

expressly stated in the agreement. The agreement does not contain any such term.

[42] Where, however, an agreement is silent on such a term, a party may nonetheless seek to rely on an implied term to the same effect. In this case it has not been pleaded that any such term could or should be implied into the agreement. In the absence of any allegation that any such term should be implied in my view it would be improper for the court of its own motion to imply such a term. And the court refrains from so doing.

[43] I therefore find that the Suttles have not established on the pleadings that it was a fundamental term of the agreement that lots 1 and 2 should both face South on the public road.

Was there a unilateral variation of the agreement?

[44] Counsel for the Suttles submits that System Sales unilaterally varied the agreement by substituting the SSL Plan admitted into evidence by consent and marked Exhibit "SSL 2(b)" for the Suttle Plan thereby changing the orientation of the lots so that only one lot faced South adjoining the public road and reducing the land (excluding road reserve and road) contained in both lots by showing the entire right of way to the