The Law Commission

Working Paper No. 71

Law of Contract

Implied terms in Contracts for the Supply of Goods

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Item I of the First Programme

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IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF GOODS

PART I INTRODUCTION

1. There are many kinds of contract under which goods are supplied by one party to another. The most obvious examples are contracts of sale and hire-purchase. There are, however, others, such as contracts of barter or exchange, contracts for work and materials (such as a building contract or contract of repair) and contracts of simple hire (such as the rental of a telephone or television set). Our main concern in this paper is with contracts for the supply of goods otherwise than by sale or by hire-purchase and with the terms to be implied in them; in Part IV, however, we consider certain problems of wider application.

2. The terms that are capable of being implied in contracts of supply are extremely diverse. They may be implied by custom or trade usage or by reason of prior dealings between the parties;[1] or they may be implied in the particular circumstances of the case to give the transaction business efficacy.[2] It

1 British Crane Hire Corpn. Ltd. v. Ipswich Plant Hire Ltd. [1975] Q.B. 303.

2 For a modern instance see Cannon v. Miles [1974] 2 Lloyd's Rep. 129; the defendant contracted to repair the plaintiff's motor-car but the Court of Appeal held that, in the particular circumstances of the case, a term was to be implied that the repairs should be done only if they would make the car saleable for more than the cost of repair.

would not be practicable to examine all the various terms that <u>might</u> in various situations be implied and we have not attempted to do so. In this paper we examine only the terms of a contract for the supply of goods that are or should be implied <u>as a matter of course</u>, unless the parties agree to their exclusion. Furthermore we are confining ourselves to a review of the implied obligations of the supplier in respect of the goods supplied; we are not concerned, in this paper, with the implied obligations of the other party.

The First Report on Exemption Clauses

3. The need for a review of implied terms in contracts for the supply of goods otherwise than by sale or by hire-purchase emerged when the two Law Commissions were working on exemption clauses.[3] In their first report on this topic[4] the Law Commissions concentrated on the terms implied in contracts of sale by sections 12 to 15 of the Sale of Goods Act 1893, being terms which are, by and large, for the benefit and protection of the buyer. They made recommendations for changes in the law under two main heads. First, they recommended a number of changes in sections 12 to 14 of the Sale of Goods Act 1893. Second, they recommended that the practice of contracting out of the terms implied by sections 12 to 15, as revised, should be controlled.

The Supply of Goods (Implied Terms) Act 1973

4. The recommendations of the Law Commissions' report were implemented by the Supply of Goods (Implied Terms) Act 1973. That Act made changes in those sections of the Sale of Goods Act 1893 which relate to implied terms as to title

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3 Item II of the Law Commission's First Programme (1965).

4 First Report on Exemption Clauses (1969), Law Com. No. 24; Scot. Law Com. No. 12.

(section 12), as to correspondence with description (section 13) and as to fitness and merchantability (section 14). The relevant sections of the Sale of Goods Act 1893, as amended, are set out in Appendix A.

5. The Law Commissions' recommendations on contracting out of the implied terms were implemented by other provisions in the same Act.

Their general effect was as follows:-

(a) exemption clauses in relation to the implied terms as to title (section 12 of the Sale of Goods Act 1893) should be void;[5]

(b) exemption clauses in relation to the implied terms as to correspondence with description, merchantability, fitness for any particular purpose or correspondence with sample (sections 13 to 15 inclusive of the Sale of Goods Act 1893) should be void in the case of a consumer sale[6] and, in any other case, unenforceable to the extent that it would not be fair or reasonable to allow reliance on them.[7]

6. The Law Commissions' first report was only concerned with implied terms in contracts of sale. However, the Supply of Goods (Implied Terms) Act 1973 also covers contracts for the supply of goods by hire-purchase and the redemption of trading stamps. As for hire-purchase, the provisions on

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5 Sale of Goods Act 1893, s. 55(3).

6 A sale of goods (other than a sale by auction or by competitive tender) by a seller in the course of a business where the goods (a) are of a type ordinarily bought for private use or consumption and (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business: Sale of Goods Act 1893, s. 55(7).

7 Sale of Goods Act 1893, s. 55(4).

implied terms, and on contracting out of them, follow the provisions on implied terms in contracts of sale, replacing different provisions found in the Hire-Purchase Act 1965. The sections relevant to the terms implied in contracts for the supply of goods by hire-purchase are set out in Appendix B. As for trading stamps, the 1973 Act imposes obligations on the supplier of goods on redemption of trading stamps that are to the same general effect as the supplier's obligations under a contract of sale or hire-purchase and are to take effect notwithstanding any terms to the contrary.[8]

7. The Supply of Goods (Implied Terms) Act 1973 came into operation on 18 May 1973 and applies to the supply of goods by sale or by hire-purchase (or on the redemption of trading stamps) made after that date.

The Second Report on Exemption Clauses

8. The Law Commissions made a second report on exemption clauses in 1975,[9] dealing with "provisions excluding or restricting any legal duty or obligation which is, or otherwise would be, owed by one person to another and which does not fall within the ambit of the Supply of Goods (Implied Terms) Act 1973".[10] Much of the second report is concerned with the control of exemption clauses in contracts for the provision of services. However the report also covers certain contracts for the supply of goods that are outside the ambit of the 1973 Act, namely contracts of barter or exchange, contracts for work and materials and contracts of hire.[11] An examination of the existing law revealed some uncertainty as to the precise

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8 Supply of Goods (Implied Terms) Act 1973, s. 16, amending Trading Stamps Act 1964.

9 Second Report on Exemption Clauses (1975), Law Com. No. 69; Scot. Law Com. No. 39.

10 Ibid., para. 4.

11 Ibid., Part II, paras. 12-35.

scope of the terms implied in such contracts, and a variety of differences between English and Scots law. Despite these difficulties the Law Commissions decided to make recommendations for the control of exemption clauses where goods were supplied under a contract other than one of sale or hire-purchase. They accordingly recommended that provisions excluding or restricting the obligations imposed by any implied term concerning the right to supply and the right to quiet possession of the goods should be subject to a reasonableness test whether or not the contract was a consumer transaction.[12] Further, they recommended that provisions excluding or restricting implied terms concerning correspondence with description or sample, quality or fitness should be made void in a consumer transaction and should be subject to a reasonableness test in any other transaction where the supplier entered into the contract in the course of a business.[13]

9. The Law Commissions made their recommendations, as above, without discussing whether the terms that were implied in such contracts in the existing state of English and Scots law needed modification, enlargement or clarification. Their report was concerned with the practice of contracting out of obligations, not with what those obligations should be. It now seems appropriate, at least so far as English law is concerned, that a thorough review of the scope and purpose of such terms should be made.

The scope of the paper

10. In this paper we consider the terms that are or ought to be implied in contracts for the supply of goods where the contract is governed by English law. We are not here concerned with Scots law nor with contracts that are governed by the law of Scotland.

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12 Ibid., para. 32(b). A "consumer transaction" is defined in para. 34(a) in terms very similar to a "consumer sale", as to which see n. 6, above.

13 Ibid., para. 32(c).

Contracts for the supply of goods

11. In confining our attention to contracts for the supply of goods we are, of course, omitting non-contractual transactions such as gifts and contracts concerned with things other than goods, such as land or choses in action. We should, however, explain at greater length what we mean by a contract for the supply of goods.

12. We intend first to include contracts for the supply of goods that are analogous to sale in that they usually involve the transfer of title from the supplier to the person supplied, but are, for one reason or another, outside the scope of the Sale of Goods Act 1893. These will be considered in Part II. We also intend to cover contracts for the supply of goods where the supplier gives the possession of the goods to the other person for his use and enjoyment without transferring title. The classic example is the contract of simple hire. Contracts of hire and contracts analogous to them will be considered in Part III. There are other kinds of contract under which possession of goods is given by one party to the other but which are not our present concern. These are, putting it generally, contracts under which goods are delivered for some purpose other than the use or enjoyment of the person who receives them. In this group are such contracts as pledge, deposit, agistment and carriage. This is not intended as an exhaustive list of the contracts that are excluded from our present study but as a citation of examples only.

13. Our main concern in this paper is with the implied terms that exist at common law in contracts of barter, work and materials and hire and with their translation into statutory terms. However, in Part IV, we consider whether there are gaps in the present law governing contracts for the supply of goods generally, including sale and hire-purchase, and, if so, how such gaps might be filled.

Remedies

14. Breach of an implied term in a contract entitles the victim of the breach to a remedy, unless it has been effectively excluded by agreement or is barred by special circumstances, such as illegality or the passing of a period of limitation. Where the contract is for the supply of goods, whether by sale, hire-purchase, hire or whatever, the remedies for breach are of two main kinds. First there is the right to sue the supplier for damages; second there is the right to reject the goods and to treat the contract as repudiated. Sometimes the person supplied with the goods has a choice of remedies; sometimes his only remedy is damages. The Sale of Goods Act 1893 divides implied terms in respect of the goods supplied into two categories; conditions, the breach of which entitles the buyer to reject the goods and treat the contract as repudiated,[14] instead of or as well as his right to damages, and warranties, the breach of which entitles the buyer to damages only.[15] A buyer may however lose the right to reject for breach of a condition by accepting the goods; he is then confined to his remedy in damages.[16] Terms in a contract of sale other than those implied by the Sale of Goods Act may be conditions or warranties or they may belong to a third category of "intermediate stipulations". Breach of such a stipulation entitles the buyer to reject the goods and to treat the contract as repudiated if the breach goes to the root of the contract; otherwise the remedy is damages only.[17] With contracts for the

14 Sale of Goods Act 1893, s. 11(1).

15 Ibid., s. 62(1).

16 Ibid., s. 11(1)(c).

17 Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. [1976] Q.B. 44, following Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26; Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, 998, per Lord Wilberforce.

supply of goods that are outside the Sale of Goods Act, for example hire or hire-purchase, it seems that terms may again be classified as conditions, warranties or intermediate stipulations, but it is not clear whether the right to reject arises, or, as the case may be, is lost, according to the same principles as in sale.

15. A case can be made for abolishing the categories of "condition" and "warranty" in relation to implied terms in contracts for the supply of goods, even where the contract is one of sale, and for treating all such implied terms as innominate obligations. However we do not intend to examine this idea further here. The whole question of remedies for breach of implied terms is, in our opinion, in need of review, but it is too large and controversial a topic to be covered conveniently in the present paper. We intend to make it the subject of a separate working paper which will be published in due course. In the present paper we do not propose to follow the precedent of the Sale of Goods Act 1893 by categorising the implied terms which we discuss as either conditions or warranties; we will refer to them simply as terms.

A provisional view

16. It is appropriate to conclude these introductory paragraphs by making some general observations on terms implied in contracts of supply and by indicating the general direction that, in our provisional view, reforms in this branch of the law should take. Here, as elsewhere, it is desirable that the law should be both clear and consistent. A measure of clarity and consistency has been achieved by the Supply of Goods (Implied Terms) Act 1973, in relation to contracts for the supply of goods by sale or by hire-purchase (or on the redemption of trading stamps). It remains to be seen whether, in bringing clarity to the terms implied in other contracts of supply,

overall consistency can be achieved. We take as our starting point the proposition that the obligations of a supplier in relation to the goods supplied should be, as nearly as possible, the same, whatever kind of contract (sale, barter, hire, hire-purchase etc.) is employed. Our provisional conclusions on the reforms that would seem to be needed are summarised in Part V.

PART II CONTRACTS OF SUPPLY ANALOGOUS TO SALE

17. There are two categories of transaction which are outside the law of sale but which involve the supply of goods and the transfer of title in them to the person supplied. A contract of sale is defined in the Sale of Goods Act[18] as a contract "whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". One category of transaction excluded by this definition is the contract whereby the goods are supplied for something other than "a money consideration". Such is the contract of barter and this is considered first. Later we come to the other main category, the contract for work and materials.[19]

Barter

18. Barter is usually taken to mean the trading of goods for other goods without the fixing of a price or the passing of money. This is not as uncommon as might be supposed. The contract of barter (or exchange, as it is otherwise known) is sometimes used in substantial commercial transactions.[20] Barter can also refer to the supply of goods in return for services.

19. The transaction known loosely as "part-exchange" is well established and particularly common in the motor trade. It signifies the supply of goods in return for other, less valuable, goods together with the payment of a sum of money. It is usual for a price to be fixed for the more valuable goods; a value is then put on the goods that are to be traded in and the cash payment represents the difference. In

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18 Section 1(1).

19 See paras. 24-32, below.

20 T.B.Smith, "Exchange or sale", (1974) 48 Tulane Law Rev. 1029-1042.

the rare case where no price has been agreed for the more valuable goods the contract is one of barter.[21] However, even where such a price has been agreed and the contract for the supply of the more valuable goods is accordingly a sale, it does not necessarily follow that the trade-in of the less valuable goods is also a sale.[22] It is the view of at least one learned writer that the trade-in is not in strict law a sale but is a contract of barter.[23] It may therefore be that the supply of goods by way of trade-in or part-exchange is not usually governed by the provisions of the Sale Goods Act 1893.

20. Another kind of transaction that may be outside the provisions of the Sale of Goods Act involves the supply of goods in return for stamps, coupons, wrappers or labels. Sometimes goods are offered in return for such things without requiring the payment of money; more often the acceptance of the offer requires the payment of a sum in cash as well. The supply of goods on the redemption of trading stamps was recognised as being outside the ambit of the Sale of Goods Act 1893, so special provision was made for it.[24] However there remain other transactions for which no provision has yet been made, transactions involving the supply of goods in return for things other than stamps, with or without the payment of money in addition. For example, in Chappell & Co. Ltd. v. Nestlé Co. Ltd.[25] the defendants advertised a gramophone

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21 Benjamin's Sale of Goods (1974), para. 30.

22 In Aldridge v. Johnson (1875) 7 E.B. 885; 119 E.R. 1476 there were mutual sales. On the other hand an agreement to make a trade-in allowance has been held not to amount to an agreement to buy. See Forsyth v. Jervis (1816) 1 Stark. 438; 171 E.R. 522; Sheldon v. Cox (1824) 3 B. & C. 420; 107 E.R. 789; G.J. Dawson (Clapham) Ltd. v. H. & G. Dutfield [1936] 2 All E.R. 232; Flynn v. Mackin and Mahon [1974] I.R. 101.

23 L.S. Sealy, Benjamin's Sale of Goods (1974), para. 32.

24 Trading Stamps Act 1964, s. 4, now amended by Supply of Goods (Implied Terms(Act 1973, s. 16.

25 [1960] A.C. 87.

record for supply to members of the public for a sum of money together with three of their chocolate wrappers. The essential nature of the transaction was not put in issue in the case but one of the Law Lords was disposed to think that it was not, strictly speaking, a sale.[26] Such transactions are a regular feature of ordinary retail trade. The promotion of particular products often involves the distribution of coupons, vouchers and the like; the customer may trade these in as part of the consideration for the supply of the goods in order to get a reduction in the price that would otherwise be payable. There is, as yet, no clear authority on the status of such a transaction; either it is a sale and subject to the provisions of the Sale of Goods Act 1893 or it is barter and subject only to the rules established at common law.

Implied terms in contracts of barter

21. The question whether the transactions just described are to be classified as sale or barter would matter less if the rules relating to barter were well-developed and clear. But they are not.

22. There appears to be only one reported case in which the courts have considered the obligations of the supplier in relation to goods supplied by way of barter or exchange. It is La Neuville v. Nourse.[27] The plaintiffs, who were wine merchants, sold the defendant some burgundy, presumably for his consumption. A year later they accepted the burgundy back in exchange for the same number of bottles of champagne. It turned out that the burgundy was by then "quite sour , and only fit to be used as vinegar". The plaintiffs claimed compensation under a variety of heads but their action was

26 Ibid., at p. 109, per Lord Reid.
27 (1813) 3 Camp. 351; 170 E.R. 1407.

dismissed. The courts were not prepared to imply a term into the contract that the defendant warranted the quality or merchantability of the goods in any way. Nothing seems to have turned on the fact that the transaction was one of barter: if the defendant had sold the burgundy back for cash the result at that date would have been the same.[28]

23. Apart from terms as to quality, contracts of sale usually include obligations on the supplier that the goods supplied should correspond with the description or sample by which they are sold and that the supplier should have title to them at the material time.[29] One would have expected to find similar terms implied in contracts of barter or exchange at common law. Before the drafting of the Sale of Goods Act 1893 Lord Blackburn wrote "If the consideration to be given is not money, it might, perhaps in popular language, rather be called barter than sale, but the legal effect is the same in both cases."[30] Indeed the Sale of Goods Bill originally contained a clause applying its provisions _mutatis mutandis_ to contracts of barter or exchange but it was cut out on the recommendation of the Commons Select Committee.[31] We agree with the view expressed in Chalmers' _Sale of Goods_ that "the rules of law relating to sales apply in general to contracts of barter or exchange; but the question has been by no means fully worked out."[32] It seems desirable that the terms to be implied in such contracts should be worked out and made plain for all to see; we consider later what exactly the terms should be and whether legislation is needed.[33]

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28 Indeed the result might well be the same today since it does not appear that the defendant acted in the course of a business.

29 The various implied terms are all set out in Appendix A.

30 _Blackburn's Contract of Sale_ (2nd ed., 1885), p. ix.

31 Parliamentary Papers 1893-94 (374) XV. 11.

32 _Chalmers' Sale of Goods_ (17th ed., 1975), 79-80.

33 At paras. 33-38, below.

Contracts for work and materials

24. A distinction was made, at common law, between a contract of sale and a contract for work and materials. Different forms of action were available for each and the case had to be pleaded in the correct form. There was another difference of great practical significance. Section 17 of the Statute of Frauds 1677 (re-enacted in section 4 of the Sale of Goods Act 1893) required contracts for the sale of goods of the value of £10 or upwards to be evidenced in writing as a condition of enforceability; this requirement did not apply to contracts for work and materials. It was for this reason that in Clay v. Yates[34] the plaintiffs had to persuade the court that the transaction under which they had printed 500 copies of a treatise was not a sale but a contract for work and materials. The basis of the distinction has been considered in various cases by the courts,[35] but we need not discuss it here. For our purposes it is sufficient that the distinction is there and that it still exists, despite the repeal, in 1954, of the requirement of writing.[36] As a result certain contracts of supply, such as to supply a meal in a restaurant[37] or to make and fit false teeth[38] are to be classed as sales whereas other contracts of supply, such as to paint a portrait,[39] repair a car,[40] apply a hair-dye[41] or roof a house[42] are not sales but contracts for work and materials.

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34 (1856) 1 H. & N. 73; 156 E.R. 1123.

35 Lee v. Griffin (1861) 1 B. & S. 272; 121 E.R. 716; Robinson v. Graves [1935] 1 K.B. 579.

36 Law Reform (Enforcement of Contracts) Act 1954, s. 2.

37 Lockett v. Charles [1938] 4 All E.R. 170.

38 Lee v. Griffin (1861) 1 B. & S. 272; 121 E.R. 716. Cf. Samuels v. Davis [1943] K.B. 526.

39 Robinson v. Graves [1935] 1 K.B. 579.

40 G.H.Myers & Co. v. Brent Cross Service Co. [1934] 1 K.B. 46.

41 Watson v. Buckley, Osborne, Garrett & Co. Ltd. [1940] 1 All E.R. 174.

42 Young & Marten Ltd. v. McManus Childs Ltd. [1969] A.C. 454.

Implied terms in contracts for work and materials

(a) Title

25. Terms are implied in a contract of sale to the effect that the seller has the right to sell the goods at the material time, that the goods are free from undisclosed encumbrances and that the buyer will have quiet possession of them.[43] Analogous terms are probably implied in contracts for work and materials although there appears to be no reported case in which the point has been considered.

(b) Correspondence with description or sample

26. Where goods are sold by description or by sample it is an implied term of the contract that the goods should correspond with the description or, as the case may be, the sample.[44] Similar terms would seem to be implied where the contract is not one of sale but for work and materials.[45]

(c) Fitness for purpose and merchantability

27. The implied terms imposed on the supplier of work and materials are of two main kinds. First his work itself must come up to a reasonable standard; second the materials used must be suitable for the job. The transaction is "half the rendering of service and, in a sense, half the supply of goods".[46] Our concern in this paper is with the supply-of-goods half. The other half involves a duty of reasonable skill and care.

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43 Sale of Goods Act 1893, s. 12; see Appendix A.

44 Sale of Goods Act 1893, ss. 13 and 15; see Appendix A.

45 Randall v. Newson (1877) 2 Q.B.D. 102, 109, *per* Brett J.A.

46 Watson v. Buckley, Osborne, Garrett & Co. Ltd. [1940] 1 All E.R. 174, 179, *per* Stable J.

28. It may be argued that the duty to use suitable materials is part of the duty to have the work done with reasonable skill and care and so, up to a point, it is. However the cases, to which we will come shortly, show that the obligation to use suitable materials goes further. It imposes a strict obligation on the supplier to use proper materials, analogous to the duties on the seller under section 14 of the Sale of Goods Act 1893.[47] If the materials prove to be unfit or unmerchantable then, within certain limits, the person supplying them is liable, although the defects in the materials may have been latent and undetectable and the supplier may have taken all reasonable care.

29. A leading case on the duty of the supplier of work and materials, in relation to the materials, is G.H. Myers & Co. v. Brent Cross Service Co.[48] The facts were that the defendant garage contracted to repair the plaintiff's car and supplied and fitted six connecting rods which had been manufactured elsewhere. As a result of a latent defect in one of the rods, which the garage could not have been expected to discover, the repairs were ineffective and further damage resulted. The plaintiff's claim against the garage, for supplying unsuitable materials, succeeded. In the Court of Appeal du Parcq L.J. made a pronouncement which has been quoted many times since:-

> "...I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty."[49]

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47 The text appears in Appendix A.

48 [1934] 1 K.B. 46.

49 Ibid., p. 55.

30. A similar approach was adopted in Dodd and Dodd v. Wilson and McWilliam.[50] The defendants, who were veterinary surgeons, inoculated the plaintiff's cattle with a substance that had a latent defect; as a result many of the animals became sick. The defendants were held liable and the trial judge concluded that the liability on the defendants should be no less than under a contract of sale: "It seems to me that justice certainly does not require that, by taking on themselves the administration of the substance in addition to recommending and supplying it, the defendants thereby in some way succeed in lessening their liability. It might, of course, increase their liability if their method of administration were improper... but how can it lessen it?"[51]

31. Additional arguments were put by members of the House of Lords in Young & Marten Ltd. v. McManus Childs Ltd.[52] One was that the supplier would normally be able to pass his liability on to the person from whom he purchased the goods in question (and would thus be no worse off) whereas the person supplied would probably have no remedy at all if he were denied a remedy in contract against the person supplying him. Another point made was that the supplier of work and materials usually charges his customer more for his materials than he pays for them so there is no serious injustice in putting the same liability on him as if he were a seller. The case itself concerned the supply, by contractors, of certain roof tiles that they had purchased from a nominated manufacturer. The tiles turned out to have a latent defect that made them unmerchantable and the contractors were held liable for breach of contract even though the person to whom they had supplied them had nominated the source of supply.

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50 [1946] 2 All E.R. 691.

51 Ibid., per Hallett J. at p. 695.

52 [1969] 1 A.C. 454, 469-470.

32. It should therefore be concluded that the terms implied in a contract for work and materials are, so far as the materials are concerned, no less strict than those implied in a contract of sale.

The need for legislation

33. Taking it that the terms implied under the existing law in contracts of barter or exchange and in contracts for work and materials are no less strict than those implied at common law in contracts of sale, is there any need for legislation? Our provisional conclusion is that there is, for two reasons, first the need for greater clarity and second the need for overall consistency.

34. There appears to be a need for greater clarity on the terms implied in contracts of barter. Although the rules relating to sales apply in general to barter there are particular points on which the law is in doubt. Take for example the circumstances in which the term of merchantability is implied. In the law of sale at common law it appears that the term was only implied where the goods were sold by description or, perhaps another way of expressing the same idea, where the buyer had no opportunity of examining the goods; certainly the codification in the Sale of Goods Act 1893 (in the original section 14(2)) confined the implied term to sales by description. By the amendment to the Sale of Goods Act 1893 made in 1973[53] the need for a sale by description was removed. Would the comparable term implied at common law in contracts of barter (and indeed contracts for work and materials) follow the

53 Supply of Goods (Implied Terms) Act 1973, s. 3, enacting a new s. 14 of the Sale of Goods Act 1893; see the new s. 14(2) (Appendix A, below).

common law of sale rather than the present statutory formulation? Probably, but the present position is far from clear.

35. Another difficulty could arise on facts such as occurred in Chappell & Co. Ltd. v. Nestlé Co. Ltd. to which we referred earlier.[54] What if the record supplied by the chocolate manufacturers had been unfit to play or of unmerchantable quality? It might be argued that since the suppliers were not "dealers" in records and it was not in the course of their business to supply records, no terms relevant to the quality of the record should be implied. Such an argument might be sustainable on an analogy with the original wording of section 14 of the Sale of Goods Act 1893.[55] This section has been amended since and, in the case of a sale, terms as to quality are now implied wherever the goods are supplied in the course of a business, whether or not the seller deals in the goods in question or sells them as a regular feature of his business.[56] The position on sale has thus been put on a slightly different footing by the Supply of Goods (Implied Terms) Act 1973, but of course that Act does not apply to contracts of barter. The common law position remains unclear.

36. There seems to be a need for greater clarity in relation to contracts for work and materials as well. Section 14 of the Sale of Goods Act 1893 provides a statutory formula for determining whether, in a contract of sale, terms as to fitness or merchantability are to be implied. With a contract for work

54 [1960] A.C. 87; see para. 20, above.

55 See, however, the Canadian case of Buckley v. Lever Bros. Ltd. [1953] 4 D.L.R. 16 in which it was assumed on similar facts that the Sale of Goods Act did apply and the argument just put was rejected.

56 Sale of Goods Act 1893, ss. 14(2) and 14(3), as set out in Appendix A. These sections were put in their present form by Supply of Goods (Implied Terms) Act 1973, s. 3.

and materials, however, there is no statutory formula; this means that the courts have to determine whether terms as to fitness or merchantability are to be implied by the application of first principles, one such principle being that "no warranty ought to be implied in a contract unless it is reasonable in all the circumstances."[57] In many situations the analogy with sale is so close that the courts have no difficulty in deciding that it is reasonable, in all the circumstances, for the supplier to be under the same obligations as if he were a seller. Problems can, however, arise. For example, in Gloucestershire County Council v. Richardson[58] the lack of a statutory formula resulted in a division of opinion in the House of Lords as to whether, on the facts before the court, a term as to fitness ought to be implied. Clarity of the kind provided by the Sale of Goods Act would make the outcome of litigation over contracts for work and materials easier to predict.

37. In addition to the need for clarity is the need for consistency. If the law treated implied terms differently in contracts of sale from contracts for work and materials it would, as Lord Upjohn said in Young & Marten Ltd. v. McManus Childs Ltd.,[59] "be most unsatisfactory, illogical and indeed a severe blow to any idea of a coherent system of common law...." The same might be said of differences in these respects between contracts of sale and contracts of barter or exchange.

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57 Young & Marten Ltd. v. McManus Childs Ltd. [1969] A.C. 454, 467, per Lord Reid.

58 [1969] 1 A.C. 480. Lord Pearson concluded that the term was to be implied; Lord Upjohn concluded that it was not; Lords Pearce and Wilberforce were of the view that the term, which might otherwise have been implied, had been excluded.

59 [1969] 1 A.C. 454, 473.

38. Our provisional conclusion is that the implied obligations of the supplier in respect of goods supplied under a contract of barter or work and materials should be assimilated by statute to those implied in a contract of sale.

PART III CONTRACTS OF HIRE

Bailment generally

39. The two main features of bailment are the delivery or transfer of possesion of goods and an obligation that the identical thing either be returned to the bailor or be dealt with in a particular way. Six kinds of bailment were identified by Holt C.J. in Coggs v. Bernard:[60] deposit, gratuitous loan, hire, pledge, delivery for carriage (or management or repair) for reward and, finally, delivery for carriage (or management or repair) without recompense. All of them involve the delivery of goods by one person, the bailor, to the other, the bailee, but we are only interested in one of them, namely hire, because this is the only one where goods are supplied, under a contract, for the other's use and enjoyment.[61]

The contract of hire

40. Under a contract of hire the bailee obtains possession of the goods for a consideration and the right to use and enjoy the goods for such purposes and for such a period as the contract may provide. It is convenient, for our purposes, to refer to the bailee hereafter as the hirer of the goods, and the bailor as the supplier.

41. The essential difference between a contract of sale and a contract of hire is that the former provides (expressly or impliedly) for the transfer of ownership of title in the goods while the latter does not; the buyer acquires title in the goods supplied, the hirer obtains possession only.

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60 (1703) 2 Ld. Raym. 909; 92 E.R. 107.

61 See paras. 11-13 above.

Under a contract of hire-purchase the hirer obtains possession only in the first instance but is given the option to acquire title as well on certain terms. We are not, however, in this Part concerned with hire-purchase contracts in view of the provisions concerning them in the Supply of Goods (Implied Terms) Act 1973 which we have surveyed in paragraph 6, above, and which are set out in Appendix B.

42. Usually the consideration for the hire of goods is the payment of money. This is what is usually meant by a contract of hire.[62] Goods may be hired out for a specific occasion in return for a single payment or they may be hired out over longer periods for the payment of a rental, calculated and payable at so much a day, week, month or year. Where the hiring is for a money consideration the agreement is described in the commercial world as a "lease", a "rental agreement" or "contract hire", depending principally on the period over which the goods are to be hired.[63] All are contracts of hire and fall within the scope of this Part of this paper. So too do contracts where the hiring is for a consideration other than the payment of money. An example of such a hiring is to be found in Mowbray v. Merryweather.[64] The plaintiffs, who were stevedores, contracted to unload the defendant's vessel on the terms that the defendant would lend them all necessary cranes, chains and other equipment; the stevedores were, for our purposes, "hirers" of the cranes, chains and other equipment although they paid nothing for them, and the ship-owner was the "supplier".

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62 Halsbury's Laws of England (4th ed., 1973), vol. 2, para. 1551.

63 Crossley Vaines' Personal Property (5th ed., 1973), 415-418; Crowther Report on Consumer Credit (1971), Cmnd. 4596, para. 1.2.14. on p. 17.

64 [1895] 2 Q.B. 640.

Charterparties

43. In relation to ships, there are two main categories of charterparty, the charterparty by demise and the charterparty not by demise. The former operates as a lease of the ship itself, to which the services of the master and crew may or may not be superadded. The master and crew, if provided, become for all intents the servants of the charterer and through them the possession of the ship is in him. Under a charter not by demise, on the other hand, the ship-owner agrees with the charterer to render services by his master and crew to carry goods which are put on board his ship by or on behalf of the charterer; the possession of the ship remains in the original owner. A charter by demise is in effect a contract for the hire of a chattel, and is governed by the general principles of the common law relating to contracts of hire.[65] It therefore falls within the ambit of this part of this paper. Charterparties not by demise, that is to say time charters and voyage charters, are contracts for the rendering of services by the owner, not for the hiring out of his ship. They are therefore outside the scope of this paper.

44. Aircraft charterparties may be classified in broadly the same way.[66] There are those where the charterer is given possession of the aircraft itself, and the pilot and crew, if provided, manage and operate the aircraft as his servants. There are, on the other hand, charterparties where the possession of the aircraft remains in the owner: the pilot and crew remain the servants of the owner and he operates the aircraft on the charterer's behalf. The first kind is a charter "by demise" (to adopt the terms used in shipping)

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65 Scrutton on Charterparties (18th ed., 1974), pp. 45-49.

66 McNair, The Law of the Air (3rd ed., 1964), pp. 372-375.

and is within the scope of this paper. It is a contract of hire and is governed by the general principles of the common law relating to contracts of hire.[67] The second is not a contract of hire and is outside the scope of this paper.

45. Our discussion, below, of terms that are or ought to be implied in contracts of hire applies to charterparties by demise, whether of ships or aircraft, but not to any other kinds of charterparty.

Implied terms in contracts of hire

(a) Title

46. The hirer is entitled to quiet possession of the goods supplied during the period of hire.[68] A term is not usually implied that the supplier is the owner of the goods because his title is not usually relevant to the transaction. It sometimes happens that goods are hired out by non-owners, for example by persons who are themselves hirers.[69] Moreover it is part of the law of bailment that an ordinary bailee is estopped from denying the title of his bailor.[70] This proposition does not apply where the contract is one of hire-purchase as the provision of an option to acquire title gives the hirer the right to expect that the supplier has the title to transfer when the time comes.[71] It may be that

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67 Vendair (London) Ltd. v. Giro Aviation Co. Ltd. [1961] 1 Lloyd's Rep. 283.

68 This is perhaps supported by Lee v. Atkinson and Brooks (1609) Cro. Jac. 236; 79 E.R. 204. See A.G. Guest, The Law of Hire-Purchase (1966), para. 262.

69 See Jones v. Page (1867) 15 L.T. (N.S.) 619; Dare v. Bognor Regis U.D.C. (1912) 28 T.L.R. 489.

70 Biddle v. Bond (1865) 6 B. & S. 225, 232; 122 E.R. 1179, 1182, per Lord Blackburn.

71 Karflex Ltd. v. Poole [1933] 2 K.B. 251.

under the existing law terms are implied in the ordinary contract of hire that the supplier has the right to hire out the goods and that they are free, and will remain free, from any charge or encumbrance not disclosed to the hirer before the agreement is made,[72] but in the absence of authority the existing law is uncertain.

(b) Correspondence with description or sample

47. Where goods are supplied under a contract of hire by description or by sample, there are implied terms that the goods should correspond with the description or, as the case may be, the sample. There is not much case-law on this point but such as there is supports this proposition.[73] Our opinion is that the terms implied at common law in contracts of hire (that the goods supplied should correspond with their description or, as the case may be, the sample) are substantially the same as the terms implied by statute in contracts for the supply of goods by sale[74] or by hire-purchase.[75]

(c) Fitness for purpose and merchantability

48. The courts have, from time to time, considered what terms as to fitness or merchantability are to be implied in the ordinary contract of hire. As will be seen, the supplier's obligations have not always been viewed in the same way by the courts and have not always received the detailed attention that the seller's obligations received when the Sale of Goods

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72 Cf. Supply of Goods (Implied Terms) Act 1973, s. 8(1)(b); Appendix B.

73 Astley Industrial Trust Ltd. v. Grimley [1963] 1 W.L.R. 584, a hire-purchase case, per Pearson L.J. at p. 595, Upjohn L.J. at p. 597 and Ormerod L.J. at p. 600.

74 Sale of Goods Act 1893, ss. 13 and 15(2)(a) and (b); Appendix A.

75 Supply of Goods (Implied Terms) Act 1973, ss. 9 and 11(a) and (b); Appendix B.

Act 1893 was being drafted. Although the cases show that a term as to fitness is normally implied in a contract of hire there are two major areas of uncertainty. First, it is not clear whether the implied term is a condition, breach of which entitles the hirer to reject the goods, or is a warranty, breach of which entitles the hirer to damages only.[76] However, we are not considering, in this paper, what remedies should be available for breach of implied terms, be they conditions, warranties or intermediate stipulations.[77] The second major area of uncertainty concerns the scope of the implied term itself. This is considered in detail in the paragraphs that follow. There have been at least seven important reported cases in the last 150 years that bear upon the nature and extent of the supplier's obligations and they are considered, below, in chronological order. From these the existing law must be extracted. They are examined in some detail with a view to establishing two things, first, the present state of the law and second, the differences, if any, between the term as to fitness implied in a contract of hire and the terms implied by statute in a contract of sale[78] or hire-purchase.[79]

49. The decisions on the nature and extent of the supplier's duty, in relation to the fitness of the goods supplied, seem to show at least three[80] different tests for liability. It

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76 For a detailed analysis of the problems in this area see N.E. Palmer, "Conditions and Warranties in English Contracts of Hire", (1975) 4 Anglo-American Law Rev. 207, 226-234.

77 See paras. 14 and 15, above.

78 Sale of Goods Act 1893, s. 14; Appendix A.

79 Supply of Goods (Implied Terms) Act 1973, s. 10; Appendix B.

80 It may well be possible to subdivide them further, but we have chosen what seem to be the three main lines of thought.

may be helpful to identify them as Models (a), (b) and (c), as follows:-

Model (a)

One approach to the question of the supplier's liability is to hold him strictly liable for seeing that the goods are fit, or at least reasonably fit, for the purposes for which they are required. This means holding the supplier liable for defects in the goods which he could not possibly have discovered. Liability under the Sale of Goods Act is in this sense strict, as is illustrated by Frost v. Aylesbury Dairy Co.[81] in which milk was sold which contained typhoid germs. No amount of skill or care could have enabled the dairy company to detect these germs, having regard to the state of medical knowledge at that time, yet they were held liable.

Model (b)

Another approach is to hold the supplier liable for supplying goods that are not as fit as reasonable skill and care can make them. The cases in which this approach has been adopted indicate that negligence will be presumed unless it is rebutted and that the absence of negligence on the supplier's part is not by itself a defence; the supplier will be liable if the goods were unfit through negligence on anybody's part. The duty on the supplier is thus not quite as stringent as under Model (a), although it is arguable that the standard of fitness is higher.[82]

Model (c)

The third approach is to hold the supplier liable for the

81 [1905] 1 K.B. 608.

82 See paras. 54 and 58, below.

unfitness of the goods supplied to the extent that there has been negligence on his part or on the part of those for whom he is responsible.

In examining the authorities in the paragraphs that follow we shall indicate, where appropriate, which of the three Models the relevant judgment or judgments seem to be adopting.

50. One of the earliest cases on the supplier's obligations in respect of goods let out on hire is Jones v. Page.[83] The plaintiff, an inn-keeper in Birmingham, took on hire from the defendant an omnibus to take a party of people to the Warwick races. He gave the vehicle a cursory inspection before it was delivered and agreed to take it. In the course of the journey a wheel broke and some passengers were injured. The points at issue in the case were whether there was an implied undertaking in the contract that the omnibus would be fit for the journey and, if so, whether the undertaking had been broken. The court held the defendant liable, but it was observed that since the plaintiff had examined the vehicle, there would have been no liability for the defect in the wheel if the defect had been external and obvious. Two important judgments were given. Kelly C.B. inclined to the approach we have described as Model (a): he said "a person letting out a carriage for hire does, in law, undertake that it shall be <u>reasonably and duly safe and fit for the particular purpose.</u>".[84] Piggott B. concurred in the result but, adopting what we have described as Model (c), added "We do not by our decision make the defendant an insurer in any event, but merely hold that,

83 (1867) 15 L.T. (N.S.) 619. For dicta on the same point in an earlier case see Sutton v. Temple (1843) 12 M. & W. 52, 60; E.R. 1108, 1111, per Lord Abinger C.B.

84 Ibid., p. 620; emphasis has been added.

as a letter out of a vehicle for hire, he was bound to use proper and ordinary care that it was reasonably fit and proper for the purpose."[85]

51. In Chew v. Jones[86] the chattel hired was a horse and it proved to be unfit to make the journey for which it had been hired. Pollock C.B. found in favour of the hirer, and said:

> "If a horse or carriage be let out for hire, for the purpose of performing a particular journey, the party letting warrants that the horse or carriage, as it may be, is fit and proper and competent for such a journey."[87]

This statement of principle seems to accord with Model (a).

52. The next case is Francis v. Cockerell.[88] Although this case is usually thought of as one dealing with occupiers' liability, the reasoning in the judgment of Kelly C.B. is clearly based on the analogy of hire. The facts were that the defendant had engaged contractors to erect a stand at the race course at Cheltenham. They did the work negligently although this was not known to the defendant who was not personally negligent in this respect. Members of the public, including the plaintiff, paid the defendant to use the stand to watch the races and were injured when it collapsed. The question was whether the defendant was liable to the plaintiff for breach of contract and the court were unanimous in holding that he was. Kelly C.B. gave the leading judgment and adopted

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85 Ibid., p. 621; emphasis has been added.

86 (1847) 10 L.T. (O.S.) 231.

87 It appears from a later passage in the judgment that the question had been much discussed by judges in relation to the hazards of travel on circuit; it was of importance that they should be entitled to have horses provided that would not fall sick between one assize town and the next.

88 (1870) L.R. 5 Q.B. 501.

the Model (a) approach as he had done in Jones v. Page:[89]

> "I do not hesitate to say that I am clearly of the opinion, as a general proposition of law, that when one man engages another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied."[90]

Keating, Montague Smith and Cleasby JJ. concurred in the result but construed the obligation as one to provide an article that was reasonably fit for the purpose for which it was to be used "so far as the exercise of reasonable skill and care should make it so" and held that the defendant was liable although not personally negligent on the ground that he was "responsible" for the negligence of his contractors.[91] Here we see, for the first time, the emergence of the approach we have described as Model (b).

53. The leading case of Hyman v. Nye was decided in 1881.[92] The defendant was a jobmaster in Brighton and he hired out a carriage to the plaintiff for a journey to Shoreham and back. On the journey a bolt in the carriage broke and there was an accident. The jury were directed, in accordance with Model (c), that the legal issue was whether the defendant had taken all reasonable care to provide a fit and proper carriage: they found that he had and the claim was dismissed. The plaintiff appealed and his appeal was allowed on the ground that the defendant's duty was higher than that of "reasonable care" and

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89 (1867) 15 L.T. (N.S.) 619. See para. 50, above.

90 (1870) L.R. 5 Q.B. 501, 504.

91 (1870) L.R. 5 Q.B. 501.

92 (1881) 6 Q.B.D. 685.

that it had been broken. In a passage that has been much quoted since Lindley J. said:

> "His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the break down was in the proper sense of the word an accident not preventable by any care or skill.... Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire."[93]

He thus based his judgment on Model (b). However Mathew J. arrived at the same result by applying Model (a):

> "It appears to me that the question which the jury ought to have been asked was, whether the carriage was, in fact, reasonably safe when it was hired to the plaintiff. The cases... seem to show that there is no distinction in this respect between contracts for the sale and for the hire of an article for a specific purpose, where trust is reposed in the person who, in the ordinary course of business, sells or lets to hire."[94]

54. In Vogan & Co. v. Oulton[95] the plaintiffs hired 3000 sacks from the defendant for use in unloading a cargo of peas. One of the sacks gave way when it was being hoisted full of peas and one of the plaintiff's employees was injured. Wright J. opted for Model (a) and held the defendants liable to the

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93 Ibid., pp. 687-688; emphasis has been added.

94 Ibid., pp. 689-690; emphasis has been added.

95 (1898) 79 L.T. 384.

plaintiffs for breach of an implied term that the sack in question should be reasonably fit for the purpose for which it was supplied. Although it did not affect the outcome of the case the learned judge appears to have thought that the standard of "reasonable fitness" which he favoured was lower than the standard propounded by Lindley J. in Hyman v. Nye, viz., as fit for the purpose as care and skill could make it.[96]

55. In Read v. Dean[97] the plaintiffs hired a motor launch from the defendant for a holiday on the Thames. There was something wrong with the engine and petrol escaped into the bilge; moreover there was no fire-fighting equipment supplied. A fire occurred in the course of the hiring and the plaintiffs claimed damages. Their claim succeeded, the learned judge holding that it was an implied term that the thing hired should be as fit for the purpose for which it was hired as reasonable skill and care could make it and that this duty had been broken. He followed Model (b) although the result would have been the same if he had followed Model (a) or, probably, if he had followed Model (c).

56. Since Read v. Dean the courts seem to have settled on the Model (b) formula, as propounded in that case, as an apposite summary of the supplier's obligations in relation to merchantability and fitness. Similar words were used in White v. John Warwick Cycle Co. Ltd.[98] and in Vendair (London) Ltd. v. Giro Aviation Co. Ltd.[99] They were also adopted in Astley Industrial Trust Ltd. v. Grimley[100] which is the last of the seven cases selected for special mention. This was

96 See para. 58, below.
97 [1949] 1 K.B. 188.
98 [1953] 1 W.L.R. 1285.
99 [1961] 1 Lloyd's Rep. 283.
100 [1963] 1 W.L.R. 584.

not a case of simple hire but of hire-purchase. However the Court of Appeal concluded that there was no essential difference between the obligations at common law as to fitness or merchantability in a contract of hire-purchase and those in a contract of hire. The case concerned the hire-purchase of a truck and Upjohn L.J. stated that, in general, upon a hiring of an ordinary vehicle for normal use on the road a stipulation should usually be implied that the vehicle must be as fit for the purpose for which it is hired as reasonable skill and care can make it.[101] However, on the facts of the particular case, the Court held that the agreement had not been broken.

57. What conclusions can be drawn about the implied term as to fitness or merchantability in the light of these cases? It is clear that a term as to fitness will generally be implied. However it is not clear whether the duty of the supplier is strict, as in Model (a), or founded on negligence, as in Model (c), or somewhere between the two, as in Model (b). A factual example may help to illustrate the difficulty. Suppose that a customer takes a television set on hire and that, within 24 hours of delivery, it catches fire. Suppose, further, that the fire resulted from an undiscoverable defect in a foreign-made component in the set. Is the supplier of the set strictly liable for hiring out a set that is unfit for use? Is he, in other words, liable under Model (a), however careful he has been to check the set for safety? Or is it a defence for him to show that he exercised all reasonable care himself, as under Model (c)? Or must he prove more? If Model (b) were applied to such facts the supplier might escape liability by showing that the defect arose in the course of production abroad without negligence on anybody's part and that it was not discoverable by the exercise of reasonable skill and care. Otherwise he

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101 Ibid., at pp. 597-598. Model (b) again.

would probably be held liable. The weight of recent authority seems to favour Model (b), that is to say an implied term that the goods supplied should be as fit as reasonable skill and care can make them. However all the other kinds of contract of supply and, in particular, sale,[102] hire-purchase[103] and work and materials[104] make the liability fot the fitness of the goods strict, as in Model (a). There is, though, no indication in any of the cases that the judges' attention was drawn to the distinctions we have tried to bring out.

58. The existing law is unclear. Our provisional preference is for Model (a). We think that the supplier of goods for hire should be strictly liable for seeing that the goods are reasonably fit for the purposes for which they are required. The exact scope of the obligation and the analogy with the terms implied in sale are considered in the paragraphs that follow. There is, however, one other point to make about Models (a), (b) and (c) which it is convenient to mention now. It is that the differing approaches that are to be found in the law of hire affect not only the nature of the supplier's duty (whether it is strict or negligence-based) but also the standard of fitness. Take the supply of a second-hand car. If the contract is one of sale the car must be of merchantable quality and reasonably fit for the purposes for which it is required, but these terms do not require the seller to see that the car is in perfect condition; it may be of merchantable quality and reasonably fit for the purposes for which it is required if it is in a roadworthy condition even though it requires work doing on it.[105] This is so in the case of sale or hire-purchase [106] and would

102 Sale of Goods Act 1893,ss. 14(2) and 14(3); Appendix A.

103 Supply of Goods (Implied Terms) Act 1973,ss. 10(1) and 10(2); Appendix B.

104 Paras. 27-32, above.

105 Bartlett v. Sydney Marcus Ltd. [1965] 1 W.L.R. 1013.

106 The terms as to merchantability and fitness in hire-purchase have been assimilated to those in sale; Supply of Goods (Implied Terms) Act 1973, ss. 10(1) and 10(2); Appendix B.

be so for hire if Model (a) were adopted. However, if Model (b) were preferred the second-hand car would have to be as fit for use as reasonable skill and care could make it, which is, arguably, a higher standard, requiring the supplier to make the car as near perfect as is humanly possible.[107] This could occasionally lead to absurd results which would be avoided by adopting Model (a).

59. Assuming that the doubts and difficulties in the existing law are to be resolved, in the first instance, by rejecting Models (b) and (c) in favour of Model (a), we must now see whether the implied terms as to fitness or merchantability are in other respects the same for hire as for sale or hire-purchase. This means considering the following further questions. Are the supplier's undertakings as to fitness or merchantability only to be implied where the goods are supplied in the course of a business? Is there only one obligation of "fitness" or are there two (a) merchantability and (b) fitness for any particular purpose made known to the supplier? Is the supplier liable in respect of defects of which the hirer knew or ought reasonably to have known? Is it an element in the obligation of "fitness for a particular purpose" that the hirer must rely on the supplier's skill or judgment?

Supply in the course of a business

60. In all the cases we have considered the goods were supplied in the course of the supplier's business. In one case, Dare v. Bognor U.D.C.[108] deck-chairs were hired out by a local authority but this would qualify as a supply in the course of a business for the purposes of the relevant

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107 See Vogan & Co. v. Oulton (1898) 79 L.T. 384; para. 54, above.

108 (1912) 28 T.L.R. 489.

provisions of the Sale of Goods Act 1893[109] and of the Supply of Goods (Implied Terms) Act 1973.[110] Hyman v. Nye[111] may be read as supporting the proposition that terms as to fitness or merchantability are only implied where goods are supplied to a hirer in the course of the supplier's business. This is therefore a point on which the supplier's obligations under the existing law of hire seem to be consistent with those implied in a contract of sale or hire-purchase. We shall however consider later[112] whether terms as to fitness and merchantability should also be imposed on the non-professional supplier.

Fitness and merchantability contrasted

61. None of the cases concerning the supplier's obligations under a contract of hire mention "merchantability" as such; they only mention "fitness". By contrast, in contracts of sale or hire-purchase two obligations are implied, one that the goods should be of merchantable quality and the other that the goods should be reasonably fit for any particular purpose made known to the supplier.[113] Goods are defined as of merchantable quality "if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances".[114]

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109 Section 62(1); see Appendix A.

110 Section 15(1); see Appendix B.

111 (1881) 6 Q.B.D. 685; see the quotations from the judgments of Lindley and Mathew JJ. set out at para. 53, above.

112 Paras. 66-68, below.

113 Sale of Goods Act 1893, s. 14(2) and (3), Appendix A; Supply of Goods (Implied Terms) Act 1973, s. 10(2) and (3); Appendix B.

114 Ibid., s. 62(1A); ibid., s. 15(3).

62. A consideration of the case-law on contracts of supply by hire suggests that although the courts do not say in terms that the goods should be of "merchantable quality" as well as fit for the purposes required two obligations may be implied, one that the goods should be reasonably fit for ordinary purposes, the other that the goods should be fit for any particular purposes made known to the supplier. The first obligation is very close to that of merchantability in contracts of sale or hire-purchase and the second is very close to the obligation in contracts of sale or hire-purchase that the goods supplied should be reasonably fit for any particular purpose made known to the supplier.

<u>Discoverable defects and reliance on the supplier's skill or judgment</u>

63. The cases that we have considered suggest that a supplier of goods under a contract of hire is not liable for defects in the goods that render them unmerchantable if the defects were known to the hirer nor, where the hirer makes an examination of the goods, if the defects should have been seen.[115] Similar limitations are set upon the liability of the supplier under a contract of sale[116] or hire-purchase.[117] Where the hirer makes known to the supplier that the goods are required for a particular purpose an obligation of fitness for that purpose is to be implied, subject to certain qualifications. Observations made in <u>Hyman</u> v. <u>Nye</u>[118] suggest

115 See, in particular, <u>Jones</u> v. <u>Page</u> (1867) 15 L.T. (N.S.) 619, para. 50, above. In <u>Astley Industrial Trust Ltd</u>. v. <u>Grimley</u> (1963) 1 W.L.R. 584, 590, para. 56, above, Pearson L.J. said that the extent and indeed the existence of an obligation on a supplier to deliver a roadworthy vehicle would depend on all the circumstances.

116. Sale of Goods Act 1893, s. 14(2)(a) and (b); Appendix A.

117. Supply of Goods (Implied Terms) Act 1973, s. 10(2)(a) and (b); Appendix B.

118. (1881) 6 Q.B.D. 685; para. 53, above.

that there must be a reliance by the hirer on the supplier's skill or judgment in this matter, although this is no doubt readily implied; in none of the reported cases that we have considered did the claim fail because of lack of reliance on the part of the hirer. In all these respects the existing law in relation to the supplier's obligations under a contract of hire is, we think, very similar to his obligations under contracts of sale[119] or hire-purchase.[120]

A provisional view on implied terms other than title

64. Implied undertakings as to title in contracts of hire raise special problems that require particular attention. We return to them later.[121] As for the rest, however, it seems that there is a close similarity between the supplier's obligations under a contract of hire and those under a contract of sale or hire-purchase. Our provisional conclusion is that they should now be assimilated yet more closely by legislation. One reason is that the implied obligations in contracts of hire were very close to those implied in contracts of sale at common law[122] although they may have grown apart a little since.[123] Another is that the major point of apparent difference, the nature and extent of the supplier's obligation to see that the goods hired out are fit and merchantable, leads or may lead to uncertainty or anomalies. Third, the terms to be implied in contracts of hire-purchase were, at common law, the same as for contracts of hire[124] and they have now been

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119 Sale of Goods Act 1893, s. 14(3); Appendix A.

120 Supply of Goods (Implied Terms) Act 1973, s. 10(3); Appendix B.

121 See para. 65, below.

122 Hyman v. Nye (1881) 6 Q.B.D. 685, 690 per Mathew J.; para. 53, above.

123 Cf. Geddling v. Marsh [1920] 1 K.B. 668, 672, per Bailhache J.

124 Astley Industrial Trust Ltd. v. Grimley [1963] 1 W.L.R. 584.

successfully assimilated by statute to the terms implied in contracts of sale. Finally there is the desirability of producing overall consistency in the law relating to contracts for the supply of goods.[125] This has, incidentally, already been achieved in Australia by their Trade Practices Act 1974. This Act provides[126] that terms as to title, encumbrances, quiet possession, quality or fitness, correspondence with description and sample should, with slight variations, be implied in all consumer transactions involving the supply of goods, whether by way of sale, exchange, lease, hire or hire-purchase.[127] We accordingly make the provisional recommendation that, with the exception of implied undertakings as to title, the implied obligations of the supplier in respect of goods supplied under a contract of hire should be assimilated to those implied in a contract of sale.

Implied undertakings as to title

65. A hirer is not entitled to have title in the goods transferred to him at any stage so it would be illogical to imply a term in his favour that the supplier was in fact the owner of the goods in question. On the other hand, it would be natural for the hirer to assume, unless advised to the contrary, that the supplier had, at the very least, the right to let him have the goods on hire. Whatever the state of the existing law,[128] our provisional view is that a term to this effect ought to be implied. It is also our provisional view that the hirer should be entitled to quiet possession of the goods during the period of hire. This is not to say that the supplier is, or should be, liable to compensate the hirer if, for example, the goods are stolen from the hirer by a thief, during the period of hire. Rather, our intention

125 See para. 16, above and N.E.Palmer, "Conditions and Warranties in English Contracts of Hire", (1975) 4 Anglo-American Law Rev. 207.

126 Trade Practices Act 1974, No. 51 of 1974, ss. 69-72.

127 Ibid., s. 4(1).

128 There is some uncertainty in this area as we indicated in para. 46, above.

is that the supplier should normally be liable if the hirer's quiet possession is disturbed by the supplier himself or by a person with a better right to possession of the goods than the supplier. The existing law is clearer in relation to hire-purchase than hire. By section 8(1)(a) of the Supply of Goods (Implied Terms) Act 1973 a person who supplies goods under a hire-purchase agreement impliedly undertakes "that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the hirer before the agreement is made and that the hirer will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known." This provision could be adapted, without difficulty, to apply to contracts of hire. We accordingly make the provisional recommendation that the following terms should be implied in contracts of hire:-

(a) the supplier has the right to hire out the goods throughout the period of hire;

(b) the goods are free and shall remain free, throughout the period of hire, from any charge or encumbrance not disclosed to the hirer before the agreement was made; and

(c) the hirer is entitled to quiet possession of the goods throughout the period of hire.

The non-professional supplier

66. We have reached provisional conclusions on a number of questions considered in this Part of the paper and should welcome comments and criticisms. There is one further question on which we have not reached a provisional conclusion, that has been left over until now. It concerns the supply of goods on hire by the non-professional supplier, by which we mean the person who supplies the goods otherwise than in the course of a business.

67. Under the existing law the non-professional supplier is bound to deliver goods that correspond with their description, or sample, and must see that the person supplied has quiet possession of the goods; this is so whether the contract is one of sale, hire-purchase or, we would think, hire. However, in none of these contracts is any term to be implied that the goods supplied will be of merchantable quality or fit for any particular purpose made known to the supplier: these obligations only arise where the supply is in the course of a business.

68. A case may be made for treating contracts of hire differently from contracts of sale or hire-purchase in this one respect. Although all involve the supply of goods, contracts of sale or hire-purchase contemplate the passing of title at some stage and give the person supplied certain rights in this regard. Thus, even if the goods are unmerchantable or unfit he may at least acquire the title in them and mitigate his loss by disposing of them. This is not so with hire; the only interest that the hirer obtains is possessory, that is to say the right to the use of the goods. If they are unfit to be used then he gets nothing. Arguably, therefore, he should have some remedy against the supplier of unmerchantable or unfit goods even if supplied otherwise than in the course of a business. Chattels such as cars, caravans and boats frequently are hired out otherwise than in the course of a business, so the problem is a real one. We should welcome comments on whether some and, if so, what special provisions should be made for the non-professional hiring out, so as to give the hirer a remedy in respect of unmerchantable or unfit goods.

PART IV ADDITIONAL IMPLIED TERMS?

Gaps in the present law

69. We have in this Paper dealt with the implied terms that exist at common law and their translation into statutory terms. A working paper on implied terms in contracts for the supply of goods would not, however, be complete if it did not raise the question whether there are gaps in the present law which should be filled if legislation is contemplated.[129]

70. If there are gaps in the law, they are not confined to contracts of barter, work and materials, and hire but extend to contracts of sale and hire-purchase of goods. We have not in the earlier parts of this paper reconsidered the implied terms in contracts of sale and hire-purchase of goods, as they were dealt with in our First Report on Exemption Clauses in 1969.[130] That report did not consider the matters raised in this part of the paper, so we shall here cover contracts of sale and hire-purchase as well as the other contracts referred to.

Durability

71. The definition of "merchantable quality" in section 62(1A) of the Sale of Goods Act 1893[131] uses the present tense: "Goods... <u>are</u> of merchantable quality ... if they <u>are</u> as fit for the purpose or purposes ...." (emphasis added). How far is

129 The Ontario Law Reform Commission issued a Report on Consumer Warranties and Guarantees in the Sale of Goods in 1972 (published by the Department of Justice, Toronto). We have found this report (which we refer to as the "Ontario Report") very helpful.

130 Law Com. No. 24, Scot. Law Com. No. 12.

131 Added by s. 7(2) of the Supply of Goods (Implied Terms) Act 1973.

it part of the concept of merchantability that the goods should last for a particular period of time? A similar question arises with reference to the implied term that goods are reasonably fit for their purpose.

72. In the case of goods which are not perishable, there is a requirement that the goods be of merchantable quality at the time they are sold but there is no specific obligation as to durability, i.e., as to the time they must remain of merchantable quality. In the case of perishable goods, the law has been expressed somewhat differently in that it has been held that goods sold must remain of merchantable quality or fit for their purpose for a reasonable time,[132] and that a reasonable time normally[133] means the time during which they will be transported to the buyer and subsequently disposed of by him. If this is to be taken as embodying a distinction that goods which are perishable must remain merchantable for a reasonable length of time whilst there is no such obligation in the case of non-perishable goods,[134] it would appear to be a distinction of doubtful validity. Both situations could be embodied within the same general principle that goods must be of merchantable quality at the time they were sold and that merchantability is to be determined in part by reference to the period of time for which it is reasonable[135] to expect them to last in a sound condition.[136]

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132 Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd. [1961] 1 All E.R. 485, reversed on the facts [1962] 1 All E.R. 77, though see Oleificio Zucchi S.p.A. v. Northern Sales Ltd. [1965] 2 Lloyd's Rep. 498, 518.

133 Cf. Broome v. Pandess Co-operative Society of Orange Growers [1940] 1 All E.R. 603.

134 Cordova Land Co. Ltd. v. Victor Brothers Inc. [1966] 1 W.L.R. 793. See P.S. Atiyah, The Sale of Goods (5th ed., 1975) pp. 90 and 100.

135 That period of time will vary according to the nature of the goods: Cordova Land Co. Ltd. v. Victor Brothers Inc. [1966] 1 W.L.R. 793, 796.

136 Benjamin's Sale of Goods (1974), para. 809.

73. The difficulty of determining the form and scope of such a general principle may be illustrated in this way. A refrigerator is manufactured to specifications (which do not form part of the contract of sale) which normally result in a trouble-free life of five years or more. The refrigerator in question is sold by a retailer, and breaks down after one year's use. Is the seller in breach of the implied terms of merchantability and fitness for purpose? Might it be said that it is implicit in these terms that the goods should not only be merchantable and fit for their purpose at the time of sale but that they should remain so for a reasonable time? If so, is a reasonable time five years or some lesser period? Alternatively, it might be said that it is enough that the goods are merchantable and fit for their purpose at the time of sale, and that there is no breach unless it can be shown that the defect existed at that time. This is consistent with the remarks of Lord Denning M.R. in Crowther v. Shannon Motor Co.[137] where he said: "Some criticism was made of a phrase used by the judge. He said: 'What does "fit for the purpose" mean? He answered: 'To go as a car for a reasonable time.' I am not quite sure that that is entirely accurate. The relevant time is the time of sale. But there is no doubt what the judge meant. If the car does not go for a reasonable time but the engine breaks up within a short time, that is evidence which goes to show it was not reasonably fit for the purpose at the time it was sold."

74. The Ontario Report drew attention to the "surprising dearth of authority on the question" and recommended that the position be clarified. The Commission recommended that the condition of merchantability be expanded to include a requirement that consumer goods should be durable for a reasonable length of time, having regard to the price and the other surrounding

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137 [1975] 1 W.L.R. 30, 33.

circumstances.[138] They did not discuss the similar question in the context of the implied condition of fitness for purpose.

75. We should welcome views on whether the present state of the law is satisfactory or whether some new statutory provision is necessary to introduce the concept of durability. If this were done it should, we suggest, be applied not only to the contracts considered in Parts II and III of this paper, but also to sale of goods and hire-purchase agreements. Our provisional view, however, is that no such provision is necessary and that in the example of the refrigerator given above[139] the court would, in the absence of evidence to the contrary, find that the refrigerator which broke down after one year was not of merchantable quality or fit for the purpose at the time of sale.

Spare parts and servicing facilities

76. If goods break down or are damaged they may become useless unless they can be repaired and unless spare parts are available. Although we believe that manufacturers frequently maintain a stock of spare parts for some time after the production of a particular article has been discontinued this is not, we think, an invariable practice, and difficulty is even experienced from time to time in obtaining spare parts for current models. In any event, there appears to be no legal obligation on the seller or supplier, let alone on the manufacturer, to maintain stocks or to provide servicing facilities.

77. There are obligations of this type in some jurisdictions. In several Canadian provinces legislation

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138 Ontario Report (see n. 129 above), p.37. Contrast the 1975 Working Paper of the Law Reform Commission of New South Wales on The Sale of Goods, paras. 8.49-8.52.

139 See para. 73, above.

imposes an implied warranty on dealers in agricultural machines and some other persons to carry spare parts for a ten-year period.[140] In California the manufacturer of consumer durables which are covered by an express warranty must maintain sufficient service and repair facilities in the State to carry out the terms of the warranty.[141] The Ontario Report contains a recommendation that in consumer sales there should be an implied warranty that spare parts and reasonable repair facilities will be available for a reasonable period of time with respect to goods that normally require repairs.[142]

78. There is much to be said for the idea that a purchaser should be entitled to obtain spare parts or replacements for goods of certain kinds. However, we foresee difficulties in determining to what goods or classes of goods such provisions should apply. Where someone buys a tea-set and breaks a cup it might be reasonable for him to expect that there would be stocks available from which he might purchase a replacement. Similarly where someone buys a new car it would be reasonable for him to expect that a stock of spare parts for the model in question would be maintained. However, different considerations would seem to apply where the article purchased was not one of a general run of products but was custom-made, or was an antique, or where it was bought at an auction of second-hand goods. Also the distinction between replacing a part and replacing the whole could give rise to difficulties. Should the person who buys a single cup and saucer expect to

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140 Alberta (Farm Implement Act, Revised Statutes of Alberta 1970, c. 136), Manitoba (Farm Machinery and Equipment Act 1971, c. 83), Prince Edward Island (Farm Implement Act, Revised Statutes of Prince Edward Island 1974, c. F-3) and Saskatchewan (Agricultural Implements Act 1968).

141 California Civil Code, ss. 1790-1792 (the Song-Beverley Act).

142 Ontario Report, p. 45, recommendation e.

be able to buy a replacement if one or other or both of them is broken? Then again there is the time factor. Should spare parts be kept available for a specific period, and, if so, should different periods be specified for different goods? Or should spare parts be kept available for a "reasonable" period in all cases, without any particular length of time being laid down? There is the further and more fundamental problem of deciding on whom the obligation, if there is to be one, should rest. One possibility is that the obligation to see that replacements and spares are available should rest on the retailer, as an additional term to be implied in the contract of sale. If this were so it would be necessary to consider whether the obligation should be strict or whether it should be a valid excuse for the retailer to show, for example, that spares simply could not be obtained because the manufacturer had gone out of business. Alternatively the obligation might be imposed on the manufacturer of the goods that are the subject of the sale, rather than on the retailer. The member of the public who purchases the goods rarely purchases directly from the manufacturer and there may be no contract of any kind between him and the manufacturer. It would therefore not be possible to frame the obligation to keep replacements and spare parts as a contractual obligation. The obligation would have to be founded in tort or be a new species of statutory obligation with civil remedies for breach. Again it would have to be considered whether the obligation should be strict and, in addition, whether special provision should be made for imported goods where the manufacturers were resident outside the jurisdiction. We express no opinion on whether terms as to spare parts or replacements should be introduced in this country but would like to know what our readers think (a) about the general principle and (b) about the difficulties just mentioned. We should also like to hear of any other suggested gaps in the law and how they might be filled.

PART V PROVISIONAL CONCLUSIONS

79. We now set out a summary of our main provisional conclusions and recommendations. They are not final views but are intended as a basis for discussion. Comments and criticisms are invited.

Generally

(a) It is desirable that the obligations of the supplier in respect of the goods supplied should be, as nearly as possible, the same, whatever kind of contract (sale, barter, hire, hire-purchase etc.) is employed (paras. 1-16).

Contracts of supply analogous to sale

(b) Where goods are supplied under a contract of barter or under a contract for work and materials, terms as to title, correspondence with description, merchantability, fitness for any particular purpose made known to the supplier and correspondence with sample may be implied (paras. 17-32). However the extent of the obligations is uncertain (paras. 33-36).

(c) The implied obligations of the supplier in respect of goods supplied under a contract of barter or work and materials should be assimilated to those implied in a contract of sale (paras. 37-38).

Contracts of hire

(d) Where goods are supplied under a contract of hire, terms as to quiet possession, correspondence with description, fitness for purpose and correspondence with sample may be implied but they lack clarity in their present form; in particular, there is doubt as to the nature and extent of the obligation of the supplier to supply goods that are fit for the purpose for which they are being hired (paras. 39-58).

(e) Subject to the qualifications set out below, the implied obligations of the supplier in respect of goods supplied under a contract of hire should be assimilated to those implied in a contract of sale (paras. 59-64).

(f) As for the implied undertakings regarding the supplier's title and the hirer's right to quiet possession, the following terms should be implied:-

(a) the supplier has the right to hire out the goods throughout the period of hire;

(b) the goods are free and will remain free, throughout the period of hire, from any charge or encumbrance not disclosed to the hirer before the agreement was made; and

(c) the hirer is entitled to quiet possession of the goods throughout the period of hire (para. 65).

(g) It is for consideration whether terms as to merchantability or as to fitness for any particular purpose made known to the supplier should be implied in a contract of hire where the goods are supplied otherwise than in the course of a business (paras. 66-68).

Additional terms in contracts of supply

(h) It is for consideration whether additional terms should be implied in contracts of supply (including sale and hire-purchase) in respect of, for example, the durability of the goods, the availability of spare parts and the maintenance of facilities for service and repair (paras. 69-78).

APPENDIX A

SALE OF GOODS ACT 1893, SECTIONS 12-15
AND EXTRACTS FROM SECTION 62

<u>Implied undertakings as to title etc.</u>

12 (1) In every contract of sale, other than one to which subsection (2) of this section applies, there is -

(a) an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(2) In a contract of sale, in the case of which there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should transfer only such title as he or a third person may have, there is -

(a) an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made; and

(b) an implied warranty that neither -

(i) the seller; nor

(ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that third person; nor

(iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made;

will disturb the buyer's quiet possession of the goods.

Sale by description

13. (1) Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.

(2) A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

Implied undertakings as to quality or fitness

14. (1) Except as provided by this section, and section 15 of this Act and subject to the provisions of any other enactment, there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition -

(a) as regards defects specifically drawn to the buyer's attention before the contract is made; or

(b) if the buyer examines the goods before the contract is made, as regards defects which the examination ought to reveal.

(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract 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 for him to rely, on the seller's skill or judgment.[137]

(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

(5) The foregoing provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

(6) In the application of subsection (3) above to an agreement for the sale of goods under which the purchase price or part of it is payable by instalments any reference to the

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137 This subsection has been enlarged by Consumer Credit Act 1974 s. 192, Sch. 4, to cover the case where the goods were sold to the seller by a credit-broker and the buyer made the purposes known to the credit-broker. However, this provision is not yet in force.

seller shall include a reference to the person by whom any antecedent negotiations are conducted; and section 58(3) and (5) of the Hire-Purchase Act 1965, section 54(3) and (5) of the Hire-Purchase (Scotland) Act 1965 and section 65(3) and (5) of the Hire-Purchase Act (Northern Ireland) 1966 (meaning of antecedent negotiations and related expressions) shall apply in relation to this subsection as they apply in relation to each of those Acts, but as if a reference to any such agreement were included in the references in subsection (3) of each of those sections to the agreements there mentioned.

Sale by sample

15. (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample -

(a) There is an implied condition that the bulk shall correspond with the sample in quality;

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Interpretation of terms

62. (1) In this Act, unless the context or subject matter otherwise requires, -

...

"business" includes a profession and the activities of any government department (including a department of the Government of Northern Ireland), local authority or statutory undertaker;

...

(1A) Goods of any kind are of merchantable quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly.

...

APPENDIX B

SUPPLY OF GOODS (IMPLIED TERMS) ACT 1973,

SECTIONS 8-11[138] AND EXTRACTS FROM SECTION 15

Hire-purchase agreements

Implied terms as to title

8. (1) In every hire-purchase agreement, other than one to which subsection (2) below applies, there is -

(a) an implied condition on the part of the owner that he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the hirer before the agreement is made and that the hirer will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of any charge or encumbrance so disclosed or known.

(2) In a hire-purchase agreement, in the case of which there appears from the agreement or is to be inferred from the circumstances of the agreement an intention that the owner should transfer only such title as he or a third person may have, there is -

(a) an implied warranty that all charges or encumbrances known to the owner and not known to the hirer have

138 Certain changes in terminology in these sections are made by Consumer Credit Act 1974 s. 192, Sch. 4, such as "the creditor" instead of "the owner" and "the person to whom goods are bailed or (in Scotland) hired" for "the hirer". The provisions effecting these changes are not yet in force.

been disclosed to the hirer before the agreement is made; and

(b) an implied warranty that neither -

(i) the owner; nor

(ii) in a case where the parties to the agreement intend that any title which may be transferred shall be only such title as a third person may have, that person; nor

(iii) anyone claiming through or under the owner or that third person otherwise than under a charge or encumbrance disclosed or known to the hirer before the agreement is made;

will disturb the hirer's quiet possession of the goods.

Letting by description

9. (1) Where under a hire purchase agreement goods are let by description, there is an implied condition that the goods will correspond with the description; and if under the agreement the goods are let by reference to a sample as well as a description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

(2) Goods shall not be prevented from being let by description by reason only that, being exposed for sale or hire, they are selected by the hirer.

Implied undertakings as to quality or fitness

10. (1) Except as provided by this section and section 11 below and subject to the provisions of any other enactment, including any enactment of the Parliament of Northern Ireland,

there is no implied condition or warranty as to the quality or fitness for any particular purpose of goods let under a hire-purchase agreement.

(2) Where the owner lets goods under a hire purchase agreement in the course of a business, there is an implied condition that the goods are of merchantable quality, except that there is no such condition -

(a) as regards defects specifically drawn to the hirer's attention before the agreement is made; or

(b) if the hirer examines the goods before the agreement is made, as regards defects which that examination ought to reveal.

(3) Where the owner lets goods under a hire purchase agreement in the course of a business and the hirer, expressly or by implication, makes known to the owner or the person by whom any antecedent negotiations are conducted, any particular purpose for which the goods are being hired, there is an implied condition that the goods supplied under the agreement 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 hirer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the owner or that person.

(4) An implied condition or warranty as to quality or fitness for a particular purpose may be annexed to a hire-purchase agreement by usage.

(5) The foregoing provisions of this section apply to a hire-purchase agreement made by a person who in the course of a business is acting as agent for the owner as they apply to an agreement made by the owner in the course of a business, except where the owner is not letting in the course of a business and either the hirer knows that fact or reasonable

steps are taken to bring it to the notice of the hirer before the agreement is made.

(6) Section 58(3) and (5) of the Hire-Purchase Act 1965, section 54(3) and (5) of the Hire-Purchase (Scotland) Act 1965 and section 65(3) and (5) of the Hire-Purchase Act (Northern Ireland) 1966 (meaning of antecedent negotiations and related expressions) shall apply in relation to subsection (3) above as they apply in relation to each of those Acts.

Samples

11. Where under a hire-purchase agreement goods are let by reference to a sample, there is an implied condition -

(a) that the bulk will correspond with the sample in quality; and

(b) that the hirer will have a reasonable opportunity of comparing the bulk with the sample; and

(c) that the goods will be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Supplementary

15. (1) In sections 8 to 14 above and this section -

...

"business" includes a profession and the activities of any government department (including a department of the Government of Northern Ireland), local authority or statutory undertaker;

....

(3) Goods of any kind are of merchantable quality within the meaning of section 10(2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances; and in section 11 above "unmerchantable" shall be construed accordingly.

....

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