, is implied by law, but invites this Court to recognise it as a new class, for the first time. The Hospital submits that this conclusion is supported by the repeated implication, in fact, of a term such as the disputed term, into "commercial contracts of indefinite duration", citing many case examples said to be supportive of that conclusion.

[63] The starting point of this argument is the decision of the New South Wales Court of Appeal in Crawford *Fitting Co v Sydney Valve & Fittings Pty Ltd* (1988) 14 NSWLR 438. The agreement the subject of this case was a distributorship agreement. It contained no express term providing for its duration or the termination of it by either party. There was no dispute between the parties that there should be implied into the agreement a term providing for termination, on the giving of reasonable notice. The sole dispute was about whether the six months' notice which was given by the manufacturer was a reasonable period of notice. In the course of addressing that question of fact, McHugh JA referred to the principles which apply "when the question arises whether a commercial agreement for an indefinite period may be terminated", the answer to which depends on whether the agreement contains an implied term to that effect (at 443). His Honour referred to the *Winter Garden Theatre* and *Martin-Baker Aircraft* cases, as well as *Australian Blue Metal*, among others, before saying:

> "The existence of the term is a matter of construction. But the question of construction does not depend only upon a textual examination of the words or writings of the parties. It also involves consideration of the subject matter of the agreement, the circumstances in which it was made, and the provisions to which the parties have or have not agreed: *Re Spenborough Urban District Council's Agreement* [1968] Ch 139 at 147."[48]

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48 Underlining added.

[64] Justice McHugh also said (at 444) that whether a contract is terminable on reasonable notice instead of at will also depends upon the existence of an implied term (referring again to *Winter Garden Theatre*, *Martin-Baker Aircraft* and *Australian Blue Metal*), noting that:

> "That question is determined by the circumstances existing at the date of the contract… However, the reasonableness of the period of notice depends upon the circumstances existing when the notice is given."

[65] In between those two statements of principle, McHugh JA made reference to the now out-dated approach to construction of contracts, on the basis of certain presumptions, including, for example, a presumption of permanence or perpetuity in the case of "an agreement *de futuro*, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited".[49] Justice McHugh observed that:

> "Although even in the second half of this century the law has been stated to be in accordance with the speech of Lord Selborne in *Llanelly*... the weight of twentieth century authority makes it difficult to hold that there is any presumption of perpetuity in the case of commercial agreements …
>
> In *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd*, McNair J said (at 577) that there is no presumption of permanency in the case of an indefinite commercial agreement but that if there is it is in favour of termination and not perpetuity. Buckley J has also expressed the view that there is no presumption either way: *Re Spenborough Urban District Council's Agreement* (at 150). To the same effect is the judgment of Lockhart J in *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1985) 6 FCR 524 at 554; 60 ALR 73 at 101. However, it is not easy to reconcile these statements with the principle that there is a general presumption against adding to a contract a term which the parties have not expressed: *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 at 137 per Lord Wright. In principle, the better view would seem to be that, although there is presumption against implying a term that an agreement is terminable, ordinarily the nature of a commercial agreement will lead to the conclusion that the parties must have intended it to be terminable on notice. This was the effect of the approach of the courts in *Winter Garden*; *Martin-Baker*; *Spenborough* and *Decro-Wall*."[50]

[66] As already noted, the approach of the courts in *Winter Garden Theatre* and *Martin-*Baker *Aircraft* involved the construction of the particular agreement, having regard to the particular facts of the case (implication in fact, not by law). The same applies to *Spenborough*.[51] In *Martin-Baker Aircraft*, the identification of the contract as a commercial one, involving obligations of mutual confidence and trust, was a factor

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49 *Llanelly Railway and Dock Co v London and North Western Railway Co* (1875) LR 7 HL 550 at 567 per Lord Selborne; applied in *J Kitchen & Sons Pty Ltd v Stewart's Cash & Carry Stores* (1942) 66 CLR 116 at 125 per Latham CJ and McTiernan J, Rich J dissenting (at 135).

50 Underlining added.

51 *Re Spenborough Urban District Council's Agreement* [1968] Ch 139 at 147 and 151.

said to support the implication (in fact), by rebutting the presumption of perpetuity.[52] That presumption was also found to have been rebutted in *Winter Garden Theatre,* having regard to the "true construction" of the letters which comprised the agreement.[53] *Decro-Wall*[54] was a case, like *Crawford*, in which there was no dispute that the agreement included an implied term that it could be terminated on reasonable notice (see at 371) and the only issue was the length of notice (see at 376).[55]

[67] *Crawford* does not stand as authority for the proposition that "commercial agreements for an indefinite period" are to be regarded as a particular class or type of contract, into which there will be implied, by law, as a necessary incident of all such agreements, a term that the agreement is terminable on reasonable notice. The implication of such a term, in fact, was not in issue in *Crawford*; all that was in issue was the reasonableness of the notice period. The observations of McHugh JA, even if they could be taken to support such a proposition, are therefore obiter.

[68] The Hospital initially seemed to submit that *Crawford* had identified "commercial contracts of indefinite duration" as a class of contract into which a term is implied, by law, allowing termination on reasonable notice. As the argument developed, it became that having regard to a lengthy list of cases in which courts have found that a term of this kind should be implied into a contract which could be described as a "commercial contract of indefinite duration", citing *Crawford*,[56] that should now be recognised as an established class. The Hospital did ultimately acknowledge that it was inviting this Court, for the first time, to recognise such a class, for the purposes of an implication by law.

[69] This was an unpersuasive, and inefficient, argument. The cases cited are, for the most part, further examples of cases in which a term was implied, in fact, on the basis of construction of the particular contract concerned, having regard to the surrounding circumstances, and in many on the basis of the "business efficacy" test.[57] Others are interlocutory decisions, involving (understandably) no detailed discussion of the principles.[58] Although some of the cases refer to there being a "usual implication" in an arrangement made in a commercial context that it is terminable upon reasonable notice,[59] citing *Crawford* as the authority for that proposition:

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52 See for example *Martin-Baker Aircraft* at 580.

53 *Winter Garden Theatre* at 203-204.

54 *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361.

55 *Decro-Wall* at 365 and 371 per Salmon LJ, 372 and 376 per Sachs LJ.

56 For the most part, which was assembled in the period of an adjournment between the first and second day of the appeal, which was only originally listed for a one day hearing.

57 For example, *Halfpenny v Minnikin* [1993] QCA 483 at 4-5; *Western Power Corporation v Normandy Power Pty Ltd* [2001] WASC 202 at [173]-[177]; *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 at [68]; *Woolworths (SA) Pty Ltd v Basetone Pty Ltd* (2006) 95 SASR 174 at [85]-[92]; *IOOF Building Society Pty Ltd v Foxeden Pty Ltd* (2009) 23 VR 536 at [63]-[65]; *Jireh International Pty Ltd v Western Exports Services Inc* [2011] NSWCA 137 at [110]-[116]; *United Resource Management Pty Ltd v Par Recycling Services Pty Ltd* [2023] NSWCA 236 at [41]-[43].

58 For example, *Stones Corner Motors Pty Ltd v Mayfairs W'Sale Pty Ltd* [2010] FCA 1465 at [35]; and *Frontier Networks Pty Ltd v Philadelphia Developments Pty Ltd* [2023] QSC 192 at [69].

59 For example, *Tri-Global (Aust) Pty Ltd v Colonial Mutual Assurance Society Ltd* (unreported, Beaumont J, 5 May 1993, judgment number 328 of 1993) at p 141 and p 156; *Futuris Industrial Products Pty Ltd v Arrow Industries Pty Ltd* (unreported, Full Court of the Federal Court, 18 April

(a) for the reasons already set out, *Crawford* does not support such an implication, as a matter of law;

(b) each of these cases makes clear that the implication depends on the "particular circumstances of the case";[60] and

(c) in any event, to say that a term is "usually" or "ordinarily" implied in such an agreement – or, as McHugh JA said in *Crawford* (at 447) "that a contract for an indefinite period will sometimes contain an implied term that it will continue for a reasonable period" – is not to say that the term is implied by law in all contracts falling within the particular class. Such a conclusion still requires construction of the particular contract concerned.

[70] The Hospital was unable to articulate the "necessity" which supports the implication of the disputed term in law in all "commercial contracts of indefinite duration". On the one hand, the Hospital argued that this Court does not need to consider "necessity", because it should accept, by reference to the long list of cases since *Crawford*, that the class is already established. That argument is rejected. On the other hand, the Hospital argued that it is necessary to imply the term to avoid commercial parties being locked into a contract forever or because otherwise the parties are unable to determine their agreement. That does not serve to explain why the disputed term is "justified functionally by reference to the effective performance of the class of contract" to which it is said to apply.[61] The agreement in the present case is plainly capable of effective performance without the implication. The enjoyment of the rights conferred by the agreement would or could not be rendered nugatory, worthless or seriously undermined without the implication.[62] The implied term is not needed for the effective working of contracts of the contended class.[63]

[71] The exercise of judicial power to imply such a term in all commercial contracts of indefinite duration is not justified.[64] That class is extremely broad, covering an infinite variety of transactions, subjects, parties and relationships, arising from all manner of factual circumstances, and recorded in a wide range of detail, from the informal to the exhaustive. One cannot discern from such a broad category anything about the inherent nature of all such contracts, or the relationship between the parties to them, which renders it necessary to imply, as a default in every contract falling within the class, the disputed term.

[72] The conclusion at first instance that the disputed term is implied, by law, into the agreement was incorrect.

Implication in Fact

[73] In case the conclusion as to implication by law should be found to be incorrect, the primary judge also addressed the question of implication in fact. Her Honour held

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1994, judgment number 193 of 1994) at pp 16, 18 and 20; and *Reda v Flag Ltd (Bermuda)* [2002] UKPC 38 at [57].

60 *Futuris* at 16.

61 *Baker* at [29] per French CJ, Bell and Keane JJ and [114] per Gageler J.

62 *Baker* at [28] per French CJ, Bell and Keane JJ and [60] per Kiefel J.

63 *Baker* at [114] per Gageler J.

64 *Baker* at [36] per French CJ, Bell and Keane JJ, at [85] per Kiefel J and at [114] per Gageler J.

that the disputed term should be implied into the agreement in fact, on the basis that the conditions of the *BP Refinery* test were satisfied. Those conditions are:

> "(1) it must be reasonable and equitable; (2) 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; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."[65]

[74] Importantly, as Mason J observed in *Codelfa* (at 346):

> "For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question."[66]

[75] The objective framework of facts is an important part of the context when considering this issue.

[76] Although the primary judge found the extrinsic evidence admissible, her Honour gave it "only a small amount of weight" (Reasons [64]). That was, in part, because the parties had included an "entire agreement" clause in their agreement (clause 1.4) and because the conversations referred to by Dr Kay in his evidence had taken place about 25 years ago, such that it was unlikely the recollections were accurate (Reasons at [64]).

[77] Impact submits that the extrinsic evidence ought to have been given greater weight, and emphasises in that regard that the evidence of Dr Kay was not challenged in cross-examination and, to a significant extent, was contained in emails written at the time (therefore, not based on recollections 25 years later). That submission is accepted.

[78] Impact also submits that the evidence supported a finding that the parties were united in rejecting the three or five year rolling terms (which is undoubtedly correct) and that evidence negatives any inference of a presumed intention of the parties that the agreement should be capable of termination on reasonable notice.

[79] The primary judge declined to reach that conclusion, saying that (Reasons [64(c)]):

> "whilst the admissible extrinsic evidence points clearly enough to rolling 3 or 5 year terms under the Agreement not being acceptable to Dr Kay, and that the Agreement would be long term and indefinite (subject to express termination rights), it is not unequivocal from that

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65 *BP Refinery* at 283; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605-606; *Codelfa* at 347.

66 See also *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [16]-[20].

> evidence that the Agreement would be perpetual and not determinable by the Hospital on the giving of reasonable notice."[67]

[80] It may not be unequivocal *from that evidence* alone. However, the requisite analysis, in terms of the relevant context for construing the agreement, involves not only the admissible extrinsic evidence, but also the express terms of the agreement itself. To the matters referred to in paragraph [16] above must be added that, under the express terms of the agreement:

(a) the parties agreed to bind their successors in title (and assigns, in the case of the Hospital);

(b) no term is specified (cf clause 2.2);

(c) the parties agreed that the engagement would continue indefinitely, unless terminated under one of the express provisions of the agreement (clause 2.2(1));

(d) the parties provided for the limited circumstances in which changed circumstances were anticipated and renegotiation of "appropriate clauses" could occur (clause 2.2(2));

(e) the parties agreed that Impact should have a right to terminate the agreement, without cause, on a minimum of six months' notice (clause 2.2(3)), but conferred no equivalent right on the Hospital;

(f) the remuneration arrangements (clause 6.1) provided for relatively modest monthly payments to Impact, given that Impact was responsible for paying for all "key personnel"; the value of the agreement was in the long term, as the royalty payment would become more valuable over time; and

(g) extensive and onerous obligations were imposed on Impact (clauses 3.1 and 3.2), in respect of which the Hospital was given substantial oversight (clauses 3.6, 3.7, 4.12(2)), all of which were made essential terms of the agreement, for breach of which the Hospital could terminate (clause 7.2), giving the Hospital substantive rights to protect its interest in having a "world's best practice" emergency centre operating within the hospital.

[81] Having regard to the properly admitted extrinsic material, and the express terms of the agreement, there is no basis on which to conclude that the disputed term should be implied, in fact, into the agreement:

(a) The disputed term is not necessary to give business efficacy to the agreement – it is effective without it.

The primary judge found that the disputed term was necessary to give business efficacy to the agreement, on the basis that there may be valid reasons for the Hospital being "unhappy with choices that are to be made under the Agreement by Impact" (for example, in relation to staff selections, charging of patients or if there is a significant breakdown in the trust and confidence between the parties) and if the dispute resolution procedure is unsuccessful, the Hospital would have no other means of redress (Reasons at [136]).

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67 Underlining added.

However, under the express terms of the agreement, the Hospital has a substantial degree of control over the choices that can be made by Impact (including, in relation to the budget (clause 3.1(10)) and key personnel (clause 4.12). And, in addition to agreeing to perform a broad range of services, on an ongoing basis, to the highest standard (clause 3.1, particularly (1), (8), (9) and (11)), Impact is also contractually obliged to perform those services "in a manner consistent with the moral teachings of the Catholic Church" and "having regard to the best interests of" the Hospital (clause 3.2). The agreement reflects a careful allocation of risk and responsibility between two commercial entities. The possibility that one party might become unhappy with the choices the other makes, in accordance with the terms of their detailed negotiated agreement, does not justify the implication of the disputed term on the basis of business efficacy.

(b) It is not "so obvious that it goes without saying" – on the contrary, having regard to the objective framework of facts within which this agreement came into existence, it is clear that if the Hospital had suggested the inclusion of the disputed term, at the time of entering into the contract with Impact, Dr Kay would have said "no", or would have insisted on a different regime for remuneration, or would have insisted on some other additional conditions (such as an early termination payment). It could not be concluded in this case that "there was only one contractual solution or that one of several possible solutions would without doubt have been preferred".[68] Any number of possibilities may have arisen, had the officious bystander suggested, at the time of the parties entering into the agreement, that they include a provision enabling the Hospital to terminate the agreement, without cause, on reasonable notice. On the admissible extrinsic evidence, not one of those possibilities would have involved the parties saying "oh, of course!".

(c) It directly contradicts the express terms of the agreement – in particular, clause 2.2(1) (which contemplates that the agreement will continue unless terminated under one of the expression provisions of the agreement); and clause 2.2(3) (which gave Impact a right to terminate, without cause, on notice, but gave no equivalent right to the Hospital).

(d) It is also directly inconsistent with the fact that the parties expressly rejected rolling fixed terms, and agreed to enter into an arrangement for an indefinite period. The rejection of such a limitation, and agreement instead to an arrangement for an indefinite period, which was to continue unless terminated in accordance with the comprehensive express provisions of the agreement, means that it cannot logically be contended the parties should be presumed to have intended to agree to the disputed term. The two cannot stand together.

[82] The conclusion at first instance that the disputed term is implied, in fact, into the agreement was also incorrect.

Cross-appeal

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68 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 at [19], referring to *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at 482 per Bingham MR; *Codelfa* at 355-356.

[83] It follows from the conclusions above that there is also no basis, by law or in fact, to imply into the agreement the broader term pressed for by the Hospital by its cross-appeal.

Orders

[84] For those reasons, the Court orders that:

(a) The appeal is allowed.

(b) The cross-appeal is dismissed.

(c) The declaration and orders made on 2 June 2025 are set aside.

(d) In lieu of those orders:

(i) Make a declaration that the agreement between the appellant and the respondent entitled "agreement for the operation of Holy Spirit Northside Emergency Centre" is not subject to an implied term that the respondent can terminate it on the giving of reasonable notice.

(ii) The respondent pay the appellant's costs of the proceeding below.

(e) The respondent pay the appellant's costs of the appeal and the cross-appeal.