FOUNDATIONS SERIES

LAW OF CONTRACT

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LAW OF CONTRACT

7.4.2 Terms implied by custom

It is, of course, possible that terms may be implied into a contract by way of custom or trade usage. In ***Hutton* v *Warren*** (1836) 1 M & W 466, a tenant proved, by virtue of local custom, that on quitting in accordance with the notice issued by the landlord, he was entitled to an allowance for seeds and labour he had expended on the land.

7.4.3 Terms implied as a matter of law

By the courts

Objective 3

So far we have seen that terms implied as a matter of fact are based on the idea that such a term emanates from the common implied intention of the parties to the contract. Terms implied by law are obligations that arise within the contract irrespective of the intentions of the parties or the facts of a particular case. Here terms are implied where the law wishes to insert common terms into certain categories of contracts so that once a term is implied by law and the courts find for its existence in the particular circumstances of a case, then that case becomes the authority for the inclusion of the term in all subsequent cases in contracts relating to that category. An important example of this process arose in the following case.

Liverpool City Council v *Irwin* [1976] 2 All ER 39

The Council had let flats in a tower block to the tenants. While the tenancy agreements imposed obligations on the tenants, they were silent as to the obligations of the Council as regards the maintenance of the building. Lifts regularly broke down and rubbish chutes blocked with the result that the appellant decided to withhold his rent as a protest against the Council's failure properly to maintain the building. The Council brought an action to seek possession of the appellant's flat, and he counter-claimed that the Council were acting in breach of an implied obligation properly to maintain the building. The term could not be implied as a matter of fact since it did not satisfy the officious bystander test nor was it reasonably necessary to give business efficacy to the contract. However, the House of Lords implied the term as a matter of law as being a necessary incident of all tenancy agreement in which tenants are granted the use of common stairways, corridors, lifts etc. There was a duty on a landlord 'to take reasonable care to keep in reasonable repair and usability' the common areas of the building, such as lifts, stairways, corridors and rubbish chutes, and so on. Lord Cross thought that the test to be applied in making a decision to imply a particular term into all contracts of a specific type was whether in the general run of such cases the term in question would be one which it would be reasonable to insert.

In order to imply a term as a matter of law the courts will have regard to duties which prima facie occur in certain types of contracts. The courts will therefore often be guided by matters of policy that affect particular types of contracts and to this extent issues of fairness and reasonableness may be considered in whether to imply a term of not. It was suggested in ***Scally* v *Southern Health and Social Services Board*** [1992] 1 AC 294 that the test of implication of a term should be one of necessity not reasonableness. Care needs to be exercised with this expression since it is not the same as that where terms are implied as a matter of fact as seen above. There the term is implied as necessary to give business efficacy to the contract, while

here the term is implied as being necessary to a particular and definable type of contractual relationship. For instance, terms implied by law commonly arise in contracts of employment, for example, a term that an employee will be faithful to the employer and obey reasonable instructions. On their part, employers impliedly promise to pay the employees' wages and treat the employees with the respect necessary to maintain the trust and confidence required in the relationship as in ***Malik* v *Bank of Credit and Commerce International SA*** [1997] 3 All ER 1. Here the term is not implied as necessary to give business efficacy to this particular contract but was implied as it was a necessary aspect in any contract of employment.

In ***Crossley* v *Faithful & Gould Holdings Ltd*** [2004] 4 All ER 447, the Court of Appeal rejected an argument that a contract of employment should contain an implied term that an employer should take reasonable care of an employee's economic well-being. The court considered that a test of 'necessity' in considering whether or not to imply standard terms into contracts of employment was not always helpful. The court considered that it was better to recognise that the existence and scope of such terms raise questions of 'reasonableness, fairness and the balancing of competing policy considerations'. Certainly this approach was met with approval by Lady Hale in ***Geys* v *Société Générale*** [2012] UKSC 63.

Other examples of terms implied by law can be seen in contracts for the supply of services it was held in ***Wong Mee Wan* v *Kwan Kin Travel Services Ltd*** [1995] 4 All ER 745 that if a tour operator agrees that certain service will be supplied, whether by it or others, a term will be implied that those services will be carried out with reasonable care and skill. Similarly in agency contracts there is an implied fiduciary duty: ***Imageview Management Ltd* v *Jack*** [2009] EWCA Civ 63.

The fact that many contracts contain similar or identical terms does not necessarily mean that it is appropriate to imply a term by operation of law. In ***Ashmore* v *Corporation of Lloyd's (No 2)*** [1992] 2 Lloyd's Rep 620, it was held that imply a term there had to be a broad category or relationship, such as employee/employer, principal/agent, landlord/tenant in which it is possible to say that certain obligations could be regarded as 'typical' for a term to be implied.

Principle

The courts may imply a term as a matter of law as a matter of policy into contracts of a particular type where the term is a 'necessary incident' of this type of contract and where it is reasonable to imply the term. Note ***Crossley* v *Faithful & Gould Holdings Ltd*** where the Court of Appeal considered that it was perhaps better to recognise that the existence and scope of such terms rested on questions of 'reasonableness, fairness and the balancing of competing policy considerations'.

7.4.4 By statute

Objective 4

Over the years obligations which have been formally implied into contracts by the courts have very often been given statutory authority. It is, of course, impossible to trace all such instances and therefore our discussion of terms implied by statute is limited to, *inter alia*, contracts for the sale of goods and the standard of care in relation to contracts for services. It must be borne in mind that terms implied in such circumstances are a mere example as to legislative intervention.

The Consumer Rights Act 2015

Introduction

The basic common law position as regards sale of goods contracts is one of 'buyer beware' or 'caveat emptor', however, this principle has now largely been subsumed by way of implied terms contained within a body of legislation principally the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Both Acts have been subject to amendment by the Sale and Supply of Goods Act 1994. Originally these Acts applied to most contracts for the sale of goods and services, though their application was more limited in relation to sales in the course of a business between businesses or where a contract of sale was otherwise entered into by a person dealing not as a consumer. In such situations such terms, subject to the Unfair Contract Terms Act 1977 (see Chapter 8), were either incapable of being excluded or limited or were capable of being excluded or limited by the express agreement of the parties and subject to the Court being satisfied that the exclusion or limitation satisfied the test of reasonableness. Thus in relation to consumer contracts the ability of sellers to exclude the terms implied by these pieces of legislation was prevented.

In relation to consumer contracts, the legislative intervention has now been subject to radical reform in that the bedrock of consumer rights is now contained within the Consumer Rights Act 2015 ('CRA'). This change became necessary as the law relating to consumer protection became extremely confused, fragmented, and unnecessarily complex as a result of various pieces of legislation by way of Acts of Parliament, Regulations and the onset of European Directives and not least the fact that the law had failed to keep up with technological advances. The effect of the piecemeal nature of the various legislative enactments has meant that there developed overlapping pieces of legislation that contain significant inconsistencies. The CRA is therefore is designed to enact one piece of legislation that will consolidate the current legislation on the rights of consumers in relation to goods, services, digital content and the law relating to unfair contract terms in consumer contracts. The CRA also implements certain European Directives such as Directive 99/44/EC of the European Parliament and Council on aspects of the sale of consumer goods and associated guarantees, Directive 93/13/EEC of the Council on unfair terms in consumer contracts and some provisions of Directive 2011/83/EU of the European Parliament and Council on consumer rights. The CRA is divided into three parts with Part 1 dealing with goods, services and digital content; Part 2 dealing with unfair contract terms; and Part 3 dealing with matters such as trading standards regulations and competition regulation, which is beyond the remit of this book. The CRA will also apply to the financial services sector, though again this is outside of the remit of this book.

As we have noted, the intention behind the CRA is to consolidate and bring together consumer rights so as to harmonise the existing provisions to provide a single approach to consumer contracts entered into between businesses and consumers ('B2C'). For other types of contracts, such as business to business ('B2B') and consumer to consumer ('C2C'), the existing legislation will remain in force. The CRA will therefore have a different impact depending on the scope of the existing legislation, thus, for example, in the Supply of Goods and Services Act 1982 the business to consumer provisions will now be found in the CRA, however, the 1982 Act will be amended so that it only covers B2B and C2C contracts. In the Sale of Goods Act 1979 B2C contracts will mainly be supplanted by the CRA, however, matters, such as when the property in the goods passes, will remain within the 1979 Act. B2B and C2C contracts for the sale of goods will remain within the 1979 Act. The Supply of Goods and Services Act 1982 will be replaced by the CRA in the case of B2C contracts

and the Act will be amended so that it only relates to B2B and C2C contracts. The Sale and Supply of Goods Act 1994, which amended the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, will be replaced by the CRA. The Sale and Supply of Goods to Consumer Regulations 2002 are revoked since the CRA implements Directive 99/44/EC, from which the 2002 Regulations are derived.

Clearly therefore the CRA makes significant changes to the overall structure as to how consumer rights will be dealt with under the legislative regime and at the same time harmonising the different national and EU provisions. The CRA therefore will show up a sharp divergence with respect to implied terms in consumer and business contracts. It is, however, useful at this juncture to remind ourselves that in relation to (B2C) contracts the CRA will apply; while in B2B and private C2C contracts, or other contracts falling outside the CRA, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 will continue to apply. It is therefore vital that a contract is correctly identified from the start since this determines the appropriate legislative regime.

Definitions within the CRA

Part 1 of the CRA applies where there is an agreement between a trader and a consumer for the trader to supply goods (Chapter 2), digital content (Chapter 3) and services (Chapter 4) if the agreement is a contract. It is of no consequence how the contract is made whether oral, written or implied by the conduct of the trader and the consumer or if there is a combination of these. It should be noted that each chapter will apply even if the contract covers something covered by another chapter so that if there is a mixed contract, for instance, if the contract is one for goods and services or services and digital contract, the CRA will still apply.

The starting point for determining whether a contract falls within the CRA is found within ss. 1 and 2 of the CRA. Section 1 provides where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract.

Section 2 provides key definitions of certain terms within the Bill and the intention here is to align these terms across the broad spectrum of consumer law. Section 2(2) provides that a 'trader' means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. A 'person' here includes not just natural persons but also includes companies, charities and arms of government. Thus if these types of bodies are acting for purposes relating to the trade, craft or profession they will fall within the definition of 'trader'. It will be noticed that 'not-for-profit' organisations such as charities, mutual or co-operatives also fall within this definition so that if a charity shop is selling clothes, for instance, the Act will apply to these types of organisations.

Section 2(3) defines a 'consumer' as meaning an 'individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession must prove it (s. 2(4)). This definition is important since the definition of a 'consumer' has previously not been consistently defined across the previous legislative framework. This change is consistent with the recommendations of the Law Commission's 2013 Unfair Terms in Consumer Contract: Advice to the Department of Business and Innovation and Skills March 2013 in which it was stated:

> We recommend that the definition of a consumer should be consistent across the new consumer legislation being considered by BIS [Department of Business, Innovation and Skills].

> The new definition is likely to be narrower than the definition of 'dealing as a consumer' in UCTA, but the loss of protection for businesses will be negligible. A consistent definition will introduce much needed simplification.

In the Committee Stage in the House of Commons there was an attempt to include 'micro-businesses' i.e. those with fewer than ten employees, however, this was rejected by the Government in that, following the wide consultation about the Bill, it was considered unreasonable to put such business on the same footing as consumers. The Minister stated that the Bill was designed to relate to business-to-consumer relationships and that the regulations implementing the CRD should define 'consumer' in the same way. This amendment while pressed to a division in the Committee Stage was defeated.

The main restriction within s. 2(3) is that it only applies to individuals, i.e. natural persons, who 'are acting for purposes wholly or mainly outside the individuals' trade, business craft or profession'. The effect therefore is that if a person buys a car that is primarily for private use outside of the purchaser's business, then the fact that he uses it for some business purposes will not preclude that purchaser from being a consumer. On the other hand, if the purchaser buys a computer for use in his business but nevertheless uses it for some private purposes, then this will not fall within a purchase by a consumer. This situation encompasses the problem associated with cases such ***R&B Customs Brokers Co Ltd*** **v** ***United Dominions Trust Ltd*** [1988] 1 All ER 847 and ***Stevenson*** **v** ***Rogers*** [1999] 1 All ER 613. The Law Commission in its Consultation Paper No 166 Unfair Terms in Contracts considered that a person who makes a contract to obtain goods or services 'related to' even though not 'in the course of' his business should be treated as dealing as a business and not as a consumer. This approach seems to tie in more consistently with the decision in ***Stevenson*** **v** ***Rogers*** so that a wide interpretation has been adopted in terms of when a person is acting as a consumer. There is good reason for this since it may well be impossible for a trader to be able to distinguish between a person acting in the course of a business or as a consumer whether a company or an individual. The fact that the definition of a consumer requires that he or she must be an individual automatically eliminates the possibility of a company falling within the protection. Further to gain the protection, the individual must be able to demonstrate that his purposes are wholly or mainly outside of the individual's trade, business, craft or profession.

Certain types of contracts are excluded from the definition of a consumer so that under s. 2(5) a person is not a consumer in relation to a sales contract:

> . . . if—(a) the goods are second hand goods sold at public auction, and (b) individuals have the opportunity of attending the sale in person.

By s. 2(7) 'business' includes the activities of any government department or local or public authority. By s. 2(8) 'goods' means any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity, while 'Digital content' means data which are produced and supplied in digital form.

It should be noted that the CRA does not talk in terms of 'implied' terms but instead it states that certain obligations are 'included'. The effect is the same so that even if the parties do not expressly include the terms they are included in any event. It is also noticeable that the CRA does not distinguish between contracts of sale and contracts to supply that gave rise to the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. While the Sale of Goods Act 1979 applied wholly to contracts of sale, the 1982 Act applied to contracts for the transfer of ownership of goods. Such transfers amounted neither to contracts for the sale of goods nor to hire purchase agreements and thus applied to contracts for the exchange of goods, such contracts not amounting to contracts for the sale of goods because

of the lack of a money consideration. Both types of contract now fall with the expression 'supply' within the CRA.

Another important feature of the CRA is that it does not designate the terms included in B2C contracts as conditions or warranties. The result of this is that effect of any breach is now determined by the provisions of the CRA rather than the common law. The distinction between a condition and a warranty is discussed more fully later in this chapter.

7.4.5 Terms implied in contracts within the CRA

As we have noted, the intention behind the Consumer Rights Act is to consolidate and bring together consumer rights so as to harmonise the existing provisions to provide a single approach to consumer contracts entered into between businesses and consumers ('B2C'). As we will see for other types of contracts, such as business to business ('B2B') and consumer to consumer ('C2C'), the existing legislation contained within the Sale of Goods Act 1979 and the Supply and Goods and Services Act 1982 will remain in force so that there will now be a sharp divergence with respect to implied terms in consumer and business contracts.

7.4.6 Consumer contracts for goods, digital content and services – Part 1

Chapter 1 The background and application of Part 1

This Part applies where there is an agreement between a trader and a consumer for the trader to supply goods (Chapter 2), digital content (Chapter 3) and services (Chapter 4) if the agreement is a contract.

As already indicated s. 2(2) provides that a 'trader' means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf. A 'person' here includes not just natural persons but also includes companies, charities and arms of government. Thus if these types of bodies are acting for purposes relating to the trade, craft or profession, they will fall within the definition of 'trader'. It will be noticed that 'not-for-profit' organisations such as charities, mutual or co-operatives also fall within this definition so that if a charity shop is selling clothes, for instance, the Bill will apply to these types of organisations.

To reiterate, s. 2(3) defines a 'consumer' as an 'individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession must prove it (s. 2(4)).

Chapter 2 Contracts for the supply of goods

In Chapter 2, a contract for a trader to supply goods to a consumer applies only if the contract is one of the following:

1. a sales contract;
2. a contract for the hire of goods;
3. a hire-purchase agreement;
4. a contract for the transfer of goods.