

NO. 1 BESTSELLING REVISION SERIES

CONSUMER AND COMMERCIAL LAW

6TH EDITION

JUDITH TILLSON

 Pearson

LawExpress

LawExpress

**CONSUMER AND
COMMERCIAL LAW**

Henry Kendall & Sons v William Lillico & Sons Ltd [1969] 2 AC 31

Facts

Kendall bought animal feed for pheasants. Unfortunately, the feed was contaminated with groundnut extract that proved fatal to the pheasants but not, however, to other livestock.

Legal principle

This feed was merchantable, because it was only *unfit* for *one* of its purposes.

Analysis

If the buyer had asked if the feed was suitable for pheasants and the seller had affirmed that it was, then this case might have been decided differently as it would have fallen within s. 14(3).

Fitness for purpose for which goods of the kind in question are commonly used

Goods did not then have to be fit for all the purposes for which they were commonly used but it would suffice for them to be fit for, at least, *one or more of their customary purposes*. Following the 1994 amendment, s. 14(2B)(a) seemed to imply that goods must be fit for *all the purposes* for which goods of that type are commonly used, irrespective of the contract being a consumer or commercial transaction.

Exam tip

Be aware of the subtle change in interpretation of s. 14(2B)(a). The courts, generally, seem to be showing a more protective attitude towards those who buy defective products in the course of a business.

Appearance and finish

The general approach to what extent appearance and finish play a part in assessing satisfactory quality is laid out in *Rogers v Parish (Scarborough) Ltd* (1987).

Rogers v Parish (Scarborough) Ltd [1987] QB 933

Facts

Rogers paid £16,000 for a new Range Rover, which suffered from a number of *minor defects* to the engine and bodywork. After six months' use, the claimant sought to reject the vehicle, on the grounds of 'unmerchantable quality'.



Legal principle

The car was not merchantable, owing to the cost and expected quality of the vehicle. The owner also had the right as well to take pride in his car's appearance.

Analysis

Hence a range of minor defects in a luxury item was deemed to make the car unmerchantable.

Freedom from minor defects

The question as to what constitutes a minor defect that would render a product's quality unsatisfactory is one of degree. A minor defect on a luxury item might make it unacceptable. Even then, much will depend on the nature of the defect in respect of other statutory criteria such as a product's safety or inherent abnormalities. In *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002, the tendency of a car to 'deviate' to the nearside was held to be the result of its 'camber insensitivity' rather than abnormal steering, which was not defective enough for it to be deemed unsatisfactory.

Safety and durability

Safety and durability will be assessed not only according to the intrinsic quality of the goods, but also according to external factors that will probably be due to how the goods have been used. That being so, it would be unlikely that a buyer of a well-used second-hand car could claim unsatisfactory quality, were the car to develop a defect shortly after purchase.

Exam tip

The assessment of satisfactory quality involves using an objective test as to whether a reasonable person would necessarily think the effects of a minor defect were sufficient to make the goods unsatisfactory. Use cases to illustrate just how the courts have applied this test, using the guidelines given in s. 14(2B)(a)–(e).

***Thain v Anniesland Trade Centre* (1997) SLT (Sh Ct) 102**

Facts

The buyer paid £2,995 for a second-hand car which was approximately five years old and had an odometer reading of 80,000. When the car developed a fault in the gearbox after two weeks that rendered it uneconomic to repair, the buyer pursued a claim.

Legal principle

The court held that it was sufficient that the car was fit for use on purchase and that in view of the age and price of the car, the buyer assumed a risk of breakdown at any time.

Analysis

This case shows that a buyer should have only reasonable expectations of the durability of a second-hand car.

Fitness for particular purpose

One may negotiate a sale knowing that certain goods are required for a particular purpose. Provision for such purchases is made under s. 14(3) SGA 1979.

Sale of Goods Act 1979, s. 14(3)

Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known –

- (a) to the seller . . . any particular purpose for which the goods are being bought, there is an implied condition that the goods . . . are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable . . . to rely on the skill or judgement of the seller . . .

Typically, this means that when a buyer asks the seller for advice on a particular use of goods, it is normally reasonable for the buyer to rely on the skill of the seller. There may be occasions, though, when it would be seen as unreasonable to rely on the seller's own skill or judgement as the following case exemplifies.

Jewson Ltd v Kelly [2003] EWCA Civ 1030

Facts

A property developer claimed that boilers he had bought to install in flats were unsatisfactory, because they did not work well in the flats. Although the property developer and the suppliers had discussed the suitability of the boilers for the flats, the property developer had not *relied* on the skill and judgement of the suppliers.

Legal principle

The suppliers were not in breach of s. 14(3) in this situation, since they had not been truly called on for their 'skill and judgement' by the buyers, who had not



3 Sale and supply of goods 1: Implied terms

relied on their expertise. Neither were they in breach of s. 14(2) because the boilers were not defective.

Analysis

It is interesting to note in this case that Clarke LJ referred to Lord Diplock's opinion in *Christopher Hill Ltd v Ashington Piggeries* [1972] AC 441 where he stated that a buyer does not have to rely on all aspects of the goods' fitness for a buyer's particular purpose; reliance may be partial only. Mr Kelly relied on Jewson only with regard to the 'extrinsic qualities' of the boilers rather than the suitability of their SAP ratings for the flats.

Exam tip

One of the important points that arises from the *Jewson v Kelly* case is the distinction between s. 14(2) and (3). Under s. 14(2B)(a) goods that are 'fit for all the purposes for which goods of the kind in question are commonly supplied' will be seen as satisfactory. The boilers in the *Jewson* case worked, although they were not up to the buyer's required standard. Under s. 14(3), once the purpose for using the goods is made clear to the seller, then the standard of the goods to be expected is higher. Take the opportunity to point out to the examiner that in the *Jewson* case, the buyer did not make it clear to the seller the specific purpose for which he required the boilers.

Particular purpose made known to the seller

Any purpose for which goods are bought does not have to be expressed to the seller, since it can be implied from the way the product is sold. When a buyer, for instance, enters a shop to buy something for everyday use, it is assumed that those goods will be fit for the purposes for which they are manufactured and displayed.

***Grant v Australian Knitting Mills Ltd* [1936] AC 85 (PC)**

Facts

After purchasing some woollen underpants, Dr Grant contracted severe dermatitis, on account of them being treated with a chemical that had not been properly rinsed out.

Legal principle

A breach of the implied terms of merchantable quality and fitness for purpose had occurred.

Analysis

As to their fitness for purpose, Lord Wright stated that it was implicit in Dr Grant's act of buying the underpants that he needed them for a particular purpose and in choosing to purchase them from the defendants he had relied on their skill and judgement in selecting the stock's wearable qualities.

On occasion, a particular purpose needs to be expressed by the buyer to the seller. In *Griffiths v Peter Conway Ltd* [1939] 1 All ER 685, the seller of a tailored Harris Tweed coat was not liable to the buyer who, on wearing it, also contracted dermatitis, as the buyer failed to make it known to the seller that she had abnormally sensitive skin.

Reliance

Still, the buyer must rely fully or partially on the seller's skill and judgement when buying a product for a specific purpose.

Ashington Piggeries Ltd v Christopher Hill Ltd [1971] 1 All ER 847

Facts

This case is about the composition of mink food that was made up using herring meal, which contained a compound toxic to mink but not to other animals. Because the suppliers knew the herring meal would be used to make food for mink, quite naturally, the buyers claimed that the meal was unfit for purpose.

Legal principle

Obviously the use of herring meal, sold as an ingredient for mink food, was unfit for this specific purpose.

Analysis

Take the opportunity to distinguish the *Ashington Piggeries* case from *Kendall v Lillico*, where it was determined that the food was of merchantable quality, because it fulfilled one of its common purposes of being food fit for animals. The distinguishing factor here seems to be that in the *Ashington Piggeries* case the meal was described as *mink* food, yet in *Kendall v Lillico* the product was *animal* feed.

Sale by sample: s. 15

Samples are often used in sales, but this does not necessarily indicate sale by sample. According to s. 15(1) SGA 1979, a contract of sale is a sale by sample where there is an

3 Sale and supply of goods 1: Implied terms

express or implied term in the contract indicating that it is so. In written contracts it is easy to establish a sale by sample, but in oral contracts the intent of the parties has to be fully determined. Once it has been established that goods are being sold by sample, s. 15(2) imputes two conditions:

- That the bulk will match the sample in quality.
and
- That the goods are free from any defects (making them unsatisfactory in quality) which would not be apparent on reasonable examination of the sample.

In *Drummond v Van Ingen* (1887) 12 App Cas 284, Lord MacNaghten, when describing the function of a sample, stated that ‘the sample speaks for itself’. Similarly, s. 13 states that when goods are sold by description they must, above all else, correspond with that declared about their content.

Don't be tempted to . . .

Be sure not to overlook the buyer's obligation to examine the sample. While s. 14 does not require the buyer to examine goods for satisfactory quality, s. 15(2)(c) makes such an examination of a *sample* obligatory. Once again, this is reinforced by s. 14(2C)(c), which allows the seller an *escape liability* for defects in samples that would have been apparent on reasonable examination of the sample.

Implied terms in contracts other than sale of goods

The implied terms in ss. 12–15 SGA 1979 have been extended into contracts of **hire purchase**, and supply of goods and services. The Supply of Goods and Services Act 1982 provides for three types of contract: contracts:

- for the transfer of goods (where goods are supplied with services).
- of hire.
- for services.

See the topic map at the beginning of this chapter for an outline of these implied terms.

The CRA 2015 has consolidated consumer rights for the supply of goods and services. Table 3.3 illustrates the reforms that have been introduced for the supply of services to consumers.