The Rule-Based Right to Terminate Indefinite Contracts

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Introduction to Implied Termination Terms

A Introduction

Usually contracts end. They are performed, or terminated for breach, or cancelled by agreement. Parties often have express contractual rights to terminate, which can be conditional and may have clear notice periods. Otherwise courts will frequently imply terms giving parties the right to unilaterally terminate on reasonable notice ("TORN").[1]

This dissertation is about when and why courts should find that a contract has a TORN. I argue that TORNs protect autonomy, underpinned by the liberal right to leave contracts. TORNs are the default response to a contract being indefinite rather than intentionally perpetual. A term implied in law analysis is therefore the best test. TORNs should be implied into all indefinitely ongoing contracts, except where the text or purpose of the contract preclude it. I further argue justifying TORNs as terms implied-by-law best fits with the authorities.

I argue against the views that TORNs are explained by a standalone presumption, or by either interpretation or implication-in-fact. These options were considered in *Ward Equipment v Preston*.[2] That case did not determine the correct test, and so the question of the correct test remains open.My main argument is that a doctrinal law analysis favours my approach: it fits well with the existing caselaw, transparently fits with much of the reasoning, and aligns with the accepted distinctions in the laws of implied terms.

I begin by giving an account of the different processes of construing contracts. Some are 'rule based' and some are 'interpretivist'. The former gives effect to default rules, the latter to apparent intentions of the parties. I argue throughout this dissertation that the former explains the ubiquity of implied TORN clauses.

My first chapter contains my negative argument. I criticise *Ward*, and argue that it is not authority for any test for TORNs Interpretivist TORN caselaw cannot explain why TORNs are a *singular-response* to indefinite contracts.

My second chapter argues a term implied in law approach consistent with caselaw in terms of both results and analysis, and with contract law doctrine.

My third chapter uses legal theory to support my principled and liberal policy--based case. It relies on two new 'autonomy theories' that provide a new approach to default terms, categorising areas of contract and policy that support an expansive approach to implication-by-law and also favour protecting autonomy, such as through TORNs.

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[1] For Termination on Reasonable Notice; Gerard McMeel *The Construction of Contracts* (2nd ed, Oxford University Press, New York) at [11.96].

[2] *Ward Equipment v Preston* [2017] NZCA, [2018] NZCCLR 15.

This dissertation shows how a default-rule based approach with an identifiable category improves certainty and is theoretically justified. This pushes back against the dominant view that contract is primarily about textual analysis. Increasing the scope and development of default-rules and contract categories is justified both in practice and in theory. My approach favours freedom of contract by enhancing predictability and meaningful choice.

B Contract construction processes and the possible tests for TORNs

1. Interpretation

Interpretation usually effects the most likely meaning of a contract's words. But it may provide a test for an un-expressed TORN because in principle it is wider than that. Per Lord Hoffmann's restatement in *Investors Compensation Scheme Ltd v West Bromwich Building Society*:[3]

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Sometimes the understanding someone would get from a document would lead them to conclude the words are in error and do not literally express the intention of the parties.[4] Unexpressed TORNs may possibly be explained by interpretation. Where the contract, read as a whole, makes something obvious through its language it may be implicit without using the tests for implication. The contractual language can imply a TORN. That would be an implication of the text done through the process of interpretation.

Interpretation ascertains the meanings of agreements contextually. This is usually a document but not always. As emphasised recently in Lord Briggs' concurring judgment in *Wells v Devani*:[5]

> Lawyers frequently speak of the interpretation of contracts (as a preliminary to the implication of terms) as if it is concerned exclusively with the words used expressly, either orally or in writing, by the parties. And so, very often, it is. But there are occasions, particularly in relation to contracts of a simple, frequently used type, such as contracts of sale, where the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more,

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[3] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896 at 912.

[4] *ICS*, above n 3, at 913.

[5] *Wells v Devani* [2019] UKSC 4, [2019] 2 WLR 617 at [58] per Lord Briggs.

> about the essential terms of the bargain than do the words themselves. Take for example, the simple case of the door to door seller of (say) brooms. He rings the doorbell, proffers one of his brooms to the householder, and says "one pound 50". The householder takes the broom, nods and reaches for his wallet. Plainly the parties have concluded a contract for the sale of the proffered broom, at a price of £1.50, immediately payable. But the subject matter of the sale, and the date of time at which payment is to be made, are not subject to terms expressed in words. All the essential terms other than price have been agreed by conduct, in the context of the encounter between the parties at the householder's front door.

This type of interpretation considers the implication of the express words and conduct in context. These are distinct from the varieties implied terms discussed below. Express-text implied terms reflect what the contract already means, not what must be added to achieve its purpose. The test for a TORN would be whether the contractual language or the parties' conduct viewed objectively and in context implicitly contained one.

2. Terms implied-in-fact

These are terms that *must* be part of the contract for it to achieve its purpose. Lord Steyn in *Equitable Life Assurance Society v Hyman* calls such terms are "ad-hoc gap fillers".[6] Ad-hoc because they are crafted to deal with a problem in a specific contract, gap-fillers because they are needed to fulfil the 'commercial object'.[7] While there is considerable controversy about the precise test for such terms,[8] the best reconciliation and summary is by Andrew Robertson.[9] Where a term is necessary to achieve a contractual purpose, it will be implied.[10] However, it must be singularly apt: it must be the best or only term that would achieve that purpose.[11] These terms express the perspective that implication is about what the parties *must have meant*. The contractual intention to achieve a purpose logically intends terms necessary to achieve it. But that intention must be clear. If there are multiple options then it is not clear what the parties would have intended, and no unintended term

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[6] *Equitable Life Assurance Society v Hyman* [2000] UKHL 39, [2002] 1 AC 408 at 459

[7] At 459

[8] *Ward*, above n 2, at[46]; *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 at [24].

[9] Andrew Robertson "The Foundations of Implied Terms: Logic, Efficacy and Purpose" in Simone Degeling, James Edelman and James Goudkamp (eds) *Contract in Commercial Law* (Law Book Company, Sydney, 2016) 143

[10] At 159

[11] At 161; *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) at 482 per Sir Thomas Bingham MR.

should be ascribed to them. It is interpretivist because it uses the device of what the parties must have meant.

The terms implied-in-fact test for TORNs would be whether it was necessary to achieve a contractual purpose, and whether it was the obviously best way of doing so.

3. Terms implied-by-law

These terms are default rules of law in certain categories of contract, which are present unless excluded.[12] Such categories include sale of goods, employment, and insurance.[13] These categories are defined by relationships, subject matter and purpose. Sale of goods has a clear purpose, employment has a distinct type of relationship, insurance has a unique subject matter. Contracts are categorised by their substantive nature, if they are sufficiently analogous to an accepted class of contract.[14] Novel terms implied-by-law are developed according to a standard of reasonableness, which then become necessary incidents in future contracts. After a contract is categorised, terms which are the necessary incidents of that category will be implied into the contract where compatible with the purpose and express terms. Where a contract fell into the category where TORNs were implied, a TORN would be implied if consistent with its express terms and purpose.

4. Interpretive presumptions

JW Carter suggests that there is another type of implied term, which is called a factual presumption.[15] These are standalone presumptions without a doctrinal basis. Carter describes TORNs as mandatory rules of law merely having the form of a presumption in the same section.[16] Where a contract appeared to be indefinite, it would be presumed to have a TORN. This is like a term implied-by-law, except each presumption is standalone. No common test or principle explains these presumptions.

C Competing Theories of Contracting Processes

There are two major competing conceptions of implied terms. Interpretivism justifies implied terms as giving effect to the underlying shared intentions of the parties. By contrast, rule-based supplementation does not rely on intentions. There are simply rules of law about

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[12] *Societe Generale, London Branch v Geys* [2012] UKSC 63, [2013] 1 AC 523 at [55] per Lady Hale.

[13] J Burrows "Contents of the contract" in J Burrows, J Finn and S Todd (eds) *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 196-198

[14] McMeel, above n 1, at [10.14]; *Wong Mee Wan v Kwan Kin Travel Services* [1996] 1 WLR 38 (PC) at 42.

[15] JW Carter *The Construction of Commercial Contracts* at 98 (Hart Publishing, Portland, 2013) at 97.

[16] At 98, n 129.

what terms to imply into a contract, and when. They are rule-based rather than discretionary because implication follows from legal tests,. with no discretion to improve a contract.[17]

The five stage test for implication-in-fact in the former leading authority *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* was less concerned with the parties' actual or presumed intentions.[18] The proposed term's consistency with express terms were as necessary as being reasonable and equitable. Reasonableness and equitableness are required because the term is being imposed upon the parties by the Court. This makes it a form of *rules-based supplementation*, that genuinely adds to the contract after a strict legal test.

The *interpretivist* approach treats implication-in-fact as working out what the contract already means. Gap-filler terms will be implied when they are already implicit in the contractual scheme. Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* treats reasonableness and equitableness as ways of understanding what the parties intended.[19] When the parties have already agreed to implicit terms then also requiring those terms to be fair is unnecessary. The normal inference from a gap in the contract is that nothing is intended. Sometimes achieving a contract's purpose will require a gap-filler term. The intention of achieving the contractual purpose implies the term necessary for achieving it. There must be a single best option, or else the intention is unclear. Implying an unintended term would improve or alter the contract which is not the role of the court.

Terms implied-by-law are rule-based. The development of novel terms depends on considerations of reasonableness, policy and fairness. There is a rule-governed evaluation of whether a term should be developed, and whether a contract is part of a category. Terms implied-by-law are automatically implied if they are consistent with the express terms. Therefore, interpretivism cannot be a full justification of terms implied-by-law.

1. The harbour examples

This part draws out the distinction between interpretivist and rule-based approaches. This can be demonstrated by two implied terms cases with similar facts, but very different legal analysis..

The Moorcock was about whether a harbour master was obliged to use reasonable skill and care to protect a ship.[20] It took a term implied-by-law approach that looked largely to the factual context rather than the contractual wording. *The Reborn* was about a contemporary exhaustive shipping contract, and whether the charterer implicitly warranted

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[17] See generally *Liverpool City Council v Irwin* [1977] AC 239 (HL) at 254-255 per Lord Wilberforce.

[18] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 180 CLR (PC) 266.

[19] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 at [27].

[20] *The Moorcock* (1889) 14 PD 64 (CA).

the safety of a berth they used.[21] The ship suffered damage docking at the shipowner's nominated berth. While the charterer indeed had control, the charter contract made complete sense textually and purposively without adding an additional term.[22] The facts did not show a gap, because the contract had expressly allocated risk.

2. The Moorcock

The Moorcock is the source of the 'business efficacy' test for terms implied-in-fact.[23] However, it is actually about a class of contracts, and set a wide precedent on that basis.[24] Wherever a jetty owner had more knowledge about the harbour than the shipowner, they would be obliged to use reasonable skill and care to ensure the ship was not damaged en route to the jetty.[25] This class is linked by a certain fact-scenario and relationship.

The harbourmasters had all the knowledge about the safety of the adjacent waters, while the ship was vulnerable. This imbalance of control led the Court of Appeal to imply a warranty.[26] There is little reference to the express terms of the contract. This is a default rule that supports fairness in a certain type of contract.

3. The Reborn

The Reborn failed because the contract's text precluded a warranty.[27] The contract exhaustively allocated risks and responsibilities. The risk of damage while docked fell on the charterer. The contract worked as expected, and there was no room on the contractual wording to add anything. The unfairness or greater power of the owner was irrelevant because the contract worked according to the reasonable expectations of the parties.[28] This turns on the wording of the contract, and whether it is strictly necessary to achieve a purpose to imply a term rather than let a loss lie where it falls.

D The Role of Justifications

My argument is that interpretivist justifications for TORNs do not explain why TORNs are so regularly implied. This is because it is a singular *response* even when it might not be the *singularly apt*, best way of achieving the interpretation. *The Reborn* shows the interpretivist emphasis on the contract's *individual* text and purpose is distinct from

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[21] *The Reborn* [2009] EWCA Civ 531; [2010] 1 All ER (Comm) 1.

[22] At [45].

[23] At 68.

[24] At 70.

[25] At 71.

[26] At 70.

[27] At [63].

[28] At [45].

TORNs nigh universal implication into indefinite contracts. By contrast, identifying contract categories very easily shows how a term implied-by-law works as in *The Moorcock*. The rule-based supplement of a term implied-by-law explains TORN caselaw.

My chapter on terms implied-in-fact shows how interpretivism cannot explain TORN caselaw. It shows how the leading case in New Zealand has a narrow ratio and does not mandate an interpretivist response. My chapter on terms implied-by-law shows how rule-based supplementation explains the approach to TORNs. My chapter on contract theory shows how autonomy justifies having TORNs as default terms. This does not depend on intention, although if sufficiently consistently implied then people can enter contracts knowing and intending there to be an implied TORN. This shows how modern theories of intention and rules can facilitate choice. Freedom of contract is expanded in practice by having a stable and distinctive range contractual categories available, rather than relying on strong interpretivist control of terms.

Chapter 1: Why TORNs are not justified by interpretivism

My dissertation argues that TORN clauses should be treated as terms implied-by-law. This chapter shows why the alternatives of interpretation, implication-in-fact and interpretive presumptions cannot work. This is my negative argument, which criticises the opposing views. This shows there is no binding position regarding TORNs, leaving no impediment to adopting my preferred and superior approach. This leads into my later positive arguments that policy and theory favour TORNs being implied-by-law. This chapter has two stages: descriptive and analytical.

1. Descriptive

I describe how the Court of Appeal addressed TORNs in *Ward Equipment*.[29] The Court of Appeal did not determine the correct test for TORNs, although in obiter considered that TORNs arise from either interpretation or implication-in-fact.[30] They ultimately decide the case on the basis that the express terms preclude a TORN.

2. Analytical

I argue that the narrow ratio of *Ward* leaves the question of the correct test open. I then argue that TORN clauses are not based on any interpretivist process of interpretation, implication-in-fact or presumptions.

My *singular-response* argument undermines interpretivist accounts. Interpretivist techniques rely on individualised intention for justification. But the range of contracts with un-expressed TORNs show they cannot be *singularly-apt*. There are alternatives to TORNs for ending indefinite contracts. The law simply mandates TORNs as a default for indefinite contracts. A standalone presumption pretends to rely on intention but is really a rule which fits better doctrinally as implied-by-law. This leaves open implication-by-law, which I argue for in the rest of this dissertation.

B What happened in Ward Equipment?

Ward Equipment is about whether a contract contained a TORN. It was a franchise agreement between two parties, for the right to sell a certain type of equipment in New Zealand. There were provisions for termination after the expiry of an intellectual property

[29] All references, unless otherwise stated, are to the lead judgment of Winkelmann J. The concurring judgment by Kós P does not address TORNs, but discusses the relationship of implication-in-fact with interpretation and discusses the test for the former.

[30] *Ward*, above n 2, at [57]

right for both parties.[31] It was an ongoing contract with no defined expiration. The relevant issues were:

i) What is the test for implying a TORN?
ii) Applying that test, was there a TORN?

The possible tests were:

i) Interpretation
ii) Implication-in-fact
iii) Implication-by-law
iv) An interpretive presumption

I summarise the approach of both courts, before more close analysing Court of Appeal's discussion of TORNs.[32] I analyse the Court of Appeal's approach on issue i), and argue for a narrow ratio based on its reasoning on issue ii).

1. The High Court

The High Court found that the test depended on categorising the contract, with the contract being in the nature of a partnership.[33] This is an implication-by-law approach, where categorisation implies a TORN as a necessary incident. The Court implied a TORN as an incident of a relational contract following established authorities.[34]

2. The Court of Appeal

The Court of Appeal overturned the High Court. The Court of Appeal found that good faith contracts did not necessarily have implicit TORNs, nor was any other class with implicit TORNs identifiable.[35] For good measure, they rejected that franchise agreements were relational contracts implying good faith.[36] The ability to terminate for breach of terms meant the express obligations of skill and cooperation rendered implying a TORN unnecessary.[37] The Court did not decide what the correct test was because a TORN was

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[31] At [1].

[32] There was also a judgment by Kos P, concurring with the result. His discussion of the law is entirely about the question of the relationship between implication-in-fact and interpretation, and the correct test for implication-in-fact. It has no direct relevance to TORNs. Unless otherwise stated references to *Ward* are references to the lead Court of Appeal judgment.

[33] *Ward Equipment v Preston* [2017] NZHC 240 at [37].

[34] At [33]-[36].

[35] At [55].

[36] At [70].

[37] At [72].

precluded by the exhaustive termination terms and the finite 'natural life' of the contract.[38] There was neither a need nor a gap for a TORN in the contract.

3. Court of Appeal critique of implication-by-law and presumptions

The Court rejects TORNs being terms implied-by-law because there was no clear suitable category.[39] A category based on good faith would be unstable and cause difficulty. The Court held there is no presumption that contracts requiring significant trust have TORNs. It cites dicta saying there is no presumption in favour of TORNs, despite the ordinary expectation that contracts are terminable:[40]

> Cooke P referred to suggestion in some authority that there is a presumption that contracts of no fixed duration are terminable on reasonable notice. Writing for the Court he said:
> "Whether it can be put as high as a presumption is doubtful, but we think that most Judges and practitioners today would expect to find cogent reasons in the nature or terms of a particular contract before placing on it the interpretation that there is no right to determine on reasonable notice."
> In *The Power Co Ltd v Gore District Council* this Court said:
> "It remains doubtful whether anything in the nature of a presumption to this effect arises, because in each case what is sought is the true construction of the particular agreement. For that reason, other cases, although they may be of assistance, cannot be determinative of the present question."
> Later, in *Bobux Marketing Ltd v Raynor Marketing Ltd* this Court put the matter in a different way:
> "In the end, although in a mercantile or commercial contract the Court will favour an interpretation which enables the relationship to be terminated on reasonable notice, the question remains whether the language actually used by the parties admits of an implication or interpretation to that effect."

C Interpretation vs Implication: The Correct Test

The Court appeared confused about the correct approach to take for a test for TORNs:[41]

> To sum up to this point, although cases which involve quite different contracts have been taken as a class for the purposes of this question, the authorities are consistent in treating the question of whether a contract is terminable on reasonable notice, in substance, as one of construction. We acknowledge, however, that if a court reads into

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[38] At [77].

[39] At [55].

[40] At [52]-[54].

[41] At [44]-[45]

> a contract with existing detailed provision for termination, a term that the contract is terminable on reasonable notice, the court has in fact implied a term. It is difficult to characterise this exercise as merely determining what pre-existing provisions of the contract mean. That is why no doubt some judges have used the language of implication rather than that of interpretation.

However, the Court is ultimately agnostic as to the correct approach:[42]

> First, we do not decide the issue of whether the applicable test is one of construction or implication. In accordance with established principle we apply the traditional approach of construction and forego the five-stage test for implication as set out in *BP Refinery*. Second, there is no presumption or preference in favour of terminability, so we do not apply one. What we are left with then is the application of ordinary contract construction principles.

They purport to take an approach based on interpretation. What they really do, as detailed below, is find reasons why the express terms and contractual scheme are inconsistent with a TORN.

D The Approach of the Court of Appeal

The Court of Appeal treats the issue as one of 'interpretation'. The Court reasons that the contract cannot contain a TORN:[43]

> Fourth, we attach particular significance to the fact that while the licence agreement has no fixed term, it does have a natural life — even if it is not construed as terminable on reasonable notice, it will not run forever. The value of the agreement lies in the intellectual property and the licensee pays royalties for access to that. The contract provides the licensee with the right to terminate on three months' notice when the patents expire. The inclusion of this right protects the licensee's natural commercial interest in not being bound to the terms of the agreement after the patents have expired — it is common ground that the patent rights are the principal rights licensed under the contract.

The Court helpfully summarises its conclusions:[44]

> For these reasons we consider that the Judge erred in interpreting the agreement as terminable on reasonable notice. The parties carefully constructed a bargain between them as to how long the agreement is to run, including in its detailed provision for termination. The agreement has a natural life. There is therefore no need, and indeed in our view no room, to construe the agreement so that it is terminable on reasonable

[42] At [57].

[43] At [73].

[44] At [77].

> notice. The respondents have not established, either as a matter or implication or construction, that the licence agreement contained a right for each contracting party to terminate on reasonable notice and in the absence of cause.

The following points are clear:

i) There are detailed provisions for termination.
ii) The agreement has a natural life.
iii) None of the express terms are TORNs, nor do they leave room for a TORN to be consistent with the exhaustive scheme for termination and ending.
iv) Nor, given i) and ii), is there a gap to be filled by an implied TORN.

I consider [77] expresses the ratio of the decision. The natural life means there is no *room* to imply it. The termination provisions are exhaustive. There is no *need* to imply or construe a TORN. The contractual text works perfectly and exhaustively without supplementation. Thus, the correct interpretation precludes adding any more terms, through any process.

The case does not decide what the correct test for a TORN is. It found a TORN cannot be implied into a contract with a finite life and exhaustive termination provisions. That ratio does not reference any test for a TORN, and is consistent with all of them. If the right interpretation is that there is a natural life and no room or need for a TORN, then obviously interpretation cannot contradict that. Express terms override implied terms and presumptions of any variety. On the Court of Appeal's interpretation in *Ward* there is no ability on any approach to imply a TORN.

E The Impossibility of Interpretivist tests for TORNs

The Court of Appeal's dicta in *Ward* favours interpretivist approaches to TORNs. I argue this is wrong: TORNs should be implied as a rule, and only excluded by clear intention to be perpetual. Indefinite contracts have no natural or fixed end. Perpetual contracts are intended to last forever. *Ward* should be treated as narrowed to its facts based on the contract precluding a TORN. The dicta about presumptions was misunderstood in *Ward*, and interpretivist accounts cannot explain why TORNs are so widely implied. Interpretivist approaches are individualistic, while a default response shows TORNs are rule-based.

F The Major Objection: The Singular-response Argument Against Singular Aptness

Interpretivist approaches to TORNs simply cannot explain how regularly and widely they are implied. I provide variants that apply to each of interpretation and implication-in-fact. This objection is my major reason. If this argument fails, then my thesis is wrong. If it succeeds, then there is a very good chance my thesis is correct.

1. The summary of the argument

Implication-in-fact requires singular-aptness of the proposed term for a contractual purpose. Interpretation is about what the particular contract requires. These interpretivist accounts turn on the meaning of the specific contract. The cases consider if the terms of contract allow a TORN. This is done through seeing if the contract is perpetual, or merely indefinite. Intention can overrun default rules, which is how *Bobux Marketing Ltd v Raynor Marketing Ltd* treated TORNs.[45] They have treated TORNs as the default. TORNs are a singular response to a situation. Interpretivism requires a singularly *apt* term or an implicit meaning of a document for a TORN. The cases considered in *Ward* show courts relying on intention to rebut the default presumption. TORNs therefore are based on a default rule of law.

This fits with the wide range of contracts where TORNs have been implied, and why consideration of the terms falls more on *excluding* than *including* TORNs, even in *Ward* itself.

2. The singular-response argument applied to implication-in-fact

Many contracts with varied terms and purposes with distinct levels of sophistication have TORNs. This shows TORNs are a general response to a general problem, not an individualised one to particular problems in individual contracts. Only direct intention to be permanently bound, or bound to a determinable length, will prevent this clause being implied due to being implied-by-law.[46] Because TORNs are a singular-response to open-ended contracts, they cannot be singularly-apt for the wide textual variations and purposes of all the contracts they are implied into. This shows they must be justified by being a rule-based supplement to contracts, rather than by interpretivist implication-in-fact.

TORNs cannot be singularly apt for ending contracts or assessing remedies for breach because there are alternative distinct terms with similar functions. Damages could compensate for the right to permanence under the head of 'negotiation damages.[47] There could a right to terminate by agreement with acceptance not to be unreasonably withheld.[48] There are likely other alternatives to TORNs for particular contracts. If it was a term

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[45] *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 (CA) at [68].

[46] See generally McMeel, above n 1, at [11.96].

[47] Negotiation damages compensate for the value of a right under a contract that could be negotiated away: see *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649. A right of buying out performance might seem drastically different to a right to exit. However, TORN cases are often about when the contract ended for the purpose of assessing damages. This term is therefore functionally similar. The justification of efficient breach is similarly liberal to the principle favouring a right to exit.

[48] The reasonableness of the use of contractual discretions is enforceable by a court: *Braganza v BP Oil* [2015] UKSC 17, [2015] 1 WLR 1661.

implied-in-fact we would expect to see argument about which term is singularly apt for the contract's unique circumstances. Terms implied-in-fact must be singularly apt for the particular contract and purpose. Yet TORNs are remarkably common responses, even where other options are available. This reflects that TORNS are the consistent outcome of a consistent legal policy. They are a term implied-by-law to reflect liberal autonomy that contract law promotes supporting a right of exit, rather indefinitely bound to a contract.[49]

The cases regularly suggest contracts are read as terminable where possible. There is a variety of examples. Cooke P in *Minister of Education v De Luxe Motor Services (1972) Ltd* considered courts would "expect to find cogent reasons in the nature or terms of a particular contract" precluding a TORN.[50] *De Luxe* is a case about an oral contract for school bus services. *Burntcopper* v *International Travel Catering Association Ltd* concerned an ordinary written commercial contract where the Court found implying a TORN would be "an attempt to truncate a fixed term contract".[51] The infrastructure case *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA), considered below, had a term of "for all time hereafter" being interpreted as an indefinite contract with an implied TORN.[52] Thus a wide variety of cases treat TORNs as *negated* by the contract' length or language, not *required* by the purpose. This follows the term implied-by-law approach that intention *negates* the default, not interpretivist approaches that *require* it.

TORNs are favoured by default over a variety of contracts. The nature and terms must push *against* the improbability of a perpetual contract to preclude a TORN. The terms must be prescriptive termination terms; the nature must be a fixed or natural life.[53] TORNs are the default, and do not rely on objective intention to be *included*. Instead the cases highlight that there must be intention to displace a TORN.

McMeel considers that the leading English case *Staffordshire* shows that the aversion to perpetual obligations affects interpretation and implication.[54] Some plumbing infrastructure was built, with the council and owner signing an agreement with a fixed price that inflation eroded. The contract included the phrase "for all time hereafter", which was read down to mean, effectively, "while the contract continues".[55] The plain meaning of a contract was read down, providing the space to imply a TORN.

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[49] See generally Chapter 3.

[50] *Minister of Education v De Luxe Motor Services (1972) Ltd* [1990] 1 NZLR 27 (CA) at 31.

[51] *Burntcopper v International Travel Catering Association Ltd* [2014] EWHC 148 (Comm).

[52] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387 (CA) at 1399.

[53] *Burntcopper*, above n 51, *Ward*, above n 2.

[54] McMeel, above n 1, [11.103].

[55] *Staffordshire*, above n 52, at 1399.

McMeel considers TORNs are readily implied following this reasoning, reflecting a policy favouring terminability.[56] McMeel is right due to the singular response of watering down perpetual contracts. This better accords with the other cases discussed above which require express terms to preclude a TORN. This can be through exhaustive termination terms or a genuine intention to be perpetually bound.

TORNs are the legal response to a contract being indefinitely ongoing. There are multiple possible answers, but the law has established TORNs as the desirable default. This term is a rule-based supplement to categories in that contract to provide a rule for ending the contract. It *could* be done through interpretation, or implication, or a *different* term implied-by-law. Interpretation and implication-in fact would lead to more varied outcomes. Their consistency shows TORNs are a default.

3. The singular response argument against interpretation

Interpretation is even more strongly bound by interpretivism. Interpretivism means that either the text or context should determine the term for termination, because those are what the objective shared intentions of the parties are assessed from. But the invariable response in indefinite contract cases is to imply a TORN. This argument substitutes implication-in-fact's *singular-aptness* for the need for interpretation to be based in some expression of intention. The cases look only to whether the contract is indefinite or intentionally endless or terminable only in prescribed circumstances.[57] This provides the basis for an automatic implication of a TORN. While the implication *responds to* the intention to be indefinitely bound, the implication is not based on intention because it has a default form prescribed by law. Therefore, it must be a rules-based supplementation rather than an interpretivist approach.

G The argument against TORNs as interpretive presumptions

Additionally, any factual or interpretive presumption would be unprincipled. If a standalone presumption is justified by doctrine, it would be justified by terms implied-by-law which have a settled methodology that justifies novel terms. In any case the need to identify a class to apply this presumption to means it overlaps with terms implied-by-law. This accords with Carter's view that presumptions are simply mandatory rules expressed in language of intention.[58] It is therefore a *legal* default rule, not a *factual* presumption about intentions. This approach is indistinct from a term implied-by-law: it would share

[56] McMeel, above n 1, at [11.96].

[57] *Ward*, above n 2, at [73].

[58] Carter, above n 15, at 97.

the same class, be subject to the same exceptions and be justified as a rule-based supplement rather than from the parties' intentions.

H Two more reasons to narrow the ratio of Ward

Ward should be read narrowly because it wrongly treated the intentions of the parties' as the basis for TORNs rather than as a way of precluding TORNs. Additionally, the misleading use of secondary sources and its narrow ratio means *Ward* should not be treated as a broad precedent.

1. Narrow use of secondary sources

Ward cites Lewison's *Interpretation of Contracts* and *Chitty on Contracts* to cite that either interpretation or implication-in-fact is appropriate.[59] *Chitty* is generalist and English. Lewison is sceptical of TORNs compared to the authors discussed below. Carter in his cross-jurisdictional *Construction of Commercial Contracts* considers TORNs to be a mandatory rule of law.[60] McMeel argues "a right to terminate on giving reasonable notice is invariably identified" for indefinite contracts.[61]

The Court of Appeal's discussion was unduly narrow. They either looked shallowly, lacked the benefit of counsel's research or considered contrary authorities unworthy of discussion. Leading contract texts for New Zealand and our closest jurisdictions were apparently ignored. *Ward* should be treated as decided narrowly rather than setting a principle, as it lacks proper and apparent full consideration of the literature.

2. The ratio of Ward Equipment

Judges rely heavily on counsels' submissions. Counsels' opposing arguments were that the *BP Refinery* test should apply,[62] and that a unique presumption in favour of TORNs applies.[63] I have shown why those are flawed positions above. Neither party argued for TORNs being implied-by-law. The Court expressly held that they were not determining the correct test.[64] Therefore *Ward* cannot have excluded implication-by-law as the TORN argument.

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[59] Kim Lewison *The Interpretation of Contracts* (6th ed, Sweet & Maxwell, London, 2015) at [6.18]; EG McKendrick "Implied Terms" in HG Beale (ed) *Chitty on Contracts: Volume 1 General Principles* (32nd ed, Sweet & Maxwell, London, 2015) at 1095; both as cited in *Ward*, above n 2, at [32]-[33]

[60] Carter, above n 15, at 98.

[61] McMeel, above n 1, [11.96]

[62] *Ward*, above n 2, at [29].

[63] *Ward*, above n 2, at [30].

[64] At [57].

That neither counsel argued for implication-by-law similarly limits the precedent. The Supreme Court refused to decide a point of law without a genuine contradictor in *McGuire v Secretary for Justice*.[65] The Court was unwilling to decide without adversarial submissions.[66]

This supports my argument that *Ward* can only be interpreted narrowly. The ratio is consistent with my analysis. This is because the 'natural life' precluding a TORN pushes it outside the scope of the class I advocate. A ratio of 'contracts with a natural life preclude the implication of a TORN' does not turn on the nature of the implication. It is obvious and consistent with all the caselaw.

The Court could not think of a category to decide the case. They reject the Australian view, endorsed by the High Court, that good faith indicia will support a TORN.[67] They did not rule on or reject a TORN being implied-by-law. Nor were they provided with materials that I rely on to make that case.

The ratio of *Ward Equipment* does not prescribe the test for implying a TORN. The ratio turns on the contract having a 'natural life'. Therefore, it is not an indeterminate contract where a TORN will be appropriate. *Ward*'s dismissal of implication-by-law is restricted to the idea of 'good faith' contracts. The dicta favouring interpretation and implication is obiter. Therefore, given the weakness of interpretivist accounts of TORNs which *Ward* supports, *Ward* should be read narrowly, and its obiter disregarded.

I Conclusion

This chapter has explained the implication-in-fact and interpretation tests for TORN clauses. In particular it discusses the reasoning and approach of the Court of Appeal in *Ward Equipment*. These approaches does not explain TORNs being a default. Interpretivist processes like interpretation and implication-in-fact would lead to more varied outcomes. *Ward* does not decide the correct test, and therefore does not preclude implication-by-law. *Ward* has a narrow ratio that does not mandate either of those processes, and is consistent with implication-by-law. It only rejects 'good faith contracts' as a class that implies TORNs, not the class I advocate.

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[65] *McGuire v Secretary for Justice* [2018] NZSC 111, [2019] 1 NZLR 335.

[66] At [87].

[67] *Ward*, above n 2, at [55].

Chapter 2: The Doctrinal Expansion of Terms Implied-by-law

A Introduction

My previous analysis has shown implication-by-law best explains TORNs being default terms. This has been by process of elimination: interpretivist approaches cannot explain TORNs. This chapter provides my positive argument: implication-by-law justifies and explains the category for TORN clauses. This is all indefinite and ongoing contracts, where the terms and purpose do not preclude implying a TORN.

Terms implied-by-law are an orthodox part of contract construction. Despite this they have received comparatively little academic or judicial attention. This chapter seeks to explain the test for novel terms implied-by-law and their justification. Courts develop novel terms by considering the nature of the relationship, fairness between the parties and which party has control. This is often described by the shorthand of considering 'reasonableness' or 'policy' reasoning. Authorities and academic writing support explicit use of these factors.[68]

This chapter also describes how established terms implied-by-law are implied into contracts. Categorisation occurs through interpretation of the nature of a contract. Once categorised, the 'necessary incidents' of the category which are consistent with the contract are implied in.[69] These are the default terms which the law imposes in those categories.

This chapter shows TORNs are justified as accepted terms implied-by-law. Alternatively, they are justified as novel terms implied-by-law. My analysis also suggests policy and doctrinal reasons favour developing an expanded term implied-by-law jurisprudence.

B The current law of terms implied-by-law

Terms implied-by-law have been studied comparatively little.[70] The most influential recent article is Peden's *Policy Concerns Behind Implication of Terms in Law* from 2001.[71] This is cited in the major contract texts on terms implied-by-law.[72] Peden concludes that courts should be open about the influence of fairness and policy factors on developing the scope of categories and the phrasing of terms. Instead, they tend to hide behind language.

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[68] Elizabeth Peden "Policy Concerns Behind Implications of Terms in Law" (2001) 117 LQR 459; *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293.

[69] Logically, where a term implied-by-law would undermine the contractual purpose, it will be excluded by necessary implication.

[70] Peden, above n 68, at 460.

[71] Peden, above n 68.

[72] McMeel, above n 10 at [10.36], Carter above n 15, at [3.29].

Where courts reject a proposed term, they note the standard for implication is 'necessity'.[73] This emphasises the difficulty of the test to reject proposed terms. Where a court accepts a term, they use language about the reasonableness of the term.[74] This emphasises the merits of the particular term. Language ought to explain why a decision was reached, not pick out different standards to mask the judge's views of the merits. The reasoning from the legal test and factors to the conclusion should be transparent.

New terms are rarely implied, although existing terms are litigated regularly.[75] Hugh Collins in *Implied Terms: The Foundation in Good Faith and Fair Dealing* attributes this to the availability of ad-hoc gap filler terms that allow the courts to decide the cases before them without setting a precedent.[76] Courts confine the effects to the immediate case without needing to consider wider policy implications. This accords with Peden's conclusion that courts worry about the scope of the class, and hence the precedential effect, of implying a new term as a necessary incident.

The expansive scope of terms implied-in-fact, and broad scope of interpretation may have marginalised the scope for implying terms-in-law. Following Collins' reasoning, these processes could have displaced the need to resort to default rules. This would eliminate the distinct space for developing new terms implied-by-law. More recent contract cases have restricted this scope.[77] These may have had more of an effect on judicial temperament than on the rules, but judicial temperament matters for evaluative exercises.[78] This retrenchment may leave more space for rule-based supplementation of contracts rather than attributing everything to party intentions.

Expansive approaches to interpretation reduce the room for implication-in-fact. "Business common sense" in interpretation briefly held sway, post-*Rainy Sky SA v Kookmin Bank*.[79] This gave courts the ability to interpret terms as being more fair, balanced or reasonable bargains.[80] However, this approach to business common sense was

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[73] At 467.

[74] At 475.

[75] There are recent cases on general damages for breach of utmost good faith in insurance, see *Young v Tower Insurance Ltd* [2016] NZHC 2956, [2018] 2 NZLR 291.

[76] Hugh Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing" (2014) 67 CLP 297 at 307.

[77] *Marks & Spencer*, above n 8 at [24]; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 at [15].

[78] Lord Sumption "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017).

[79] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.

[80] Contrast *Arnold v Britton*, above n 77, at [19]-[20] .

deprecated as uncertain and undermining the text of contracts, and so resiled from in *Arnold v Britton.*[81] Therefore, interpretation is inappropriate for doing justice in particular cases.

The recent reemphasis on terms implied-by-law improving contracts gives it a distinct niche. Lloyd LJ in *National Bank of Greece S.A. v. Pinios Shipping* held gap-filling may not make contracts fairer or better while discussing varieties of implied-terms.[82] This implies terms implied-by-law *will* tend to make a contract better or fairer. He emphasises policy and reasonableness as the criteria for introducing terms implied-by-law.[83] Implication-by-law responds to issues of fairness and policy that other forms of contract construction do not.

C The New Category-terms

I use the ideas of implied good faith contracts and a specific obligation in banking contracts to make some general observations about the process of categorisation. The formulation of the term depends on policy factors of fairness and controls. Formulations of 'reasonableness' give judges a larger role in future cases, reflecting Collins' suggestion courts are unwilling to tightly bind their successors. The implication of accepted terms is consequential to evaluating the nature of the contract. A contract's nature is treated as a question of interpretation.[84]

1. Good Faith

Good faith in contract is a developing concept across New Zealand's usual comparator jurisdictions. England and Wales, Australia and Canada are all taking distinct approaches. Good faith's content is debated, but is generally focused on mandating a cooperative approach to carrying out the substance of the bargain:[85]

> [Good faith] is an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

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[81] *Arnold*, above n 77, at [17].

[82] *National Bank of Greece S.A. v. Pinios Shipping Co. No.1* [1990] 1 AC 637 (CA) at 645.

[83] At 646.

[84] *Wong Mee Wan*, above n 14.

[85] *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50, (2015) 236 FCR 199 at [288].

Good faith is a governing principle of Canadian contract law but is unsettled pending a Supreme Court appeal.[86] Canadian contract law's divergence makes it a bad comparator.

Instead I focus on English law which is more developed and probably more stable. The law has been largely developed by Andrew Leggatt. His appointment to the Supreme Court bodes well for continued acceptance of good faith in England, notwithstanding critical reaction.[87]

Leggatt J used implication-by-law as an alternative justification for implied good faith in *Yam Tseng Pte Ltd v International Trade Corporation*.[88] This followed the categorisation of the contract as relational, applying Lord Wilberforce's test of what is inherently required by the nature of the contract. Relational contracts require cooperation to achieve the venture.[89] These are long term contracts involving trust, integration and the ongoing nature of the relationship is inapt to being prescribed in advance by express terms.

Yam Tseng concerned a reasonably limited textual contract, for the bold venture of selling Manchester United-branded perfumes and colognes at airports across Asia. Due to the paucity of express terms, the implied term of good faith was given a broad and flexible interpretation.[90] This largely governed the general way in which the parties were to treat each other. Good faith contracts can function therefore distinctly from other categories of commercial contracts. Relying on an animating spirit of reasonableness and cooperation is in stark contrast to the ordinary Anglo-Australasian approach where parties can rely on express terms.[91] Wherever the nature of a contract requires trust and confidence but not the selflessness of fiduciary obligations, good faith is necessarily implicit in the contract. Therefore, good faith is implied-by-law when a contract is categorised as relational.

2. Barclays Bank plc v Quincecare Ltd[92]

The *Quincecare* duty is a duty on bankers not to fulfil client instructions where there is a strong suspicion of fraud.[93] It is coextensive in both contract and tort.[94] It is unnecessary as a gap-filler in banking contracts due to tort liability Instead, policy goals independent of

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[86] *Bhasin v Hrynew*, [2014] SCC 71, [2014] 3 SCR 494.

[87] JW Carter and Wayne Courtney "Good Faith in Contracts: Is there an Implied Promise to Act Honestly?" (2016) 75 CLJ 608.

[88] *Yam Tseng Pte Ltd v International Trade Corporation* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

[89] At [142].

[90] See [154].

[91] *Yam Tseng* at [123].

[92] *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (QB).

[93] At 376.

[94] At 376.

achieving parties' intentions support its inclusion as a default rule. The discrete term makes it a suitable example for assessing how policy influences terms implied-by-law.

Steyn J did not discuss the proposed term as being *necessary* in *Quincecare*. He thought the term proposed was principled, reasonable, fair to both parties and limited in effect to promote certainty and efficiency.[95] Banking law's legal context and policy factors favoured this extension. Therefore, it was akin to developing a new rule of the common law, while striking a fair balance between both sides. He reasoned from the inevitable clash of a bankers' duty to use reasonable skill and care appropriate for a professional, to a bankers' obligation to obey a customer's mandate. Banks usually act with unhesitating loyalty for clients. However, where the mandate appears to be fraudulent or dubious there may be good reason to not obey it. It would not make sense for a banker to be obliged to make a payment where it is plainly fraudulent. The *Quincecare* implied term obliges bankers to refrain from paying when they have reasonable grounds for thinking the payment is part of a fraudulent scheme, as a "sensible compromise which strikes a fair balance between competing considerations".[96]

The standard of reasonableness is instructive, and common in terms implied-by-law. Reasonableness gives room for judges to assess the facts by contemporary standards. Judges can rely on industry standards where appropriate but prescribe higher standards when the policy underpinning the implied term requires it. This avoids the threat of a default term unjustly binding future judges. This answers Collins' point about the precedential effect of terms implied-by-law making judges unwilling to rely on them. Reasonableness retains flexibility and the court's ability to prescribe standards.

D Categorisation in practice

The examples above show the modern approach to new terms implied-by-law. *Quincecare* shows how new terms are developed according to policy reasoning. Good faith shows how categorisation of contracts by the underlying nature of the relationship works. *Quincecare* has the standard of a reasonable banker; good faith the idea of a relational contract with necessary integration and cooperation. This gives the judge a greater role in assessing the substance of the relationship, not just the text of the contract. As McMeel says, characterising is more substantial than merely textual: the nature of the relationship does not depend on the labels and words the parties use.[97] Analogies to cases with similar facts matters more rather than application of textual labels. This common law method shows implication-by-law is deeply rule-based, rather than interpretivist.

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[95] At 376

[96] At 376

[97] McMeel, above n 1, at [1.24]

Established terms are implied into other contracts of that general nature, identified through analogies to previous cases using those terms. For example, good faith was implied by analogy from *Yam Tseng*'s optimistic airport fragrance deal, to a long-term car crushing contract for a police department in *D&G Cars Ltd v Essex Police Authority*.[98] Long term procurement projects similarly involve trust and integration, making them a type of relational contract which implies good faith. Evaluation of the nature of the contract depends on the factual nature of the relationship, not the contractual text.[99]

E The Implications of the New Approach to Implications-by-law to TORN clauses

I reject the High Court's view in *Ward* that TORNs are implicitly part of good faith contracts. I make the strong claim that TORNs would be justified being accepted as novel terms implied-by-law.[100] My proposed category is indefinite and ongoing contracts. I consider exceptions to this category in the next chapter.

F The Relationship of Good Faith and TORNs

The difference in *Ward* between the High Court and Court of Appeal concerns whether the contract being relational implies a TORN as a standard incident. The High Court says it does, which treats TORNs as incidents of good faith contracts. The Court of Appeal disagreed. Breach of the quasi-good faith express term would justify cancellation for breach, making a TORN unnecessary. They disagreed that franchise agreements are relational; they could identify no general category where TORNs were appropriate; and they held that the express terms of the contract precluded the term being implied. The third finding is determinative. Taken as the ratio, it is fully consistent with a term implied-by-law analysis and my singular-response argument from chapter 1.

I argue the High Court was wrong. The New Zealand position is uncertain. The English position is that good faith applies to performance but not termination. The Australian position is that good faith affects termination rights. I will argue that New Zealand already has law that does what Australian good faith law does, so we are more likely to adopt the English approach. A law of good faith that did not affect termination would not incidentally imply a TORN.

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[98] *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB), [2015] All ER (D) 85 (Mar).

[99] McMeel, above n 1, at 17

[100] This is a stronger claim than my previous argument that TORNs are already accepted as terms implied-by-law from chapter 1.

Good faith clauses do not affect discretions to terminate contracts in English law.[101] *Yam Tseng* was about good faith performance, and termination clauses are plainly not about *performing* the substance of the contract. The integration required probably affect the length of notice required under a TORN if it exists. A contract that by its nature requires greater amounts of cooperation will take longer to disentangle than an arms-length relationship, ceteris paribus. But that is not a basis for implying a TORN in the first place.

The Australian caselaw on good faith, termination and discretions suggests that discretionary termination clauses indicate good faith.[102] This is contrary to the English authority. Good faith might simply be the Australian equivalent to the English rules on contractual discretion. Australian good faith imports the idea of 'reasonableness'.[103] English ideas of reasonableness fettering contractual discretion uses analogies to judicial review: *Braganza v BP Shipping*.[104] All contractual powers must be used for the contractual purpose, expressly analogised from administrative law: *Equitable Life Assurance Society*. This purpose is understood by construing the contract and the discretion in context.[105] These English cases represent New Zealand law: *Braganza* has been affirmed by the High Court,[106] and the concurring judgment in *Equitable Life* was given by Lord Cooke.

As New Zealand already has law about contractual discretions, importing good faith is unnecessary. Moreover, the English dicta that good faith performance does not cover termination is persuasive. Termination cannot be necessary to achieve a contract's purpose. The contractual purpose of performance is undermined by being unilaterally terminated. Instead, such terms reflect contract law's promotion of individual autonomy including a right to exit contracts. Courts also find that parties are objectively unlikely to be permanently bound, even when their wording suggests it.[107] Whether this is separate from the legal policy of autonomy, or an excuse to hide that substantive rule of law behind a veil of party autonomy is unclear.

However, the occasional reliance of courts on objectively-assessed party intentions to justify TORN clauses does not affect my thesis. Overlapping support for conclusion in contract construction is common.[108]

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[101] *Ilkerler Otomotiv Sanayai ve Ticaret Anonim v Perkins Engines Co Ltd* [2017] EWCA Civ 183, [2017] 4 WLR 144 at [29].

[102] *Burger King Corp v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 (CA) at [163].

[103] *Burger King*, above n 102, at [163].

[104] *Braganza*, above n 48, at [28]-[30].

[105] *Equitable Life*, above n 6, per Lord Cooke at 460.

[106] *L&M Coal Holdings Ltd v Bathurst Resources Ltd* [2018] NZHC 2127 at [202]

[107] *Ward*, above n 1, at [74]

[108] See *Wells v Devani*, above n 5, at [35] per Lord Kitchin for entirely overlapping conclusions of interpretation and implication.

It therefore seems unlikely that categorising a contract as one of "good faith" will imply a TORN as an incidental term. New Zealand often follows English rather than Australian or Canadian contract law, especially on interpretation and implication. However, there are Canadian and Australian influences which may favour that conclusion. Similarly, in those jurisdictions' good faith, rather than reasonableness and proper purpose in the administrative law sense, provides the major fetter on contractual discretions. The only recent New Zealand case discussing good faith, *Detection Services Ltd v Pickering*, cited English authorities about how the categorisation occurs and Australian authority about the content of the duty.[109] The position is therefore slightly unclear. If my prediction that we follow English law on good faith is wrong then a finding of contractual good faith may incidentally imply a TORN clause. However, that cannot explain the generality of implied TORN cases.

G The Test for a TORN

TORN clauses are justified as terms implied-by-law for ongoing contracts with an indefinite life. They meet the high standards of necessity, fairness, policy and proper role for such implications. This reflects the ability to leave, dishonour or underperform obligations as a fundamental part of freedom of contract.[110] This part of the chapter argues that policy and principle favour indefinitely ongoing contracts having TORNs implied-by-law. This follows on from my case in chapter 2 that TORNs must be justified as terms implied-by-law on the basis that this is most consistent with case law and that there are no alternative explanations for TORNs being a singular response.

The proper test is categorising the contract as indefinite according to the ordinary indicia. A contract being indefinitely ongoing is a defeasible reason to imply a TORN. Factors that point away from that include may include a statutory context,[111] or existing termination/cancellation rights.[112] Factors that are fatal include a truly indisputable intention to be permanently bound,[113] and a definite or natural length.[114] This is a matter of contextual interpretation. It may be necessary to achieve the contract's purpose to impliedly undo the default term.

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[109] *Detection Services Ltd v Pickering* [2018] NZHC 3310, [2019] NZAR 515.

[110] Oliver Wendell Holmes "The Path of the Law" (1897) 10 Harv Law Rev 457 at 462.

[111] I thank Barry Allen for the observation that in government cases, where there is probably a political pact behind the contract, that if all goes wrong Parliament can intervene. This requires less from contract law.

[112] *Ward*, above n 2, at [65].

[113] See *Staffordshire*, above n 52, at 1399.

[114] *Ward*, above n 2, at [73].

1. Policy reasons for favouring TORNs as terms implied-in-law

Legal policy factors push for recognising TORNs as implied-by-law into indefinite contracts. These includes consistency with precedent, theory, efficiency and respect for autonomy.

Firstly, it is sufficiently unusual to enter a perpetual contract that courts require clear indications to do so.[115] Yet a strong interpretive presumption can only affect the interpretation of the actual words, or otherwise imply a term where that is necessary for the contract.[116] While some dicta about terms implied-in-fact mentions it need only be necessary for the full "reasonable expectations", there has been a swing back to textual emphasis. Parties should only be permanently bound by clear intent. The best way of mandating this as a general rule is to use the rule-based, rather than interpretivism based, way of implying default terms into contracts. This avoids the fiction of interpretation which brings concomitant uncertainty, as it could be outweighed by other interpretive factors.

In short, TORNs are necessary. My arguments against interpretive presumptions and implications-in-fact are successful. Therefore, by process of elimination they must be terms implied-by-law.

Secondly, legal theory and contract laws' principle of protecting party autonomy favours TORNs as defaults. I expand on this in chapter 4. There I argue that the best current views of legal theory mandates TORNs as a way of protecting party autonomy. Contract law promotes the ability to leave contracts as part of liberal autonomy.

Thirdly, TORNs are efficient and certain which promotes its use. Implication-by-law provides the best framework of a certain and efficient default rule that people can intentionally vary. The other options for implying TORNs are meant to turn on the individual text. By contrast, implication-by-law reduces the probability of litigation through simple and certain rules. This makes the contract less risky and promotes its use. The term is simple enough for people to understand as a general rule, which would not be the case for an interpretive presumption.[117] Additionally, New Zealand has the benefit of binding and high authority in *Paper Reclaim Ltd v Aotearoa International Ltd* about the interpreting of 'reasonable notice'.[118] This limits the uncertainty of that term.[119]

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[115] See *Staffordshire*, above n 52, at 1399.

[116] The presumption here would be an ordinary and accepted part of the factual context.

[117] It is beyond the scope of this paper to make empirical claims, but many statutory implied terms are easier to explain to laypeople than the *BP Refinery* test.

[118] *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.

[119] Although, in fairness, this will probably be restricted to legally advised parties and the practical effect of Supreme Court authority for a term that will usually arise in Disputes Tribunal cases is unclear.

Fourthly, the category's *scope* is efficient and certain. Indefinite and ongoing contracts that do not contract out of TORNs are easily recognisable. They will be clear from the terms read in their factual context, which is available to the parties. This is in stark contrast to the overly narrow scope considered in *Ward Equipment* of 'good faith' contracts, where termination for breach would be possible. It is more efficient to promote a default rule around trust that does not rely on provable breaches or unusual terms.

Fifthly, it best expresses the principles of previous cases. This is like the navigation through caselaw Steyn J undertook in *Quincecare*. *Staffordshire* required close examination of the wording. *"For all time hereafter"* signified an indefinite rather than perpetual contract.[120] This is best understood as an interpretation to classify the contract as indefinite, and lacking an express term that would overrule the implied TORN. The principles of autonomy and the sheer improbability of perpetual contracts, as well as the invariable legal response of a TORN rather than other terms is best expressed through this approach.

Sixthly, the qualifier of 'reasonableness' best accords with terms implied-by-law analysis. Collins suggestion that implications-by-law are disused due to worry about overly restrictive precedents.[121] Steyn J was satisfied reasonableness struck a fair balance while maintaining the certainty and efficiency of a high bar for liability for the *Quincecare* duty.[122] This limits the scope of any unforeseen implications, as the notion of 'reasonableness' allows judges scope for evaluative judgment regarding facts of unanticipated cases. It is telling that many terms implied-by-law use the device of reasonableness: good faith in Australia demands reasonable cooperation and reasonable use of discretions; *Liverpool* required reasonable care in taking care of facilities; *Quincecare* refers to the "reasonable banker".[123]

Overall these factors push strongly towards a recognition of TORNs as terms implied-by-law in indefinite length ongoing contracts. There is good reason to recognise TORNs in general, as acknowledged by the "presumed intention" factors, policy and legal principles. There are good reasons to treat this as a general rule rather than a mere presumption or contract specific approach, shown especially by my first, third and fifth principles. The general scope, rather than restriction to good faith contracts, is more applicable and general and therefore supported by the same considerations. Additionally, good faith is an unsafe basis for such an implication in New Zealand.

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[120] At 1399.

[121] At 307.

[122] At 367.

[123] 367.

Terms implied-by-law can be contractually excluded. TORNs can be inappropriate due to the purpose or wording. This makes the generally phrased class entirely consistent with the authorities. Such cases where TORNs were rejected were perpetual rather than indefinite.[124] Exceptional subcategories where TORNs are incompatible are discussed in more depth in the theory chapter.

2. Conclusion

This chapter has used contemporary terms implied-by-law jurisprudence to argue TORNs should be treated as terms implied-by-law. The dominant considerations for developing terms implied-by-law are around legal policy and principle. Reasonableness rather than necessity is the standard for developing default terms for categories. These factors support a simple, broad category of indefinitely ongoing contracts implying TORNs as a necessary incident.

[124] Eg, *The Power Co Ltd v Gore District Council* [1996] 1 NZLR 537 (CA).

Chapter 3: Theoretical Support for a TORN default rule

This chapter draws support from accounts of contract theory that emphasizes the role of autonomy. The protection of autonomy and a right to exit indefinite contracts means TORNs should generally be implied-by-law into indefinite ongoing contracts. It argues TORNs ought *not* be implied-by-law if that would undermine autonomy. Finally, these theories support the use of categorisation in contract law which supports an expansive scope for terms implied-by-law.

This chapter is not an overview of contract theory. It has a narrow scope to support my thesis. Autonomy based theories justify categorisation and default terms as necessary incidents. They are based on the idea that giving the maximum amount of control over *drafting* terms does not maximise freedom of contract. Instead, having stable, predictable default rules that accord with values maximises freedom of contract. This would let parties pick prepared, predictable and stable categories of contract. This supports my existing doctrinal arguments, and justifies the expanding scope of terms implied in law. Importantly, these new theories provide more practical answers to cases than existing theories. This chapter also gives support to those autonomy theories because they provide and justify the best approach to TORN clauses.

A Monist Contract Theory

In this chapter I critique 'monist' conceptions of contract law. Monist theories argue that there should be identical rules across all sorts of contract. They often exclude types of contract that do not strengthen their core case. For instance, Stephen Smith excludes instantaneous consumer sale of goods contracts.[125] I favour contract theory that covers all contracts.

I adopt Hedley's critique of monist moral or efficiency-based theories of contract.[126] Later I draw upon other notions of contract law that emphasises autonomy, freedom of contract and categorising contracts to have different rules for different types of contract. These support TORNs and better fit with the caselaw and doctrine.

I adapt Stephen Smith's taxonomy of legal theories to provide a simplified framework to assess the quality of theories against.[127] I explain briefly the few terms I use, and use these to show why the more recent 'autonomy theories' are preferable.

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[125] Stephen Smith *Contract Theory* (Oxford University Press, New York, 2004) at 178-179.

[126] Steve Hedley "The Rise and Fall of Private Law Theory" (2017) 134 LQR 218.

[127] Smith, above n 125, at 36.

1. Promissory Views

All the theorists I discuss are responding to and critiquing promissory views. Promissory theory of contract law has a long heritage, developing from the earlier 'will' theory. Promissory theories argue that contract law should be monist, with variations between contracts depending purely on the promise involve.[128] I draw upon promissory theory as an example of a purely moral conception of contract, and show how this does not seem to work.

The morality of promising morally justifies contract law.[129] Similarly, promise mandates much of its content. The morality of promises requires that they be kept, protected and enforced. The law is instrumental and subordinate to maintaining promissory morality.

Promissory views often reflect a highly *Kantian* liberalism: based around individuals self-determining and self-legislating.[130] This is a notoriously harsh and demanding form of morality.[131]

2. Fit and principled prediction

Stephen Smith developed a taxonomy of legal theories in *Contract Theory*.[132] This chapter is using a simplified form of Smith's taxonomy. This is used to emphasize how the autonomy theories I discuss below are superior. The best theories of law should explain and predict caselaw and underlying principles. Predictions of the caselaw should *fit* with its theories, and it should give a solid account of principles that underpin the cases. Explanatory integrity is where the categories and rules of the law are collectively coherent. These fit together and are justified by the underlying principles. Principled integrity is when the second-order principles that underpin the explanations also form a coherent and principled explanation and justification of the law.

3. Morgan's Contract Law Minimalism

Jonathon Morgan's formalist contract law minimalism is influenced by classical liberalism and notions of freedom of contract.[133] Classical liberalism is an ideology animated by individuals expressing their freedom through commerce, consumption and free

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[128] Smith, above n 125, at 36.

[129] Above, n 125, at 56.

[130] See generally Smith, above n 125 at 71.

[131] Susan Wolf "Moral Saints" (1982) 79 Journal of Philosophy 419 is the classic about how Kantianism is too demanding.

[132] At 36.

[133] Jonathan Morgan *Contract Law Minimalism* (Cambridge University Press, New York, 2013) at 89.

association.[134] Individual political and property rights should be protected against the state which was seen as a threat. Paternalistic rules of contract limit the use of property rights and individual autonomy. Therefore, a minimal and certain contract law that effects the intentions of the parties faithfully is preferable. People can make whatever decisions they like on a backdrop of efficient default rules.

Strictly, he is concerned only with 'commercial' contract law: emphasised by his subtitle: "A Formalist Restatement of Commercial Contract Law". Morgan emphasises the importance and utility of contract law to commercial parties and transactions. Within this sphere of 'commercial' contracts, freedom to select terms and depart from efficient default rules as desired maximises utility and freedom of parties.[135] This is desirable on grounds of efficiency and individual autonomy. He is therefore a paradigm example of a monist,[136] commercially focused, efficiency-based contract theorist.

4. Gava's Contract Constitutionalism

Gava develops a critique of Morgan's work in a review.[137] He agrees with Morgan's minimalism, but doubts this can be based on minimalism supportining efficient commercial outcomes.[138] Morgan's commercial minimalism is meant to have a core of certain default rules to facilitate commerce. Allowing commerce to flourish is good for society and preference satisfaction. Efficient free market favouring contract law may promote this. But contract law is only accidently efficient, and favouring formalism for efficiency reasons does not show any given formal contract law *does* maximise efficiency.[139] Instrumental theories value having a consistent justification and purpose, and can require constant changes in rules and defaults.

Gava prefers the common law method and incremental change to drastic theories.[140] This provides a foundation of certainty for the law and its users. The legitimacy of contract

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[134] Gerald Gauss, Shane Courtland, David Schmidtz "Liberalism" (22 January 2018) Stanford Enclopaedia of Philosophy <https://plato.stanford.edu> at 2.1.

[135] At 190.

[136] Admittedly he is not a monist, he merely treats commercial contract law as a core. But he treats all of commercial contract law as governed by the same monist principles, in a way the new autonomy theories discussed below do not due to their idea of individuated categories of contracts.

[137] John Gava "What we know about Contract Law and Transacting in the Marketplace" (2014) 35 Adel Law Rev 409. He also reviews another work by Catherine Mitchell which he finds more superior but ultimately subject to his critique of instrumentalism. Morgan's formalist restatement better illustrates my argument, despite Gava thinking it is the weaker work.

[138] At 411.

[139] At 420-423.

[140] At 425.

law, and its constitutional purpose, depend on moderation.[141] It should be slow to change and largely in its current form. Any theory which seriously disputes this attacks the proper place of contract in the common law.

The proper place of contract law is to be good at being contract law.[142] It is not there to fulfil any particular moral commitment. It is constitutional in that it fits a particular part of the legal system. It should develop in a consistent and conservative manner of case analysis and developing precedents. Its particulars reflect history, which is how it ought to be. Contract law is meant to be stable and reliable for users.

5. Hedley's Antitheory

Steve Hedley critiques the utility of private law theory.[143] His major objection is that the moral theories of contract in general, and promissory theory in particular simply does not map onto anything.[144] It is a failed enterprise. None of it assists or predicts future cases, and is suspiciously absent from judicial reasoning compared to doctrinal analysis. It is unclear whether it being present would make the law better. Law serves many masters, and being slavishly devoted to new ideas or consistency could undermine that.[145]

Applying his critique to monist theories is instructive. Promissory theorists embrace elaborate theories of promise. They are making significant moral claims about the role of promise and what people should accept. Their theories of the law seem to barely be based on caselaw, policy or politics and prefers a theoretically convenient tabula rasa.[146] This makes a strongly normative case for what contract law can be, without grappling with the policy and political implications let alone the doctrinal ones. Monist conceptions of contract can be very harsh given they are made to be good in theory rather than practice. There is hardly a less democratic route to neoliberal capitalist dominance of the proletariat than legal academics demanding that an ancient body of law be made pure. Reducing or reinforcing power imbalances is an obvious effect of contract law but those are merely incidental to the promissory theorists. Its practical effects might be *good* or *bad*. But the *right* requires promissory contract law *no matter what*.

Hedley also argues moral theories make strong predictions with little to no fit.[147] Contract is context specific and varied. Monist theories are strongly universal and by definition not varied. The necessary core of Kantian morality that promissory theorists

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[141] At 425-426.

[142] At 424-425.

[143] Hedley, above, n 126.

[144] At 236.

[145] At 237.

[146] At 233.

[147] At 236-237.

desire is suspiciously absent in every variant of contract law.[148] If contract law is adapted to its context and local policy considerations, then promissory theories will never fit.

6. The inadequacy of current theories

Private law theory can and should be practically productive to actual topics of pressing legal concern, and fit well with existing doctrine and caselaw. Hedley's critique shows monist theories fail by that standard. The radical implications of completely subordinating contract law to instrumental means, as Gava points out, means Morgan's approach cannot be accepted. By contrast, Gava does not seem to explain *anything*. It justifies incrementalist development of law from its existing base, rather than justifying its present complete form. But Gava considers much of the recent development has been astray. While it is good to know just how much the law can and should change, it also helps to provide direction and suggestions for how. Thus there is a need for new theories.

B Contemporary Autonomy Theories

These theories support individual autonomy in contracting. In contrast to older liberal ideas, autonomy is not protected merely by freedom to alter terms of the contract. That is what "Freedom of contract" often amounts to. They promote the individuation of contract categories, rather than seeing all of contract as uniform. Policy considerations in subareas matter.

1. Choice Theory

Hanoch Dagan and Michael Heller's *The Choice Theory of Contracts* provides a new liberal account of contract law.[149] It treats contract law as instrumental, to the goal of increasing autonomy.[150] This is based on Raz's theory of autonomy: people ought to have enough options available to them to achieve their personal goals.[151] It emphasises freedom of contract.[152] It agrees with Hedley that existing monist theories have failed, as have their normative suggestions for radical alteration of the law, and that "[i]t is time to move on.".[153]

Its novelty is in holding freedom of contract is best served by having an expansive range of contract types.[154] This expands the range of meaningfully distinct choices. The

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[148] At 237.

[149] Hanoch Dagan and Michael Heller *The Choice Theory of Contracts* (Cambridge University Press, New York 2017).

[150] At 1-2.

[151] At 68.

[152] At 2.

[153] At 10.

[154] At 69-70.

traditional model holds default rules ought to be efficient and minimal, and the ability to contract-out should be unlimited.[155] Choice Theory considers this imposes considerable costs of imagination and drafting on developing suitable contracts.[156] Having carefully formed and distinct contract types available facilitates more purposes and goals than the traditional model. Therefore, there should be a sufficiently expansive range of contract types, with unique purposes and sets of values.

The market can be relied upon to create new categories of contract in general that the law can promote, develop and distinguish from other areas.[157] But the state should make sure there are alternatives, even rarely used ones.[158] Their active rejection shows that people are selecting meaningfully when they pick their desired contracts.[159]

Each contract is meant to fulfil a distinct niche. There are only so many purposes of contracts. Each purpose can only have so many meaningful distinct variations of emphasizing efficiency and autonomy, or on ongoing ties of community and trust, or balances between this.[160] There is thus diminishing marginal returns on developing new contracts for a given area. The goal is to facilitate meaningful choices to achieve desired goals for individuals. In this way, people willingly enter into contracts with a suitable values and default rules. This does not require any presumed intention analysis, as terms implied-by-law often do. People can enter into contracts that reliably effect their reasonable expectations, without worrying about its precise drafting.

2. Civic Republican Contract Theory

Prince Saprai's book *Contract Law Without Foundations* gives a civic republican account of contract law.[161] Republicanism is a political theory based on the value of citizenship and political equality. Citizens are not isolated individuals, but are also engaged in political and social life in their state. Protecting and promoting this requires protection against domination by other people and the state.

Saprai rejects foundationalist and promissory accounts of contract theory. His account has plural values and accounts for contingencies and differences over time and contexts. No one value accounts for everything. Nor does it account for everything forever. Foundational and promissory accounts *inflate* the role of those values.[162]

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[155] Morgan, above n 133, at 90.

[156] *Choice Theory*, above n 149, at 74-75.

[157] At 114-115.

[158] At 115-116.

[159] At 125.

[160] At 113.

[161] Prince Saprai *Contract Law Without Foundations* (Oxford University Press, Croydon, 2019).

[162] At 27-29.

For instance, he critiques promissory accounts of undue influence.[163] That doctrine allows the rescission of contracts made when one party influences the will of the other to gain a benefit from a contract. Types of relationship can be presumed to involve such influence, and relationships can be proven to be unduly influential on the facts. The promissory account suggests there is no promise. He suggests this is strained. The promise would simply be oppressive if it was binding.[164]

The difficulty with this theory is that its account of non-domination does not seem distinct from liberal theories it apparently objects to. It provides a valuable Dworkinian account of why individuated categories of law should arise. It does less than Choice Theory to spell out what these are and what they ought to be. The value of categorisation comes less strongly.

3. The overlapping approach to autonomy

Republicanism promotes interdependence and shared political values. By contrast, Choice Theory by contrast is committed to individualism. Some contracts types promote 'thick community' bonds, others aim for opposing values. Choice theory is starkly liberal, and treats the choice between these contracts as valuable. It would be coercive to force people into "thick community" promoting contracts rather than alternatives. Yet the practical political implications of this ideological difference seem low. Both emphasise the autonomy of natural people. This requires they do not be permanently bound into contracts, and hence supports TORNs as I argue below.

C Individuation and core cases

Autonomy theories are unified by their emphasis on individuating categories of contract. This rejects the monist approach where there are universal rules. It also rejects approaches which treat some areas of contract as being core, and others being peripheral. Morgan for instance sees sophisticated and exhaustive commercial contracts as the core. Choice Theory rejects this view: contract law has no core case.[165] Contract law should explain all the areas of contract law, from exhaustive texts to instantaneous consumer transactions. Both Saprai and Choice Theory emphasize the role of categorisation of contracts as practical and policy based, while being as theoretically justified.[166]

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[163] At 108-109.

[164] At 29 and 109.

[165] *Addis v Gramophone Co Ltd* [1909] AC 488 (HL).

[166] Saprai bases his account on Dworkinian jurisprudence, while Choice Theory bases its approach on the work of Joseph Raz. Nothing turns on the conceptual basis or differences between these accounts.

The categorisation of contracts may already matter in practice. I briefly draw some support from the law of contractual remedies. Consider *Robinson v Harman*, per Parke B:[167]

> "…where a party sustains loss by reason of a breach of contract, he is, so far as money can do it to be placed in the same situation, with respect to damages, as if the contract had been performed"

Obviously being put right to where one be, but for breach, would include non-pecuniary damages. The authority of *Addis v Gramophone Co Ltd* makes this difficult: emotional distress and non-pecuniary damages are not usually recoverable in contract.[168] However, the law of damages seems to be slowly expanding into ideas of legitimate interest and substituting performance rather than mere reparations for direct and some consequential pecuniary loss.[169] The expansion and restatement of negotiation damages for loss of valuable rights rather than consequential damages reflects this trend.[170] Indeed, the interpretivist account may explain the scope of damages, as in *The Achilleas*, in terms of what responsibility was assumed for.[171] Treating this as a question of construction is perhaps the ideal way of explaining language about 'legitimate interests', assessed from the contractual language and objective contemplation. By this principle a commercial lease may allow only recovery of pecuniary damages, while residential leases may allow recovery as a substitute for general and amenity damages.[172] Such contracts have legitimate expectations beyond financial interests. They may promote personal life and autonomy, bonds of community and socially conscious property relationships.[173] This may explain rare cases of accounts of profit: non-commercial contracts ought to allow an extension into gain-based remedies without being expressly contracted for.[174] By contrast, commercial

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[167] *Robinson v Harman* 1 Ex Rep 850, at 855.

[168] *Addis v Gramophone Co Ltd* [1909] AC 488 (HL); Andrew Burrows *A Restatement of the English Law of Contract* (Oxford University Press, New York, 2016) at 127.

[169] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [27] per Elias CJ dissenting, at [191] per McGrath J; at [161] per Tipping J; D Winterton, "Money awards substituting for performance" [2012] LMCLQ 446 at 447

[170] See *Morris Garner*, above n 47, at [30] per Lord Reed; see generally Simon Connell and Tim Wilkinson, "Remedies when a tenant profits from unlawful sublease on Airbnb: Nice Place Property Management Ltd v Paterson" (2020) 20 OUCLJ (forthcoming).

[171] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2009] AC 61 at [22]-[23] per Lord Hoffmann

[172] Even on this account, substituted performance may not be narrow: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272.

[173] *Choice Theory*, above n 149, at 58-61 and 122-123.

[174] *Choice Theory*, above n 149, at 106.

contracts may not have gain-based remedies but there is a greater willingness to enforce specific performance where a contract is not for personal service.[175] This reflects that damages are preferable to making a person do something against their will, which reeks of servitude.[176] Thus categorisation does work in the development of contractual remedies: the nature of the expectation and hence types of recoverable loss depend on the contracts' categorisation. This better explains variation than Parke B's monist expectation damages rule.

D The Autonomy Theories in action

1. The Familiar Examples

Consider the examples of approaches from Chapter 1, *The Reborn* and *The Moorcock*.

The Reborn looked primarily to the contractual documentation.[177] It is an exercise in reading the papers, working out what the overall purpose of the contract is and seeing if anything was necessarily required to achieve that. The role of the factual context is to assist in interpretation of the ordinary words, and to see if there is a gap.

The Moorcock looked primarily to the *nature* and *categorisation* of the contract.[178] The words are subordinated to the factual context and overall purpose of the agreement. Viewed objectively, it must have been presumed that risk would fall on the party with the better knowledge. Business efficacy of that type of contract is achieved.

The Reborn reflects a closely textual approach to interpretation. Because contracts are, and can be, highly varied they *both* represent autonomy theories. The sophisticated textual contract, per *Wood v Capita Insurance Services*, ought to be read on its own terms.[179] Any contract of a defined category by the same rules ought to be read as an ordinary and predictable member of its category. Again, *Wood v Capita* mandates contextualism where that is how the contract naturally demands to be read.[180] The certainty of the category of contract matters more than the particular wording.

However, the elements of policy, fairness and predictability of categories in Choice Theory shows *The Moorcock* may be a better theoretical fit with it. If not in specially crafted high value commercial transactions, then at least it fits with Choice Theory's approach to default terms. *The Moorcock*'s identification of a class and the ordinary consequences of this fit better with the certainty of category-terms. The emphasis on policy

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[175] *Restatement*, above n 168 at 150-151.

[176] Saprai, above n 161, at 138.

[177] *The Reborn*, above n 21.

[178] *The Moorcock*, above n 20.

[179] *Wood v Capita Insurance Services* [2017] UKSC 24, [2017] AC 1173 at [13].

[180] At [13].

factors rather than pure promissory morality in republicanism make it especially suitable. While *Choice Theory* emphasises both individual agreement and default terms, the latter is usually more important under it.

2. Limits to Autonomy

Autonomy-based theories acknowledge limits on autonomy. Given TORN clauses are justified as defaults on the basis of autonomy, this is the greatest hurdle once these theories are accepted.

Republicanism limits domination: the oppression of one party by another. However, sophisticated commercial parties do not need to be protected from domination in the same way that citizens do. Therefore, indefinite commercial contracts that lock legal bodies are less of a concern. TORNs may not need to be a default in contracts between two sophisticated commercial parties. However, *Ward* and *Staffordshire* are about this situation.[181] The judicial instinct against perpetual contracts and in favour of protecting the freedom to exit and contract again is very strong.

Choice Theory promotes people retaining their autonomy. This is about individuals' retaining their own powers rather than stopping imbalanced relationships. This may in practice amount to the same thing. There are forms of limiting autonomy which facilitate autonomy by expanding future options.[182] There are times when limiting autonomy is justified by reference to other values of furthering community, policy or efficiency.[183]

E Autonomy and TORNs

1. Introduction

This section applies autonomy theories to support TORN clauses as default rules in indefinitely ongoing contracts. This relies on the explanatory and predictive power of autonomy theories, and the failure of other approaches. The discussion above has shown the advantages of autonomy theories. They adequately describe and fit the law. They provide normative explanations, which tend to fit well with accepted contract law reasoning around autonomy.

Autonomy theories support sensible developments in contract law. It is therefore a productive theory which generates promising results. Given the unhelpfulness of promissory theories and the radical changes required by commercial minimalist contract theories, autonomy theories are the best theoretic guide for now.

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[181] *Ward*, above n 2; *Staffordshire*, above n 52.

[182] At 85.

[183] At 85.

The core of autonomy theories is that the value of autonomy can be expressed in multiple ways depending on the type of contract. They mandate distinct approaches in each type of contract rather than completely universal rules of contract law.[184] This is because the policy and normative concerns are specific to each type. Formalities that may be necessary for a commercial conveyancing are hopelessly implausible for buying domestic goods, and in fact sap the attention and freedom of individuals.[185] Saprai holds legal bodies do not need the same protection from domination as citizens.[186] Choice Theory holds that individual categories of contract should have rules that serve their unique array of values and purposes. Moreover, although autonomy should generally be protected at all costs there are areas where autonomy can be limited for other important goals and values.

2. Autonomy as applied

Ordinary cases in ordinary categories

TORN clauses promote and protect future autonomy. They assist the ability to contract again. They can allow leaving burdensome and inefficient contracts.

Choice Theory expressly refers to unilateral rights of terminating ongoing contracts.[187] Having a single way of achieving this goal rather than searching for the factually singularly apt term increases efficiency and certainty. This promotes society having consistent and reasonable expectations of the social practice of ongoing contracts. Choice Theory therefore best explains why a category-term is preferable to implication in fact analysis that requires analysis of singular aptness. It therefore links in and supports my analysis in the caselaw. This further supports Choice Theory as having good fit and predictive power as a legal theory.

Similarly, an unending obligation that cannot be unilaterally ended is akin to slavery. It limits present and future autonomy without freedom to escape. This is anathema to republican contract law. While this may be different for legal versus natural persons, it also contains an account of categorisation that may result in similar effects. This has some support in the New Zealand caselaw. *Power Co Ltd v Gore District Council* found the state's ability to step in was a reason to find a contract was perpetual rather than indefinite, despite analogous facts and wording to *Staffordshire*.[188] Fundamentally, contract law

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[184] *Choice Theory*, above n 149, at 69-70.

[185] *Choice Theory*, above n 149, at 81 .

[186] At 99.

[187] At 85. *Choice Theory* draws on American law but it is aimed at contract law generally, not even distinguishing between civil law and common law.

[188] Above n 124.

should protect individual autonomy. There are wider concerns of politics, policy and efficiency for larger bodies.

For larger contracts of public concern and political interest, the prospect of legislative solutions may be enough. Public and political deliberation may be superior for issues that have public and political aspects. Republican theory favours subjecting public matters to political control by the citizenry.[189] Freedom from dominance matters for citizens as natural people, which includes their political control of public legal entities. It would therefore mandate TORN clauses where there is no political control of a contract. Treating TORNs as a mere default presumption would risk locking natural people into endless objectionable contracts of dominance. There would likely be an exclusion for contracts of public concern. Public powers and properties enable dominance over people. The traditional question of whether the 'public' actor is sufficiently part of the state misunderstands how state powers can be 'private' and how others are tools of political dominance.[190] This compromise position protects both parties to private transactions, and natural people who may be dominated by contracts in public contracts.

TORN clauses are sometimes treated as flowing from the objectively probable intention of the parties not to be permanently bound. Terms implied-by-law are justified as default legal rules of relationships. TORNs indeed may be the sort of implied term that comes close to a mandatory rule of law. Under these autonomy- and category-based theories, both are true. TORNs are necessary incidents of indefinitely ongoing contracts. People typically do intend to be bound by that mix of values and default rules. They had meaningful choices if they wanted something else. This reconciles terms implied-by-law analysis with general objective contract construction. It reflects the scepticism of "tabulated legalism" common in implied terms discussions.[191] It shows TORNs are both a valuable rule of law, and effect intentions of the parties, without confusing their basis as category-terms.

3. Are there exceptions to the TORN category?

There might be indefinite contracts where TORN clauses are inappropriate. TORNs should be generally implied to protect autonomy, but sometimes autonomy is outweighed by practical considerations. Sufficiently strong demands from other values should stop it being

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[189] At 57.

[190] Morris Cohen "Property and Sovereignty" (1927) 13 Cornell Law Rev 8 at 11-12 . This point is politically controversial and difficulty, so I will park the discussion of how republican theory would distinguish private vs public contracts.

[191] *Vickery v Waitaki* [1992] 2 NZLR 58 (CA) at 64 per Cooke P.

implied in the name of autonomy. Similarly, contracts where TORNs would not promote autonomy ought not to have them.

There may be ongoing contracts where TORN clauses ought not to be implied. For example, parties can make pre-relationship agreements to contract out of the normal rules for post-separation division of relationship property. These are indefinitely ongoing but conditional obligations about how parties will allocate property after a relationship. These apply to marriages, civil unions and de-facto relationships. They take effect under the Property (Relationships) Act, s 21.[192] The purpose of the contract and statute would be undermined by allowing reneging on a promise that induced a further romantic relationship based on certain economic allocations. Additionally, rights of escape and challenge are contained within at s 21J.[193] There is no need, and no room, for TORN clauses in that category of contract. It is a perfect case where values of community, trust and autonomy preclude TORNs.

The feminist aspects of Saprai's non-dominance rule mean that backing out unfairly of the arrangement is likely to be oppressive and disallowed.[194] This would be based more directly on policy concerns around imbalances of power than Choice Theory's purist basis of maximising autonomy. Autonomy, as well as other concerns such as fairness between the parties, undermine family property law's policy purpose of distributional justice.[195]

4. Conclusion

Ongoing contracts fall into categories where TORN clauses ought to be implied. While there are exceptional categories where that is inappropriate, that turns on their specific purpose.

F Conclusion

The best theories for the development of the law support the category-term approach to TORN clauses. These fit with and support the caselaw reasoning and outcomes, the confused dicta in *Ward Equipment* aside. Additionally, the category-term approach to TORN clauses is consistent with the developing scope of terms implied-by-law.

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[192] Property (Relationships Act) 1976, s 21.

[193] Property (Relationships Act) 1976, s 21J; s 21G preserves common law and equitable challenges to the contract.

[194] At 80-81.

[195] JJW Herring, "Why Financial Orders on Divorce Should Be Unfair" (2005) 19 International Journal of Law Policy and the Family 1.

Conclusion

G TORNs

Termination on reasonable notice clauses are almost invariably implied into contracts once they are categorised as indefinite, not perpetual. This is a general policy of the law. Implication-by-law best explains this as a default rule to protect party autonomy. This accords well with the caselaw. Other alternative explanations for the ubiquity of TORN clauses simply do not explain why TORNs are a singular-response to this situation. Alternatives rely more on expressions of intention which vary greatly between contracts, which would undermine the consistency TORNs are implied with. The category TORNs are implied into must simply be indefinite and ongoing: no other identifiable category, such as good faith, is adequately broad and certain enough to explain the consistent caselaw. There will be categories of exceptions in practice, where TORNs would undermine autonomy or the contracts' purpose.

To the extent the recent case *Ward* disagrees with my view, it is merely obiter. It also misinterprets older cases, did not hear argument on implication-by-law and cited a misleadingly narrow selection of commentary. Its authority is therefore restricted to the idea of a contract with a 'natural life'.

H Implications for the future of contract law

There are three major implications of my approach for contract law. Terms implied-by-law should do more, other approaches to construction should do less, and the success of the new autonomy theories means they should play a larger role in developing contract law.

1. The expansive role of terms implied-by-law

The expansion of interpretation and implication-in-fact made academics think rectification was obsolete. The subsequent retrenchment returned unique space to rectification to justify its continual existence. *Belize Telecom* appeared to briefly give a unified account of interpretation, implication-in-fact and implication-by-law. The comparative disinterest in implication-by-law meant this was not always appreciated. However, terms implied-by-law have returned to policy and principle-based default terms for particular categories of contract. The current position is that implication-by-law expresses default rules of law. Given the retrenchment of more malleable and expansive concepts of construction based on party intention, resort to default rules gives judges more scope to adjudicate fair outcomes. The upshot of this is policy arguments are more important, because these cases are important precedents in a way implication-in-fact cases are not. This sets the scope for categories and for identifying the nature of contractual relationships. This is because these

terms arise from the facts and nature of the relationship, not the phrasing and gaps in the contractual scheme. This promotes courts having a greater role in evaluating the substance and policy concerns in contract cases. This contrasts the interpretivist view where giving effect to the agreement and its purpose was dominant.

2. Limiting the role of intention and construction

The opposite implication of expanding the role of default rules is limiting the role of intention. It was over ambitious for interpretation to be reduced merely to ascertaining objective intention. There is a variety of principles and policy factors that weigh in on interpretation. Interpretation and implication-in-fact do not need to explain everything, when predictable defaults can do that just as well. Additionally, the fascination with *Belize Telecom* and different standards of terms implied-in-fact has not solved any practical issues in the law of implied terms.

3. Favours new approaches to legal theory

A standard assumption of contract law is that freedom of contract is maximised by control to vary the terms. This is the case under the so-called monist theories, like Morgan's minimalism. However, a renewed emphasis on default rules, autonomy and policy in the new autonomy theories of Sapriah's republicanism and Choice Theory challenges this assumption. Instead, giving a wider range of stable, predictable default types of contract maximises autonomy.

Theories are supported by fitting with, predicting and justifying doctrinal developments. On this basis, the autonomy theories and especially Choice Theory gain considerable support. The further consequences of this could be quite substantial: Choice Theory has considerable implications for general approaches to interpretation, objectivity and remedies. It would push away from a monist concept of freedom of contract and create more demarcated categories with their own default rules and values.

This dissertation was also sceptical of the value of good faith contracts. While they have some value in promoting cooperation in a way standard commercial contracts do not, they may need to be further demarcated into subcategories. They reflect a greater requirement for substantive cooperation rather than reliance on rights. There should be types of contracts that suit this need.

I Parting Thoughts

The development of individuated categories of contract can reconcile the tension between rules-based and intention approaches in contract law. Sufficiently certain categories would be rules-based but parties would know perfectly well what they were getting into. Hard rules may therefore be the best way of facilitating autonomy. Similarly, the rules-based

approach to TORNs responds to the intentions of whether the party should be perpetual or merely indefinite. This may require judges to evaluate the substance of an agreement rather than just interpret text due to the need to understand the nature of the contract. If anything, default rules and the overall nature of the contract are probably more predictable than the vagaries of drafting. The benefits of looking to a contract's substantive nature rather than precise terms may make contract more predictable in practice. It may be that the retrenchment of expansive interpretation and implication-in-fact combined with new autonomy theories leaves more room for terms implied-by-law.

The convergence of new theoretic approaches with expanded doctrinal space for default rules based on policy and principle may lead to a new approach in construction. Transparency about the roles of text for interpretation, purpose for implication-in-fact, and wider factors for implication-by-law may clarify the recent controversial and difficult caselaw construction. I have sketched a path to achieving this using the example of TORNs. While 'tabulated legalism' of rules may be imperfect, so is justifying all contractual obligations as objectively intended. Contract doctrine is in tension between predictable rules and effecting intentions. A workable synthesis begins with transparency. My reinterpretation of 'interpretivist' TORN caselaw as a rules-based default with justified by principle shows how this can work in practice.

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