Analysis of uk commercial law

Commercial Law

Definition

Commercial law in England and Wales is not susceptible to succinct categorisation as a unified body of law such as, for example, criminal law or the law of torts. Goode [1] has commented:

“ The absence of anything resembling a commercial code makes [the question, “ Does Commercial Law exist?] harder to answer than might be imagined. If, by commercial law, we mean a relatively self contained, integrated body of principles and rules peculiar to commercial transactions, then we are constrained to say that this is not to be found in England”.

Commercial legal practice will deal with a wide variety of subjects including the law relating to contracts, consumer credit, insurance, tax and partnerships. Commercial Law is thus an amalgam of common law, statute and even equity.

Historical Development

Despite these difficulties of categorisation the existence of a body of law controlling mercantile life has been recognised since medieval times when special courts existed for the purpose of dealing expeditiously with trade disputes. In the eighteenth century Lord Mansfield held sittings in the Guildhall in the City of London to hear commercial cases assisted by special panels of merchant jurymen to provide commercial expertise. When these sittings were discontinued the parties were forced back into the common law courts which proved unpopular due to procedural delays and the fact that

the judges were often not conversant with the needs of the commercial community. Accordingly, in 1892, the Council of Judges recommended that there should be a special court to hear commercial cases and this led to the introduction in 1895 of a special commercial list in the Queen's Bench Division. In 1970, a special Commercial Court was established but this remains part of that division.

Court Structure and Jurisdiction

The Commercial Court is subject to the Civil Procedure Rules. Part 49 and the associated Practice Direction provides that the court has jurisdiction in:

" any case arising out of trade and commerce in general including any case relating to":

- A business document or contract;
- The export or import of goods;
- The carriage of goods by land, sea, air or pipeline;
- The exploitation of oil and gas resources;
- Insurance and reinsurance;
- Banking and financial services;
- The operation of markets and exchanges;
- Business agency; and
- Arbitration.

The remit of the court therefore also represents a succinct statement of the type of disputes which might be regarded as “ commercial” notwithstanding the vagueness of this term. However, it should be noted that the county court has unlimited jurisdiction in claims in contract and tort and it is mandatory for claims worth less than £15, 000 to be commenced there. Thus a high volume of “ commercial” law is administered by this court with the more valuable or complex being dealt with by the Queen‘ s Bench Division of the High Court. The Chancery Division (the role of which in this regard can be summarised by its dealing with cases concerning companies and insolvency) will therefore also hear commercial matters. Finally, it should be noted that in addition to the Commercial Court, there is also a specially constituted Companies Court. The rationale behind the establishment of these fora is to allow the speedy resolution of commercial disputes by a body with expertise in and sympathy for the unique needs of those involved in commercial enterprise.

Thus the scope and extent of commercial law is vast and full description is impossible within the scope of this submission. Nonetheless, it is proposed to examine certain key elements of the *corpus* of commercial law which characterise its principles and demonstrate its operation in practice.

Sale of Goods

This is a species of the law of contract which has long existed and been regulated by common law principles. Contracts have been defined [2] as “ legally enforceable agreements which represent a vehicle for planned exchanges”. Contracts for the sale of goods are therefore subject to contract law principles but it should not be forgotten that they are increasingly

controlled by specific statutory provisions. Thus all contracts for the supply of goods now contain terms which are implied by statute and prescribe that they must be of a stipulated quality. The Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994) imposes a number of requirements:

- s. 12: that the seller should have the right to sell the goods, that the goods should be free from encumbrances and that the buyer should enjoy quiet possession of them;
- s. 13: that where the goods are sold by description, they should corespond with that description;
- s. 14(2): that the goods should be of satisfactory quality;
- s. 14(3): that the goods should be fit for the buyer's purpose;
- s. 15: that where the goods are sold by sample, they should correspond with that sample.

Of the above, the implied term as to satisfactory quality is one of the most frequently litigated. The word " satisfactory" replaced (by the 1994) the use of the historic term " merchantable" in relation to quality and continues a long pedigree of such a requirement in English law. Decisions in the 19 th Century demonstrate a recognition by the law of the commercial expectations of a purchaser. In *Gardiner v Gray* [3] , Lord Ellenborough observed somewhat bluntly:

" The purchaser cannot be expected to buy goods to lay them on a dunghill"(!)

While the concept of " merchantability" endured, it was not until 1973 that it was the subject of statutory definition. By then, the term had become somewhat outmoded with Lord Ormrod commenting in 1976 [4] :

" the word has fallen out of general use and largely lost its meaning, except to merchants and traders in some branches of commerce".

Nonetheless, it was not until 1994 that it was replaced by somewhat less arcane terminology.

Another significant statutory intervention in the ability of parties to determine the contractual relationships between themselves relates to exemption clauses or unfair contract terms. The leading piece of legislation in this field is the Unfair Contract Terms Act 1977. Prior to its enactment, the courts interpreted attempts by parties to a contract to restrict or exclude their liability in the event of a breach of contract very strictly. The legislative code has now largely superseded this function. The common law lacked the ability simply to declare such a term unenforceable merely on the ground that it was unfair or unreasonable (see *Photo Production Ltd v Securicor Transport Ltd* [5]) hence the need for the sometimes strained interpretation of such clauses. In broad terms the 1977 Act applies a test of " reasonableness" to such clauses in commercial contracts. Not surprisingly, this concept and the interpretation of the term has been the subject of much litigation. The Unfair Terms in Consumer Contracts Regulations 1999 extend certain aspects of the 1977 legislation. They were implemented as a result of a European Directive and apply to terms (other than " core" terms in consumer contracts. They are therefore different in certain critical aspects

from the 1979 Act and a comparison of the respective effects of the two reveals anomalies. It is submitted that the original legislation should now be reviewed and redrawn in order to provide a unified and consistent framework.

Manufacturers and Product Liability

While the above legislation applies only in contract law, it should not be overlooked that there are certain commercial situations in which the law of tort can play a part supplying an additional or alternative remedy. The statutory implied terms described above may entitle the buyer to reject defective goods and, in any event, claim damages for the breach of contract. Because this law is based upon the contract, a problem arises as a result of the doctrine of privity of contract which enables only the parties to a contract to sue upon it. Accordingly, the law of tort began to develop remedies for situations in which loss or damage was caused by a breach but the breach was not actionable in contract at the behest of the party thus injured. In the classic case of *Donoghue v Stevenson* [6] , the principle was established that in certain circumstances a manufacturer owes a duty of care to the end-user of his product. Thus where the product is defective and causes injury, the consumer may recover against the manufactuer in negligence notwithstanding that there is no direct contractual or other relationship between them concerning the supply of the product. Again driven by Europe, the UK passed the 1987 Consumer Protection Act in order further to regulate product liability. A claim may be brought under the Act by any person injured by a “ defective product”. “ Product” includes goods and even electricity. A product is defective for the purposes of the Act if its safety, including not

only the risk of personal injury but also the risk of damage to other property is “ not such as persons generally are entitled to expect”. It is submitted that this legislation is not only appropriate but necessary in the complex modern consumer society in which products are increasingly sophisticated and the relationship between manufacturer and end-user far more difficult to discern than would have been the case in the nineteenth century.

Consumer Credit

A very significant development in commercial law in the recent age has been in respect of the protection of customers in credit transactions. In *Consumer Credit Deregulation, A Review by the Director General of Fair Trading* [7] it was recognised that there was required “ a strong level of protection in a market which for many centuries – perhaps even since ancient times – has been regarded by law makers as particularly sensitive. Buyer-seller interactions in credit markets are characterised by imbalances of information and bargaining strength between lenders and borrowers.” Accordingly, in the 1970’s, following the report of the Crowther Committee [8] the Consumer Credit Act 1974 was enacted. The Act applies to “ regulated agreements” which are defined as “ consumer credit agreements or consumer hire agreements”. Despite the emphasis on the word consumer, certain types of business credit transactions are controlled. Section 8 of the Act defines a consumer credit agreement as “ a personal credit agreement by which the creditor provides the debtor with credit not exceeding [an amount varied by Statutory Instrument from time to time]. Section 189(1) defines an individual as “ including a partnership or other unincorporated body of persons not consisting entirely of bodies corporate”. Thus many commercial business

transactions (provided that they do not involve companies) are caught by the Act. The OFT Report referred to above proposed that all business credit transactions be removed from the scope of the Act but this suggestion was rejected. Conversely (and perhaps a little perversely) the present upper limit on such transactions of £25, 000 means that many genuine non-business consumers increasingly fall outside the safety net of the Act. The operation of this type of provision in the commercial sector again serves to illustrate the difficulty of classifying commercial law as a single discrete body of regulation. The inclusion of chapters on consumer credit in most so-called commercial law textbooks plus the existence of an entirely separate body of work purporting to deal with " consumer law" is illustrative of this dilemma.

Insurance

The scope of commercial law extends into many other fields of human activity. On such example is insurance. This remains essentially commercial in nature and, in many instances, can be said to stem from the basic commercial dealings of the parties. If commercial law is regarded as being based upon transactions, insurance has developed as a means of protecting those transactions and the subject-matter thereof. The modern law of insurance has developed directly from the activities of merchants principally those involved in seafaring from Italy in the fourteenth century. Merchants reached agreements between themselves to insure their ships and cargo against the risk of travel by sea. This practice was adopted in the coffee houses of London and gave birth to Lloyds the principal insurance underwriter in the world. The insurance industry has been subject to statutory regulation since the Life Insurance Companies Act 1870. The

current regime is regulated by the Financial Services and Markets Act 2000. Interestingly, in addition to such controls, contracts of insurance where appropriate also fall under the Unfair Terms in Consumer Contracts Regulations 1999 discussed above.

Banking

Bradgate [9] places banking at the very heart of commercial law:

“ The banking system plays an essential part in commercial activity in a developed economy. The modern bank provides a wide range of services to both business and private customers. The provision of such services is itself an aspect of commerce…in addition, banks provide essential services which underpin all other commercial activity…”

Banking activities in the UK have long been regulated by regulated by statute with important developments occurring in the Bills of Exchange Act 1882 and the Cheques Act 1957.

International Trade

Although this submission has focussed perforce upon UK domestic law, it would be erroneous to conclude without acknowledging the international element which represents so great a proportion of commercial activity and gives rise to a consequent need for regulation. In this regard a distinction should be drawn between two possible uses of the term “ international trade law”. First, it is used to describe the law controlling the relationships between the parties involved in international trade transactions. Second, it may describe the body of rules which govern relationships between states

and regulate the use between states of devices such as tariffs to control imports which are subject to such international treaties as the General Agreement on Tariffs and Trade. Works on commercial law habitually focus upon the English law applicable to international transactions. A great many contracts used in such international transactions contain a standard clause requiring the contract to be governed by English Law with the result that the Commercial Court in London is frequently called upon to adjudicate upon agreements that have been made between one or more parties located outside the jurisdiction. The UK is a party to the Hague Convention on Contracts for the International Sale of Goods which is given effect in English law by the Uniform Law on International Sales Act 1967. That Act is applicable to contracts where the contract itself stipulates that it should apply. In practice, few contracts take the opportunity to do so with the result that international sales contracts which are governed by English law fall to be determined according to the principles of the Sale of Goods Act 1979 thus returning us to the outset of this discussion.

Conclusion

Thus the scope and extent of the law which might be grouped under the heading of " commercial" is seen to be vast in reach and divers in type. Detailed description is therefore beyond the limit of a submission of this length. However, an examination of the broad cross section of topics discussed above reveals an enduring theme. In all aspects of commercial law the focus is upon *transactions* . Some commercial law such as the sale of goods legislation regulates such transactions directly. Other areas such as the law relating to banking and insurance concern the mechanisms that are

necessarily ancillary to such transactions. Others again, such as product liability, stem from the consequences of transactions even where the party seeking to avail himself of the law was not a direct participant in such a transaction.

Bibliography

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Footnotes

[1] *Commercial Law* (2 nd Ed., 1995), p. 1205

[2] Poole, J., *Textbook on Contract Law* , (7 th Ed., 2004), p. 1

[3] (1815) 4 Camp 144

[4] *Cehave NV v Bremer Handelgesellschaft mbH* [1976] QB 44 @ p. 80

[5] [1980] AC 827

[6] [1937] AC 562

[7] OFT (1994), para. 1. 8

[8] Report of the Committee on Consumer Credit (1971) Cmd 4596

[9] *Commercial Law* , (3 rd Ed., 2000)