

INTRODUCTION

T5 Implied terms of the contract

T6 Remedies

T7 Misrepresentation & commercial Misconduct

T8 Legislation & remedies (liability for defective products)

T9 Consumer rights and the sale of GOODS & services (ACL)

T10 Agencies

T5 IMPLIED TERMS

Note: see remedies for dealing with problems of implied terms

Def: Terms of contract that were not expressly agreed upon between parties, but which law nevertheless considers to be part of agreement.

Special terms implied by courts:

Corporation terms- implies that each party will do that which is reasonably necessary to enable the other party to have benefit of the contract.

Good faith terms- implied duty of good faith is recognised for relational contract- on going relationships (bread supplier and café)

Burger King v Hungry Jack's: Franchisee required to develop a certain # of new franchise restaurants each year, subject to franchisor's approval. Franchisor refused to give approval needed. Held; Franchisor breached duty by refusing approvals. Agreement subject to IT/duty of good faith (protects weak).

Reasonable care and skill- Certain type of service contract ('by law')

a. Contracts between professionals and clients- solicitors (a service)

- That professionals carry out their duty with reasonable care and skill

- service provided must be reasonable fit for the purpose for which they were acquired

b. Contracts for work and materials

Implied:

1. Reasonable care and skill will be exercised in performance of the work

2. Materials supplied will be of good quality and reasonably fit for purpose intended

3. Service provided must be reasonable fit for the purpose for which they were acquired

NOTE: court will not imply term if it would be unreasonable in the circumstances
Helicopter Sales v Rotor-Work: R serviced H's helicopter. H followed manufacturer's manual. H provided note to R stating materials used conformed to quality standards. Used a defective bolt, R knew H did not have expertise to check the quality (conduct fitness tests). Held: 'No room' for a warranty of quality to be implied. Principle: If there is no express term requiring particular quality there is no implied warranty of quality.

Red Gloss Pty Ltd v Rivers Lock

c. Hire contracts:

- Goods are reasonably fit for the purpose for which they are hired.

d. Employment contracts:

- Safe system of work is provided and employees are not

- required to do any unlawful act.

- Employee must obey all reasonable instructions, carry out the

- work with skill and competence, act in good faith towards the employer and keep the - employer's trade secrets confidential.

e. Landlord/tenant contracts:

- The tenant has quiet enjoyment of the premises;

- The tenant impliedly warrants to pay the rent and to use the

- premises in a 'tenant-like' manner.

f. OTHER SERVICE CONTRACTS (E.g. taxi services, car parks,)

- An implied obligation to take reasonable care and skill in providing the service and to - ensure that the service is reasonably fit for purpose

Costa Vraca v Berrigan Weed 24d (p.)

terms implied by courts based on the facts of the case:

A Term may be implied as a matter of fact due to:

1. Previous course of dealings ('in fact') provided that:

Requirements (Hollier v Rambler):

1. The term claimed to have been used in past dealings is clearly identifiable.

2. The previous dealings were sufficiently numerous + consistent to= regular course of dealing.

3. The present dealing fits into that course of dealing to the extent that it can reasonably be said that the same terms should be included (current same as past)

4. No conflict between the implied term and the express terms (consistent)

Henry Kendall v William Lilloco [1969]: W sold Brazil nuts to H (3-4 transactions per month for past 3 years). W would send a 'sale note' to H; stipulating buyer bore risk of any defects. Nuts defective. Court: clause on sold note was implied into contract due to past dealings (even though post contractual term). Reasonable seller would assumed buyer agreed to term. DO NOT have to prove actual knowledge.

past 5 yrs; not regular or consistent course of dealings). Held: term not implied and RM liable in negligence to H.

2. On the basis of customer or trade usage 'provided that'

Term must be (requirements):

(1) it is possible to state the term with precision;

(2) the custom or trade usage relied on is so well known and widespread throughout the industry that all contracts of the same type can be said to have that term (even if one of the parties to the contract wasn't aware of the custom);

(3) the custom is reasonable; and

(4) there is no conflict between the implied term and the express terms.

British Crane v Ipswich Plant Hire: Contract for construction work. Both parties assumed work would proceed continuously. However, work was delayed when C was restrained by injunction from working 10pm-6am each day. To give business efficacy – C should be given an extended time to complete.

3. To give contract 'business efficacy' provided that

Term must be (requirements):

(1) Reasonable & equitable;

(2) Necessary to give business efficacy to the contract, no term will be implied if the contract is effective without it;

(3) So obvious that "it goes without saying" (reasonable person; Belize)

(4) Capable of clear expression;

(5) It must not contradict any express term of the contract (

Codeifa v State Rail Authority NSW (1982): Contract for construction work. Both parties assumed work would proceed continuously. However, work was delayed when C was restrained by injunction from working 10pm-6am each day. To give business efficacy – C should be given an extended time to complete.

NOTE: terms cannot be implied simply because they are fair or reasonable; it must also be necessary and obvious (**Liverpool v Irwin, Durham**).

Moorcock (1889): P using D's wharf for unloading/loading ship, ship damaged at low tide as river to low. P argued it was implied that D would ensure suitability of the wharf.

Benefit of contract was use of the berth. Risk must have been intended to lie with D. P won: implied term to bring business efficacy.

terms implied by sale of goods legislation

NOTE: Consumer contracts are now specifically dealt with under the ACL. (See provisions in **topic 9**)- not for this

Non-consumer contracts are those contracts for the sale of goods that are not covered by the ACL. They are covered by sale of good legislation (State legislation such as the Goods Act 1958 (Vic)

contracts include:

- Sale of component parts to a manufacturer

- Sale of raw materials to a commercial enterprise

- Sale of finished goods to a reseller (manu>wholesaler>retailer)

- Sale of industrial goods where price is more than 40 000 (not bought for personal, domestic use, consumption)

- International sales of goods

Terms implied Include:

Conditions that:

1. Correspond with description

A purchaser alleging a breach on this basis will have to prove the following:

- There was a contract for the sale of goods

- The contract was made in (state)

- The goods were sold by description

- The goods do not match the description

Varley v Whipp: V agreed to buy 2nd hand machine from W. W assured V, who had not seen machine (sale by description), was 1 year old. Machine delivered, V discovered much older. Held: breach of implied term that good would correspond.

Beale v Taylor

Re Moore & Landauer

2. Is of Merchantable quality

Goods are of merchantable quality if they're reasonably fit at the time of sale for their normal purpose having regard to the circumstances of the case including the contract description and the price.

A buyer alleging a breach of contract on the basis goods are not fit of merchantable quality would have to prove the following:

- There was a contract for the supply of goods

- Contract was made in (vic)

- The goods were sold by description

- The seller was in the business of supplying goods of that type

- The goods were not as fit for their normal purposes is reasonable to expect having regard to price and other circumstances

- The buyer was not aware of the defect prior to sale

- Inspection by the buyer prior to sale would not have revealed defect

Grant v Australian Knitting Mills: Buyer purchased 'woollen underwear' that contained sulphite: not of merchantable quality (fit for purpose that the goods are usually used for).

3. Is Fitness for purpose

Goods must be reasonably fit for the purpose for which they were bought provided that purpose was made known to the seller and the buyer relied on the seller's skill

A purchaser alleging a breach on this basis will have to prove the following:

- There was a contract for the sale of goods

- The contract was made in (vic)

- The seller was in the business of supplying goods of that type

- The buyer made known to the seller the purpose for which the goods were required

- The buyer relied on the seller's skill and judgment

- The goods were not reasonably fit for the specified purpose

David Jones v Willis

Buyer purchased 'walking shoes' but one heel fell off. Held; breach of implied condition of merchantable quality and fitness for purpose

- May apply whether goods are new or used

Atkinson v Hastings Deering

- Buyer must rely on seller's skill and judgment

Griffiths v Peter Conway Ltd (UK Court of Appeal): Sale of tweed coat causing dermatitis: no breach of fitness for purpose as G had not told seller they suffered from an abnormal skin condition.

- Buyers' purpose may be a matter of inference

Godley v Pery

- Buyer's reliance must be reasonable

Teheran-Europe Co v ST Belton

T6 REMEDIES

Remedies can include:

a) Termination of Contract.

NOTE: Innocent party must not do anything to affirm contract – ie by indicating that the contract is still running

- Election to Termination must be unequivocal and must be communicated

- Terminating party must ready and willing to perform

Foran v Wight

Terminated by Frustration

A contract is terminated by frustration when:

- an event occurs, after the contract is made, that makes it impossible to perform or radically different the contract as contemplated. This means:

- Event was outside the control of the parties.

- Event was not foreseeable (unforeseen delay is major cause of contracts being terminated for frustration

Codeifa Constructions- Contract for construction work. Both parties assumed work would

