

The Law Commission

(LAW COM. No. 95)

Law of Contract

IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF GOODS

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by The House of Commons to be printed
17th July 1979*

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HER MAJESTY'S STATIONERY OFFICE

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**REPORT ON
IMPLIED TERMS IN CONTRACTS FOR
THE SUPPLY OF GOODS**

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CORRECTIONS

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August 1979

LONDON: HER MAJESTY'S STATIONERY OFFICE

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Kerr, *Chairman*.

Mr. Stephen M. Cretney.

Mr. Stephen Edell.

Mr. W. A. B. Forbes, Q.C.

Dr. Peter M. North.

The Secretary of the Law Commission is Mr. J. C. R. Fieldsend and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

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THE LAW COMMISSION

Item I of the First Programme

LAW OF CONTRACT IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF GOODS

*To the Right Honourable the Lord Hailsham of Saint Marylebone, C.H.,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1. This report on implied terms in contracts for the supply of goods is the third report in a sequence of three. The first was a report which was made jointly with the Scottish Law Commission in 1969 as part of our joint work on exemption clauses. It was entitled "Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act 1893" and is referred to hereafter as "the First Report on Exemption Clauses".¹ The second, which was published in 1975, was also a report on exemption clauses in contracts and was also made jointly with the Scottish Law Commission. It is referred to hereafter as "the Second Report on Exemption Clauses".² The third is the present report.

2. In order to place the present report in its proper context it is necessary to give a short summary of the two earlier reports and the legislation which has followed them.

The First Report on Exemption Clauses

3. In the First Report on Exemption Clauses we and the Scottish Law Commission reviewed the terms implied in contracts for the sale of goods and, in particular, the terms implied by virtue of sections 12 to 15 inclusive of the Sale of Goods Act 1893. This Act applies throughout the United Kingdom. The report recommended that changes should be made in sections 12, 13 and 14, with a view to clarifying the law, removing anomalies and adapting the law to take account of modern trading innovations such as the supermarket and "self-service".

4. Section 55 of the Sale of Goods Act 1893 provided that where any right, duty or liability would arise under a contract of sale of goods by implication of law it might be negated or varied by express agreement. When the terms of the contract were set out in a document put forward by the seller attempts were often made under this section to exclude or limit his liability in respect of terms implied by sections 12 to 15 of the Act. In our First Report on Exemption Clauses it was recommended by the Scottish Law Commission and ourselves that clauses which sought to exclude or limit the liability imposed by those sections should be controlled.

¹(1969) Law Com. No. 24; Scot. Law Com. No. 12.

²(1975) Law Com. No. 69; Scot. Law Com. No. 39.

The Supply of Goods (Implied Terms) Act 1973

5. The recommendations in the First Report on Exemption Clauses were implemented by the Supply of Goods (Implied Terms) Act 1973, which amended the Sale of Goods Act 1893 in two important respects. First, there were amendments of the sections which provided the implied terms. Section 12 (implied terms as to title), section 13 (implied term that goods should correspond with description), and section 14 (implied terms as to fitness and merchantability) were all amended. Section 15 (implied term that goods sold by sample should correspond with the sample) should be mentioned for the sake of completeness although it was not amended. Second, there was amendment of the section which provided that the terms might be varied or restricted by agreement, section 55. This section was amended by various provisions aimed at controlling the use of exemption clauses, as follows:—

- (a) exemption clauses in relation to the implied terms as to title (section 12) were made void;³
- (b) exemption clauses in relation to the implied terms as to correspondence with description, merchantability, fitness for any particular purpose and correspondence with sample (sections 13 to 15 inclusive) were made void in the case of a consumer sale⁴ and, in any other case, unenforceable to the extent that it would not be fair or reasonable to allow reliance on them.⁵

6. The provisions aimed at controlling the use of exemption clauses were later repealed and replaced by other provisions. This was achieved by the Unfair Contract Terms Act 1977 which is discussed in greater detail below.⁶ On the other hand, the provisions amending the sections of the Sale of Goods Act 1893 which are relevant to the terms to be implied in respect of goods supplied by sale remain in force. The relevant sections of the Sale of Goods Act 1893 (as amended) are reproduced at the end of this report as Appendix B. They provide a régime of terms to be implied in contracts for the supply of goods by sale which is referred to hereafter as “the Sale of Goods Act model”.

7. The First Report on Exemption Clauses was only concerned with implied terms in contracts of sale. However, the Supply of Goods (Implied Terms) Act 1973 also applies to contracts for the supply of goods by hire-purchase and the acquisition of goods by the redemption of trading stamps. As for hire-purchase, the provisions on implied terms⁷ follow the Sale of Goods Act model, save for a necessary variation in the implied terms as to title.⁸ As for trading stamps, the Act imposes obligations on the supplier of goods which follow the Sale of Goods Act model, although expressed in somewhat general terms.⁹

8. The Supply of Goods (Implied Terms) Act 1973 provided for the control of exemption clauses which purported to limit or exclude liability under the

³Sale of Goods Act 1893, s. 55(3).

⁴*Ibid.*, s. 55(7).

⁵*Ibid.*, s. 55(4).

⁶Paras. 11 to 13, below.

⁷Supply of Goods (Implied Terms) Act 1973, ss. 8–11.

⁸*Ibid.*, s. 8.

⁹*Ibid.*, s. 16, which substitutes a new s. 4 for the old s. 4 of the Trading Stamps Act 1964.

terms to be implied in contracts of hire-purchase¹⁰ and on the redemption of trading stamps.¹¹ However, these provisions (save in the case of the redemption of trading stamps) were repealed and replaced by the Unfair Contract Terms Act 1977.¹²

The Second Report on Exemption Clauses

9. The Second Report on Exemption Clauses was primarily concerned 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.*”¹³ The report considered, amongst other things, the purported exclusion of liability for “negligence” and of liability for breaches of contracts other than contracts for the supply of goods. However—and this provides the link with the present report—the report also examined the law relating to contracts for the supply of goods otherwise than by sale or hire-purchase, such as contracts of barter (or exchange), contracts for work and materials and contracts of hire.¹⁴ There appeared to be some uncertainty in the existing law as to the precise scope of the terms implied in such contracts, and a variety of differences between English and Scots law. But an examination of the case-law relevant to these contracts suggested strongly that terms as to title (or at least quiet enjoyment), correspondence with description or sample, and merchantability and fitness, were in some circumstances to be implied in such contracts, although not necessarily in accordance with the Sale of Goods Act model. The report accordingly made recommendations for the control of clauses which purported to restrict or exclude liability under such implied terms.¹⁵

10. The recommendations as to exemption clauses were made in the Second Report on Exemption Clauses without a discussion whether the terms which were implied in contracts for the supply of goods otherwise than by sale or hire-purchase (or on the redemption of trading stamps) needed modification, enlargement or clarification. The report was concerned with the practice of contracting out of obligations, not with what those obligations should be. The latter question is our main concern in the present report.

The Unfair Contract Terms Act 1977

11. The Second Report on Exemption Clauses was the basis of a Private Member’s Bill which was introduced in the House of Commons on 22 December 1976 as the Avoidance of Liability (England and Wales) Bill. In its passage through Parliament it was extended in scope so as to apply throughout the United Kingdom and many other substantial changes were made. It has now passed into law as the Unfair Contract Terms Act 1977.

12. For the purposes of the present report the important provisions in the Unfair Contract Terms Act 1977 are those concerned with clauses which purport to exclude or restrict liability under terms implied in contracts for the supply

¹⁰*Ibid.*, s. 12.

¹¹*Ibid.*, s. 16, amending the Trading Stamps Act 1964.

¹²See paras. 11 to 13, below.

¹³(1975) Law Com. No. 69; Scot. Law Com. No. 39, para. 4; (emphasis added).

¹⁴*Ibid.*, Part II, paras. 12–35.

¹⁵*Ibid.*, para. 32.

of goods. Part I amends the law of England and Wales (and Northern Ireland); Part II amends the law of Scotland. We are only concerned here with the former, and the most important of its provisions are sections 1, 6, 7, 11 and 12 and Schedule 2; they are reproduced at the end of this report as Appendix C.

13. Section 6 controls exemption clauses in relation to terms implied in contracts for the supply of goods by sale or hire-purchase in accordance with the scheme provided by the Supply of Goods (Implied Terms) Act 1973.¹⁶ Section 7 controls exemption clauses in relation to terms implied in other contracts under or in pursuance of which the possession or ownership of goods passes. Section 7 is similar to section 6, except that it is limited, by section 1(3), to the supply of goods in the course of a business, and that clauses excluding or restricting the implied terms as to title are not automatically void under section 7 (as they are in the case of sale or hire-purchase), but are valid or invalid depending on their "reasonableness". Section 11 provides a "reasonableness" test by which the enforceability of exemption clauses (other than those which are outside the Act altogether or inside the Act and completely void) are to be judged; the "reasonableness" test and the guidelines in Schedule 2 replace the test propounded in the Supply of Goods (Implied Terms) Act 1973. Section 12 provides a new set of rules, in place of those propounded by the Supply of Goods (Implied Terms) Act 1973, for determining when a person deals as a consumer. These rules are relevant to the enforceability of clauses which exclude or restrict implied terms (as to the goods' correspondence with description or sample, or their quality or fitness for any particular purpose) in contracts to which sections 6 or 7 apply.¹⁷ Where the person receiving the goods deals as a consumer such clauses are void: otherwise their enforceability depends on whether or not they pass the "reasonableness" test.

The need for the present report

14. To sum up, in 1969 we reported on the terms implied in contracts for the supply of goods *by sale* and recommended the control of clauses which purported to exclude or restrict liability under such terms. This gave the impetus to the Supply of Goods (Implied Terms) Act 1973, which dealt with contracts for the supply of goods *by hire-purchase* as well as by sale, and also covered the acquisition of goods by the redemption of trading stamps. In 1975 we recommended the control of clauses purporting to exclude or restrict liability under implied terms in contracts of supply which were not dealt with in the Supply of Goods (Implied Terms) Act 1973. This was achieved by the Unfair Contract Terms Act 1977. The purpose of the present exercise is to report on the terms to be implied in other contracts of supply (apart from the contracts dealt with in the Supply of Goods (Implied Terms) Act 1973) and to recommend such reforms as may be necessary.¹⁸

The need for consolidation

15. The reforms recommended in this report would necessarily involve the

¹⁶See para. 5, above.

¹⁷These rules are not relevant to questions as to title because s. 6(1) and s. 7(4) which deal with exclusion clauses as to title both apply (although having different effects) irrespective of whether the recipient of the goods deals as a consumer.

¹⁸Summarised in para. 130, below.

enactment of further legislation in the field of supply of goods. One way of reducing the number of statutes in this field might accordingly be to consolidate the existing legislation on implied terms in contracts of sale, hire-purchase and for the redemption of trading stamps (i.e., the Supply of Goods (Implied Terms) Act 1973) with the legislation proposed in this report. Whilst this would ensure that all legislation relating to the terms to be implied by statute in such contracts was contained in one Act of Parliament, it would still be necessary to look at no less than five major statutes¹⁹ to find all the sale of goods legislation. In our view, a better way of reducing the number of statutes in the field of supply of goods would be to consolidate the legislation relating to contracts for the sale of goods and we have set such a consolidation in hand.

Scope of this report

16. Our two earlier reports in 1969 and 1975 were made jointly with the Scottish Law Commission, and the legislation which followed from those reports²⁰ applies throughout the United Kingdom. The present report and our draft Bill apply only to England and Wales. It is not a joint report with the Scottish Law Commission, because the development of the law relating to contracts for the supply of goods other than sale and hire-purchase has been different in England from the development in Scotland,²¹ so that a joint law reform exercise in this field would not have been appropriate. Moreover the minor statutory amendments we propose²² will only apply to England and Wales. Furthermore the consolidation of the sale of goods legislation which we have set in hand does not apply to Scotland either.

Working Paper No. 71

17. In accordance with our usual practice we prepared a consultative document on the topic in question and sought views on the need for reform. We made provisional recommendations to the general effect that the terms to be implied in the contracts under consideration should be adapted to comply with the Sale of Goods Act model. We also invited views on the need for additional terms in *all* contracts for the supply of goods, including sale and hire-purchase. Our Working Paper No. 71 on Implied Terms in Contracts for the Supply of Goods was published on 8 March 1977.

Results of consultation

18. The comments which we received in response to our Working Paper No. 71 supported the idea that contracts for the supply of goods should all have more or less the same implied terms and that those terms should follow the Sale of Goods Act model. Most, but not all, thought that legislation was needed. We received detailed comments from those with experience of contracts for the supply of work and materials (a category dealt with in Part II of the paper) and those concerned in hiring out equipment and other goods (dealt with in Part III of the paper). The law of barter (or exchange) did not attract much comment except in relation to transactions such as part-exchange: the general view was

¹⁹Sale of Goods Act 1893; Misrepresentation Act 1967; Supply of Goods (Implied Terms) Act 1973; Consumer Credit Act 1974; Unfair Contract Terms Act 1977.

²⁰Supply of Goods (Implied Terms) Act 1973; Unfair Contract Terms Act 1977.

²¹See (1975) Law Com. No. 69; Scot. Law Com. No. 39, paras. 18-24.

²²To the Supply of Goods (Implied Terms) Act 1973, Consumer Credit Act 1974 and the Unfair Contract Terms Act 1977.

that the question whether goods were supplied for money (sale) or for some other consideration (barter) ought not to make any difference to the terms to be implied.

19. In Part IV of the working paper we canvassed the idea that additional terms might be introduced into all contracts for the supply of goods, and we instanced a legal requirement that goods should be durable; we also invited views on implied terms requiring the suppliers of goods to maintain servicing facilities and a stock of spare parts. Commentators were divided about the need for an implied term that goods should be durable. As for terms relating to servicing facilities and spare parts, the response from almost everyone was that although such a proposal sounded attractive, it was doubtful whether it would work fairly (or at all) unless the manufacturers of the goods and of the spares were somehow brought into the scheme. We did not offer any other suggestions for additional implied terms, and although we invited suggestions from readers²³ none were received.

Remedies

20. We made it clear in our working paper that the topics under discussion did not include the reform of the law of remedies for breaches of implied terms.²⁴ Under the existing law implied terms are sometimes classified as conditions, sometimes as warranties, and sometimes as intermediate stipulations or “innominate terms”. The general rule is that if the supplier breaks a *condition* of the contract of supply the person receiving the goods may reject them and treat the contract as repudiated, instead of or as well as claiming damages; if the supplier breaks a *warranty* the other party may not normally reject the goods but is confined to a remedy in damages. The Sale of Goods Act 1893 also classifies the terms implied under that Act in contracts for the sale of goods as either conditions or warranties.²⁵ Where these expressions are used, the remedy available in the event of breach follows automatically; breach of an implied condition on the part of the seller usually²⁶ entitles the buyer to reject the goods, whereas breach by the seller of an implied warranty will only entitle the buyer to claim damages.²⁷ The legislation relating to implied terms in hire-purchase agreements²⁸ also uses the expressions “condition” and “warranty” but does not define them. It has been suggested²⁹ that the same strict interpretation of these expressions would be adopted in the hire-purchase legislation as is required by the Sale of Goods Act 1893. This suggestion derives support from the fact that in 1938, when the first Hire-Purchase Act was passed, lawyers tended to take the view that all contractual terms could be classified either as conditions or as warranties. It is only in recent years that the common law has moved away from the strict classification of conditions and warranties adopted in the Sale of Goods Act 1893. There are different remedies for breach of contractual terms depending both on whether the term is derived from statute or common

²³Working Paper No. 71, para. 78.

²⁴Working Paper No. 71, paras. 14 and 15.

²⁵See e.g. Sale of Goods Act 1893, s. 12(1)(a) (condition) and s. 12(1)(b) (warranty).

²⁶This is not always so; a right to reject can be lost by acceptance; see Sale of Goods Act 1893, s. 11(1)(c).

²⁷Sale of Goods Act 1893, s. 11(1)(b).

²⁸Supply of Goods (Implied Terms) Act 1973, ss. 8–15.

²⁹See Halsbury's Laws of England (4th ed., 1974) vol. 9 p. 372, para. 543, n. 2.

law and, in the case of statutory implied terms, on the statutory régime which is the source of the term. There are terms implied by statute which are classified as conditions and warranties where under the statute, i.e., the Sale of Goods Act 1893, the remedy for breach follows the classification. Then there are terms implied and classified by statute but without any express prescription of remedy, as with terms implied in hire-purchase contracts under the Supply of Goods (Implied Terms) Act 1973. Finally, the remedy for breach of express contractual terms depends, at common law, on the seriousness of the breach. If the breach goes to the root of the contract the person receiving the goods may reject them; otherwise his remedy is limited to damages.³⁰

21. In view of these developments it is now clearly arguable that the old classification of implied terms into conditions and warranties, as used in the Sale of Goods Act 1893, needs to be revised. But, as we said in our working paper,³¹ the whole question of remedies for breaches of contractual terms is so wide and controversial that it could not be examined conveniently in the present limited exercise.

22. However, there has now been a new development which will in due course affect the whole position. Your predecessor recently referred to us, at our request, a number of matters in the field of supply of goods (including sale and hire-purchase) which will enable us to consider whether or not the Sale of Goods Act classification of implied terms into conditions and warranties, and the consequences of breaches of such terms, should be revised or preserved.³²

23. We cannot at present foresee what our recommendations on this new reference will be. Meanwhile, however, we are faced with a choice, if not a dilemma, of having to decide which model we should follow in the legislation proposed in this report. There are three possibilities.

- (a) To follow the rigid classification of the Sale of Goods Act by using the words “condition” and “warranty” and to define them so as to prescribe the remedy for their breach.
- (b) To follow the recent example of the legislation relating to implied terms in hire-purchase agreements³³ by continuing to use the words “condition” and “warranty” but leaving them undefined.
- (c) To abandon the use of these words altogether and to use a neutral word such as “term” to describe the implied terms proposed in this report.

³⁰*Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.* [1976] Q.B. 44, following *Hongkong 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.

³¹Working Paper No. 71, para. 15.

³²Our terms of reference are to consider (a) whether the undertakings as to the quality and fitness of goods implied under the law relating to sale of goods, hire-purchase and other contracts for the supply of goods require amendment; (b) the circumstances in which a person, to whom goods are supplied under a contract of sale, hire-purchase or other contract for the supply of goods, is entitled, where there has been a breach by the supplier of a term implied by statute, to (i) reject the goods and treat the contract as repudiated; (ii) claim against the supplier a diminution or extinction of the price; (iii) claim damages against the supplier; (c) the circumstances in which, by reason of the Sale of Goods Act 1893, a buyer loses the right to reject the goods; and to make recommendations.

³³Supply of Goods (Implied Terms) Act 1973, ss. 8–15.

24. We have carefully considered which of these would be the best course. All have disadvantages, since the appropriate choice depends on whatever may ultimately prove to be the best recommendation to make on the new reference mentioned above; to this extent any of the three solutions may prove to be temporary.

25. We have rejected solution (c), since it would take the presently proposed legislation out of line with all the rest; this would be undesirable, particularly since the proposed legislation is largely complementary to the Supply of Goods (Implied Terms) Act 1973. We have also rejected solution (a), since it would perpetuate a rigid distinction which may on examination prove to be unsatisfactory. We have accordingly adopted solution (b) as the one which is most convenient and also consistent with the hire-purchase legislation.

Arrangement of the report

26. This report follows the same divisions as the working paper, that is to say,

PART II CONTRACTS OF SUPPLY ANALOGOUS TO SALE

Here we consider the implied terms in the Sale of Goods Act model and their suitability for contracts of barter, contracts of work and materials and other contracts analogous to sale. We make recommendations for legislation.

PART III CONTRACTS OF HIRE

In this Part we discuss the existing law regarding terms implied in contracts of hire and the need for reform. We make recommendations for legislation.

PART IV ADDITIONAL IMPLIED TERMS

In this Part we discuss the need for additional terms in *all* contracts for the supply of goods (including sale and hire-purchase). Terms as to durability and as to servicing facilities and the availability of spare parts are all discussed. We make recommendations for legislation.

PART V SUMMARY OF RECOMMENDATIONS

We end with a summary of our recommendations.

APPENDIX A Draft Bill and Explanatory Notes.

APPENDIX B SALE OF GOODS ACT 1893, sections 12–15 and 55 and extracts from section 62.

APPENDIX C UNFAIR CONTRACT TERMS ACT 1977, sections 1, 6, 7, 11 and 12 and Schedule 2.

APPENDIX D List of persons and organisations who sent comments on Working Paper No. 71.

PART II

CONTRACTS OF SUPPLY ANALOGOUS TO SALE

27. We should first explain why we have entitled this Part "Contracts of supply analogous to sale". Contracts of sale are excluded. So are contracts of hire-purchase. So too are transactions involving the supply of goods on the redemption of trading stamps. The reason is that for these three types of contract statutory provisions are already in force concerning the obligations of the supplier in respect of the goods supplied: (a) the Sale of Goods Act 1893 (sections 12 to 15 of which provide the "Sale of Goods Act model"), (b) the Supply of Goods (Implied Terms) Act 1973 (sections 8 to 12 of which are concerned with hire-purchase) and (c) the Trading Stamps Act 1964. Our concern in this Part is with other contracts for the supply of goods which are analogous to sale but for which no statutory régime exists so that the obligations of the supplier in respect of the goods supplied depend entirely on the common law and the general law of contract.

The analogy with sale

28. Although there are two contracts analogous to sale which we have singled out for detailed consideration, namely, contracts of barter and of work and materials, our concern is more general. In the discussions and recommendations which follow we are, with only two exceptions, dealing with all contracts for the supply of goods which are analogous to sale.³⁴ The feature which they have in common with sale, and which provides the analogy, is that they are contracts in pursuance of which ownership of goods is transferred or is to be transferred. However, in contrast with the contract of sale, which requires there to be a money consideration,³⁵ the consideration for these contracts may involve something other than money, and it may be that the provision of services is also involved. By "goods" we mean those things which are classified as "goods" for the purposes of the Sale of Goods Act 1893.³⁶

29. As mentioned above, there are two classes of contracts for the supply of goods to which the recommendations of this report do not apply. The first of these encompasses contracts under or in pursuance of which the property in goods is transferred but which are intended to operate by way of mortgage, pledge, charge or other security. Any transaction in the form of a contract of sale which is intended so to operate is excluded from the Sale of Goods Act 1893 by section 61(4), and we believe that a similar exclusion is appropriate in the case of contracts analogous to sale. The second exception relates to those cases where there is a contract for the supply of goods which is only enforceable by reason of it being made by deed under seal. Although strictly contractual, such transactions under seal bear a closer resemblance to gifts³⁷ than to con-

³⁴The most common types of contract analogous to sale are contracts of barter and contracts of work and materials. However, there may be others which, on analysis, are found not to fall into either of these categories, (see e.g. *Esso Petroleum Co. Ltd. v. Commissioners of Customs and Excise* [1976] 1 W.L.R.1, per Lord Simon, at pp. 5-7 and Lord Wilberforce at p. 3) and our proposals relating to contracts analogous to sale are intended to apply to any such contracts as well.

³⁵Sale of Goods Act 1893, s. 1(1).

³⁶Section 62. The definition of "goods" is reproduced in Appendix B.

³⁷We deal with the borderline between contracts and gifts in paras. 30-32, below.

tracts for the sale of goods, and we therefore do not think that it would be right to include them within the scope of our proposals.

The contract of supply

30. In our working paper we explained that we would not be concerned with non-contractual transactions such as gift where there was no *contract* to supply the goods in question.³⁸ However, the borderlines separating (a) gift from sale and (b) gift and sale from contracts analogous to sale are not always clear, a point which is well illustrated by *Esso Petroleum Co. Ltd. v. Commissioners of Customs and Excise*.³⁹ Esso had devised a petrol sales promotion scheme which involved the distribution of coins to petrol stations. Each coin was stamped with the likeness of one of the English footballers selected for the 1970 World Cup Competition, and the object of the scheme was that the petrol station proprietor should offer to give away a coin for every four gallons of Esso petrol which motorists bought. The coins were of little intrinsic value but it was hoped that motorists would wish to build up a full set of 30. The coins were advertised as "Going free, at your Esso Action Station now". The question to be decided was whether the coins were being "sold" and were accordingly chargeable to purchase tax. Pennycuik V-C held that the coins were being sold; the Court of Appeal, reversing his decision, held that the coins were not being sold but were being distributed as gifts and that no tax was due. In the House of Lords, opinions were divided. Lord Fraser's opinion was that there was a sale; Viscount Dilhorne and Lord Russell thought that the Court of Appeal were right in holding that the coins were being distributed as gifts. Lord Simon and Lord Wilberforce both concluded that the supply of the coins to the motorists was contractual but without there being a sale; the consideration for the transfer of the coin or coins was not a money payment but the undertaking by the motorist to enter into a collateral contract to purchase the appropriate quantity of Esso petrol; accordingly it was not a gift, but it was not a sale either.

31. The result of the *Esso* case was that the House of Lords decided, Lord Fraser dissenting, that the coins had not been "sold" and that they were therefore exempt from purchase tax. For our purposes the significance of the case is on a more general point. It shows that the distinctions between gifts and sales and contracts analogous to sale are not always easy to draw and that the consequences of the distinction can be important.

32. Under the existing law a person who receives a gift has no right of redress against the donor merely because the gift is of unmerchantable quality or does not correspond with the donor's description of it. The person receiving the gift may have a remedy in tort if the gift causes injury or damage which is attributable to negligence on the donor's part. But that is another matter: he has no remedy in contract against the donor for the simple reason that there is no contract between them. To the extent that the offer of worthless goods, without charge, as part of a sales promotion, is against the public interest it is primarily the concern of the Office of Fair Trading. We therefore do not intend to examine the law of gift in this report.

³⁸Working Paper No. 71, para. 11.

³⁹[1976] 1 W.L.R. 1.

Our starting point

33. We explained in our working paper⁴⁰ that our starting point was that the obligations of a supplier in relation to the goods supplied should be, as nearly as possible, the same whatever kind of contract was employed. Everyone who commented on our paper agreed that this was a reasonable way of approaching the problems in this area, although not everyone agreed with the provisional conclusions at which we arrived. The contract of supply which has received most attention in the courts and in Parliament is the contract of sale, and the régime of obligations on the supplier in respect of goods sold is now embodied in a series of statutory provisions to which we refer as “the Sale of Goods Act model”. The terms implied at common law in contracts analogous to sale are close to, but not exactly the same as, the terms prescribed by the Sale of Goods Act model, and their content is by no means as clear. Our conclusion, as will be seen, is that they ought to be assimilated to contracts of sale by statute.

The Sale of Goods Act model

34. The provisions comprising the Sale of Goods Act model are set out in Appendix B but it is convenient to give a short summary here of their content and effect. This will be done under the following headings:—

- (a) Undertakings as to title.
- (b) Correspondence with description and sample
- (c) Merchantability and fitness
- (d) Interrelation with other terms

(a) Undertakings as to title

35. The undertakings as to title are set out in section 12 of the Sale of Goods Act 1893. Two sets of undertakings are provided, depending on whether the seller is agreeing to transfer a good title to the goods (which is the ordinary case) or whether he is only agreeing to transfer such title as he or a third person may have (which might be appropriate in the sale, by a receiver or liquidator, of goods in the possession of a company that is being wound up). In the former case there is an implied condition on the part of the seller that he has a right to sell the goods at the time of sale or, in the case of an agreement to sell (as opposed to a sale), that he will have a right to sell the goods at the time when the property is to pass.⁴¹ There is also 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;⁴² also that the buyer will enjoy quiet possession of the goods except in respect of disturbance by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed.⁴³

36. Before passing to the other kind of sale, where the agreement is to transfer a limited title only, mention should be made of a decision of the Court of Appeal concerning the implied warranty of quiet possession, *Microbeads A.G.*

⁴⁰Working Paper No. 71, para. 16.

⁴¹Sale of Goods Act 1893, s. 12(1) (a)

⁴²*Ibid.*, s. 12(1) (b).

⁴³*Ibid.*

v. *Vinhurst Road Markings Ltd.*⁴⁴ The defendants had purchased three road-marking machines from the plaintiffs in early 1970 and paid only part of the price. They were eventually sued for the balance. Unknown to either party a third enterprise had applied for a patent for certain road-marking apparatus in 1967. A specification was published late in 1970 and the letters patent were granted in February 1972. It was alleged that the three machines infringed the patent and the defendants relied on this fact as entitling them to damages from the plaintiffs for breach of the implied undertakings as to title. The Court of Appeal held that there was no breach of the implied condition that the plaintiffs had the right to sell (nor, it would seem, of the implied warranty that the goods were free from charges and encumbrances) since at the time that title in the goods was to pass the specification was still unpublished. However it was further held that, assuming that the three machines did infringe the patent, there was a breach by the plaintiffs of the implied warranty that the defendants should have quiet possession of the goods since the implied warranty of quiet possession was operative not only at the time when title in the goods was to pass but afterwards as well. The relevant section of the Sale of Goods Act 1893, section 12, was amended by the Supply of Goods (Implied Terms) Act 1973 after the date of the dispute in the *Microbeads* case, but the reasoning of the Court of Appeal applies to the new wording in the same way as to the old; so presumably if the facts of the *Microbeads* case were to recur the case would be decided in the same way.

37. This brings us to the other kind of sale, the contract under which the seller agrees to transfer only such title as he or a third person may have. In such a case there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed before the contract is made.⁴⁵ There is also an implied warranty that the buyer's quiet possession will not be disturbed by the seller or by the person whose title he purports to pass or by anyone claiming through or under either of them except under a charge or encumbrance disclosed or known to the buyer before the contract was made.⁴⁶ There is no implied term that the seller has the right to sell the goods.

(b) Correspondence with description and sample

38. It is convenient to take together the requirements that goods should correspond with their description (section 13 of the Sale of Goods Act 1893) and with the sample by which they are sold (section 15). As for the former it is an implied condition of the sale, where goods are sold by description, that the goods supplied should correspond with the description; as for the latter it is an implied condition, where goods are sold by sample, that the goods supplied should correspond with the sample. Sections 13 and 15 include other provisions but they are not of sufficient importance to warrant comment in the present summary, save for the provision that a sale may be a sale "by description" even where the goods are exposed for sale or hire and are selected by the buyer⁴⁷. This provision was added by the Supply of Goods (Implied Terms) Act 1973 in order to dispel any doubt as to whether a sale in a self-service store or super-

⁴⁴[1975] 1 W.L.R. 218.

⁴⁵Sale of Goods Act 1893, s. 12(2) (a).

⁴⁶*Ibid.*, s. 12(2) (b).

⁴⁷*Ibid.*, s. 13(2).

market could constitute a sale by description;⁴⁸ the provision makes it clear that it can.

(c) *Merchantability and fitness*

39. The implied undertakings as to merchantability and fitness, that is to say the “quality” provisions, are contained in section 14 of the Sale of Goods Act 1893, a section which was revised extensively by the amending legislation in the Supply of Goods (Implied Terms) Act 1973 as mentioned below.

40. An important feature of section 14 in its amended form, which distinguishes it from sections 12, 13 and 15, is that the implied obligations to which section 14 relates only arise where the seller sells goods “in the course of a business”, whereas the obligations as to title and correspondence with description or sample arise whether the sale is in the course of a business or whether it is what may be described as a “private” sale. For the purposes of the Act a “business” is to be regarded as including “a profession and the activities of any government department (including a department of the Government of Northern Ireland), or local or public authority.”⁴⁹

41. Section 14(2) of the Sale of Goods Act 1893 provides for an implied condition on the part of the seller that the goods supplied should be of “merchantable quality”. Section 62(1A) of the Sale of Goods Act 1893 states that this means that they should be “as fit for the purpose or purpose 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 the other relevant circumstances . . .” We are aware that it has been suggested that this statutory definition of merchantable quality is unsatisfactory and should be reviewed,⁵⁰ but major reform of the definition of merchantable quality does not lie within the scope of this present exercise. We did not seek views on the statutory definition in our Working Paper No. 71, and it would therefore be inappropriate for us here to make proposals for its reform. However, part of our work under the new reference on supply of goods already mentioned⁵¹ will be to consider whether the criticisms of the statutory definition which have been voiced are well-founded and whether any amendment is needed. We shall be seeking views on these and the other matters covered by the new reference⁵² in a separate working paper.

42. Two important qualifications are placed upon the business seller’s obligation to supply goods of merchantable quality. First, the obligation does not apply to defects specifically drawn to the buyer’s attention before the contract is made.⁵³ Second, if the buyer examines the goods before the contract is made, the obligation does not apply to defects which the examination ought to reveal.⁵⁴

⁴⁸See the First Report on Exemption Clauses (1969), Law Com. No. 24; Scot. Law Com. No. 12, paras. 23–25.

⁴⁹Section 62, as amended by the Supply of Goods (Implied Terms) Act 1973 and, more recently, by Sched. 3 to the Unfair Contract Terms Act 1977.

⁵⁰In particular, by the Consumers’ Association; see Robin Young, “What is merchantable quality?” *The Times* 11 July 1978 p. 10.

⁵¹See para. 22, above.

⁵²The terms of the new reference are set out at n. 32, above.

⁵³Sale of Goods Act 1893, s. 14(2) (a).

⁵⁴*Ibid.*, s. 14(2) (b).

43. As for “fitness”, section 14(3) of the Sale of Goods Act 1893 provides that where 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 goods sold and supplied by a seller in the course of a business should be reasonably fit for that purpose. This applies whether or not the purpose in question is one for which such goods are commonly supplied. There is, however, one important qualification to the obligation as to fitness just described. It is not to be implied 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.⁵⁶

44. Section 14 contains other provisions as well. They are not of sufficient importance to the present report to justify comment here but they are set out in Appendix B.

(d) Interrelation with other terms

45. The terms affecting the seller’s obligations in relation to the goods supplied are contained in the provisions just considered, namely sections 12 to 15 of the Sale of Goods Act 1893. They comprise what we are calling “the Sale of Goods Act model” and are more or less self-contained. There are many other provisions in the Act relating to the obligations of buyer and seller, for example, provisions as to whether time is to be of the essence, when title in the goods is to pass and what remedies are available to the buyer if the seller fails to deliver the goods or to the seller if the buyer refuses to accept them or fails to pay. These are not our present concern and are not included in the Sale of Goods Act model.

46. We ought, however, to mention section 55 of the Sale of Goods Act 1893 because it links the provisions on implied terms with the legislation on exemption clauses. It provides that any right, duty or liability which would otherwise arise under a contract of sale of goods by implication of law (including the implied obligations of the seller under the Sale of Goods Act model) may be negated or varied by express agreement, by the course of dealing or by usage, subject however to the provisions of the Unfair Contract Terms Act 1977.⁵⁶

47. In the rest of this Part we consider two major questions: (a) what terms are or should be implied in contracts analogous to sale, i.e. those other contracts under which one person transfers or agrees to transfer to another the property in goods,⁵⁷ and (b) whether the control on contracting out of such terms, provided by the Unfair Contract Terms Act 1977, need revision.⁵⁸

Contracts of barter

48. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a *money* consideration called the price.⁵⁹ Where the consideration is not a money consideration the transaction

⁵⁶All the provisions described in this paragraph appear in s. 14(3) of the Sale of Goods Act 1893.

⁵⁶See paras. 11–13, above.

⁵⁷Paras. 48–66, below.

⁵⁸Paras. 67–73, below.

⁵⁹Sale of Goods Act 1893, s. 1(1).

is not a sale but barter. Although barter is generally taken to mean the trading of goods for other goods it has, in law, a wider meaning. For example the supply of goods in exchange for services would amount to barter. Also, where goods are “bought” for a composite consideration, part money and part something else such as other goods, the transaction is not a sale. It is the view of at least one writer that the transaction, well known in the motor trade, of “trading in” one vehicle in part-exchange for another is not in strict law a sale but is barter.⁶⁰

49. The exchange of goods for other goods is not as rare as might be supposed. Sometimes barter is used in substantial commercial transactions. The leading modern Scottish authority on barter concerns whisky,⁶¹ large stocks of 1962 grain being exchanged for 1964 grain. Goods sometimes provide a more reliable form of payment than cash. As Professor T. B. Smith has said in his article “Exchange or Sale?”: “Even if the currency may suffer unwelcome and involuntary dilution in value at the present time, a Scotsman may hope that whisky will not suffer likewise.”⁶²

50. There is another kind of transaction on the borderline between sale and barter which has become a common feature of retail trade in recent times. The promotion of particular products often involves the distribution of coupons, vouchers and the like which the customer is allowed to trade in as part of the consideration for the supply of goods entitling him to a reduction in the price otherwise payable. Another practice is that of offering goods at reduced prices provided that the customer hands over a certain number of wrappers or labels from the product which is being promoted.⁶³ Yet another variant is the supply of products as a bonus to which the customer becomes entitled on purchasing a certain quantity of the products which are being promoted.⁶⁴ Sometimes the transaction involves no more than a free gift. Sometimes, however, there is a contract for the supply of the goods in return for coupons or labels or some other non-monetary consideration with or without money in addition; the contract is either a sale or barter but considerable legal doubt exists as to which it is.⁶⁵

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

52. *La Neuville v. Nourse*,⁶⁶ which was decided in 1813, appears to be the only reported case in which the English courts have considered the obligations of the supplier in relation to goods supplied by way of barter. In this case the plaintiffs who were wine merchants sold some burgundy to the defendant and a year later agreed to exchange the burgundy for champagne. By this time the

⁶⁰L. S. Sealy, *Benjamin's Sale of Goods* (1974), para. 32.

⁶¹*Widenmeyer v. Burn, Stewart & Co.*, 1967 S.C. 85.

⁶²(1974) 48 Tulane Law Rev. 1029, 1042.

⁶³*Chappell & Co. Ltd. v. Nestlé Co. Ltd.* [1960] A.C. 87.

⁶⁴cf. *Esso Petroleum Co. Ltd. v. Commissioners of Customs and Excise* [1976] 1 W.L.R. 1.

⁶⁵In the *Chappell & Co.* case Lord Reid thought the transaction was *not* a sale. In a Canadian case on similar facts, *Buckley v. Lever Bros. Ltd.* [1953] 4 D.L.R. 16, the Court treated the transaction as one of sale. See too the divergence of opinion in the *Esso* case, noted in para. 30, above.

⁶⁶(1813) 3 Camp. 351; 170 E.R. 1407.

burgundy was “quite sour, and only fit to be used as vinegar”. The plaintiffs claimed compensation under a variety of heads but their action was dismissed. The court was not prepared to imply a term into the contract that the defendant warranted the quality or merchantability of the burgundy in any way; the maxim of *caveat emptor* applied in the absence of “evidence of an express warranty, or of direct fraud”.

53. It is not clear whether the plaintiffs would have fared better if their customer had returned the burgundy *in the course of a business*; whether or not this is so is now the issue on which liability for the merchantability of goods depends if the Sale of Goods Act model is applied.⁶⁷ It seems quite likely that the plaintiffs would still have failed, because the common law of sale (and, presumably, of barter) required that the goods had to be sold *by description* if a term as to merchantability were to be implied.⁶⁸ This requirement does not appear to have been satisfied on the facts of *La Neuville v. Nourse*.

54. It was generally supposed before 1893 that at common law the obligations of the supplier of goods were the same for barter as for sale.⁶⁹ Indeed the Sale of Goods Bill originally contained a clause applying its provisions *mutatis mutandis* to contracts of barter, but this clause was cut out on the recommendation of the House of Commons Select Committee.⁷⁰ The difficulty today is that even if the provisions in sections 12 to 15 of the Sale of Goods Act 1893 were originally no more than declaratory of the existing law of sale (and *mutatis mutandis* of barter) the changes made by the Supply of Goods (Implied Terms) Act 1973 only apply to sale, not barter. Thus, on such important matters as the supplier’s obligations to provide goods which are merchantable and fit for the purpose required, the legal result may very well be different depending on whether the transaction is classified as a *sale*—to which the terms of the Sale of Goods Act model in Appendix B would apply—or as *barter* in which case the terms would be those to be implied at common law, using the unamended provisions of the Sale of Goods Act 1893 as an analogy.

55. No one who commented on our working paper suggested that the supplier’s obligations in respect of goods supplied by barter should be any different from those of a seller. Indeed everyone who commented said that the obligations should be exactly the same and that any doubts or discrepancies which may exist should be removed by legislation. We agree and recommend accordingly.

Contracts of work and materials

56. 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 (re-enacted in section 4 of the Sale of Goods Act 1893) required contracts for

⁶⁷See s. 14(2) and (3) of the Sale of Goods Act 1893 in Appendix B; also para. 40, above.

⁶⁸The Sale of Goods Act 1893 required that goods had to be sold by description for the condition as to merchantable quality to apply; but this requirement was removed when s. 14 of the 1893 Act was amended by s. 3 of the Supply of Goods (Implied Terms) Act 1973.

⁶⁹*Blackburn’s Contract of Sale* (2nd ed., 1885), p. ix.

⁷⁰Parliamentary Papers 1893–94 (374) XV 11.

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. The basis of the distinction has been considered in various cases by the courts,⁷¹ 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.⁷² As a result, certain contracts of supply, such as to supply a meal in a restaurant⁷³ or to make and fit false teeth,⁷⁴ are to be classed as sales, whereas other contracts of supply, such as to paint a portrait,⁷⁵ repair a car,⁷⁶ apply a hair-dye,⁷⁷ or roof a house⁷⁸ are not sales but contracts for work and materials.

57. The problem with contracts for work and materials is substantially the same as with barter and, in our view, amenable to the same treatment. It seems reasonably clear that at common law the obligations of the supplier in respect of materials supplied were regarded as the same whether the contract was classified as one of sale or of work and materials, and in either case whether the supplier worked on, or with, the materials or whether he did not.⁷⁹ The difficulty today is that, whereas the supplier's obligations in the case of sale are clearly set out in the Sale of Goods Act model provisions, in the case of a contract of work and materials the supplier's obligations in respect of the materials are those to be implied at common law. The present state of legal uncertainty about the supplier's obligations⁸⁰ seems undesirable, and the solution which suggests itself is to make the obligations of the supplier, in respect of goods supplied under a contract of work and materials, the same as those of the seller under a contract of sale.

58. It is indeed hard to see any justification for imposing less stringent obligations on the supplier of work and materials than on someone who merely sells the materials. Such an argument was considered and rejected in *Dodd and Dodd v. Wilson and McWilliam*.⁸¹ The defendants who were veterinary surgeons innoculated the plaintiffs' cattle with a substance which had a latent defect; as a result many of the animals became sick. The defendants were held liable and the trial judge, Hallett J., 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?"⁸²

⁷¹See e.g. *Lee v. Griffin* (1861) 1 B. & S. 272; 121 E.R. 716; *Robinson v. Graves* [1935] 1 K.B. 579.

⁷²Law Reform (Enforcement of Contracts) Act 1954, s. 2.

⁷³*Lockett v. A. & M. Charles Ltd.* [1938] 4 All E.R. 170.

⁷⁴*Lee v. Griffin* (1861) 1 B. & S. 272; 121 E.R. 716; cf. *Samuels v. Davis* [1943] K.B. 526.

⁷⁵*Robinson v. Graves* [1935] 1 K.B. 579.

⁷⁶*G. H. Myers & Co. v. Brent Cross Service Co.* [1934] 1 K.B. 46.

⁷⁷*Watson v. Buckley, Osborne, Garrett & Co. Ltd.* [1940] 1 All E.R. 174.

⁷⁸*Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454.

⁷⁹See a review of the older authorities by Lord Pearce in *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454 at p. 470 and by Lord Wilberforce at pp. 476-480.

⁸⁰See the division of opinion in the House of Lords in *Gloucestershire County Council v. Richardson* [1969] 1 A.C. 480 and in the High Court of Australia in *Helicopter Sales (Australia) Pty. Ltd. v. Rotor-work Pty. Ltd.* (1974) 4 A.L.R. 77; 132 C.L.R. 1.

⁸¹[1946] 2 All E.R. 691.

⁸²*Ibid.*, at p. 695.

59. In *Young & Marten Ltd. v. McManus Childs Ltd.*⁸³ Lord Upjohn made another and more general point in favour of eliminating any differences which might exist between the obligations of the supplier of materials by sale and of the supplier of materials under a contract of work and materials. He said that such differences would be “most unsatisfactory, illogical, and indeed a severe blow to any idea of a coherent system of common law. . . .”

60. A clear majority of those who commented on our working paper agreed with our provisional conclusion that obligations in contracts for work and materials should be made to conform to the Sale of Goods Act model. However, two points were raised on behalf of the construction industry which call for further consideration.

61. The first point concerns the supplier’s obligations in regard not to the materials but to the work. His obligation is “half the rendering of service and, in a sense, half the supply of goods.”⁸⁴ In our working paper we explained⁸⁵ that we were only concerned with the supply-of-goods half, but it was suggested to us on consultation that our work would remain incomplete unless we tackled the rendering-of-service half as well. In Australia this has been done by section 74(1) of the Federal Trade Practices Act 1974 which provides as follows:—

“In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.”

62. This particular provision has been criticised⁸⁶ for achieving the very thing which we are seeking to eliminate, namely, a different set of obligations in regard to the materials supplied depending on whether the supplier is merely selling or whether he is providing services as well. It will be noted that in this section the obligation to supply materials which are reasonably fit for the purpose for which they are supplied is unqualified. It appears that the duty binds the supplier even where the circumstances show that the person receiving the work and materials does not rely on the seller’s skill or judgment or does so unreasonably. On this basis, the customer who insists, contrary to the advice of the builder, that certain materials are to be used in a particular job would be able to sue the builder if the builder’s advice that the materials are unsuitable proves to be correct. On the other hand the obligations on the seller, in the matters of merchantability and fitness, are regulated in the Australian legislation by sections 71(1) and (2) which have the same qualifications, as to reliance and so on, as the provisions in our Sale of Goods Act model.⁸⁷ Thus section 74(1) appears to impose much stricter obligations on the supplier of work and materials, so far as the materials are concerned, than sections 71(1) and (2) impose on the person who sells the same materials in similar circumstances. This has been criticised, rightly in our view, as producing an undesirable anomaly.

⁸³[1969] 1 A.C. 454, 473.

⁸⁴*Watson v. Buckley, Osborne, Garrett & Co. Ltd.* [1940] 1 All E.R. 174, 180.

⁸⁵Working Paper No. 71, para. 27.

⁸⁶N. E. Palmer and F. D. Rose, “Implied Terms in Consumer Transactions—The Australian Approach” (1977) 26 I.C.L.Q. 169, 173–178.

⁸⁷Paras 39–44, above.

63. However, it may be argued in defence of section 74(1) of the Australian Act that at least the rendering-of-service element in the work and materials contract has been dealt with simply and satisfactorily by requiring “due skill and care”; but this provision has also not escaped criticism:—

- (a) it is not clear whether, and if so in what circumstances, it imposes a higher duty than the avoidance of negligence;
- (b) it creates anomalies and inconsistencies by singling out one kind of “service” for special treatment.⁸⁸

Both points would need serious consideration if we were to make recommendations for the reform of English law in regard to the rendering-of-service element in the contract of work and materials. It would be necessary to consider in what circumstances the duty was merely to provide reasonable skill and care and in what circumstances there was an implied warranty that the finished work would be fit for a particular purpose.⁸⁹ Moreover, the obligations of the supplier of services under a work and materials contract could not be considered in isolation solely because the supply of goods element of such contracts is under review. All kinds of contracts involve the supply of services, and it would be necessary to consider the obligations of the person supplying work and materials in a wide context, including professional services generally, with or without materials being supplied. We do not think that this report on supply of goods should be postponed for the length of time required to carry out such a study. Accordingly we are satisfied that the best course is to make recommendations for the supply-of-goods element of the contract of work and materials and to omit, at least for the present, the rendering-of-service element.

64. The other point raised on consultation concerned the effect of making building contractors subject to the same obligation as sellers in the matter of fitness of the materials supplied. We were informed that, in almost all major works of civil engineering, questions concerning the design to be adopted and the materials to be used are decided by the employer (or client) or the engineer (or consultant) without involving the building contractor; the role of the building contractor is simply to buy and use the materials stipulated and to build to the design required. Accordingly, if the materials used are unsuitable for the design in question it has to be decided whether the legal responsibility for loss or damage which results rests, or should rest, with the employer or engineer on the one hand or with the building contractor on the other. This is, of course, a situation which is not restricted to the building industry; it is one which can arise in any contract for work and materials and the same principles should apply. We shall however discuss it in the field of construction contracts since this is the context in which it was raised on consultation.

65. Those who raised this matter argued strongly that, as between the employer, the engineer and the contractor, responsibility for the selection of unsuitable materials should rest with the person who selected them (the employer or the engineer) rather than the person who supplied them (the building contractor); and that the effect of the proposal to impose obligations on the builder

⁸⁸N. E. Palmer & F. D. Rose, *op. cit.*, pp. 185–190.

⁸⁹*Greaves & Co. (Contractors) Ltd. v. Baynham Meikle & Partners* [1975] 1 W.L.R. 1095.

in accordance with the Sale of Goods Act model would be to make the builder strictly liable if the materials turned out to be unfit for the purposes for which they were required. We do not accept that this is so, since the builder would seem to have a good defence to an action for breach of an implied term, whether the term be that the goods should be of merchantable quality or, alternatively, that they be reasonably fit for the particular purpose for which they are required. If the issue is one as to the merchantable quality of the goods in question,⁹⁰ the obligation of the builder would be to supply goods which “are as fit for the purpose or purposes for which goods of that kind are commonly [supplied] as it is reasonable to expect.”⁹¹ Thus, when the use of particular materials has been stipulated by the employer, the builder’s obligation would be to ensure that the materials which he supplies, of the type stipulated, are fit for whatever is their normal purpose. If they are not fit for their normal purpose, i.e. not of merchantable quality, he would be liable, as indeed he is at present under the common law if he fails to supply materials of good quality;⁹² but if the goods, stipulated by the employer and supplied by the builder, are fit for their normal purpose but not suitable for a particular purpose for which the employer requires them, we do not believe the builder would be liable. For if the builder has been made aware of the particular purpose for which the goods are required, he would be liable⁹³ if he supplies materials which are not reasonably fit for that purpose “*except where the circumstances show that the [employer] does not rely, or that it is unreasonable for him to rely, on the [builder’s] skill or judgment.*”⁹⁴ The building contractor would be able to rely on this proviso in such cases, since the skill and judgment relied upon would have been that of the employer himself or of the engineer.

66. Our conclusion is therefore that the supplier’s obligations in respect of the materials supplied should be the same whether he simply sells them or whether he supplies them and also does work under the contract. In other words, the person who supplies goods under a contract for work and materials should be bound by implied terms in respect of the materials supplied in accordance with the Sale of Goods Act model. We recommend accordingly.

Contracting out

67. It is convenient to turn, at this stage, to the provisions of the Unfair Contract Terms 1977 concerning clauses which exclude or restrict the terms implied in contracts involving the sale or supply of goods. We have already concluded that the same terms should be implied in contracts analogous to sale as in contracts of sale. The next question is whether clauses excluding or restricting those implied terms should be subject to the same control. As will be seen, there are two differences, which are discussed below; however, for the most part the régime of control established by the Unfair Contract Terms Act 1977⁹⁵ applies to contracts of sale and contracts analogous to sale in the same way.

⁹⁰Sale of Goods Act 1893, s. 14(2). See paras. 41–42, above.

⁹¹*Ibid.*, s. 62(1A).

⁹²*G. H. Myers & Co. v. Brent Cross Service Co.* [1934] 1 K.B. 46; *Young & Marten Ltd. v. McManus Childs Ltd.* [1969] 1 A.C. 454.

⁹³Sale of Goods Act 1893, s. 14(3).

⁹⁴*Ibid.*, (emphasis added). See para. 43, above.

⁹⁵The text of the relevant provisions is set out in Appendix C.

68. Section 6 of the Unfair Contract Terms Act 1977 controls exemption clauses in contracts of sale and hire-purchase and section 7 provides a similar system of control in relation to other contracts for the supply of goods including those with which we have been concerned in this Part. What the two sections have in common are that (a) both of them invalidate exemption clauses concerning the fitness or merchantability of goods and their correspondence with description and sample in contracts where the person receiving the goods deals as a consumer, and (b) both sections provide that where the person receiving the goods does not deal as a consumer the efficacy of such exemption clauses depends on whether they pass the “reasonableness” test. The two points of difference are (a) the treatment of exemption clauses relating to undertakings as to title, and (b) the distinction drawn between “business liability” and other forms of liability.

69. As for the first point of difference, section 6(1) (a) provides that liability for breach of the obligations under section 12 of the Sale of Goods Act 1893 (seller’s implied undertakings as to title, etc.) cannot be excluded or restricted by reference to any contract term; therefore an exemption clause to this effect would be void. Section 6(1) (b) makes the same provision with regard to corresponding obligations in relation to hire-purchase. With contracts analogous to sale, however, the restriction on exemption clauses is different; liability in respect of the right to transfer ownership and the assurance of quiet possession may be excluded, under section 7(4), even vis-à-vis a consumer, provided that the exemption clause in question satisfies the requirement of reasonableness.

70. The reason for the difference⁹⁶ is that section 12 of the Sale of Goods Act 1893 was divided into two parts when it was amended by the Supply of Goods (Implied Terms) Act 1973 so as to allow the parties to provide either for the transfer of full title (the ordinary case) or for the transfer of such title as the seller or some third party may have. Thus, the seller can contract out of the obligation to transfer *full* title by stipulating for sale with a restricted title; but section 6 of the Unfair Contract Terms Act 1977 prevents him from excluding or restricting his obligations as to title in any other way. However, that Act could not make similar provision for other contracts of supply, because the common law, which governed such contracts, did not, it seemed, allow the supplier to choose between supplying the goods on the basis that he had full title to the goods or on the basis that he had only restricted title. Instead, the approach of the common law was thought to be to imply undertakings as to title on the part of the supplier in contracts of supply but to allow the parties to contract out of them. This approach was reflected in the Unfair Contract Terms Act 1977 in that the Act permits continued reliance on exemption clauses affecting implied terms as to title in contracts of supply but, as part of its scheme of protection from unfair terms, it also subjects such clauses to a test of reasonableness.⁹⁷ We now recommend that implied terms as to title in contracts analogous to sale should be the same as for sale. This will mean that a supplier, like a seller, will be able to choose between supplying the goods with full title or with restricted title. It follows that the treatment of exclusion clauses relating

⁹⁶See the Second Report on Exemption Clauses (1975), Law Com. No. 69; Scot. Law Com. No. 39, para. 30.

⁹⁷Unfair Contract Terms Act 1977, s. 7(4); see Appendix C.

to implied terms as to title in contracts of supply analogous to sale ought to be brought into line with the treatment of such clauses in contracts of sale. Accordingly, clauses excluding or restricting the new implied obligations as to title of the “business” supplier should be made void, irrespective of reasonableness, as they are in the case of sale.⁹⁸ This would mean amending section 7 of the Unfair Contract Terms Act 1977. We recommend accordingly.

71. The other point of difference is that the control of exemption clauses in contracts of sale applies, by reason of section 6(4) of the Unfair Contract Terms Act 1977, to all the terms in the Sale of Goods Act model whether the sale is private or in the course of business. Some of the terms, namely those concerned with merchantability and fitness, only arise when the sale is made in the course of a business,⁹⁹ but the terms concerning title and correspondence with description or sample can arise in a private sale as well.¹⁰⁰ In contrast, where goods are supplied under a contract analogous to sale the control over exemption clauses only applies if the supply is in the course of a business. It does not apply to a private transaction.¹⁰¹

72. The exclusion of private transactions stems, no doubt, from the decision which we and the Scottish Law Commission took to make no recommendations in our Second Report on Exemption Clauses for controlling exemption clauses in anything but business transactions. As we said in that report,¹⁰² we confined our attention to things done or left undone in the course of a business because this seemed to be the source of a social problem, whereas exemption clauses in private dealings did not seem to give rise to difficulty or concern. Parliament endorsed this view by limiting the controls imposed by section 7 of the Unfair Contract Terms Act 1977 to “business suppliers”. We have received no evidence since we submitted our Second Report on Exemption Clauses to make us think that private transactions other than sale ought to be brought within the régime of control, and we therefore make no recommendations in this regard.

73. However, we do recommend one other minor amendment to section 7 of the Unfair Contract Terms Act 1977. The provisions of the Sale of Goods Act model apply to all contracts of sale, and this expression includes both sales (where the property is transferred) and agreements to sell (where the property is to be transferred). The provisions of section 6 of the Unfair Contract Terms Act 1977 apply to clauses excluding or restricting liability in agreements to sell as well as sales. However, section 7 of the Unfair Contract Terms Act 1977 only refers to contracts under which “possession or ownership of goods passes”, and we recommend that it should be amended to include contracts under which possession or ownership are to pass, since contracts under which the property in goods is to be transferred are included in the scope of our proposals.

⁹⁸Section 7 of the Unfair Contract Terms Act 1977 is confined by s. 1(3) of the Act to exclusions of “business liabilities” but s. 6 is not so confined; see paras. 71 and 72, below.

⁹⁹Paras. 39–44, above.

¹⁰⁰Paras. 35–38, above.

¹⁰¹Unfair Contract Terms Act 1977, s. 1(3). See Appendix C.

¹⁰²(1975), Law Com. No. 69; Scot. Law Com. No. 39, para. 9.

PART III

CONTRACTS OF HIRE

74. In the preceding Part we considered contracts for the supply of goods which are analogous to sale and recommended that the implied terms in such contracts should be made to conform with the Sale of Goods Act model. This leaves for consideration contracts which are contracts for the supply of goods but which are not analogous to sale because they do not involve the transfer of title in the goods.¹⁰³ What is transferred under the contract is not title in the goods but possession of them and, more particularly, the use and enjoyment of them. We have noted already¹⁰⁴ that statutory provisions are in force concerning the obligations of a supplier of goods in hire-purchase contracts¹⁰⁵ and transactions involving the supply of goods on the redemption of trading stamps.¹⁰⁶ Nothing in this Part is intended to alter those provisions.

Bailment generally

75. The existing law concerning the contracts under consideration is contained partly in the law of bailment and partly in the general law of contract. Six kinds of bailment were identified by Holt C. J. in *Coggs v. Bernard*:¹⁰⁷ 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, without transferring title.

The contract of hire

76. Of the six categories of bailment listed, only one of them, hire, is considered in any detail in this Part. We are here concerned with contracts of hire including not only hire for money (which is what is usually meant by a contract of hire)¹⁰⁸ but also hire for some other consideration.¹⁰⁹ We also intend to include contracts under which goods are hired out but which may be variously described as “leases”, “rental agreements” or “contract hire”.¹¹⁰ Later in this report¹¹¹ we consider the case for excluding one particular kind of hire known as “finance leasing”, but our general approach is that all contracts classifiable as “hire” under the existing law, i.e. contracts under which one party bails or agrees to bail goods to the other party by way of hire, should be treated together and, for the purposes of implied terms at least,¹¹² treated in the same way. However, we ought to distinguish from contracts of hire another kind of contract, the contract under which services are rendered involving the use of goods (such as a ship¹¹³ or excavating plant) which remain under the control of the person rendering the services (the shipowner or the owner of the plant).

¹⁰³Para. 28, above.

¹⁰⁴Para. 27, above.

¹⁰⁵Supply of Goods (Implied Terms) Act 1973, ss. 8–12.

¹⁰⁶Trading Stamps Act 1964, s. 4.

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

¹⁰⁸*Halsbury's Laws of England* (4th ed., 1973), vol. 2, p. 721, para. 1551.

¹⁰⁹cf. *Mowbray v. Merryweather* [1895] 2 Q.B. 640 discussed at greater length in Working Paper No. 71, para. 42.

¹¹⁰Crowther Report on Consumer Credit (1971), Cmnd. 4596, para. 1.2.14 on p. 17.

¹¹¹Paras. 93–97, below.

¹¹²But not necessarily as regards contracting out; see paras. 98–99, below.

¹¹³See para. 77, below.

Contracts of this kind are excluded from our consideration in the present study because they are not contracts under or in pursuance of which the *possession* of goods passes. On the other hand, where possession *does* pass we are treating the contract as a hiring out of goods, whether or not services are supplied in addition.

77. The case of charterparties of ships and aircraft deserves particular attention. In our working paper¹¹⁴ we explained that, in relation to ships, there are two main categories of charterparty, the charterparty by demise and the charterparty not by demise. The charterparty by demise operates as a lease of the ship itself, to which the services of the master and crew may or may not also be added. If the master and crew are provided, they become for all intents and purposes the servants of the charterer and, through them, the possession of the ship is in him. In the case of a charterparty not by demise (time and voyage charters) the shipowner simply agrees with the charterer to render services through his master and crew, by carrying goods which are put on board his ship by or on behalf of the charterer, and the possession of the ship remains in the original owner. A charterparty by demise is in effect a contract for the hire of a chattel, governed by the general principles of the common law relating to hire.¹¹⁵ In our working paper¹¹⁶ we said that this led to the conclusion that charterparties by demise should be included within the scope of our proposals for hire generally. We said that charterparties not by demise, that is to say time charters and voyage charters, being contracts for the rendering of services by the owner rather than the hiring out of his ship, were outside the scope of the working paper. On consultation, there was general agreement with the view expressed in the working paper, with the one exception of the Senate of the Inns of Court and the Bar who argued that, as there were similarities in practical terms between a charterparty by demise and a time charter, it would be wrong for charterparties by demise to be treated differently from time charters where implied terms were concerned. This argument seems however to have gained some of its force from an assumption that we proposed to restrict the parties' freedom to exclude implied terms. This is not so; for it is not part of our recommendations that any changes of significance should be made to the scheme of control set up by the Unfair Contract Terms Act 1977.¹¹⁷ We are not persuaded that there is any reason for departing from our original view that charterparties by demise should be included in the scope of our proposals for contracts of hire but that other kinds of charterparty, not being contracts of hire, should not be so included.

78. So far as concerns the other kinds of bailment (deposit, gratuitous loan, pledge and delivery for carriage, management or repair) the obligations of the bailor vis-à-vis the bailee have rarely been the subject of litigation. As part of the general law of tort the bailor is liable for injury or damage caused by defects in the goods where he, the bailor, has been negligent. As for contract, the position is obscure; it is, indeed, doubtful whether a gratuitous bailment qualifies as a contract at all. Presumably where there *is* a contract, for example

¹¹⁴Working Paper No. 71, para. 43.

¹¹⁵*Scrutton on Charterparties* (18th ed., 1974), pp. 45–49; and see *Reed v. Dean* [1949] 1 K.B. 188; *Vendair (London) Ltd. v. Giro Aviation Co. Ltd.* [1961] 1 Lloyd's Rep. 283.

¹¹⁶Working Paper No. 71, paras. 43–45.

¹¹⁷See para. 98, below.

in the case of a pledge, terms as to title and quiet possession may be implied,¹¹⁸ and the court may also imply an obligation on the bailor to supply goods that correspond with the description given by him. Where goods are delivered to a common carrier the court may imply a warranty by the bailor that the goods are not dangerous.¹¹⁹ The possibility of terms relating to the general merchantability of the goods and their fitness for use being implied into a contract of bailment would only arise if it was intended that the bailee should have the use and enjoyment of the goods supplied. The only kind of contract of bailment where this is likely to happen is the contract of hire. The discussion in the following paragraphs is therefore concerned entirely with terms implied in contracts of hire.

Implied terms generally

79. Much of great value and interest has been written in recent years on the conditions and warranties that are implied in contracts of hire.¹²⁰ In our working paper¹²¹ we considered the various implied terms under the same headings as in the Sale of Goods Act model, implied terms as to title, as to correspondence with description or sample and as to fitness for purpose and merchantability. The case law in respect of the first two categories is exiguous; in respect of fitness and merchantability there are many more reported decisions, but they seem to be inconsistent one with another. Clarification by statute would seem to be desirable. Our general approach in the working paper was that in all respects except "title" the implied terms in contracts of hire should be assimilated to the Sale of Goods Act model. This approach received general support on consultation.

Implied undertakings as to title

80. The characteristic of hire which distinguishes it from other contracts for the supply of goods is that it does not involve the transfer of title but of possession only. In the paragraphs which follow we describe the person hiring out the goods as "the owner" and the person granted possession of them as "the hirer" (though strictly speaking they ought more accurately to be described as "the bailor" and "the bailee" respectively); but from the hirer's point of view it does not matter whether the owner is really the owner so long as he, the hirer, does not have his possession of the goods disturbed by the true owner, or by anyone claiming through him, and is not sued by such persons for "wrongful interference with goods".¹²²

81. In our working paper we made provisional proposals that the following terms should be implied in contracts for the supply of goods by hire:¹²³

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

¹¹⁸cf. *Rose v. Matt* [1951] 1 K.B. 810.

¹¹⁹*Great Northern Railway Co. v. L.E.P. Transport and Depository Ltd.* [1922] 2 K.B. 742.

¹²⁰In particular, Dr. Clive Turner "Common Law Implied Terms of Fitness in Contracts of Simple Hire and Hire-Purchase: An Analysis", (1972) 46 A.L.J. 560 and 619; N. E. Palmer "Conditions and Warranties in English Contracts of Hire", (1975) 4 Anglo-American Law Rev. 207.

¹²¹Working Paper No. 71, para. 46, *et seq.*

¹²²Torts (Interference with Goods) Act 1977, s. 1.

¹²³Working Paper No. 71, para. 65.

- (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.

82. As for the first of the three proposed terms the general view on consultation was that a term that the supplier (i.e. the person whom we now describe as the owner) had the right to hire out the goods was appropriate and necessary. We note that the Australian legislation to which we referred earlier,¹²⁴ namely, the Federal Trade Practices Act 1974, only provides an implied warranty of quiet possession.¹²⁵ However we think that there should also be an implied term that the owner has the right to hire out the goods. Otherwise the hirer might have to accept delivery of goods in breach of third party rights which might or might not be exercised and run the risk of a lawsuit.¹²⁶

83. As for the implied term that the goods supplied on hire are free from encumbrances not disclosed before the agreement was made, the proposal in the working paper was modelled on a term to this effect which is implied in contracts of hire-purchase.¹²⁷ Most of those we consulted found it unexceptionable. However, we were impressed by a point raised by several commentators to the effect that such a term was not necessary for the protection of the hirer and was unduly onerous from the owner's point of view: it was not necessary for the protection of the hirer so long as the owner had the right to hire the goods to him¹²⁸ and so long as his (the hirer's) quiet possession was not disturbed during the period of hire.¹²⁹ On the other hand, it was said, such a term could be unduly onerous from the owner's point of view, because goods hired out may often be in the process of being acquired by the owner on hire-purchase terms or may be charged by the owner to finance his own business. We agree that, provided that the hiring out of the goods is not prohibited by the terms of the hire-purchase agreement or by any charge on them (which would be a breach of the implied term recommended in paragraph 82), and provided that the hirer's quiet possession is not in fact disturbed (which would be a breach of the implied term recommended in paragraph 84 below), we do not see any need to make the owner disclose such encumbrances as may exist. Accordingly we recommend that a warranty of freedom from undisclosed encumbrances should not be included amongst the implied undertakings as to title.

84. This leaves the implied term that the hirer should have quiet possession of the goods throughout the period of hire. Such a term is implied in contracts of hire under the existing state of the law¹³⁰ and on consultation the almost

¹²⁴Paras. 61-63, above.

¹²⁵Trade Practices Act 1974, s. 69(1)(b). The condition that the supplier has the right to sell is confined by s.69(1)(a) to sale and hire-purchase; the warranty of freedom from encumbrances is confined by s.69(1)(c) to contracts for the supply of goods "under which the property is to pass".

¹²⁶Examples include proceedings for breach of copyright, infringement of patent and wrongful interference with goods.

¹²⁷Supply of Goods (Implied Terms) Act 1973, s. 8(1)(b).

¹²⁸The first of the three terms proposed in para. 81, above.

¹²⁹The third of the three terms proposed in para. 81, above.

¹³⁰See A. G. Guest, *The Law of Hire-Purchase* (1966), para. 262; *Lee v. Atkinson and Brooks* (1609) Cro. Jac. 236; 79 E.R. 204.

unanimous view was that such a term should be included in the statutory régime. It was, however, objected by one body of commentators that where the possession was disturbed by the owner of patent rights of whose claim neither the owner nor the hirer was aware at the time of making the contract of hire the loss should fall on the hirer rather than the owner. We do not agree with this view. The position seems to us to be very similar to that of the “innocent” seller who buys and, in good faith, sells something to which he has acquired no title. As between himself and the person who buys from him he has to bear the loss. As with sale, so with hire.¹³¹ Accordingly, we recommend that a term as to quiet enjoyment should be implied in contracts of hire in the terms suggested in paragraph 81 above. We should add, for the avoidance of doubt, that this is to protect the hirer against being disturbed by the person from whom he is hiring the goods or by a person with a better right to possession of the goods, but not against being disturbed by others (such as thieves) nor against lawful repossession in accordance with the terms of the contract.

85. We see no good reason for confining the terms as to title which we are recommending to transactions entered into in the course of a business. In this respect we recommend that the terms should follow the Sale of Goods Act model; they should be implied wherever goods are hired out by contract, whether by private individuals or in the course of a business.

Correspondence with description and sample

86. Where goods are supplied under a contract of hire by description or by sample, it seems likely that terms are to be implied that the goods should correspond with the description¹³² or, as the case may be, the sample. There was general support, on consultation, for our view that the terms were substantially the same as the terms implied by statute in contracts for the supply of goods by sale¹³³ or by hire-purchase¹³⁴ and that, if the terms implied in a contract of hire were to be made statutory, terms as to correspondence with description and sample should follow the Sale of Goods Act model.¹³⁵ They should be implied in all contracts of hire, whether the goods are supplied by a private individual or in the course of a business. We accordingly recommend that terms as to correspondence with description and sample should be implied in contracts of hire in accordance with the Sale of Goods Act model.

Merchantability and fitness for purpose

87. There is considerable uncertainty in the existing law as to the nature and extent of the owner’s obligations regarding the quality of the goods hired out, that is to say their merchantability and their fitness for the purpose or purposes required. The case law, which we examined in detail in our working paper,¹³⁶ shows that the courts have at different times interpreted the owner’s obligation to hire out goods of reasonable fitness in three different ways:—

¹³¹cf. *Microbeads A.G. v. Vinhurst Road Markings Ltd.* [1975] 1 W.L.R. 218; see para. 36, above.

¹³²*Astley Industrial Trust Ltd. v. Grimley* [1963] 1 W.L.R. 584, per Pearson L. J. at p. 595, Upjohn L. J. at p. 597 and *Ormerod L. J.* at p. 600; and see *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, per Viscount Dilhorne, at p. 1000.

¹³³Sale of Goods Act 1893, s. 13 and s. 15(2)(a) and (b); see Appendix B.

¹³⁴Supply of Goods (Implied Terms) Act 1973, s. 9 and s. 11(a) and (b).

¹³⁵Working Paper No. 71, paras. 64 and 79(e).

¹³⁶*Ibid.*, paras. 48–58.

Model (a)

One line of authority¹³⁷ suggests that the owner is strictly liable for ensuring that the goods are reasonably fit for the purposes for which they are required.

Model (b)

A second line of authority¹³⁸ suggests that the owner is liable unless the goods are as fit for the purposes for which they are required “as reasonable skill and care can make them”.

Model (c)

A third line of authority¹³⁹ suggests that the owner is only liable for the unfitness of the goods hired out to the extent that there has been negligence on his part or on the part of those for whom he is responsible.

88. In our working paper¹⁴⁰ we indicated a preference for Model (a) and this was supported unanimously on consultation. We accordingly recommend that the owner’s obligation to ensure that the goods hired out are reasonably fit should not be based on negligence but should be strict, as are the obligations of merchantability and fitness in the Sale of Goods Act 1893.¹⁴¹

89. We noted in our working paper¹⁴² that in the cases concerning the quality of goods let out on hire the courts dealt with a requirement of reasonable fitness by referring to this in various ways. Sometimes they were concerned with fitness in a general sense akin to merchantability, for example the fitness of a vehicle to be driven on the road,¹⁴³ and sometimes with fitness for a particular purpose made known to the owner, for example the fitness of a horse for a particular journey.¹⁴⁴ The cases also show that the owner was not liable for defects made known to the hirer,¹⁴⁵ nor was he liable for the unfitness of the goods for some particular purpose where the hirer either did not make the required purpose known or did not rely on the owner’s skill or judgment in that regard.¹⁴⁶ In all these respects the existing law seems to conform to the Sale of Goods Act model,¹⁴⁷ and it therefore seems appropriate that the terminology of the Sale of Goods Act 1893 should be used, *mutatis mutandis*, when the implied terms as to merchantability and fitness in contracts of hire are put into statutory form. There was no dissent from this view on consultation.

90. There are, however, two points arising out of the application of the Sale of Goods Act model to contracts of hire which need further consideration.

¹³⁷*Chew v. Jones* (1847) 10 L.T. (O.S.) 231; *Jones v. Page* (1867) 15 L.T. (N.S.) 619, 620 per Kelly C. B.; *Francis v. Cockrell* (1870) L.R. 5 Q.B. 501, 504, per Kelly C. B.; *Hyman v. Nye* (1881) 6 Q.B.D. 685, 689–690, per Mathew J.; *Vogan & Co. v. Oulton* (1893) 79 L.T. 384.
¹³⁸*Francis v. Cockrell* (1870) L.R. 5 Q.B. 501, per Keating, Montague Smith and Cleasby JJ.; *Hyman v. Nye* (1881) 6 Q.B.D. 685, 687–688 per Lindley J.; *Reed v. Dean* [1949] 1 K.B. 188; *White v. John Warwick & Co. Ltd.* [1953] 1 W.L.R. 1285; *Vendair (London) Ltd. v. Giro Aviation Co. Ltd.* [1961] 1 Lloyd’s Rep. 283; *Astley Industrial Trust Ltd. v. Grimley* [1963] 1 W.L.R. 584.

¹³⁹*Jones v. Page* (1867) 15 L.T. (N.S.) 619, 620 per Piggott B.

¹⁴⁰Working Paper No. 71, para. 58.

¹⁴¹*Frost v. Aylesbury Dairy Co. Ltd.* [1905] 1 K.B. 608.

¹⁴²Working Paper No. 71, paras. 61–62.

¹⁴³*Astley Industrial Trust Ltd. v. Grimley* [1963] 1 W.L.R. 584.

¹⁴⁴*Chew v. Jones* (1847) 10 L.T. (O.S.) 231.

¹⁴⁵*Jones v. Page* (1867) 15 L.T. (N.S.) 619.

¹⁴⁶*Hyman v. Nye* (1881) 6 Q.B.D. 685.

¹⁴⁷See Appendix B.

One concerns durability. The other concerns the distinction drawn in the Sale of Goods Act model between sales in the course of business and private sales.

91. So far as durability is concerned, a point was made by several commentators that a hirer usually expects that the goods hired to him will remain in working order for the period of hire and that this expectation should be given legal effect in the formulation of the statutory implied terms as to merchantability and fitness. Sale, in contrast, is not a continuing transaction, and although a buyer may reasonably expect that the goods he buys will be reasonably durable there is no specified period of use and enjoyment as there usually is in a contract of hire. Accordingly it was suggested to us that provision should be made in regard to durability so as to take account of the different expectations of the hirer and the buyer. We mention this point here to show that we are aware of it, but we believe that it is better considered in a more general discussion of durability as an additional implied term. We return to this in Part IV.¹⁴⁸

92. So far as private hire is concerned, we expressed no provisional view in our working paper. We said, as an argument for imposing obligations of merchantability and fitness on the private supplier of goods on hire, that since the only right which the hirer acquires is the use of the goods, he should be entitled to goods that are merchantable and reasonably fit for use; otherwise he receives no real benefit from the hiring.¹⁴⁹ However, the great majority of commentators took the view that there was no justification for treating private contracts of hire differently from private contracts of sale. On balance we are satisfied that the majority is right and that the obligations of the private owner who sells or hires out goods should not be expanded beyond the implied terms as to title (including quiet possession) and as to correspondence with description or sample. All the reported cases on the fitness of hired goods have been cases in which the goods were hired in the course of a business,¹⁵⁰ and *Hyman v. Nye*¹⁵¹ may be read as supporting the proposition that terms as to fitness or merchantability are only implied under the existing law where goods are supplied to the hirer in the course of the supplier's business. We are persuaded by the comments received on consultation that there is no need to extend the operation of the implied terms as to merchantability and fitness beyond those cases in which the goods are hired out in the course of a business. In the result, therefore, we are recommending that the Sale of Goods Act model on merchantability and fitness should be followed in all respects.

Finance leasing

93. We now turn to the one major reservation which was expressed on consultation regarding our proposals for contracts of hire. It concerns what has been described as "finance leasing". Under this type of contract goods are delivered direct by the retailer to the customer for use over a period of time; the customer does not buy the goods but hires them from a company (often, but not invariably, a finance house) which buys them from the retailer; the rental is calculated to amortise the finance company's capital outlay and to provide a

¹⁴⁸Paras. 100–114, below.

¹⁴⁹Working Paper No. 71, para. 68.

¹⁵⁰*Dare v. Bognor U.D.C.* (1912) 28 T.L.R. 489 was a case in which the goods (deck-chairs) were hired out by a local authority, but this would qualify as a "business" transaction for the purposes of the Sale of Goods Act model; Sale of Goods Act 1893, s. 62; see Appendix B.

¹⁵¹(1881) 6 Q.B.D. 685, dicta of Lindley J. at pp. 687–688 and of Mathew J. at pp. 689–690.

profit in the form of interest on the capital. The distinction in practice between this kind of hire and the more usual kind of hire, for example of a television set, is that the goods are selected by the hirer and purchased by a finance company without that company having seen them; its function and expertise are not in the marketing or maintenance of goods but simply in providing finance.¹⁵²

94. It was argued on behalf of those engaged in finance leasing of such goods as ships, aircraft, commercial vehicles, machine tools, contractors' plant, agricultural equipment, computers, office equipment and other items that the terms to be implied in finance leases should be different from other forms of hire, so as to reflect the practical differences in the two kinds of transaction. In particular it was urged that it was unjust to hold the owners (the finance house) liable for goods which prove unmerchantable or unfit; it was unjust because the finance house played no part in the selection of the goods but merely provided the finance.

95. We think that these arguments are overstated. We are recommending that the owner should be under similar liabilities as to the fitness and quality of the goods which he supplies under a contract of hire to those of a seller in relation to the goods which he sells. In this context it is important to distinguish clearly between an obligation on an owner to supply goods of merchantable quality and an obligation to supply goods fit for any particular purpose which the hirer has made known expressly or impliedly. The owner (the finance house) could be held liable under the former obligation for defects in the goods supplied so as to constitute a breach of the requirement of merchantable quality, but the owner will not be liable if the defect is one of which the hirer was aware or, if the hirer examined the goods before the contract was made, of which he ought to have been aware.¹⁵³ As for the obligation to supply goods fit for a particular purpose which the hirer has expressly or impliedly made known to the owner, no liability would be imposed on the owner where the circumstances show that the hirer did not rely, or that it was unreasonable for him to rely, on the owner's skill or judgment.¹⁵⁴ Bearing in mind the nature of a finance lease¹⁵⁵ we believe that a hirer would only very rarely be able to show that he reasonably relied on the finance house's skill and judgment in selecting goods for his particular purpose. The burden of responsibility on the finance house is thus much lighter than that resting on, say, a company which hires out television sets. (In referring to the burden of responsibility we are of course referring to that which would be imposed by our recommendations; we are not here concerned with the special liabilities and responsibilities arising under the Consumer Credit Act 1974 in the case of "consumer hire agreements".)¹⁵⁶

96. However, it must be admitted that under our recommendations, and indeed under the existing law, owners who hire out goods under a finance lease have to accept some responsibility for the quality of the goods supplied, unless the terms which would otherwise be implied are effectively excluded by exemption clauses.¹⁵⁷ But is this unjust? We think not. First, the finance company is itself a buyer and will be entitled to be indemnified by the original seller if the

¹⁵²See Churchill (1977) 127 N.L.J. 1144, 1146.

¹⁵³Sale of Goods Act 1893, s. 14(2)(a) and (b); see Appendix B.

¹⁵⁴*Ibid.*, s. 14(3); see Appendix B.

¹⁵⁵As described at para. 93, above.

¹⁵⁶Consumer Credit Act 1974, s. 15.

¹⁵⁷See Appendix C and paras. 98-99, below.

goods hired out prove unmerchantable or unfit for their particular purpose (unless this right is barred by an exemption clause that passes the “reasonable-ness” test).¹⁵⁸ Second, finance leasing is very like hire-purchase in that the finance company’s role in either case is merely to provide the finance. In *Financings Ltd. v. Baldock*¹⁵⁹ Diplock L. J. made observations which apply to both kinds of transaction:

“In order to avoid the necessity of complying with the statutory requirements relating to money-lenders and to bills of sale, hire-purchase finance companies enter into a contract with the hirer whereby they hire to him a chattel for a fixed period at an agreed monthly rental and confer upon him an option to purchase the chattel at the end of the fixed period for an agreed (and nominal) sum. The business nature of the transaction is that of moneylending . . . But hire-purchase finance companies cannot eat their cake and have it. If they choose to conduct their business by entering into contracts of hire of chattels, instead of entering into moneylending contracts secured by chattel mortgages, their legal rights [and obligations] will be governed by the terms of the contracts into which they enter and by the general principles of law applicable to contracts of that nature.”

97. We believe that there is much force in these observations and there are no sufficient policy grounds for exempting finance leases from the régime which we are recommending for contracts of hire generally. We recommend that finance leases should be included.

Contracting out

98. The Unfair Contract Terms Act 1977 places no restriction on exemption clauses in contracts of hire where the owner is letting the goods out as a private individual.¹⁶⁰ Where the goods are hired out in the course of a business, however, clauses excluding or restricting the terms which would otherwise be implied (as to title, correspondence with description or sample, merchantability and fitness) are controlled except in the charterparty of a ship or hovercraft.¹⁶¹ The validity of a clause seeking to exclude liability in respect of implied terms as to title depends on whether the clause passes the “reasonableness” test.¹⁶² The test of the validity of an exemption clause relating to implied terms as to correspondence with description or sample, merchantability or fitness depends on the status of the hirer. Where the hirer deals as a consumer, such clauses are void;¹⁶³ where he deals not as a consumer but in a business capacity the validity of the clause depends on whether it passes the “reasonableness” test.¹⁶⁴

99. The implementation of our recommendation that terms in contracts of hire should be put in statutory form on the Sale of Goods Act model (save as to title) will not, we think, necessitate any changes in the Unfair Contract Terms Act 1977.

¹⁵⁸Unfair Contract Terms Act 1977, s. 6(3).

¹⁵⁹[1963] 2 Q.B. 104, 117–118. The words in square brackets have been added.

¹⁶⁰Unfair Contract Terms Act 1977, s. 1(3); Appendix C.

¹⁶¹*Ibid.*, s. 1(2) and Sched. 1, para. 2(b). However, a charterparty may not exclude or restrict redress in the case of death or personal injury or where the hirer of the vessel deals as a consumer.

¹⁶²*Ibid.*, s. 7(4); Appendix C.

¹⁶³*Ibid.*, s. 7(2); Appendix C.

¹⁶⁴*Ibid.*, s. 7(1) and (3); Appendix C.

PART IV

ADDITIONAL IMPLIED TERMS

100. In this Part we consider the need for additional implied terms in *all* contracts for the supply of goods, including sale and hire-purchase (and where goods are supplied upon the redemption of trading stamps). In our working paper we raised two matters for consideration: (a) the need for implied terms as to durability and (b) the need for implied terms as to the availability of spare parts and servicing facilities. We asked for comments on these matters and for suggestions on other terms which it might be appropriate to imply. The consensus of opinion was that these were the only additional terms for which an arguable case could be made and that both deserved serious consideration. Durability is taken first; spare parts and servicing facilities are considered later.¹⁶⁶

Durability

101. The “quality” requirements in the Sale of Goods Act are that the goods supplied (a) should be of merchantable quality and (b) where the buyer makes known to the seller any particular purpose for which the goods are being bought should be reasonably fit for that purpose.¹⁶⁶ “Merchantable quality” means¹⁶⁷ that the goods 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 the other relevant circumstances.¹⁶⁸ The wording of the equivalent requirements in hire-purchase contracts is the same.¹⁶⁹

102. The requirements just described must be satisfied at the time of sale. The question of how long the goods should remain merchantable and fit *after* sale is not dealt with explicitly in the statute and we invited comment in our working paper on whether the law needed reform in this regard.

The problems

103. We were given convincing evidence on consultation that from the consumer’s point of view the question of how long the goods should last before wearing out or going wrong is of crucial importance.¹⁷⁰ The purchaser can generally satisfy himself of the appearance and performance of the goods by examining and testing them, but the question of how long they will last has to be taken largely on trust. The problem is particularly acute in the field of so-called “durable” consumer goods, such as refrigerators and washing machines, where the purchaser is not normally competent to diagnose faults or carry out repairs. We were also told that complaints and queries are constantly being raised with

¹⁶⁶ Paras. 115–122, below.

¹⁶⁷ Sale of Goods Act 1893, s.14(2) and s.14(3).

¹⁶⁸ See para. 41, above.

¹⁶⁹ Sale of Goods Act 1893, s.62(1A).

¹⁷⁰ Supply of Goods (Implied Terms) Act 1973, s.10(2), s.10(3) and s.15(3). The “quality” requirements for goods supplied on the redemption of trading stamps are limited to “merchantability” but follow the Sale of Goods Act model in this respect; Trading Stamps Act 1964 s.4(1) (c) and s.4(2).

¹⁷⁰ We found the material in Which? October 1974, pp. 292–301 and Which? January 1976, pp. 13–16 very helpful on the question of durability and on the question of spare parts and servicing.

consumer protection agencies and associations concerning such goods as carpets, shoes and sofas which simply wear out, beyond any hope of repair or refurbishing, in an unjustifiably short time. Time and again (we are told) the aggrieved purchaser wants to know how long goods are supposed, by law, to last and has to be given the answer that the law on durability is unclear. Cases concerning consumer complaints about durability are often tried before county court registrars and decisions are not reported; we are told that judicial attitudes to the question vary from court to court. More important, perhaps, the absence of clarity in the law makes it harder for people to resolve their differences without recourse to litigation.

The present law

104. The relevant statute law is section 14 of the Sale of Goods Act 1893 and the other provisions, to similar effect, referred to in paragraph 101. Section 14 was altered extensively by the Supply of Goods (Implied Terms) Act 1973 but not in ways that bear upon the “durability” problem. The relevance of the statutory provisions to the requirement of durability has been considered in three fairly recent cases.

105. In *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.*¹⁷¹ the plaintiffs purchased a consignment of potatoes from the defendants at a time when the potatoes were being carried by sea from Cyprus to Liverpool. When they arrived they were, on any view, of unmerchantable quality. Diplock J., finding as a fact that the potatoes were not fit to travel at the time they left Cyprus,¹⁷² said: “Merchantability in the case of goods sold c.i.f. or c.& f. means that the goods must remain merchantable for a reasonable time, and that, in the case of such contracts, a reasonable time means time for arrival and disposal on arrival.”¹⁷³

106. In *Cordova Land Co. Ltd v. Victor Brothers Inc.*¹⁷⁴ the problem again concerned the sale of goods which were at sea and which were of unmerchantable quality when they arrived in England. The question was whether there was a breach of contract by the sellers within the jurisdiction of the English courts (i.e. in England) assuming that there was a breach. It was argued on behalf of the English purchasers that the delivery of unmerchantable goods in England amounted to a breach of contract by the sellers, and the observations of Diplock J. were quoted as authority for the existence of an implied warranty that the goods must not only be merchantable as sold but must remain merchantable until after arrival at the port of destination. Winn J. rejected the argument on various grounds, one being that the observations of Diplock J. ought to be confined to the sale of “perishables” (such as potatoes) and not applied to less vulnerable commodities. The consignment in the instant case was of skins. On the authority of these two cases it might be argued that perishable goods are required by law to last longer than non-perishables!

107. The third case, *Crowther v. Shannon Motor Co.*,¹⁷⁵ concerned the sale of a second-hand motor-car. In this case the buyer founded his claim on the

¹⁷¹ [1961] 1 W.L.R. 862.

¹⁷² This finding of fact was reversed on appeal; [1961] 2 Lloyd's Rep. 326.

¹⁷³ [1961] 1 W.L.R. 862, 867.

¹⁷⁴ [1966] 1 W.L.R. 793.

¹⁷⁵ [1975] 1 W.L.R. 30.

implied term as to fitness for purpose. He complained that the car was not fit for the purpose required (namely use on the road) because it broke down irretrievably within a few months of purchase. The sellers maintained that the buyer had driven the car for thousands of miles without any trouble between the date of sale and the date of the breakdown and that the car was fit for use at the time of sale. The county court judge found in favour of the buyer and treated the requirement that the car should be "fit for the purpose" as meaning "[fit] to go as a car for a reasonable time." Lord Denning M.R. said that this was not entirely accurate, as a matter of law, although he agreed with the county court judge that the implied term of fitness had been broken.

He said:¹⁷⁶

"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."

108. The provisional conclusion at which we arrived in our working paper¹⁷⁷ was that the courts would interpret the implied terms as to merchantability and fitness in the light of *Crowther v. Shannon* and would allow the purchaser a remedy based on the implied terms as to merchantable quality and fitness for purpose where he had been sold goods that were not reasonably durable. Many of those who sent us comments agreed with us. Their argument was not so much that an additional requirement of reasonable durability would be harmful as that it was not needed.

109. In our working paper we may well have underestimated the lack of clarity in the existing law and the difficulties thereby created. Of the three cases just cited, the first suggests that, if the seller is to discharge his obligations under the implied term as to merchantable quality, the goods must remain of merchantable quality for a reasonable time after sale. The second case casts considerable doubt on the first, and the third, in which the buyer's claim was based on the implied term as to fitness for purpose, suggests that the buyer has to adopt what one commentator criticised as a "must have" kind of argument, bordering on fiction—"because the refrigerator, say, broke down after only one year's use it must have been defective at the time of sale." The same argument could be adopted in a case where the buyer was relying on the implied term as to merchantable quality. Arguably, if the seller can prove positively that the goods were in perfect working order at the time of sale, the inference to be drawn from the subsequent break-down loses its force and the purchaser loses his case.

Possible solutions

(a) Prescribed periods

110. A possible solution to the problems under consideration might be for periods of "durability" to be prescribed by law. There are, however, serious difficulties. The most obvious is that different products would need different periods. Some products can reasonably be expected to last longer than others and even within the same range of product—say carpeting or cars—one would

¹⁷⁶ *Ibid.*, at p. 33.

¹⁷⁷ Working Paper No. 71, para. 75.

expect differences. And what provision should be made for the durability of second-hand goods? A comprehensive set of rules fixing the legal "life" of all products on the market would be an enormous undertaking and one which would be of dubious benefit. It would, for instance, lead to injustice if a retailer was automatically liable for the breakdown of a mechanical product within the prescribed period if this was due to the way in which the product had been misused by the customer. No one who sent us comments on our working paper argued in favour of a comprehensive set of rules for durability, product by product. We are satisfied that this solution should be rejected as impracticable.

(b) An implied term of "reasonable durability"

111. Another possibility is that section 14 of the Sale of Goods Act 1893, and provisions modelled on it, should provide for "reasonable durability" to become part of the implied obligations of the seller as to quality and fitness. The case for imposing such a requirement (assuming that it is not already provided under the existing law) is hard to resist and has been accepted in, for example, some Provinces of Canada.¹⁷⁸ We cannot see any convincing ground for excluding it and we are persuaded, by comments received on consultation, that a provision to this effect would help to simplify and clarify the existing law.

112. Factors relevant in determining what is reasonable in any particular case should, no doubt, include the description of the goods and the price charged and the expectations of durability to which such a description and price are likely to give rise. The nature of the transaction ought also to be a relevant circumstance. If a car is taken on hire for a weekend it is not expected to break down during the period of hire. On the other hand where the goods are sold, or hired out for an indefinite period under a finance leasing agreement,¹⁷⁹ it may be unreasonable to expect the goods to last indefinitely without maintenance or repair.

Our conclusion

113. We have reached the conclusion that in all contracts for the supply of goods the supplier's obligations in respect of the fitness and quality of the goods should include an obligation to the effect that the goods will remain reasonably fit for their purpose (whether that is a general purpose or a particular purpose made known to the seller) for a reasonable period of time; thus goods which were bought six months ago must be as fit for their purpose as six-month old goods of their kind can reasonably be expected to be. However, the simple concept of reasonable durability will not in our view be adequate. Where the buyer's legitimate expectations as to the quality and fitness of the goods are disappointed, this is probably most commonly because he finds that they do not last as long as they should; but this is not the only case which in our view should be covered. We have also considered the case of goods which are expected to change or develop in a particular way after the supplier has supplied them; for example, seeds which are bought for sowing at a later date. We think that where the goods supplied are acquired for a purpose which is not expected to be fulfilled immediately, but at some later date, the same principles should apply,

¹⁷⁸ See the Nova Scotia Consumer Protection Act R.S.N.S. 1967 c.53 as amended by S.N.S. 1975 c.19, s.20c (3) (j); the Saskatchewan Consumer Products Warranties Act 1977 s.11(7).

¹⁷⁹ See para. 93, above.

so that the goods must at that time be reasonably fit to fulfil that purpose and must remain reasonably fit for a reasonable time thereafter. As for exemption clauses, we think that the Unfair Contract Terms Act 1977 should apply to terms excluding or restricting the supplier's obligations in respect of the requirements of merchantability and fitness, extended as proposed above, in the same way as that Act at present applies to exemption clauses in the matter of merchantability and fitness for purpose.

114. However, the draft Bill appended to this report¹⁸⁰ does not include clauses to implement this part of our recommendations. This is because we believe that the new obligations as to durability which we are proposing should form part of whatever should be the supplier's obligations to supply goods which are of merchantable quality and fit for their purpose, and because they are also relevant to whatever should be the rights of the other party in consequence of breaches of these obligations. We are to examine these matters under our new reference on supply of goods.¹⁸¹ If this part of our recommendations were implemented immediately by extending the existing obligations of the supplier, his obligations might well have to be altered yet again as a consequence of any amendments which we may recommend under the new reference. This would be undesirable; it seems preferable that in formulating proposals and preparing draft clauses under the new reference we should not be inhibited by such considerations. We might, of course, have withheld our recommendations on the subject of reasonable durability altogether until we report on the new reference. However, it may be thought useful for our views on this subject to be known now, and we can see no reason why we should delay expressing them. We do, however, recommend that implementation of this part of our proposals be postponed until we are able to report on the new reference; our intention is then to include draft clauses to implement our recommendations on durability in that report.

Spare parts and servicing facilities

115. In our working paper¹⁸² we raised questions about the obligations on the suppliers of goods in relation to spare parts and servicing. When goods break down or are damaged they may become useless unless they can be repaired and unless spare parts are available, but 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. We invited comments on the problems which arose in practice and on the need for law reform. This part of the working paper stirred up considerable interest, particularly amongst manufacturers, retailers and consumer organisations, and we received many informative and useful comments and proposals.

Additional obligations on the retailer

116. On the assumption that some additional obligation concerning spare parts and servicing should be created, the most important question would be: On whom should any such additional obligation be imposed, the retailer, the manufacturer or both? For the purpose of the discussion which follows we are

¹⁸⁰ See Appendix A.

¹⁸¹ The terms of the new reference are set out at n.32, above.

¹⁸² Working Paper No. 71, paras. 76-78.

using the word “retailer” as meaning the last person in the chain of distribution, the person with whom the ultimate customer makes his contract. Where the contract is one of sale the “retailer” is the retail seller; where the contract is one of hire-purchase the “retailer” is, for our purposes, the finance company; where the contract is one of hire or barter the “retailer” is the person who supplies the goods; where the contract is for work and materials the “retailer” is the person (builder, tailor or engineer) who agrees to do the work and supply the materials. By “manufacturer” we mean the person who makes the goods, and no-one else, although it is arguable that a person who puts his brand name or trade mark on goods, or (in the case of foreign goods) imports them into the jurisdiction, ought also to be regarded as a “manufacturer”.¹⁸³

117. If an obligation to stock spares and to provide servicing of goods is to be imposed on the retailer alone then the obligation can be formulated as an additional implied term in the contract of sale or supply. Conceptually the notion presents no difficulty (we come to the practical problems later).

118. If, on the other hand, the manufacturer is included in the scheme as the person on whom the obligation should rest (either alone or jointly with the retailer) the concept of an additional implied term is much harder to support, because the manufacturer is not dealing directly with the ultimate customer. There is, in the ordinary way, no contract between them into which an additional term can be implied. This is not to say that additional obligations may not be imposed by law. They may. Indeed we and the Scottish Law Commission recommended in our Report on Liability for Defective Products that manufacturers should be made strictly liable, by statute, for personal injury or death caused by defects in their products; but we emphasised that the new right of redress should be created by statute as a *tort* remedy.¹⁸⁴ The idea of creating new remedies by allowing the customer to sue the manufacturer *for breach of a fictitious contract* between them was rejected by us as it was by the great majority of those whom we consulted on the question.¹⁸⁵

119. As we said earlier, there would be no conceptual difficulty in including an additional term in contracts of sale or supply to the effect that the retailer should maintain a stock of spares and servicing facilities.¹⁸⁶ However, hardly any support for this idea was received on consultation. If applied to all kinds of contract involving all kinds of goods it could, in many cases, impose hardship on the retailer. It is unrealistic to suppose that the small shop-keeper could or should maintain a stock of spares for every product which he sells. For example, if he orders goods for a customer which he does not usually stock it would be unjust to require him to lay in a stock of spare parts as well. Even if one considers large department stores, there is a limit to the amount of space which is available for the stocking of spares and to the number of staff who can be

¹⁸³ Report on Liability for Defective Products (1977), Law Com. No. 82, Scot. Law Com. No. 45, Cmnd. 6831 paras. 97–103.

¹⁸⁴ *Ibid.*, paras. 38–42.

¹⁸⁵ *Ibid.*, paras. 30–33. See too the Final Report of the Committee on Consumer Protection (the Molony Report) (1962), Cmnd. 1781, paras. 415–417 and the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (the Pearson Report) (1978) Cmnd. 7054–1, paras. 1224–1225.

¹⁸⁶ Para. 117, above; and see s.11(8) of the Saskatchewan Consumer Products Warranties Act 1977.

retained for servicing the goods supplied. If such extra stocks and facilities were made obligatory by law the cost would have to be passed on to the consumer, and we are informed that the extra cost would be considerable. In some Provinces in Canada,¹⁸⁷ manufacturers, distributors and dealers in agricultural machinery are required to maintain stocks of spares and servicing facilities for ten years, and we were told on consultation that their machinery is, as a result, considerably more expensive. English farmers tend to prefer to buy more cheaply and either to do their own servicing and maintenance or to have the work done by experts engaged either under a maintenance contract or from time to time as the need arises.

120. It may be said that the retailer need not be placed under a duty to keep stocks of spares on the premises but that the risk of their being unavailable should be placed on him rather than on the customer. Even so, the acceptance of the extra risk would mean an increase in price which would not be welcomed. Many commentators went further and said that it would be oppressive to hold the retailer liable for the parts becoming unavailable, for example on the manufacturer going out to business. But anything less would be ineffective. If the retailer were only liable to provide spares as long as they were available the position would be no different, in practice, from that which obtains under the existing law.

121. There are other problems as well. Should periods be laid down, product by product, for the time over which spares should be maintained? This would be a massive undertaking. Should the scheme apply to custom-made goods (a suit made out of particular cloth) and second-hand goods? Should one distinguish (as they do in the motor trade) between "functional" parts and "non-functional" parts? Or should all these problems be solved by a duty on the retailer in general terms; for example, that, where the goods supplied are likely to require repair or maintenance which it would be reasonable to expect the retailer to attend to, spare parts and service facilities should be available for a reasonable period after the date of supply? We think that a duty along these lines would be so imprecise as to be of no real value to the customer.

122. The conclusion at which we have arrived, and which received wide support on consultation, is that it would be wrong to make it an additional term in contracts of sale (or supply) that the seller (or supplier) should maintain stocks of spares or servicing facilities. We recommend accordingly.

Additional obligations on the manufacturer

123. Having reached this conclusion we might end this report at this stage. However, we did raise the question of manufacturers' liabilities in our working paper, and although it takes us beyond "implied terms" into another branch of the law we feel that, in fairness to those who sent us comments, we should say something further.

¹⁸⁷ 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).

124. The question of manufacturers' liabilities in the matter of spares and servicing facilities has to be considered in the context of manufacturers' liabilities generally. In jurisdictions where manufacturers are under a legal duty to keep spares and servicing facilities available¹⁸⁸ they are also liable to answer for defects in the products themselves as, for example, where the products do not correspond with the description applied to them by the manufacturer, where the goods do not perform in the way claimed by the manufacturer, and where the manufacturer has broken an express "warranty", by which is meant not only warranties set out in the "manufacturers' guarantee" but also undertakings, assertions and statements made by or on behalf of the manufacturer in advertisements and promotional material relating to the goods in question. This is in keeping with the pattern of the Ontario Report which recommended that manufacturers should be under a duty to maintain stocks of spares for their products and also repair facilities,¹⁸⁹ not as a single recommendation but as part of the whole new body of obligations which it recommended should be borne by manufacturers.

125. In 1977 we concluded a study, jointly with the Scottish Law Commission, on the remedies which are or should be available in respect of defective products. In our report we recommended, amongst other things, that manufacturers should be strictly liable for defects in their products but that the liability should be confined to personal injury and death; we recommended that the régime of strict liability should not cover damage to property or pure economic loss.¹⁹⁰ We also recommended that the test whether a product was defective should be whether it was unsafe, not whether it was unmerchantable in a more general sense. Our conclusion, in which we were supported by a majority of commentators, was that liability for "safe but shoddy" products should be regulated by the law of contract as at present and not included in the régime of strict liability in tort.¹⁹¹

126. One branch of the law which we deliberately excluded from our consideration when considering the law relating to defective products was the problem of the product which was not inherently defective but which was defective in the context of the representations made about it.¹⁹² We mentioned, as illustrative of the problem, the *American Cyanamid* case.¹⁹³ The manufacturers, American Cyanamid Company, made and marketed a chemical resin called "Cyanamid" which they represented would prevent fabrics from shrinking. Other manufacturers produced fabric which they treated with "Cyanamid" and sold as having been treated for shrinkage with "Cyanamid". The fabric was purchased by a third enterprise and made up into garments which, in the event, shrank. The third enterprise sued American Cyanamid Company for the losses

¹⁸⁸ We have studied in particular the Manufacturers Warranties Act 1974 which is in force in South Australia, the Law Reform (Manufacturers Warranties) Ordinance 1977 (Australian Capital Territory No. 12 of 1977) and the Consumer Products Warranties Act 1977 in Saskatchewan.

¹⁸⁹ Report by the Ontario Law Reform Commission on Consumer Warranties and Guarantees in the Sale of Goods (1972), pp. 44-46, 76-77.

¹⁹⁰ Report on Liability for Defective Products (1977), Law Com. No. 82, Scot. Law Com. No. 45, Cmnd. 6831 paras. 117-121.

¹⁹¹ *Ibid.*, paras. 45-47.

¹⁹² Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20, para. 13.

¹⁹³ *Randy Knitwear Inc. v. American Cyanamid Co.*, 181 N.E.2d 399 (1962) New York.

which they had sustained and were awarded damages, but it was held that the liability turned "not upon the character of the product but upon the representation."¹⁹⁴

127. When preparing our consultative document on Liability for Defective Products,¹⁹⁵ we did not examine the law relating to misrepresentation, and what may loosely be called "manufacturers' warranties". These are among the matters to be considered as part of our work on the general law of contract.¹⁹⁶ Representations about the availability of spare parts and servicing facilities are some of the many kinds of representation to be examined in that context.¹⁹⁷

Voluntary codes of practice

128. We intend in due course to produce a consultative document on the topic of misrepresentation which will consider the need for reform and for additional remedies to be provided in respect of representations made by manufacturers (and others) in respect of their goods. However we are not the only body with an interest in this branch of the law. The Office of Fair Trading has, as part of its responsibility, the control of consumer trade practices which are prejudicial to the economic interests of consumers in the United Kingdom,¹⁹⁸ and the Director General has a duty to keep commercial activities affecting consumers under review.¹⁹⁹ We have learnt from the Office of Fair Trading that manufacturing industries are working with them to produce voluntary codes of practice which provide for, amongst other things, their advertisements regarding their products, the terms set out in guarantees, and the obligations undertaken in regard to spare parts and servicing. A number of industries in which spare parts and servicing present a real problem (including the motor trade and electrical industries) have already agreed codes with the Office of Fair Trading, though the codes vary as to the obligations laid down with regard to spare parts. Those in the electrical industry require that spares will be kept for a specified period after production of the goods in question has ceased; whilst motor manufacturers go no further than accepting a responsibility for ensuring a reasonable availability of spare parts throughout the distribution chain. The formulation of codes of practice has the support of the Confederation of British Industry and of the Consumers' Association, amongst others, and, provided the codes are clear in their terms, specific in their obligations as to spare parts and are in fact honoured, we think that many of the problems concerning spare parts (and servicing) are best solved by this means.²⁰⁰

129. We should mention that we are aware of the work which has been done by the Council of Europe, at Strasbourg, on the matter of the Provision of

¹⁹⁴ *Ibid.*, p. 404, *per* Fuld J.

¹⁹⁵ Law Commission Working Paper No. 64, Scottish Law Commission Memorandum No. 20.

¹⁹⁶ Thirteenth Annual Report (1977-78), Law Com. No. 92 para. 2.9.

¹⁹⁷ Also of interest is a draft EEC Directive on Misleading and Unfair Advertising which has been prepared in the Commission of the European Communities in Brussels. There has been opposition to the draft Directive in this country (see e.g. *Hansard* (H.L.), 4 July 1978, vol. 394, cols. 848-911; *Hansard* (H.C.), 16 November 1978, vol. 958, cols. 705-758; *Hansard* (H.L.), 28 November 1978, vol. 396, cols. 1189-1241; and the report of the House of Lords Select Committee on the European Communities, (1977-78) H.L. 38), and we understand that it has now been under consideration by the Council of Ministers for some time.

¹⁹⁸ Fair Trading Act 1973, s.13 and s.17.

¹⁹⁹ *Ibid.*, s.2.

²⁰⁰ On the operation of voluntary codes of practice in the motor trade, see *Motoring Which?* January 1977 pp. 14-17.

Adequate After-Sales Service. On 27 September 1978 a resolution²⁰¹ was adopted by the Committee of Ministers which adverts specifically (among other things) to the durability of goods, the contents of manufacturers' guarantees and the maintenance of stocks of spare parts. The key provision, Article 9, recommends the Governments of Member States to encourage the preparation and implementation of rules and codes of good practice by trade, industrial and commercial associations, in co-operation with organisations representative of the consumer interest, to strengthen and supervise the implementation of existing measures to provide the consumer with adequate after-sales service; and, if need be, to introduce appropriate legislation. Our understanding is that United Kingdom policy favours the encouragement of codes of practice rather than legislation, and unless and until the codes of practice prove inadequate we accept that this is the preferable course in this field.

PART V

SUMMARY OF RECOMMENDATIONS

130. We conclude this report with a summary of our main recommendations:—

Contracts analogous to sale

(a) The implied obligations of a person who supplies goods under a *contract analogous to sale* (that is to say a contract other than sale or hire-purchase or for the redemption of trading stamps and not a gift, under which the property in goods is transferred and excluding analogous contracts which are intended to operate by way of mortgage, charge, pledge or other security) need to be reviewed (paragraphs 27-33).

(b) The implied obligations of a *supplier* of goods (i.e. the transferor of the property in goods) under a *contract analogous to sale* should be put in a statutory form which should be modelled on the statutory obligations of the *seller* (paragraphs 34-46) and which should apply, in particular, to contracts of barter (paragraphs 48-55) and contracts for the supply of work and materials (paragraphs 56-66).

(c) Terms in a *contract analogous to sale* which exclude or restrict the supplier's implied obligations, as above, should continue to be regulated by section 7 of the Unfair Contract Terms Act 1977 subject to such consequential amendments as the implementation of recommendation (b) may make necessary (paragraphs 67-73).

Contracts of hire

(d) The implied obligations of a person who supplies goods under a contract of hire need to be reviewed (paragraphs 74-79).

²⁰¹ Council of Europe Resolution (78) 38 on Adequate After-Sales Service.

(e) The obligations of an owner of goods who supplies them under a contract of hire should include implied terms that—

- (i) the owner, i.e. the bailor, has the right to hire out the goods throughout the period of hire; and
- (ii) the hirer, i.e. the bailee, is entitled to quiet possession of the goods throughout the period of hire (paragraphs 80-85).

(f) As for the obligations of a person who supplies goods under a contract of hire to supply goods that correspond with their description and sample and are merchantable and fit, these should be put in statutory form and modelled on the statutory obligations of a seller, *mutatis mutandis* (paragraphs 86-92).

(g) The recommendations in (e) and (f) should apply to all contracts of hire under which one person bails or agrees to bail goods by way of hire to another—

- (i) whether the consideration for the hire is the payment of money or some other consideration (paragraph 76);
- (ii) whether or not services are supplied as well as goods (paragraph 76); and
- (iii) whether the hire takes the form of a lease, a rental agreement, contract hire, a finance lease or some other form (paragraphs 76 and 93-97).

(h) Terms in a contract for the hire of goods which exclude or restrict the supplier's implied obligations, as above, should continue to be regulated by section 7 of the Unfair Contract Terms Act 1977, subject to such consequential amendments as the implementation of recommendations (e), (f) and (g) may make necessary (paragraphs 98-99).

Durability

(i) Provision should be made to expand the implied terms as to merchantable quality and fitness for purpose to include an obligation on the supplier that the goods should not only be of merchantable quality or fit for their purpose (as the case may be) at the time when that obligation arose but should continue to be of such quality and fitness as can reasonably be expected at any particular time thereafter. This obligation should be imposed on the supplier in all contracts for the supply of goods (including sale, contracts analogous to sale, hire and hire-purchase) wherever a term is to be implied that goods are of merchantable quality or fit for their purpose; and terms excluding or restricting this obligation should be controlled by sections 6 and 7 of the Unfair Contract Terms Act 1977 in the same way as those sections at present control terms excluding or restricting the requirements of merchantable quality and fitness for purpose (paragraphs 100-114).

Spare parts and servicing facilities

(j) We have considered whether provision should be made for a term to be implied in contracts for the sale (or supply) of goods that the seller (or supplier) should keep spare parts and servicing facilities available, but our recommendation is that no such provision should be made (paragraphs 115-122).

131. Draft clauses designed to give effect to the recommendations we make in paragraph 130 (a)–(h) are attached.²⁰² We have explained our reasons for not

²⁰² See Appendix A.

including draft clauses to implement the proposals as to durability made in paragraph 130(i).²⁰³ It might be said that the same reasoning applies to all our other proposals (in paragraph 130 (a)–(h)) and that their implementation should also be delayed. We do not believe that this is so. It is only one part of our proposals that there should be implied terms as to the quality and fitness of goods in contracts such as barter, work and materials and hire. Admittedly, the present formulation of the statutory undertakings as to quality and fitness may fall to be amended as the result of whatever recommendations we may make on the new reference which we have already mentioned.²⁰⁴ However, in our view this consideration is outweighed by the desirability now to clarify the terms implied in contracts of barter, work and materials and hire and to align them with the terms implied in contracts of sale and hire-purchase.

(Signed) MICHAEL KERR, *Chairman*
STEPHEN M. CRETNEY
STEPHEN EDELL
W. A. B. FORBES
PETER M. NORTH

J. C. R. FIELDSEND, *Secretary*
4 June 1979

²⁰³ See para. 114, above.

²⁰⁴ The terms of the new reference are set out at n.32, above.

APPENDIX A

DRAFT

**Supply of Goods (Implied Terms)
Bill**

ARRANGEMENT OF CLAUSES

Contracts for the transfer of property in goods

Clause

1. The contracts concerned.
2. Implied terms about title, etc.
3. Implied terms where transfer is by description.
4. Implied terms about quality or fitness.
5. Implied terms where transfer is by sample.

Contracts for the hire of goods

6. The contracts concerned.
7. Implied terms about right to transfer possession, etc.
8. Implied terms where hire is by description.
9. Implied terms about quality or fitness.
10. Implied terms where hire is by sample.

Supplementary

11. Exclusion of implied terms, etc.
12. Minor and consequential amendments.
13. Interpretation: general.
14. Interpretation: references to Acts.
15. Citation, transitionals, commencement, saving and extent.

SCHEDULE—Transitional provisions.

Draft Supply of Goods (Implied Terms) Bill

DRAFT
OF A
B I L L
TO

A.D. 1979 Amend the law with respect to the terms to be implied in certain contracts for the transfer of the property in goods and in certain contracts for the hire of goods; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Contracts for the transfer of property in goods

The contracts
concerned.

1.—(1) In this Act a “contract for the transfer of goods” means a contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract—

(2) For the purposes of this section an excepted contract means any of the following:—

- (a) a contract of sale of goods;
- (b) a hire-purchase agreement;
- (c) a contract under which the property in goods is (or is to be) transferred in exchange for trading stamps on their redemption;
- (d) a transfer or agreement to transfer which is made by deed and for which there is no consideration other than the presumed consideration imported by the deed;
- (e) a contract intended to operate by way of mortgage, pledge, charge or other security.

(3) For the purposes of this Act a contract is a contract for the transfer of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the transfer or agreement to transfer.

EXPLANATORY NOTES

Clause 1

1. This clause identifies those contracts analogous to sale with which the recommendations of the report are concerned.

2. Subsection (1) refers to those contracts as contracts “ for the transfer of goods ” and sets out the essential elements in “ a contract for the transfer of goods ” namely that it is a contract under which the parties agree that one of them shall transfer the property in goods to the other, either immediately or at some future date.

3. In accordance with the recommendation in paragraph 130(a) of the report, subsection (2) excludes from the definition of a “ contract for the transfer of goods ” a contract for the sale of goods, a hire-purchase agreement and a contract under which the property in goods is or is to be transferred on the redemption of trading stamps. This is because statutory provisions already exist concerning the obligations of the supplier in respect of the goods supplied under such contracts, as referred to in paragraph 27 of the report. For the reasons given in paragraph 29 of the report, a transfer or agreement to transfer made by deed and for which there is no consideration other than the presumed consideration imported by the deed is also excluded, as are contracts intended to operate by way of security.

4. Subsection (3) makes it clear that the fact that services may also be provided under a contract will not prevent it from being a “ contract for the transfer of goods ”. Neither will the nature of the consideration for the transfer or agreement to transfer prevent it from being a “ contract for the transfer of goods ” provided it does not fall into one of the classes of contract excluded by subsection (2).

Draft Supply of Goods (Implied Terms) Bill

Implied terms
about title,
etc.

2.—(1) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is an implied condition on the part of the transferor that in the case of a transfer of the property in the goods he has a right to transfer the property and in the case of an agreement to transfer the property in the goods he will have such a right at the time when the property is to be transferred.

(2) In a contract for the transfer of goods, other than one to which subsection (3) below applies, there is also an implied warranty that—

(a) the goods are free, and will remain free until the time when the property is to be transferred, from any charge or encumbrance not disclosed or known to the transferee before the contract is made, and

(b) the transferee 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.

(3) This subsection applies to a contract for the transfer of goods in the case of which there appears from the contract or is to be inferred from its circumstances an intention that the transferor should transfer only such title as he or a third person may have.

(4) In a contract to which subsection (3) above applies there is an implied warranty that all charges or encumbrances known to the transferor and not known to the transferee have been disclosed to the transferee before the contract is made.

(5) In a contract to which subsection (3) above applies there is also an implied warranty that none of the following will disturb the transferee's quiet possession of the goods, namely—

(a) the transferor;

(b) in a case where the parties to the contract intend that the transferor should transfer only such title as a third person may have, that person;

(c) anyone claiming through or under the transferor or that third person otherwise than under a charge or encumbrance disclosed or known to the transferee before the contract is made.

EXPLANATORY NOTES

Clause 2

This clause implements the recommendations in paragraph 130(b) of the report in so far as implied obligations as to title in contracts for the transfer of goods are concerned. It provides for statutory implied obligations as to title on the part of the supplier of goods (the transferor of the property in goods) similar to those of the seller under section 12 of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Terms) Bill

Implied terms where transfer is by description. 3.—(1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by description.

(2) In such a case there is an implied condition that the goods will correspond with the description.

(3) If the transferor transfers or agrees to transfer the property in the goods by sample as well as by 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.

(4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the transferee.

EXPLANATORY NOTES

Clause 3

1. Clause 3 implements the recommendations in paragraph 130(b) of the report in so far as the implied obligation as to description in a contract for the transfer of goods is concerned. It provides that where the property in goods is or is to be transferred by description there shall be a statutory obligation on the supplier of the goods (the transferor of the property in the goods) to supply goods that correspond with the description given. This statutory obligation as to description is modelled on the obligation of the seller under section 13 of the Sale of Goods Act 1893.

2. In subsection (4) the expression “exposed for supply” is used instead of “exposed for sale or hire” which is the expression used in section 13 of the Sale of Goods Act 1893 and section 9 of the Supply of Goods (Implied Terms) Act 1973, to allow for the possibility of goods being exposed with a view to other sorts of transaction, such as barter.

Draft Supply of Goods (Implied Terms) Bill

Implied terms
about quality
or fitness.

4.—(1) Except as provided by this section and section 5 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract for the transfer of goods.

(2) Where, under such a contract, the transferor transfers the property in goods in the course of a business, there is (subject to subsection (3) below) an implied condition that the goods supplied under the contract are of merchantable quality.

(3) There is no such condition as is mentioned in subsection (2) above—

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

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

(4) Subsection (5) below applies where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known—

(a) to the transferor, or

(b) where the consideration or part of the consideration for the transfer is a sum payable by instalments and the goods were previously sold by a credit-broker to the transferor, to that credit-broker,

any particular purpose for which the goods are being acquired.

(5) In that case there is (subject to subsection (6) below) 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.

(6) Subsection (5) above does not apply where the circumstances show that the transferee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the transferor or credit-broker.

(7) An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the transfer of goods.

(8) The preceding provisions of this section apply to a transfer by a person who in the course of a business is acting as agent for another as they apply to a transfer by a principal in the course of a business, except where that other is not transferring in the course of a business and either the transferee knows that fact or reasonable steps are taken to bring it to the transferee's notice before the contract concerned is made.

EXPLANATORY NOTES

Clause 4

This clause implements the recommendations in paragraph 130(b) of the report in so far as implied obligations as to the quality and fitness of goods supplied under a contract for the transfer of goods are concerned. It provides for statutory obligations on the part of the supplier, as to the quality and fitness of the goods, similar to the obligations of the seller under section 14 of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Terms) Bill

(9) Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly supplied as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

EXPLANATORY NOTES

Draft Supply of Goods (Implied Terms) Bill

Implied terms
where transfer
is by sample.

5.—(1) This section applies where, under a contract for the transfer of goods, the transferor transfers or agrees to transfer the property in the goods by reference to a sample.

(2) In such a case there is an implied condition—

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

(b) that the transferee 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.

(3) In subsection (2)(c) above “unmerchantable” is to be construed in accordance with section 4(9) above.

(4) For the purposes of this section a transferor transfers or agrees to transfer the property in goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

EXPLANATORY NOTES

Clause 5

Clause 5 implements the recommendation in paragraph 130(b) of the report with regard to the implied obligations arising as a result of the goods being supplied under a contract for the transfer of goods by reference to a sample. It provides for implied obligations on the part of the supplier of goods (the transferor of the property in goods) similar to those of the seller of goods under section 15 of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Terms) Bill

Contracts for the hire of goods

The contracts
concerned.

6.—(1) In this Act a “contract for the hire of goods” means a contract under which one person bails or agrees to bail goods to another by way of hire, other than an excepted contract.

(2) For the purposes of this section an excepted contract means any of the following:—

(a) a hire-purchase agreement;

(b) a contract under which goods are (or are to be) bailed in exchange for trading stamps on their redemption.

(3) For the purposes of this Act a contract is a contract for the hire of goods whether or not services are also provided or to be provided under the contract, and (subject to subsection (2) above) whatever is the nature of the consideration for the bailment or agreement to bail by way of hire.

EXPLANATORY NOTES

Clause 6

1. This clause identifies those contracts of hire with which the recommendations of the report are concerned.

2. Subsection (1) refers to those contracts as contracts “for the hire of goods” and sets out the essential elements in a “contract for the hire of goods” namely that it is a contract under which the parties agree that one of them shall bail goods to the other by way of hire either immediately or at some future date.

3. In accordance with the recommendation made in paragraph 130(g) of the report, subsection (3) excludes from the definition of a “contract for the hire of goods” a hire-purchase agreement and a contract under which goods are or are to be bailed on the redemption of trading stamps. This is because statutory provisions already exist concerning the obligations of the supplier in respect of goods supplied under a hire-purchase agreement and on the redemption of trading stamps, as mentioned in paragraph 74 of the report.

4. Subsection (3) makes it clear that the fact that services may also be provided under a contract will not prevent it from being “a contract for the hire of goods”; neither will the nature of the consideration for the transfer or agreement to transfer provided the contract does not fall into either of the classes of contract excluded by subsection (2).

Draft Supply of Goods (Implied Terms) Bill

Implied terms
about right to
transfer
possession,
etc.

7.—(1) In a contract for the hire of goods there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment.

(2) In a contract for the hire of goods there is also an implied warranty that the bailee will enjoy quiet possession of the goods for the period of the bailment except so far as the possession may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance disclosed or known to the bailee before the contract is made.

(3) The preceding provisions of this section do not affect the right of the bailor to repossess the goods under an express or implied term of the contract.

EXPLANATORY NOTES

Clause 7

1. Subsections (1) and (2) of this clause implement the recommendations in paragraph 130(e) of the report; they imply terms on the part of the owner of the goods (the bailor) as to his right to hire out the goods for the period of the hire and as to the right of the hirer (the bailee) to quiet possession of the goods throughout the period of the hire.

2. Subsection (3) of this clause makes it clear that the implied obligations of the owner under this clause do not affect any rights he may have, under an express or implied term of the contract, to repossess the goods.

Draft Supply of Goods (Implied Terms) Bill

Implied terms
where hire is
by
description.

8.—(1) This section applies where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by description.

(2) In such a case there is an implied condition that the goods will correspond with the description.

(3) If under the contract the bailor bails or agrees to bail the goods 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.

(4) A contract is not prevented from falling within subsection (1) above by reason only that, being exposed for supply, the goods are selected by the bailee.

EXPLANATORY NOTES

Clause 8

1. Clause 8 implements the recommendations in paragraph 130(f) of the report in so far as the implied obligation as to description in a contract for the hire of goods is concerned. It provides that, where the owner (the bailor) bails or agrees to bail goods by description, there shall be a statutory obligation on him to supply goods that correspond with the description given. This statutory obligation as to description is modelled on the obligation of the seller under section 13 of the Sale of Goods Act 1893.

2. In subsection (4), as in clause 3(4), the expression “exposed for supply” is used instead of “exposed for sale or hire”, which is found in the Sale of Goods Act model, to allow for the possibility of goods being exposed with a view to other sorts of transaction such as barter.

Draft Supply of Goods (Implied Terms) Bill

Implied terms
about quality
or fitness.

9.—(1) Except as provided by this section and section 10 below and subject to the provisions of any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods bailed under a contract for the hire of goods.

(2) Where, under such a contract, the bailor bails goods in the course of a business, there is (subject to subsection (3) below) an implied condition that the goods supplied under the contract are of merchantable quality.

(3) There is no such condition as is mentioned in subsection (2) above—

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

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

(4) Subsection (5) below applies where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known—

(a) to the bailor in the course of negotiations conducted by him in relation to the making of the contract, or

(b) to a credit-broker in the course of negotiations conducted by that broker in relation to goods sold by him to the bailor before forming the subject matter of the contract,

any particular purpose for which the goods are being bailed.

(5) In that case there is (subject to subsection (6) below) 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.

(6) Subsection (5) above does not apply where the circumstances show that the bailee does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the bailor or credit-broker.

(7) An implied condition or warranty about quality or fitness for a particular purpose may be annexed by usage to a contract for the hire of goods.

(8) The preceding provisions of this section apply to a bailment by a person who in the course of a business is acting as agent for another as they apply to a bailment by a principal in the course of a business, except where that other is not bailing in the course of a business and either the bailee knows that fact or reasonable steps are taken to bring it to the bailee's notice before the contract concerned is made.

EXPLANATORY NOTES

Clause 9

This clause implements the recommendations in paragraph 130(f) of the report in that it provides for statutory implied obligations on the part of the supplier of goods under a contract of hire (the bailor), as to the quality and fitness of the goods supplied, similar to those of a seller under section 14 of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Forms) Bill

(9) Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods of that kind are commonly supplied as it is reasonable to expect having regard to any description applied to them, the consideration for the bailment (if relevant) and all the other relevant circumstances.

EXPLANATORY NOTES

Draft Supply of Goods (Implied Terms) Bill

Implied terms
where hire is
by sample.

10.—(1) This section applies where, under a contract for the hire of goods, the bailor bails or agrees to bail the goods by reference to a sample.

(2) In such a case there is an implied condition—

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

(b) that the bailee 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.

(3) In subsection (2)(c) above “unmerchantable” is to be construed in accordance with section 9(9) above.

(4) For the purposes of this section a bailor bails or agrees to bail goods by reference to a sample where there is an express or implied term to that effect in the contract concerned.

EXPLANATORY NOTES

Clause 10

Clause 10 implements the recommendation in paragraph 130(*f*) of the report with regard to the implied obligations arising as a result of goods being supplied under a contract for the hire of goods by reference to a sample. It provides for implied obligations on the part of the owner of the goods (the bailor) similar to those of the seller of goods under section 15 of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Terms) Bill

Supplementary

Exclusion of
implied terms,
etc.

11.—(1) Where a right, duty or liability would arise under a contract for the transfer of goods or a contract for the hire of goods by implication of law, it may (subject to subsection (2) below and the 1977 Act) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

(2) An express condition or warranty does not negative a condition or warranty implied by the preceding provisions of this Act unless inconsistent with it.

(3) Nothing in the preceding provisions of this Act prejudices the operation of any other enactment or any rule of law whereby any condition or warranty (other than one relating to quality or fitness) is to be implied in a contract for the transfer of goods or a contract for the hire of goods.

EXPLANATORY NOTES

Clause 11

1. Subsections (1) and (2) of Clause 11 reflect section 55(1) and (2) of the Sale of Goods Act 1893 as amended by the Unfair Contract Terms Act 1977. The aim of Clause 11(1) and (2) is to align the law relating to exclusion of implied terms in those contracts with which the Bill is concerned with the law relating to exclusion of implied terms in contracts for the sale of goods.

2. Clause 11(3) makes it clear that, with the exception of terms relating to quality and fitness, the terms implied under the Bill are not intended to be exclusive.

Draft Supply of Goods (Implied Terms) Bill

Minor and consequential amendments.

12.—(1) In section 10(2) of the 1973 Act, as originally enacted and as prospectively substituted by paragraph 35 of Schedule 4 to the 1974 Act (implied condition in hire-purchase agreement that goods are of merchantable quality), after “implied condition that the goods” there shall be inserted “supplied under the agreement”.

(2) In section 7(1) of the 1977 Act (limit on curtailment of liability for obligations implied in contracts under which possession or ownership of goods passes) after “passes” there shall be inserted “or is to pass”.

(3) The following subsection shall be inserted after section 7(3) of the 1977 Act:—

“(3A) Liability for breach of the obligations arising under section 2 of the Supply of Goods (Implied Terms) Act 1979 (implied terms as to title etc. in certain contracts for the transfer of the property in goods) cannot be excluded or restricted by reference to any such term”.

(4) In consequence of subsection (3) above, in section 7(4) of the 1977 Act, after “cannot” there shall be inserted “(in a case to which subsection (3A) above does not apply)”.

EXPLANATORY NOTES

Clause 12

1. Clause 12(1) is included to bring the wording of section 10(2) of the Supply of Goods (Implied Terms) Act 1973, as to be substituted by paragraph 35 of Schedule 4 to the Consumer Credit Act 1974, (implied term as to merchantable quality in contracts of hire-purchase) into line with the wording of the equivalent provision in section 14(2) of the Sale of Goods Act 1893 (the same thing in contracts for the sale of goods) and with the wording of the equivalent provisions in the Bill (clauses 4(2) and 9(2); implied terms as to merchantable quality in contracts for the transfer of the property in goods and contracts for the hire of goods).

2. Subsections (2), (3) and (4) of Clause 12 implement the recommendations in paragraph 130(c) and (h) of the report.

Draft Supply of Goods (Implied Terms) Bill

Interpreta-
tion: general. **13.**—(1) In the preceding provisions of this Act and this section—

“bailee”, in relation to a contract for the hire of goods, means (depending on the context) a person to whom the goods are bailed under the contract, or a person to whom they are to be so bailed, or a person to whom the rights under the contract of either of those persons have passed;

“bailor”, in relation to a contract for the hire of goods, means (depending on the context) a person who bails the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed;

“business” includes a profession and the activities of any government department or local or public authority;

“credit-broker” means a person acting in the course of a business of credit brokerage;

“credit brokerage” means the effecting of introductions of individuals desiring to obtain credit—

(a) to persons carrying on any business so far as it relates to the provision of credit, or

(b) to other persons engaged in credit brokerage;

“goods” include all personal chattels (including emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before the transfer or bailment concerned or under the contract concerned), other than things in action and money;

“hire-purchase agreement” has the same meaning as in the 1974 Act;

“property”, in relation to goods, means the general property in them and not merely a special property;

“quality”, in relation to goods, includes their state or condition;

“redemption”, in relation to trading stamps, has the same meaning as in the 1964 Act;

“trading stamps” has the same meaning as in the 1964 Act;

“transferee”, in relation to a contract for the transfer of goods, means (depending on the context) a person to whom the property in the goods is transferred under the contract, or a person to whom the property is to be so transferred, or a person to whom the rights under the contract of either of those persons have passed;

EXPLANATORY NOTES

Clause 13

“ business ”

The definition of “ business ” follows the definition in section 62(1) of the Sale of Goods Act 1893, section 15(1) of the Supply of Goods (Implied Terms) Act 1973 and section 14 of the Unfair Contract Terms Act 1977.

“ credit-broker ”, “ credit brokerage ”

The definitions of “ credit-broker ” and “ credit brokerage ” follow the definitions in section 10(6) of the Supply of Goods (Implied Terms) Act 1973 as to be substituted by paragraph 35 of Schedule 4 to the Consumer Credit Act 1974.

“ goods ”, “ property ”, “ quality ”

The definitions of these terms follow their definitions in section 62(1) of the Sale of Goods Act 1893.

Draft Supply of Goods (Implied Terms) Bill

“transferor”, in relation to a contract for the transfer of goods, means (depending on the context) a person who transfers the property in the goods under the contract, or a person who agrees to do so, or a person to whom the duties under the contract of either of those persons have passed.

(2) In subsection (1) above, in the definitions of bailee, bailor, transferee and transferor, a reference to rights or duties passing is to their passing by assignment, operation of law or otherwise.

EXPLANATORY NOTES

Draft Supply of Goods (Implied Terms) Bill

Interpreta-
tion:
references
to Acts.

14. In this Act—

- “ the 1893 Act ” means the Sale of Goods Act 1893;
- “ the 1964 Act ” means the Trading Stamps Act 1964;
- “ the 1973 Act ” means the Supply of Goods (Implied Terms) Act 1973;
- “ the 1974 Act ” means the Consumer Credit Act 1974;
and
- “ the 1977 Act ” means the Unfair Contract Terms Act 1977.

EXPLANATORY NOTES

Draft Supply of Goods (Implied Terms) Bill

Citation,
transitionals,
commence-
ment, saving
and extent.

15.—(1) This Act may be cited as the Supply of Goods (Implied Terms) Act 1979.

(2) The transitional provisions in the Schedule to this Act shall have effect.

(3) This Act (except this subsection) shall come into operation on such day as may be appointed by the Secretary of State by order, and different days may be so appointed for different provisions or for different purposes.

(4) The power to make an order under subsection (3) above shall be exercisable by statutory instrument.

(5) No provision of this Act applies to a contract made before the provision comes into operation.

(6) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Draft Supply of Goods (Implied Terms) Bill

Section 15

SCHEDULE

TRANSITIONAL PROVISIONS

1.—(1) If section 4 of this Act comes into operation before paragraph 3 of Schedule 4 to the 1974 Act (which amends section 14(3) of the 1893 Act so as to make it refer to credit-brokers) and before the consequential repeal of section 14(6) of that Act, then, until the paragraph and repeal come into operation, section 4 of this Act shall have effect with the modifications set out in sub-paragraphs (2) to (4) below.

(2) For subsection (4) substitute:—

“ (4) Subsection (5) below applies where, under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business and the transferee, expressly or by implication, makes known to the transferor any particular purpose for which the goods are being acquired.”

(3) In subsection (6) omit “ or credit-broker ”.

(4) After subsection (9) insert:—

“ (10) In the application of subsections (4) to (6) above to a contract for the transfer of goods under which the consideration or part of the consideration for the transfer is a sum payable by instalments any reference to the transferor includes a reference to the person by whom any antecedent negotiations are conducted.

(11) Section 58(3) and (5) of the Hire-Purchase Act 1965 (meaning of antecedent negotiations and related expressions) apply, with the appropriate modifications, in relation to subsection (10) above as in relation to that Act.”

2.—(1) If section 9 of this Act comes into operation before paragraph 35 of Schedule 4 to the 1974 Act (which, among other things, amends section 10(3) of the 1973 Act so as to make it refer to credit-brokers), then, until the paragraph comes into operation, section 9 of this Act shall have effect with the modifications set out in sub-paragraphs (2) to (4) below.

(2) For subsection (4) substitute:—

“ (4) Subsection (5) below applies where, under a contract for the hire of goods, the bailor bails goods in the course of a business and the bailee, expressly or by implication, makes known to the bailor or the person by whom any antecedent negotiations are conducted any particular purpose for which the goods are being bailed.”

(3) In subsection (6), for “ credit-broker ” substitute “ person by whom the antecedent negotiations are conducted ”.

EXPLANATORY NOTES

Schedule

TRANSITIONAL PROVISIONS

The Bill has been drafted on the basis that it will become law after paragraphs 3 and 35 of Schedule 4 to the Consumer Credit Act 1974 come into operation. The transitional provisions in the Schedule have been included in case these paragraphs of Schedule 4 to the Consumer Credit Act are not brought into operation until after the Bill has become law.

Draft Supply of Goods (Implied Terms) Bill

(4) After subsection (9) insert:—

“ (10) Section 58(3) and (5) of the Hire-Purchase Act 1965 (meaning of antecedent negotiations and related expressions) apply, with the appropriate modifications, in relation to subsections (4) to (6) above as in relation to that Act.”

APPENDIX B

Implied Terms in Contracts for The Supply of Goods The Sale of Goods Act Model

(Sections 12-15 and 55 and extracts from section 62 of the Sale of Goods Act 1893, as amended by the Supply of Goods (Implied Terms) Act 1973 and the Unfair Contract Terms Act 1977).

12. Implied undertakings as to title, etc.

(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 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.

13. Sale by description

(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 corresponds 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.

14. Implied undertakings as to quality or fitness

(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 that 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.

[(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—

- (a) to the seller, or
- (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,

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 skill or judgment of the seller or credit-broker.

In this subsection "credit-broker" means a person acting in the course of a business of credit brokerage carried on by him, that is a business of effecting introductions of individuals desiring to obtain credit—

- (i) to persons carrying on any business so far as it relates to the provision of credit, or
- (ii) to other persons engaged in credit brokerage.²⁰⁵

(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 of a business 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.

²⁰⁵ The subsection shown in square brackets is to be substituted for subsection 3 of s.14 of the Sale of Goods Act when para. 3 of Sched. 4 to the Consumer Credit Act 1974 takes effect.

(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 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.²⁰⁶

15. Sale by sample

- (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.

55. Exclusion of implied terms and conditions

- (1) Where any right, duty or liability would arise under a contract of sale of goods by implication of law, it may be negated or varied by express agreement, or by the course of dealing between the parties, or by usage if the usage is such as to bind both parties to the contract, but the foregoing provision shall have effect subject to the provisions of the Unfair Contract Terms Act 1977.
- (2) An express condition or warranty does not negative a condition or warranty implied by this Act unless inconsistent therewith.

62. Interpretation of terms

- (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 or public authority;

“Goods” include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part or the land which are agreed to be severed before sale or under the contract of sale.
- (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 the other relevant circumstances; and any reference in this Act to unmerchantable goods shall be construed accordingly.

²⁰⁶ This subsection will be repealed when Sched. 5 to the Consumer Credit Act 1974 takes effect.

APPENDIX C

Unfair Contract Terms Act 1977 Provisions Controlling Clauses which Exclude or Restrict Obligations Implied in Contracts for the Sale or Supply of Goods (Sections 1, 6, 7, 11 and 12 and Schedule 2)

PART I

1. Introductory

- (1) For the purposes of this Part of this Act, “negligence” means the breach—
 - (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
 - (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
 - (c) of the common duty of care imposed by the Occupiers’ Liability Act 1957 or the Occupiers’ Liability Act (Northern Ireland) 1957.
- (2) This Part of this Act is subject to Part III; and in relation to contracts, the operation of sections 2 to 4 and 7 is subject to the exceptions made by Schedule 1.
- (3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—
 - (a) from things done or to be done by a person in the course of a business (whether his own business or another’s); or
 - (b) from the occupation of premises used for business purposes of the occupier;and references to liability are to be read accordingly.
- (4) In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

6. Sale and hire-purchase

- (1) Liability for breach of the obligations arising from—
 - (a) section 12 of the Sale of Goods Act 1893 (seller’s implied undertakings as to title, etc.);
 - (b) section 8 of the Supply of Goods (Implied Terms) Act 1973 (the corresponding thing in relation to hire-purchase),cannot be excluded or restricted by reference to any contract term.
- (2) As against a person dealing as consumer, liability for breach of the obligations arising from—
 - (a) section 13, 14 or 15 of the 1893 Act (seller’s implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);
 - (b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase),cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

(4) The liabilities referred to in this section are not only the business liabilities defined by section 1(3), but include those arising under any contract of sale of goods or hire-purchase agreement.

7. Miscellaneous contracts under which goods pass

(1) Where the possession or ownership of goods passes under or in pursuance of a contract not governed by the law of sale of goods or hire-purchase, subsections (2) to (4) below apply as regards the effect (if any) to be given to contract terms excluding or restricting liability for breach of obligation arising by implication of law from the nature of the contract.

(2) As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term.

(3) As against a person dealing otherwise than as consumer, that liability can be excluded or restricted by reference to such a term, but only in so far as the term satisfies the requirement of reasonableness.

(4) Liability in respect of—

- (a) the right to transfer ownership of the goods, or give possession; or
- (b) the assurance of quiet possession to a person taking goods in pursuance of the contract,

cannot be excluded or restricted by reference to any such term except in so far as the term satisfies the requirement of reasonableness.

(5) This section does not apply in the case of goods passing on a redemption of trading stamps within the Trading Stamps Act 1964 or the Trading Stamps Act (Northern Ireland) 1965.

11. The “reasonableness” test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act, section 3 of the Misrepresentation Act 1967 and section 3 of the Misrepresentation Act (Northern Ireland) 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without prejudice to subsection (2) above in the case of contract terms) to—

- (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- (b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

12. “Dealing as consumer”

(1) A party to a contract “deals as consumer” in relation to another party if—

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party does make the contract in the course of a business; and
- (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

SCHEDULE 2

“GUIDELINES” FOR APPLICATION OF REASONABLENESS TEST

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21 are any of the following which appear to be relevant—

- (a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);

- (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.

APPENDIX D

List of Persons and Organisations who sent Comments on Working Paper No. 71

Mr. R. A. J. Allnut
B.I.C.C. Ltd.
Baroness Birk
Mr. Gordon Borrie (Director-General of Fair Trading)
British Insurance Association
Committee of Associations of Specialist Engineering Contractors
Confederation of British Industry
Consumers' Association
Department of Consumer Protection in Berkshire
Equipment Leasing Association
Federation of Civil Engineering Contractors
Finance Houses Association
H. H. Judge Norman Francis
Mr. John Goldring
Johnson, Pearce & Co. Ltd.
Holborn Law Society
The Law Society
Mr. M. J. Leder
Mr. W. A. Leitch, C.B.
Lord Chancellor's Department
Multiple Shops Federation
National Farmers' Union
National Federation of Building Trades Employers
National Federation of Consumer Groups
Office of Fair Trading
Mr. N. E. Palmer
Royal Institute of British Architects
Royal Yachting Association
Mr. Peter J. Schofield
A Working Party set up by the Scottish Law Commission
Senate of the Inns of Court and the Bar
Society of Motor Manufacturers and Traders Ltd.

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