

Terms are implied
into contracts on
many occasions
essay



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The terms of a contract describe the duties and obligations that arise under the agreement. Although a term has not been expressed by either party, it is nevertheless contained in the contract. Terms can be expressed or implied. Expressed terms may be expressed orally or in writing. A term may have been omitted by mistake, when both parties clearly intended it to apply. In such circumstances the courts can imply a term into a contract. A term may also be implied by custom, practice or trade usage; by statute, and by the courts in fact or in law.

In this question it is necessary to focus on implied terms by statute and by the courts (common law). When a statute declares that a term shall be included in a particular type of contract then it will do so irrespective of the wishes of the parties. A significant example of this is the Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994). There are many terms incorporated into a consumer transaction by this statute. S. 12 of the Act states that the seller has the right to sell the goods i. e. has the title to the goods. In the case of *Rowland v Divall* (1923) the claimant bought a car from the defendant.

However, both parties were unaware that the car had been stolen. The claimant then sold the car to a third party from which the true owners' insurance company reclaimed it. It was held that the defendant was in breach of s. 12 of the Sale of Goods Act 1979 and therefore ownership was never transferred to the claimant. Another incorporated term is s. 13 of the Sale of Goods Act 1979. This section denotes that goods will correspond to their description. An example of this term can be seen in the case of *Beale v*

Taylor (1967) where an advertisement read 'Herald, convertible white 1961'.

In fact the car consisted of two 'half cars' joined together, the back half of a 1961 model and the front of an older model. It was held that as the vehicle did not conform to the description, there was a breach of s. 13 of the Sale of Goods Act 1979. S. 14 (2) states that good supplied will be without undeclared defects and of satisfactory quality. This term was breached in *Grant v Australian Knitting Mills*. The claimant purchased a pair of long woolen underpants that contained excess sulphite that had not been removed in the manufacturing process.

He developed acute dermatitis and was hospitalised for several months. It was held that the goods were not of satisfactory quality. S. 14 (3) of the Sale of Goods Act 1979 asserts that goods supplied will be reasonably fit for their intended purpose. In the case of *Baldry v Marshall (1924)* the claimant wanted a car for touring Europe. He asked the defendant to supply him with a fast, flexible and easily managed car that would be comfortable and suitable for touring. It was held that the Bugatti which the defendant sold him was not fit for the purpose of touring.

Another term implied by the Sale of Goods Act 1979 is that the bulk corresponds with the sample in terms of quality (s. 15). S. 15 also states that the buyer will have reasonable opportunity to compare the bulk with the sample and that the goods will be free from defect. Terms that are implied by the courts (common law) can be implied in fact and in law. A common example is that in a lease of a furnished house, it is understood that the

accommodation will be reasonably fit for the habitation at the beginning of the lease period. Where terms are implied in fact, two tests are used: the officious bystander test and the business efficacy test.

The courts will imply a term into a contract to give effect to the clear and obvious intentions of the parties (officious bystander test). An example of this was in the case of *Shirlaw v Southern Foundries (1926)*. In this case MacKinnon LJ said, "... that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'oh, of course!'".

The business efficacy test relates to terms that must be implied to make the contract work. *The Moorcock (1889)* is an example of this test. The defendants owned a wharf and jetty, and contracted with the plaintiffs to moor and unload the plaintiff's boat at the jetty. The water was too shallow and the boat was damaged. It was held that in a business contract like this one, where a party invites another to moor at his jetty, there must be an implied term that it is suitable for that purpose, so the defendants were held liable for the damage. Both these tests are subjective and so the courts ask what the parties in the case would have agreed.

A term will not be implied in fact where one of the parties is unaware of the subject matter to be implied. This can be seen in the case of *Spring v NASDS (1956)*. An agreement had been made between unions for the transfer of members from one union to another, known as the 'Bridlington agreement'.

The defendant union admitted Mr. Spring without including this in their contract. When it was later suggested that it was implied, the officious bystander test was used. If Mr. Spring had been asked whether he had intended this agreement to be included in his contract, he would not have known about it, so the answer would have been 'no'.

A term will not be implied in fact if it's clear that one of the parties would not agree to it being there if he/she had put his/her mind to it. An example of this point can be seen in the case of *Luxor v Cooper* (1941). Terms that are implied in law refers to when the courts dictate that certain terms must be included in the contract. For example, in contracts of employment there is an implied term that an employer has a duty to provide a reference for an employee which is given based on facts compiled with due care. In *Spring v Guardian Assurance plc* (1994) the claimant was sacked by the defendant.

When seeking a new job he needed a reference and the defendant wrote one saying that he was incompetent and dishonest. It was held that the defendant was in breach of the implied term that he should provide a reference with due care. Another implied term in law is where a landlord lets flats in one building; he has a duty to take reasonable care to look after the common parts. This point can be seen in the case of *Liverpool City Council v Irwin* (1977) where Lord Denning suggested that a term concerning the maintenance of services to a block of flats should be implied where it was reasonable.

A consumer transaction is where the person selling is in the course of business, and the person buying will use this for their own personal use.

Through implied terms the Courts can achieve what they regard as fair and practical application of risks between the contracting parties. Therefore, consumers are given the fairest possible outcome if transactions are not successful. For example, s. 14 of the Sale of Goods Act 1979 states that the goods should be fit for the purpose they were made for, and should be of satisfactory quality and without undeclared defects.

This clearly protects the consumer from purchasing anything of a low quality and this section allows legal action to be taken against the seller. The requirements in s. 14, however, do not apply to matters that had been drawn to the attention of the buyer; where the buyer examines the goods in the sufficient way (that is examination which is ought to have revealed any sort of defect) before the purchase. S. 14 also asserts that goods supplied will be of satisfactory quality, as would be assessed by a 'reasonable' person having regard to all the circumstances.

However, this section does not apply to private sales and this section is only a condition until the goods are accepted; after this it becomes a warranty. Thus, the buyer can only repudiate the contract until he accepts the goods. The consumer is also protected under s. 15 of the Sale of Goods Act 1979 in that: the bulk corresponds with the sample in terms of quality; the buyer will have reasonable opportunity to compare the bulk with the sample; and that the goods will be free from defect - a fact which may not be apparent on reasonable examination of the goods.

An example of how a consumer can be protected in such instances can be seen in the case of *Godley v Perry* (1960). A boy was injured in the eye by a

catapult he had purchased. The retailer had tested the sample and was able to show that the bulk didn't match the quality of the sample. As a result, there was a breach of s. 15. The consumer is further protected under s. 13 of the Sale of Goods Act 1979. This section states that goods should correspond with the description, should the sale be one of the description. If this is not the case then the consumer is allowed to repudiate the contract.

These provisions apply to both private and consumer sales. To protect the consumer even more, these provisions have been given great scope; this can be seen in the case of *Re Moore and Landauer*. The buyer of packs of tinned beans stated to contain 30 tins to a pack was held to be entitled to reject the goods when they were supplied 24 to a pack, even though the quantities were equivalent. However, not all descriptive words are conditions within the scope of s. 13; the words must identify the subject. So, for example, words identifying the garage where a car that is being sold to be built are not within this section.

Consumers are additionally protected through implied terms in common law. A good example of how consumers are protected can be seen in the case of *Liverpool City Council v Irwin (1977)*. Under this case it was said that there is an implied term that landlords were obliged to maintain common areas of a block of flats that were let in units. This makes sure that the consumer has reasonable conditions around his/her home. *The Moorcock (1889)* provides that terms must be implied to make the contract work. For example, services should be suitable for their purpose, otherwise damages can be awarded.