

# Chitty on Contracts 32nd Ed.

## Consolidated Mainwork Incorporating Second Supplement

### Volume I - General Principles

### Part 4 - The Terms of Contract

### Chapter 14 - Implied Terms

#### Nature of implied terms

#### 14-001

So far, only express terms have been discussed, that is to say, those terms which are actually recorded in a written contract or openly expressed at the time the contract is made. But there are cases in which the law implies a term in a contract although it is not expressly included therein by the parties. An implied term may be a condition, a warranty or an intermediate (innominate) term.<sup>1</sup>

#### Implication of terms

#### 14-002

⚠ The problem of the implication of terms is one which frequently arises in the law of contract. In certain instances, the parties to a contract may have been content to express only the most important terms of their agreement, leaving the remaining details to be understood. The court will then be asked to imply a term or terms to remedy the deficiency. More often, however, a subsequent disagreement reveals that there are contingencies for which the parties have not provided in their express contract. The question is then whether the court can imply a term to cover the contingency which has unexpectedly emerged. The principles that traditionally govern the implication of terms differ from those which apply to the construction of express terms.<sup>2</sup> However, in *Att-Gen of Belize v Belize Telecom Ltd*<sup>3</sup>

⚠ Lord Hoffmann challenged the validity of this difference in treatment on the ground that in both cases the court is seeking to establish what the contract would reasonably have been understood to mean having regard to the commercial purpose of the contract as a whole and the relevant available background of the transaction.<sup>4</sup> ⚠ The extent to which the process of implication can be assimilated with the principles applicable to the interpretation of the express terms of a

contract has since been the subject of much judicial comment<sup>5</sup> ⚠ and academic controversy.<sup>6</sup> ⚠ More recently the Supreme Court has sought to distance itself from the approach of Lord Hoffmann, with a majority describing his analysis in *Belize* as “a characteristically inspired discussion rather than authoritative guidance on the law of implied terms”.<sup>7</sup> ⚠ However, it does not follow from this that there is no relationship at all between the principles that govern the implication of terms and those which apply to the construction of express terms. While the process of interpretation precedes

implication and thus may be described as “the precursor of implication”,<sup>8</sup> ⚠ the two processes, while “logically distinct” have nevertheless been held to be “closely related” in that “both involve taking into account the words used in the contract, the surrounding circumstances known or available to the parties at the time of the contract, commercial common sense and the reasonable reader or reasonable parties”.<sup>9</sup> ⚠

#### “Intention of the parties”

#### 14-003

Whether or not a term is implied is conventionally said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances.<sup>10</sup> However, the implication of a term is a matter of law for the court,<sup>11</sup> and in many classes of contract implied terms have become standardised, so that it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. The court is, in fact, laying down a general rule of law that in all contracts of a defined type—for example, sale of goods, landlord and tenant, employment, the carriage of goods by land or sea—certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement.<sup>12</sup> Such implications do not depend entirely on the intentions of the parties, actual or presumed, but take account of more general considerations.<sup>13</sup>

### **Terms implied in law and terms implied in fact**

#### **14-004**

The implied terms described in the previous paragraphs can be divided into two broad groups, namely terms implied in fact and terms implied in law.<sup>14</sup> There are important differences between the two categories. Terms implied in fact are implied in order to give effect to the intention of the parties to the particular contract. The test to be applied in such cases has been expressed at different times in different ways by different courts<sup>15</sup> but the essential idea is that the term sought to be implied is a necessary one which gives to the contract the meaning which the particular parties to the contract intended. Terms implied in law, by contrast, are, as has been noted, implied into:

“a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it.”<sup>16</sup>

When deciding whether or not to imply a term as a matter of law into a contract of a particular type, the courts do not confine themselves to a narrow test of necessity but instead can draw upon a broader range of factors, such as the reasonableness of the term, its fairness and a range of competing policy considerations, when deciding whether the proposed term is a necessary incident of the type of contractual relationship in question.<sup>17</sup>

### **Traditional principles**

#### **14-005**

In many cases where it is sought to imply a term as a matter of fact, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will not make a contract for the parties<sup>18</sup> but will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question.<sup>19</sup> Traditionally, an implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap<sup>20</sup> and, in many cases, have been applied cumulatively,<sup>21</sup> although in other cases they have (more sensibly) been treated as alternative grounds.<sup>22</sup> Both are predicated to depend on the presumed common intention of the parties. Such intention is, in general, to be ascertained objectively and is not dependent on proof of the actual intention of the parties at the time of contracting. As so formulated, these criteria were traditionally regarded as “tests” which were required to be satisfied if a term was to be implied.

### **Att-Gen of Belize v Belize Telecom Ltd**

#### **14-006**

⚠ More recently, however, a much broader approach to the implication of terms was adopted by the Judicial Committee of the Privy Council in *Att-Gen of Belize v Belize Telecom Ltd.*<sup>23</sup> Lord Hoffmann stated that:

“... in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument read against the relevant background, would reasonably be understood to mean”<sup>24</sup>

and that the list of requirements set out in previous cases for the implication of a term:

“... is best regarded not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually meant, or in which they have explained why they did not think that it did so.”<sup>25</sup>

## Marks and Spencer v BNP Paribas

### 14-007

⚠ Initially, Lord Hoffmann’s judgment received the endorsement of both the Court of Appeal<sup>26</sup> ⚠ and it was applied or referred to in a number of cases at first instance.<sup>27</sup> ⚠ As a result, the traditional “tests” for the implication of terms into a contract were treated as guidelines to be applied by the courts when seeking to answer the single question: Is this what the instrument, read as a whole against the relevant background, would reasonably be understood to mean? However, in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*<sup>28</sup> ⚠ the Supreme Court re-established the traditional principles applicable to the implication of terms and “qualified”<sup>29</sup> ⚠ the judgment of Lord Hoffmann in *Belize*. In doing so the Supreme Court emphasised that Lord Hoffmann had not diluted the requirements which must be satisfied before a term will be implied into a contract.<sup>30</sup> ⚠ The test which must be applied by the courts when seeking to imply a term into a contract as a matter of fact is whether the term satisfies the test of “business necessity”.<sup>31</sup> ⚠ It is not enough to show that the term is a reasonable one for it to be implied into the contract.<sup>32</sup> ⚠ Reasonableness may be a necessary requirement before a term will be implied but it is not sufficient. Thus a term should not be implied into a detailed commercial contract merely because it appears fair or because the parties might have agreed to it had it been suggested to them.<sup>33</sup> ⚠ The test remains one of necessity, albeit not “absolute necessity” but whether, without the term, the contract would lack commercial or practical coherence or whether it is necessary to imply the term “in order to make the contract work”.<sup>34</sup> ⚠ In short, in order to imply a term into an ordinary business contract, the term must be necessary to give business efficacy to the contract; it must be so obvious that it goes without saying; it must be capable of clear expression; and it must not contradict any express term of the contract.<sup>35</sup> ⚠

## Efficacy to contract

### 14-008

An important factor which the courts continue to take into account when deciding whether or not to

imply a term into a contract is whether the term is necessary, in the business sense, to give efficacy to the contract. The general principle of law was thus stated by Bowen L.J. in *The Moorcock*<sup>36</sup>:

“Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded upon the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have.”

In this situation, although there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work<sup>37</sup> or because an implication is necessary to give effect to the reasonable expectations of the parties.<sup>38</sup>

## Illustrations

### 14-009

The principle laid down in *The Moorcock* has been approved and applied many times. For example, a term has been implied into a contract for the use of a wharf that it was safe for a ship to lie at the wharf<sup>39</sup>; into a contract for a Turkish bath that the couches for reclining on were free from vermin<sup>40</sup>; into a charterparty that the charterer would not order the ship to proceed to a port impossible of access<sup>41</sup> and would indemnify the shipowner against loss incurred in complying with the charterer's orders<sup>42</sup>; into a contract of bailment, the purpose of which was the use of the goods by the bailee, an authority to do in relation to the goods all things reasonably incidental to their reasonable use<sup>43</sup>; into a contract for the printing of banknotes that the plates should not be allowed to get into the hands of unauthorised persons<sup>44</sup>; into a father's contract to pay such school bills of his son as should be approved by him, that such consent should not be unreasonably withheld<sup>45</sup>; into a contract between a “pop group” and their personal manager, that the latter would not do anything which he could reasonably foresee would destroy the mutual confidence which was required to exist between them<sup>46</sup>; into a contract to provide a package holiday that reasonable care and skill would be used in rendering the services which the tour operator had contracted to provide, whether these were carried out by the tour organiser or others<sup>47</sup>; into a contract for driving lessons that the vehicle provided would be covered by insurance<sup>48</sup>; into a contract of agency that the principal would not deprive the agent of his commission by committing a breach of the contract between himself and a purchaser which released the purchaser from his obligation to pay the purchase price<sup>49</sup>; into insurance contracts between underwriters and insureds that documents previously shown to the underwriters by the insureds' brokers, and in the possession of the brokers, should be made available to the underwriters<sup>50</sup>; into a contract between architects and a construction company that the architects would carry out their design work in such time as would enable the company to complete its contract with its client<sup>51</sup>; into a towage contract that the tug would proceed with all reasonable despatch<sup>52</sup>; into a contract of sale of goods, where defective goods had been returned to the seller for repair, that the seller would inform the buyer of the nature of the defect and what had been done to repair it<sup>53</sup>; into contracts between landowners and developers that one party had to tell the other that a Town and Country Planning Act 1990 s.106 agreement could not be obtained<sup>54</sup> or that the landowner was not free to sell the property while the agreement was in force<sup>55</sup>; into a mooring contract, an obligation to take reasonable care to see that the layerage was safe<sup>56</sup>; into an estate agent's contract that, in order to earn its commission, the agent had to be the effective cause of the purchase<sup>57</sup>; into a construction contract that, where one party had paid money to the other in compliance with a decision of an adjudicator, that party was entitled to have the dispute finally determined by legal proceedings and, if the dispute was finally resolved in its favour, to have the money repaid to it<sup>58</sup>; into a letter of credit transaction that the issuing bank was obliged to act in accordance with the disposal statement in its art.16 UCP notice<sup>59</sup>; into a contract of guarantee that the creditor would provide a Lloyd's decision

within a reasonable time frame from the receipt of a notice of dispute <sup>60</sup>; into a refund guarantee that the sellers would extend the validity of the guarantee 0within a reasonable time <sup>61</sup>; into a construction contract that a party to an adjudication has a directly enforceable right to recover any overpayment to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute. <sup>62</sup>

### Obvious inference from agreement

#### 14-010

A term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract. <sup>63</sup>

“Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, ‘oh, of course’.” <sup>64</sup>

A term will not, however, thus be implied unless the court is satisfied that *both* parties would, as reasonable men, have agreed to it had it been suggested to them. <sup>65</sup> The knowledge or ignorance of each party of the matter to be implied, or of the facts on which the implication is based, is therefore a relevant factor. <sup>66</sup> Further, since:

“... the general presumption is that the parties have expressed every material term which they intended should govern their contract, whether oral or in writing,” <sup>67</sup>

the court will only imply a term if it is one which must necessarily have been intended by them, <sup>68</sup> and in particular will be reluctant to make any implication where it is essential that contracts of the particular type “should operate in accordance with the terms which appear on their face” <sup>69</sup> or “where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them”. <sup>70</sup> Nevertheless, even a carefully drafted contract may not have catered for an unanticipated contingency and a term can then be implied if obviously required. <sup>71</sup>

### Incomplete contract

#### 14-011

⚠ There is yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms:

“[i]n this sense the court is searching for what must be implied”. <sup>72</sup> ⚠ In *Liverpool City Council v Irwin* <sup>73</sup> the contract by which dwelling units in a council block were let to tenants consisted of “conditions of tenancy” which imposed obligations upon the tenants, but which were silent as to the contractual obligations of the landlord. The House of Lords implied an obligation on the part of the landlord to take reasonable care to keep the essential means of access and other communal facilities in reasonable repair. In *Sim v Rotherham Metropolitan BC* <sup>74</sup> the contracts under which secondary school teachers were employed were in general silent as to the extent of the teachers’ obligations as teachers. The court implied an obligation on their part to cover for absent colleagues during non-teaching periods if requested to do so. And in *Scally v Southern Health and Social Services Board* <sup>75</sup> contracts of employment of public health service employees contained a term, derived from a collective agreement reached between representatives of the employers and of the employees, whereby a valuable pension benefit was conferred upon an employee contingent upon action being taken by him to avail himself of the benefit. An employee could not, in all the circumstances, reasonably be expected to be aware of the term unless it was drawn to his attention. The House of

Lords implied an obligation on the employer to take reasonable steps to bring the term in question to the employee's attention so that he might be in a position to enjoy the benefit. In this type of case, the implication does not appear so much to depend on the intentions of the parties, but resembles more closely an implication of law,<sup>76</sup> since the term is implied as a "legal incident"<sup>77</sup> of a definable category of contract, though only where certain circumstances exist.

### Where term not implied

#### 14-012

A term ought not to be implied unless it is in all the circumstances equitable and reasonable.<sup>78</sup> But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so<sup>79</sup> or because it would improve the contract<sup>80</sup> or make its carrying out more convenient<sup>81</sup>: "[t]he touchstone is always *necessity* and not merely *reasonableness*".<sup>82</sup> The term to be implied must also be capable of being formulated with sufficient clarity and precision.<sup>83</sup> But it may be that lack of precision in the criterion to be embodied in the term is not fatal to any implication, since:

"... it is no novelty in the common law to find that a criterion on which some important question of liability is to depend can only be defined in imprecise terms which leave a difficult question for decision as to how the criterion applies to the facts of a particular case."<sup>84</sup>

A term will not be implied if it would be inconsistent with the express wording of the contract.<sup>85</sup>

### Further illustrations of cases where no term was implied

#### 14-013

No term was implied into a contract of employment that the employee was to be paid overtime for excess hours worked<sup>86</sup> or that he was not to be paid during absence owing to illness<sup>87</sup>; into a contract for the hire of a private detective that employees of the detective agency would not divulge confidential information<sup>88</sup>; into a contract for the sale and purchase of all grains manufactured over a certain period that the seller would retain his business<sup>89</sup>; into a contract of employment that the employer would take reasonable care to ensure that his employee's effects were not stolen<sup>90</sup> or that he would insure the employee when abroad against accidental injury or advise the employee to obtain such insurance for himself<sup>91</sup>; or that he would take reasonable care of the employee's economic well-being by advising him of the financial consequences under an insurance scheme of his early retirement<sup>92</sup>; into a contract for the sale of a patent to a company that the company would keep the patent alive<sup>93</sup>; into a contract for the exchange of two incomplete housing estates that the building work was of good quality<sup>94</sup>; into a contract for the building of a school that the builder should have uninterrupted possession of, and access to, the site<sup>95</sup>; into a lease that the lessor would keep a drain in repair<sup>96</sup>; into a contract for the services of a handwriting expert that he should not voluntarily give assistance to the other side<sup>97</sup>; into a voyage charterparty that the charterers would indemnify the shipowners against claims made by the cargo-owners<sup>98</sup>; into a contract for the carriage of goods by sea that the master was authorised to contract on behalf of the cargo-owners with third parties other than as agent of necessity<sup>99</sup>; into a contract between a banker and a customer that the customer would take reasonable precautions in his business to prevent forgeries by his employees<sup>100</sup> or that the banker would advise the customer of a new type of interest-bearing account<sup>101</sup>; into a debenture that the debenture holder could appoint a receiver if his security was in jeopardy<sup>102</sup>; into a contract of insurance that the insurers would indemnify the insured in respect of expenditure incurred by him in preventing or minimising a loss which might fall to them under the policy<sup>103</sup>; into a contract between insurers and the assignee of the policy to inform him that the insured was dishonestly jeopardising the cover provided by the insurers<sup>104</sup>; into a contract between insurers and a reinsurer that they could recover a pro rata share of their costs of investigating, settling or defending claims on the underlying policies<sup>105</sup>; into a non-proportional insurance contract that the reinsured would act "prudently" or "reasonable carefully"<sup>106</sup>; into an agreement to submit disputes to arbitration that the claimant would



proceed with the arbitration without undue delay <sup>107</sup>; into a contract of employment of a schoolmaster that he was required to occupy a house for the better performance of his duties as such <sup>108</sup>; into a highway maintenance contract that the contractor would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust that existed between itself and the employer <sup>109</sup>; into a contract which provided for the obtaining of counsel's opinion that the opinion would only be valid if given on the basis of true facts or proper instructions <sup>110</sup>; into an exclusive purchasing agreement that the seller would not act in a way that was prejudicial to the buyer by selling directly to customers <sup>111</sup>; into an option agreement that payment had to be made within the original option period <sup>112</sup>; into a construction sub-contract that the subcontractor would execute the works with such diligence and expedition as was reasonably required to meet the dates of the programme <sup>113</sup>; into an estate agent's contract a term that the agent was entitled to commission only if he was the effective cause of the sale <sup>114</sup>; into an FOB contract for the sale of goods, that the parties should be discharged in the event that the seller's suppliers refused to supply the necessary goods <sup>115</sup>; into a charterparty, that the charterers were obliged to nominate a safe berth at the loading port <sup>116</sup>; into a milk supply contract that one party would not sell or otherwise dispose of its business or assets without procuring that the person acquiring the same would be bound by the contract <sup>117</sup>; into a merchant service agreement between a bank and a merchant that the bank would retain money received from cardholders only for a reasonable time and in respect of actual loss suffered by the bank <sup>118</sup>; into a financial contract that the financial adviser would competently assess risk and not permit excessive risk to be taken <sup>119</sup>; into an option agreement that the option had to be exercised within a limited time <sup>120</sup>; into a voyage charter containing laytime exceptions that the events specified had to be beyond the control of the charterer <sup>121</sup>; into a subbrokerage contract that the sub-broker's entitlement to commission was conditional on the broker being paid its commission. <sup>122</sup>

## Co-operation

### 14-014

⚠ The court may be willing to imply a term that the parties shall co-operate to ensure the performance of their bargain. <sup>123</sup> Thus:

“... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.” <sup>124</sup> ⚠

However, the guidelines mentioned above for the implication of a term must be taken into account. <sup>125</sup> Also the duty to co-operate and the degree of co-operation required is to be determined, not by what is reasonable, but by the obligations imposed—whether expressly or impliedly—upon each party by the agreement itself, and the surrounding circumstances. <sup>126</sup>

## Prevention of performance

### 14-015

By the same token:

“... if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can become operative.” <sup>127</sup>

Also where a binding contract is subject to a condition precedent,<sup>128</sup> a term may be implied that a party will not do an act which, if done, would prevent fulfilment of the condition.<sup>129</sup> But these implications are not inevitable: the alleged term may be unreasonably wide<sup>130</sup> or be displaced by an express term<sup>131</sup> or the nature of the contract may indicate otherwise.<sup>132</sup> A term may also be implied that a right, remedy or benefit expressly conferred upon one party to a contract or to which he may be entitled shall not be available if that party relies on his own breach of the contract, to establish his claim.<sup>133</sup>

## Export and import licences

### 14-016

In international trade, contracts of sale of goods are frequently the subject of governmental restrictions and a licence may have to be obtained for the import or export of goods from one country to another. The parties will normally provide expressly who is to assume this responsibility, but, in the absence of any express provision, it will be necessary to imply a term as to whether the duty to obtain a licence rests upon the buyer or the seller.<sup>134</sup> Once the incidence of this duty has been determined, the court will then have to consider whether the party placed under the duty impliedly undertook to use his best endeavours to obtain a licence<sup>135</sup> or whether he undertook absolutely that a licence would be obtained.<sup>136</sup> In any event, both parties are under an obligation to co-operate with each other to the extent that is necessary for the obtaining of a licence.<sup>137</sup>

## Occupiers of premises

### 14-017

Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, is the "common duty of care".<sup>138</sup> The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there,<sup>139</sup> except in so far as the occupier is free to<sup>140</sup> and does extend, restrict modify or exclude that duty by agreement or otherwise.<sup>141</sup> However, the duty cannot be restricted or excluded by the contract so as to diminish the rights of third parties who are entitled to enter by virtue of its provisions.<sup>142</sup> The same duty applies in relation to fixed and movable structures as it does to premises<sup>143</sup> but does not extend to the obligations imposed by any contract for the hire of, or for the carriage for reward of persons or goods in, any means of transport, or by any contract of bailment.<sup>144</sup>

## Fitness for habitation: sale of land

### 14-018

It is well established that prima facie upon a contract for sale of a piece of land with a house on it, there is no warranty as to the habitability of the house.<sup>145</sup> The same rule would apply in the case of an uncompleted house, which is the subject matter of a sale, where the structure stands at the time of the sale. But where the vendor sells a piece of land and covenants to build or complete a house on it, there is, at common law, an implied term: (i) that the work will be done in a good and workmanlike manner; (ii) that he will supply good and proper materials; and (iii) that the house will be reasonably fit for human habitation when built or completed.<sup>146</sup> This implication may, however, be rebutted where the purchaser has himself expressly prescribed the way in which the work is to be done, and the work has been completed in accordance with his instructions.<sup>147</sup> The Defective Premises Act 1972<sup>148</sup> in addition, imposes on every person who takes on work for or in connection with the provision of a dwelling a similar statutory duty<sup>149</sup> (which cannot be excluded or restricted by any term of an agreement), subject to certain exceptions provided for in the Act. This statutory duty is owed to any person to whose order the dwelling is provided and also to every person who acquires an interest



(whether legal or equitable) in the dwelling. <sup>150</sup>

### **Fitness for habitation: leases**

#### **14-019**

In general, a landlord gives no implied under-taking that leased premises are or will be fit for habitation or for any particular use, <sup>151</sup> or that the premises can lawfully be used for any particular purpose. <sup>152</sup> But where a house or flat is let furnished, there is an implied covenant or warranty that it is reasonably fit for human habitation when let, <sup>153</sup> although there is no obligation at common law to keep furnished or unfurnished premises in that condition or to repair them during the tenancy. <sup>154</sup> However, covenants on the part of the landlord are implied in the cases of houses let at a low rent <sup>155</sup> or for a short term. <sup>156</sup>

### **Buildings in multiple occupation**

#### **14-020**

Where an essential means of access to units in a building in multiple occupation is retained by the landlord, a covenant may be implied on his part to use reasonable care to keep the essential means of access in reasonable repair and fit for use. <sup>157</sup>

### **When implied from usage or custom**

#### **14-021**

If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom <sup>158</sup>; provided there is no inconsistency between the usage and the terms of the contract. <sup>159</sup> To be binding, however, the usage must be notorious, certain and reasonable, and not contrary to law <sup>160</sup>; and it must also be something more than a mere trade practice. <sup>161</sup> But when such usage is proved, it will form the basis of the contract between the parties, and:

“... their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect.” <sup>162</sup>

These usages are incorporated on the presumption that:

“... the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages” <sup>163</sup>

or on the ground that “the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain”. <sup>164</sup> However, even in cases where the party alleged to be liable upon an implied promise, arising solely from the usage of a particular trade, is not shown to have been cognisant of the usage, he can still be held to be liable by virtue of it. <sup>165</sup>

### **Incorporation of collective employment agreements**

#### **14-022**

In relation to contracts of employment, particular problems arise as to whether the terms of collective

agreements between trade unions and employers concerning industrial conditions in a particular trade can be impliedly incorporated by usage into an individual worker's contract of employment <sup>166</sup> as they can be by express reference. <sup>167</sup>

## Human rights

### 14-023

The question whether a term may be implied into a contract to secure compliance with the Human Rights Act 1998 has been discussed in Ch.1 of this work. <sup>168</sup>

## Usage employed by one of the parties

### 14-024

Where the usage is one which merely applies to the mode of dealing of a particular firm, a party cannot be bound thereby, unless he is shown to have had actual notice of it. To establish a usage it must be proved that a course of dealing has acquired such a notoriety, has been so well established and has become so universal in the particular trade, that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business. <sup>169</sup>

## When implied from previous course of dealing

### 14-025

⚠ It is, however, clear that a term may be implied in any given case from the circumstances of the parties having consistently on former and similar occasions adopted a particular course of dealing. <sup>170</sup>

⚠ Thus, a covenant to pay interest or to allow interest to be added to principal at stated periods and to pay interest on the whole, has been held to be implied from the fact that on former occasions the accounts between the parties have been stated and settled on that footing. <sup>171</sup> And it has been held that an oral contract between the buyer and seller of goods incorporated by a long course of dealing conditions printed on the back of "sold notes" as conditions of sale, in so far as a condition was appropriate to the oral contract. <sup>172</sup>

## Express terms prevail

### 14-026

⚠ A custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and it can only be incorporated if it is not inconsistent with the tenor of the contract as a whole. <sup>173</sup> ⚠ Thus a custom that commission was only payable to the broker who had negotiated a charterparty when freight was actually earned was ousted by an express term that commission was to be paid on the signing of the charter. <sup>174</sup> And a contract to ship rubber from the East to New York "direct and/or indirect" was alleged to have been duly carried out by shipping goods to the American Pacific seaboard and across the American continent to New York by train. Evidence of such a practice, said to have been common in the First World War, was disallowed as being contrary to the contract. <sup>175</sup>

## Implication from words of recital

### 14-027

Where words of recital or reference manifest a clear intention that the parties should do certain acts, the courts may from these infer a covenant to do such acts, just as if the instrument had contained an express agreement to that effect. <sup>176</sup> So a recital in a separation deed that a wife had agreed to live apart from her husband implied a covenant by the wife to live apart. <sup>177</sup> Also where by charterparty it was agreed that the ship C, “expected to be at A about December 15”, should with all convenient speed sail and proceed to that port and there receive a cargo, it was held that the words “expected, etc”, amounted to a warranty that the ship was then in such a position that she might reasonably be expected to arrive by the day named. <sup>178</sup>

## 14-028

In contrast, however, with the use of words of recital in order to ascertain the meaning of a written contract, <sup>179</sup> the courts are reluctant to imply such a covenant in the absence of a manifest intention:

“It is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted.”” <sup>180</sup>

So the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subjectmatter. <sup>181</sup>

### Implied restriction on contractual discretion

## 14-029

⚠ A discretion conferred by contract in seemingly absolute terms may be restricted by the implication of a term: that the discretion should not be exercised dishonestly, for an improper purpose, capriciously, arbitrarily, or in a way that no reasonable person, acting reasonably, would act. <sup>182</sup> ⚠ Similarly a contract which provides that one party shall not enter into a transaction with a third person without the consent of the other may be subject to an implied term that the consent shall not be unreasonably withheld. <sup>183</sup> However, the discretion conferred may be found, on its true construction, to be unqualified. <sup>184</sup>

### Implied term as to trust and confidence

## 14-030

⚠ In *Malik v Bank of Credit and Commerce International SA* <sup>185</sup> the House of Lords recognised that, in a contract of employment, there was to be implied a term that the employer should not:

“... without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

The exact boundaries of the incidence of this implication are somewhat uncertain <sup>186</sup> but the duty may possibly be reciprocal in some cases and extend to analogous relationships, e.g. principal and agent, <sup>187</sup> but not to ordinary commercial relationships. <sup>188</sup> ⚠

## Implied term as to good faith

### 14-031

⚠ English law has traditionally been hostile to the imposition of any general principle of good faith in the performance of contracts <sup>189</sup> but in *Yam Seng Pte Ltd v International Trade Corp Ltd* <sup>190</sup> Leggatt J. considered the arguments for (and against) the implication of such a duty. While the issue awaits definitive resolution, it would appear that the courts may now be willing to imply such a duty as a matter of law into a narrow category of contracts, such as “contracts between partners or others whose relationship is characterised as a fiduciary one” <sup>191</sup> and to imply it as a matter of fact where the implication is necessary to give effect to the intention of the parties. However, the courts are likely to be slow to imply such a term as a matter of fact and are more likely to decline to do so either because it is inconsistent with or does not fit with the express terms of the contract <sup>192</sup> ⚠ or because of the arm’s-length nature of the relationship between the parties. <sup>193</sup> ⚠ The willingness of the court to imply the term may also be linked to the substantive content of the term. The more demanding the term, the less willing the court may be to imply the term. <sup>194</sup> ⚠ Conversely, if the term requires only that the parties act honestly and with integrity, <sup>195</sup> ⚠ the court may be more willing to imply the term and, indeed, it may not be possible for the parties to exclude an obligation to act honestly. <sup>196</sup>

## Implied term as to duration of contract

### 14-032

A contract which contains no express provision for its determination may yet be determined by reasonable notice on the part of one or both of the parties. The question whether a contract can be determined in this way is often said to depend upon the implication of a term, although it is probably better to regard it as depending upon the true construction of the agreement. <sup>197</sup> Nevertheless, since *ex hypothesi*, the agreement contains no provisions expressly dealing with determination, the question is not one of construction in the narrow sense of putting a meaning on language which the parties have used, but in the wider sense of ascertaining, in the light of all the admissible evidence and in the light of what the parties have said or omitted to say in the agreement, what the common intention of the parties was in the relevant respect when they entered into the agreement. <sup>198</sup> Thus a contract to supply gas to a public authority in such quantities as it should require has been held determinable by either party on reasonable notice, <sup>199</sup> and a licence to occupy a theatre and to produce their stage plays, which gave to the licensee an option to extend the licence at stated intervals, but which contained no provisions for determination by the licensor, was held to be determinable by the licensor upon giving reasonable notice. <sup>200</sup> Similar constructions have been adopted in the case of contracts between employer and employee, <sup>201</sup> between principal and agent, <sup>202</sup> and between solicitor and client in respect of an indefinite retainer. <sup>203</sup>

## Contractual licences

### 14-033

A licence coupled with the grant of an interest in land cannot be revoked so as to defeat the grant to which it is appurtenant. <sup>204</sup> Since the Judicature Act 1873 such a licence may be made either by deed or by a specifically enforceable agreement in writing. <sup>205</sup> On the other hand a “bare licence” is revocable at any time upon the licensor giving clear <sup>206</sup> and adequate <sup>207</sup> notice to the licensee. The position of a contractual licensee is that, if a licence is given for consideration and coupled with an agreement, whether express or implied, that it will not be revoked until the effluxion of a specified period of time or the happening of a particular event, it is irrevocable until the expiration of the period or the happening of the event. <sup>208</sup> An injunction will be granted to restrain the licensor from revoking the licence, or from acting in pursuance of the purported revocation, <sup>209</sup> and the licensee may also claim damages for breach of contract <sup>210</sup> and for assault should he be forcibly ejected by the licensor. <sup>211</sup>

## Sale of goods, hire-purchase and hire

### 14-034

Undertakings as to title, quality, fitness for purpose and correspondence with description or sample are implied into contracts of sale of goods by ss.12 to 15 of the Sale of Goods Act 1979, <sup>212</sup> into contracts of hire-purchase by ss.8 to 11 of the Supply of Goods (Implied Terms) Act 1973, <sup>213</sup> and into contracts for the hire of goods by ss.7 to 10 of the Supply of Goods and Services Act 1982. <sup>214</sup> The principle that a term will not be implied which is inconsistent with an express term <sup>215</sup> does not apply in the case of a statutory implied term: any conflict must be resolved as a matter of construction. <sup>216</sup> With the coming into force of the Consumer Rights Act 2015, <sup>217</sup> contracts concluded after October 1, 2015 between a trader and a consumer for the trader to supply goods or digital content to the consumer are to be “treated as including” <sup>218</sup> a number of terms relating to matters such as title, quality, fitness for purpose and correspondence with description (including the provision of certain pre-contract information) and sample. <sup>219</sup> Contracts of sale, hire and hire-purchase all fall within the definition of a contract for a trader to supply goods to a consumer. <sup>220</sup>

## Supply of goods

### 14-035

Undertakings in respect of the goods similar to those implied in the case of sale, hire-purchase and hire are implied into contracts for the transfer of goods, e.g. for work and materials, by ss.2 to 5 of the Supply of Goods and Services Act 1982. <sup>221</sup> These replace and extend <sup>222</sup> the undertakings previously implied by the common law, for example, into a contract for the manufacture of a set of false teeth, <sup>223</sup> for the repair of a motor car, <sup>224</sup> for the dyeing of a woman’s hair, <sup>225</sup> for the supply and installation of a burglar-proof door, <sup>226</sup> for the inoculation of cattle, <sup>227</sup> and for the roofing <sup>228</sup> and erection <sup>229</sup> of a building. Similar undertakings are to be treated as included in contracts for the transfer of goods between a trader and a consumer that fall within the scope of the Consumer Rights Act 2015. <sup>230</sup>

## Disposition of property

### 14-036

The covenants for title that are implied on a disposition of property are those set out in Pt I of the Law of Property (Miscellaneous Provisions) Act 1994. “Property” is defined <sup>231</sup> in the same terms as in the Law of Property Act 1925, i.e. to include “a thing in action, and any interest in real or personal property”.

## Supply of services

### 14-037

In the case of a contract under which a person agrees to carry out a service, other than a contract of service or apprenticeship <sup>232</sup> and certain other excepted contracts, <sup>233</sup> where the supplier is acting in the course of a business, <sup>234</sup> there is an implied term that the supplier will carry out the service with reasonable care and skill. This term is implied by s.13 of the Supply of Goods and Services Act 1982. <sup>235</sup> If the contract is one for the supply of professional services, the degree of care and skill required of a professional man is that which is to be expected of a member of his profession (in the appropriate speciality, if he be a specialist) of ordinary competence and experience. <sup>236</sup> If the service is to be carried out by an artisan, then the work should be done in a good and workmanlike manner. <sup>237</sup> However, the special circumstances of the case may show that the supplier impliedly warrants that his services will produce a specified result or that the product of his service will be reasonably fit for the purpose for which it is required. <sup>238</sup>

**14-038**

By ss.14 and 15 of the 1982 Act, where, under a contract for the supply of a service by a supplier acting in the course of a business, <sup>239</sup> the time for the service to be carried out, or the consideration for the service, is not fixed or determined by the contract, left to be fixed or determined in a manner agreed by the contract or determined by the course of dealing between the parties, there are respectively implied terms that the supplier will carry out the service within a reasonable time and that the party contracting with the supplier will pay a reasonable charge. <sup>240</sup>

**Consumer Rights Act****14-039**

With the coming into force of the Consumer Rights Act 2015, contracts concluded on or after October 1, 2015 <sup>241</sup> between a trader and a consumer under which the trader agrees to supply a service to a consumer will be treated as including a term that (i) the trader must perform the service with reasonable care and skill, <sup>242</sup> (ii) the consumer must pay a reasonable price for the service if the consumer has not paid a price and the contract does not expressly fix a price of other consideration and does not say how it is to be fixed, <sup>243</sup> (iii) the trader must perform the service within a reasonable time if the contract does not expressly fix the time for the service to be performed and does not say how it is to be fixed <sup>244</sup> and (iv) anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service is binding on the trader. <sup>245</sup>

**Consumer contracts: supply of information****14-040**

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 <sup>246</sup> apply to contracts between traders and consumers <sup>247</sup> which have been entered into on or after June 13, 2014. They apply in principle to all such contracts but, subject to certain important exceptions, <sup>248</sup> reg.18 provides that every contract to which Pt 2 of the Regulations applies is to be treated as including a term that the trader has complied with the provisions of regs 9 to 14 and reg.16 in Pt 2. These regulations require traders to provide certain information to consumers in relation to contracts concluded between them. The information to be provided varies according to whether the contract is an “on-premises contract”, <sup>249</sup> an “off-premises contract”, <sup>250</sup> or a “distance contract”, <sup>251</sup> including contracts concluded by electronic means. These three types of contract will include contracts for the sale or supply of goods, of services and of digital content, but they are not limited to such contracts. As a result, many—if not most—contracts entered into between traders and consumers will contain a statutory implied term that the information requirements of Pt 2 of the Regulations have been complied with. The amount of information required to be given in the case of distance and off-premises contracts is particularly onerous. It may include more than 20 items (listed in Sch.2). Any information that the trader gives to the consumer as required by regs 9, 10 and 13 is also to be treated as a term of the contract. <sup>252</sup> However, Pt 2 does not apply to certain contracts for medical products, to contracts for passenger services other than distance contracts concluded by electronic means and to offpremises contracts under which the payment to be made by the consumer is not more than £42. <sup>253</sup>

**Information supplied incorrect****14-041**

When the trader gives information as required (see previous paragraph), the regulations provide that the information given is to be treated as included as a term of the contract. <sup>254</sup> For consumer contracts made on or after October 1, 2015, the same applies as a result of the Consumer Rights Act 2015. <sup>255</sup> The 2013 Regulations do not set out remedies the consumer will have if the information supplied by the trader is incorrect. If the trader has described incorrectly the main characteristics of the goods, it seems that the consumer should be able to treat the goods as not complying with the contract and



have the normal remedies for non-conformity. However, that cannot be the case for all the types of information that the trader must provide. For example, it cannot be the case that a trader who gives incorrect information about its address can be required to move to the address given; or even that a trader who incorrectly states that the manufacturer provides a commercial guarantee can be required to provide an equivalent. It is submitted that the correct interpretation of the Regulations is that adopted by the Consumer Rights Act 2015, which repeats the provisions that the information supplied in accordance with the 2013 Regulations is to be treated as included as a term of the contract and also sets out the consumer's remedies in detail. Information about the main characteristics of the goods will be treated as part of the description, and the consumer will have the normal remedies for non-conformity, <sup>256</sup> whereas for other information that is given the consumer may recover costs incurred up to the amount of the price <sup>257</sup>—the trader is in effect, treated as giving a contractual warranty that the information was correct at the time.

## Enforcement

### 14-042

Breach by a trader of the obligation to provide the consumer with certain information before the consumer enters into an off-premises contract may attract criminal penalties. <sup>258</sup> The enforcement procedures under Pt 8 of the Enterprise Act 2002 <sup>259</sup> also apply in relation to a breach of the Regulations. Part 3 of the Regulations gives to consumers the right to cancel a distance or offpremises contract in prescribed circumstances <sup>260</sup> and regulates the exercise of the right to withdraw or cancel and the effects of so doing.

## Additional charges

### 14-043

Part 4 of the Regulations <sup>261</sup> protect the consumer against additional charges. If an unauthorised additional payment or charge is required to be paid by the consumer, the contract is to be treated as providing for the trader to reimburse the consumer. <sup>262</sup>

## Package travel, etc

### 14-044

By the Package Travel, Package Holiday and Package Tours Regulations 1992 <sup>263</sup> a number of terms are implied in favour of the consumer in contracts for the sale of package travel, package holidays and package tours. These include implied terms: that the contract contains certain elements specified in the Regulations and that these are communicated in writing to the consumer before the contract is made and a copy of them is supplied to him <sup>264</sup>; that the consumer may transfer his booking where he is prevented from proceeding with the package <sup>265</sup>; that if the organiser is constrained before departure to alter significantly an essential term of the contract, such as the price, he will notify the consumer as soon as possible in order to enable the consumer to take appropriate action and in particular to withdraw from the contract without penalty <sup>266</sup>; that if for that reason the consumer withdraws from the contract or if the organiser cancels the package, the consumer will be entitled to take a substitute package or to have repaid to him all moneys paid by him under the contract <sup>267</sup>; and that if a significant proportion of the services contracted for is not provided, the organiser will make suitable alternative arrangements at no extra cost and compensate the consumer for the difference between the services provided and those contracted for. <sup>268</sup> The Regulations also impose (subject to certain exceptions) a strict liability on the other party to the contract for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that party or by other suppliers of services. <sup>269</sup>

## Interest on commercial debts

## 14-045




A term is implied into contracts for the supply of goods and services <sup>270</sup> by the Late Payment of Commercial Debts (Interest) Act 1998 whereby any qualifying debt <sup>271</sup> created by the contract is to carry statutory interest subject to and in accordance with the Act. <sup>272</sup>

1. *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277.
2. See above, Ch.13.
3. **!** [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [17]–[27]. For an earlier statement of Lord Hoffmann's views, expressed extra-judicially, see Lord Hoffmann (1997) 56 S.A.L.J. 656 and (1995) 29 Law Teacher 127.
4. **!** *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [19]–[21].
5. **!** While the courts regularly applied *Belize* and recognised it for a period of time as the leading modern authority on the implication of terms into a contract, cases can be found in which the courts expressed some uncertainty about the precise scope of the decision and its relationship with earlier case-law: see, for example, *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] EWCA Civ 543, [2011] Pens. L.R. 22 at [44]; *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [2012] 2 All E.R. (Comm) 480 at [52] and *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277 at [15]. The reaction to *Belize* in the Commonwealth has been more mixed. Thus the courts in Singapore have declined to follow *Belize* (see *Foo Jong Peng v Phua Kiah Mai* [2012] SGCA 55, [2012] 4 S.L.R. 1267 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43, [2013] 4 S.L.R. 193) but it has been followed by the courts in New Zealand (*Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 N.Z.L.R. 160).
6. **!** See, for example, McLauchlan [2014] L.M.C.L.Q. 203; Courtney and Carter (2014) 31 J.C.L. 151; Hooley [2014] C.L.J. 315; McCaughran [2011] C.L.J. 607; Davies [2010] L.M.C.L.Q. 140; Macdonald (2009) 26 J.C.L. 97; Kramer [2004] C.L.J. 384; McMeel, *The Construction of Contracts*, 2nd edn (2011), Ch.11.
7. **!** *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [31] per Lord Neuberger. Not all members of the Supreme Court are, however, of the same view. Thus in *Marks & Spencer* Lord Carnwath (at [74]) saw no sufficient reason to question the "continuing authority" of the judgment of Lord Hoffmann in *Belize* and the judgment of Lord Clarke (at [76]) is more equivocal, as is the judgment of Lord Mance in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85 at [42]–[44]. However, the judgment of Lord Neuberger represents the majority view, so that the authority of Lord Hoffmann's judgment has now been considerably diminished. See also *Utilise TDS Ltd v Davies* [2016] EWHC 2127 (QB) at [52].
8. **!** *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 W.L.R. 85 at [35] per Lord Hodge.
9. **!** *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm), [34] per Popplewell J. The relationship between the two may be particularly close in the case where it is alleged that something has been omitted from the contract. As was noted by Snowden J. in *Hayfin Opal Luxco 3 SARL v Windermere VII CMBS Plc* [2016] EWHC 782 (Ch) at [68], the gap in such a case can be filled either by a process of corrective interpretation or by the implication








of an appropriate term in the contract. But in either case it is important to note that the test applied by the court is a strict one, so that a court will not lightly correct the contract by supplying the alleged missing term, whether by corrective interpretation or by implication.

10. *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1983] 1 Lloyd's Rep. 551, 558; *Equitable Life Assurance Socy v Hyman* [2002] 1 A.C. 408; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The "Zenovia")* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [22].
11. *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 K.B. 868, 899; *O'Brien v Associated Fire Alarms Ltd* [1968] 1 W.L.R. 1916, 1923, 1925; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The "Zenovia")* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [22].
12. cf. *Johnstone v Bloomsbury H.A.* [1992] Q.B. 333; *Yarm Road Ltd v Hewdon Tower Cranes Ltd* [2002] EWHC 2265, (2002) 85 Const. L.R. 142.
13. *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555, 576, 579, 594; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095, 1099, 1100; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1196; *Liverpool City Council v Irwin* [1977] A.C. 239, 255, 258; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 307; *Spring v Guardian Assurance Plc* [1995] 2 A.C. 296, 320, 340, 353; *Ali Shipping Corp v Shipyard Trogir* [1998] 1 Lloyd's Rep. 643, 651; *Mahmud v Bank of Credit and Commerce International SA* [1998] A.C. 20, 34, 45; *Equitable Life Assurance Socy. v Hyman* [2002] 1 A.C. 408, 458, 459. Contrast *National Bank of Greece SA v Pinios Shipping Co* [1990] 1 A.C. 637; *Reid v Rush & Tompkins Group Plc* [1990] 1 W.L.R. 212, 233; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G. Tsaviris & Sons Maritime Co* [1990] 1 Lloyd's Rep. 517, 526; *Ashmore v Corp of Lloyd's (No.2)* [1992] 2 Lloyd's Rep. 620, 631 (one-off or sui generis contracts).
14. See, for example, *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523, [55].
15. The various (overlapping) conditions which have been relied upon over time were drawn together by the Privy Council in *B.P. Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26,
16. *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523, [55].
17. See, for example, *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523, [56], *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.C.R. 1615; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294.
18. *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609.
19. *Hamlyn & Co v Wood & Co* [1891] 2 Q.B. 488, 494; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*, above, at 609.
20. See, e.g. *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 Lloyd's Rep. 122, 128, 131.
21. e.g. by Scrutton L.J. in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 K.B. 592, 598, by Lord Tucker in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555, 594, and by Lord Cross in *Liverpool CC v Irwin* [1977] A.C. 239, 258. See also *B.P. Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26, PC; *Codelfa Construction Pty Ltd v State Ry Authority of New South Wales* (1982) 149 C.L.R. 337, 347; *Byrne v Australian Airlines Ltd* (1995) 185 C.L.R. 410, 422, 441; *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 480, 482; *Association of British Travel Agents Ltd v British Airways Plc* [2001] 1 Lloyd's Rep. 169, 175, [2000] 2 Lloyd's Rep. 209, 219; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558 at [105]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84

(Comm), [2010] 2 Lloyd's Rep. 641 at [62].


22. *Mosvolds Rederi A/S v Food Corp of India* [1986] 2 Lloyd's Rep. 68; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255, 263; *Barclays Bank Plc v Taylor* [1989] 1 W.L.R. 1066, 1076; *Marcan Shipping (London) Ltd v Polish S.S. Co* [1989] 2 Lloyd's Rep. 138, 144; *Lauritzen (J.) A/S v Wijsmuller B.V* [1990] 1 Lloyd's Rep. 1, 6; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander Tsavlis & Sons Maritime Co (The Choko Star)* [1990] 1 Lloyd's Rep. 517, 524, 526; *Ashmore v Corp of Lloyds (No.2)* [1992] 2 Lloyd's Rep. 620, 627; *C. Itoh & Co Ltd v Companhia de Navegacao Lloyd Brasileiro and S.S. Mutual Underwriting Association (Bermuda) Ltd* [1999] 1 Lloyd's Rep. 115, 120–121; *Modahl v British Athletic Federation Ltd* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [119]; *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65, [2009] 1 W.L.R. 2013 at [15].
23. [2009] UKPC 10, [2009] 1 W.L.R. 1988.
24. [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [21].
25. [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [28].
26.  *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 at [8]–[14]; *Chantry Estates (South East) Ltd v Anderson* [2010] EWCA Civ 316, 130 Con. L.R. 11; *KG Bominflot Bunkergesellschaft für Mineralöle mbh v Petroplus Marketing AG* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep. 442 at [44]; *Beazer Homes Ltd v Durham CC* [2010] EWCA Civ 1175 at [36]; *Crema v Cencos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [36]; *Garratt v Mirror Group Newspapers Ltd* [2011] EWCA Civ 425, [2011] I.R.L.R. 591 at [46]; *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] EWCA Civ 543, [2011] Pens. L.R. 22 at [36]; *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548, [2011] 20 E.G. 113 (C.S.) at [34]; *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133; *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWCA Civ 1413; *Rathbone Brothers Plc v Novae Corporate Underwriting Ltd* [2014] EWCA Civ 1464 at [84].
27.  *Durham Tees Valley Airport Ltd v BMI Baby Ltd* [2009] EWHC 852 (Ch), [2009] 2 Lloyd's Rep. 246 at [89]; *Inta Navigatori v Ranch Investments Ltd* [2009] EWHC 1216 (Comm), [2010] 1 Lloyd's Rep. 74 at [42]; *AET Inc Ltd v Arcaola Petroleum Ltd* [2009] EWHC 2337 (Comm), [2010] 1 Lloyd's Rep. 593 at [4]; *ENE 1 Kos Ltd v Petroleo Brasileiro SA* [2009] EWHC 1843 (Comm), [2010] 1 Lloyd's Rep. 87 at [42]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [60]; *Redmayne Bentley Stockbrokers v Isaacs* [2010] EWHC 1504 (Comm) at [84]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] I.C.L.C. 701 at [541]; *F & C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) at [271]; *Leander Construction Ltd v Mulalley & Co Ltd* [2011] EWHC 3449 (TCC) at [41]; *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch); *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm); [2012] All E.R. (D) 259 (Jul); *Graiseley Properties Ltd v Barclays Bank Plc* [2012] EWHC 3093 (Comm) at [28]; *Wuhan Ocean Economic & Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277 at [15]; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [41]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [132]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484 at [44]; *Lombard North Central Plc v Nugent* [2013] EWHC 1588 (QB); *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [72]; *Straw v Jennings* [2013] EWHC 3290 (Ch) at [99]; *Carewatch Care Services Ltd v Focus Care Services Ltd* [2014] EWHC 2313 (Ch) at [104]; *Rosserlane Consultants Ltd v Credit Suisse International* [2015] EWHC 384 (Ch).
28.  [2015] UKSC 72, [2016] A.C. 742. See also *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [5].



29.  *Walter Lilly & Co Ltd v Clin* [2016] EWHC 357 (TCC), [2016] B.L.R. 247 at [39] and *Manor Asset Ltd v Demolition Services Ltd* [2016] EWHC 222 (TCC) at [45].
30.  *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 at [24], [66] and [77].
31.  [2015] UKSC 72 at [17].
32.  [2015] UKSC 72 at [23]. See also *Rosenblatt (A Firm) v Man Oil Group SA* [2016] EWHC 1382 (QB) at [59].
33.  [2015] UKSC 72 at [21].
34.  [2015] UKSC 72 at [21] and [77]. Commercial coherence must be ascertained objectively and not simply from the perspective of one party. The fact that without the term the contract might potentially work to the disadvantage of one party in certain circumstances, in that it does not make a profit it might have made at other times, does not necessarily render the contract as a whole incoherent: *J Toomey Motors Ltd v Chevrolet UK Ltd* [2017] EWHC 276 (Comm) at [91]–[92].
35.  *Hallman Holding Ltd v Webster* [2016] UKPC 3 at [14]. See also *Europa Plus SCA SIF v Anthracite Investments (Ireland) Plc* [2016] EWHC 437 (Comm) at [33]. Given the strict nature of the test established by the Supreme Court it is now a very difficult task to persuade a court to imply a term into a contract, particularly a written contract of some length which has been negotiated with the benefit of legal advice, and a number of cases can now be found in which the courts have applied the approach of the Supreme Court in *Marks and Spencer* and, on that basis, have declined to imply a term into the contract between the parties (see, for example, *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57, [2016] 3 W.L.R. 1422 at [31]–[32]; *BP Gas Marketing Ltd v La Societe Sonatrach* [2016] EWHC 2461 (Comm) at [320]; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep 387 at [190]; *J Toomey Motors Ltd v Chevrolet UK Ltd* [2017] EWHC 276 (Comm); *Law Debenture Trust Corp Plc v Ukraine* [2017] EWHC 655 (Comm) at [356]; *Gard Shipping AS v Clearlake Shipping Pte Ltd (The Zaliv Baikal)* [2017] EWHC 1091 (Comm), [2017] 2 All E.R. (Comm) 179 at [51] and *Co-operative Bank Plc v Hayes Freehold Ltd (in liquidation)* [2017] EWHC 1820 (Ch) at [99]).
36. (1889) 14 P.D. 64, 68.
37. *Liverpool CC v Irwin* [1977] A.C. 239, 254, 262; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 106; *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716, [2004] 1 Lloyd's Rep. 381 at [20]–[21]; *Concord Trust v Law Debenture Trust Corp Plc* [2005] UKHL 27, [2005] 1 W.L.R. 1591 at [37].
38. *Equitable Life Assurance Society v Hyman* [2002] 1 A.C. 408, 459; *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [23]; *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603, [2014] 2 E.G.L.R. 48 at [28].
39. *The Moorcock* (1889) 14 P.D. 64.
40. *Silverman v Imperial London Hotels Ltd* (1927) 137 L.T. 57.
41. *Aktieselskabet Olivebank v Dansk Svolsyre Fabrik* [1919] 2 K.B. 162. Contrast *Eurico Spa v Philipp Brothers* [1987] 2 Lloyd's Rep. 215.
42. *Triad Shipping Co v Stellar Chartering & Brokerage Inc* [1994] 2 Lloyd's Rep. 227.

- [43.](#) *Tappenden v Artus* [1964] 2 Q.B. 185.
- [44.](#) *Banco de Portugal v Waterlow & Sons Ltd* [1932] A.C. 452.
- [45.](#) *Addison v Brown* [1954] 1 W.L.R. 779.
- [46.](#) *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699.
- [47.](#) *Wong Mee Wan v Kwan Kin Travel Services* [1996] 1 W.L.R. 38; see also below, para.14-044.
- [48.](#) *British School of Motoring Ltd v Simms* [1971] 1 All E.R. 317.
- [49.](#) *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 Lloyd's Rep. 122; *C. Christo & Co v Marathon Advisory Service Ltd* [2015] EWHC 1971 (QB). But see *Marcan Shipping (London) Ltd v Polish Steamship Co* [1989] 2 Lloyd's Rep. 138, and Vol.II, para.31-150.
- [50.](#) *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2006] EWCA Civ 54, [2006] 1 Lloyd's Rep. 566.
- [51.](#) *CFW Architects v Cowlin Construction Ltd* [2006] EWHC 6 (TCC), (2006) 105 Const. L.R. 116.
- [52.](#) *Ease Faith Ltd v Leonis Marine Management Ltd* [2006] EWHC 232 (Comm), [2006] 1 Lloyd's Rep. 673.
- [53.](#) *J C Ritchie Ltd v Lloyd Ltd* [2006] UKHL 9, [2007] 1 W.L.R. 670 at [37].
- [54.](#) *Yewbelle Ltd v London Green Developments Ltd* [2007] EWCA Civ 475, [2008] 1 P. & C.R. 17.
- [55.](#) *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1130 (Ch), [2007] E.G.L.R. 101.
- [56.](#) *George v Coastal Marine 2004 Ltd* [2009] EWHC 816 (Admlty), [2009] 2 Lloyd's Rep. 356.
- [57.](#) *MSM Consulting Ltd v Republic of Tanzania* [2009] EWHC 121 (QB), 123 Con. L.R. 154; see Vol.II, para.31-147. Contrast *Glentree Estates Ltd v Favermead Ltd* [2010] EWCA Civ 1473.
- [58.](#) *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 1906 (TCC), 125 Con. L.R. 141.
- [59.](#) *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641.
- [60.](#) *Ostfriesische Volksbank EG v Fortis Bank* [2010] EWHC 361 (Comm), [2010] 2 All E.R. (Comm) 921.
- [61.](#) *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 All E.R. (Comm) 1277. See also *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239, [2005] Info. T.L.R. 294; *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1191 (TCC), 148 Con. L.R. 127 (extension of time for performance); para.21-021, below.
- [62.](#) *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 W.L.R. 2961 at [23].
- [63.](#) *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 K.B. 592, 605; *Weg Motors Ltd v Hales* [1961] Ch. 176, 192; *Bronester Ltd v Priddle* [1961] 1 W.L.R. 1294, 1304; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 69; *Gardiner v Moore* [1969] 1 Q.B. 55, 61; *Alpha Trading Ltd v Dunnshaw-Patten Ltd* [1981] 1 Lloyd's Rep. 122, 128; *K/S Stamar v Seabow Shipping Ltd* [1994] 2 Lloyd's Rep. 183, 191; *Fletamentos Maritimos SA v Effjohn International BV* [1995] 1 Lloyd's Rep. 311, 345; *Cargill International SA v Bangladesh Sugar & Food Industries Corp* [1996] 2 Lloyd's Rep. 524, 531 (affirmed [1998] 1 W.L.R. 461); *C.*



- Itoh & Co Ltd v Companhia de Navegacao Lloyd Brasileiro and Steamship Mutual Underwriting Association (Bermuda) Ltd* [1999] 1 Lloyd's Rep. 115, 120; *Weldon v GRE Linked Life Assurance Ltd* [2002] 2 All E.R. (Comm) 914, 919; *Modahl v British Athletic Federation Ltd* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 at [119]; *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685 at [36]; *Adler v Ananhall Advisory & Consultancy Services Ltd* [2009] EWCA Civ 586; *Graiseley Properties Ltd v Barclays Bank Plc* [2012] EWHC 3093 (Comm) at [29].
64. *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 K.B. 206, 227 (affirmed [1940] A.C. 701). This approach was criticised by Lord Hoffmann in (1998) 56 S.A.L.J. 656, 662 and in *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [25]. For a different test, see *William Morton & Co v Muir Bros & Co* 1907 S.C. 1211, 1224; *JH Ritchie Ltd v Lloyd Ltd* [2007] UKHL 9, [2007] 1 W.L.R. 670 at [14], [18].
65. *Luxor (Eastbourne) Ltd v Cooper* ; [1941] A.C. 108; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Rederei GmbH* [1976] 1 Lloyd's Rep. 250; *Liverpool CC v Irwin* [1977] A.C. 239, 258, 266; *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1977] 1 Lloyd's Rep. 217, 229 (affirmed [1977] 2 Lloyd's Rep. 301, 309); *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 W.L.R. 425; *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, 2012 S.L.T. 205 at [20]–[22], [31]–[33]. cf. the misgivings felt by May L.J. in *Marcan Shipping (London) Ltd v Polish S.S. Co* [1989] 2 Lloyd's Rep. 138, 142 and by Lord Hoffmann in *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [25].
66. *The Moorcock* (1889) 14 P.D. 64, 68; *Partabmull Rameshwar v K.C. Sethia* (1944) Ltd [1950] 1 All E.R. 55 (affirmed [1951] 2 All E.R. 352n); *Spring v National Amalgamated Stevedores and Dockers Socy.* [1956] 1 W.L.R. 585; *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA* [1960] 2 Q.B. 115; *Jamil Line for Trading and Shipping Ltd v Atlanta Handelsgesellschaft Harder & Co* [1982] 1 Lloyd's Rep. 481. cf. *Greene Wood & McClean LLP v Templeton Insurance Ltd* [2009] EWCA Civ 65, [2009] 1 W.L.R. 2013 at [15].
67. *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 137; *Kelly v Battershell* [1949] 2 All E.R. 830; *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [17].
68. *L. French & Co v Leeston Shipping Co* [1922] 1 A.C. 451, 455; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609; *Liverpool CC v Irwin* [1977] A.C. 239; *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1977] 1 Lloyd's Rep. 217, 228–229 (affirmed [1977] 2 Lloyd's Rep. 301, 309); *Equitable Life Assurance Socy. v Hyman* [2002] 1 A.C. 408; *Clarion Ltd v National Provident Institution* [2000] 2 All E.R. 265; *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 1 W.L.R. 3059 at [33].
69. *Uzinterimpex JSC v Standard Bank Plc* [2008] EWCA Civ 819, [2008] 2 Lloyd's Rep. 456 at [23] (financial undertakings).
70. *Jones v St John's College, Oxford* (1870) L.R. 6 Q.B. 115, 126; *Lynch v Thorne* [1956] 1 W.L.R. 303; *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1200; *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales* (1982) 149 C.L.R. 337, 346; *Gordon v Selico Co Ltd* [1986] 1 E.G.L.R. 71; *J. Lauritzen A/S v Wijsmuller B.V* [1990] 1 Lloyd's Rep. 1, 6; *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep. 434, 437; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 Const. L.R. 64, 71; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] F.S.R. 29; *Leander Construction Ltd v Mulalley & Co Ltd* [2011] EWHC 3449 (TCC); *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [41]; *Lishave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm), [2013] 2 Lloyd's Rep. 203; *Rosserlane Consultants Ltd v Credit Suisse International* [2015] EWHC 384 (Ch).
71. *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [25].
72.  *Liverpool CC v Irwin* [1977] A.C. 239, 254. However, the implication of a term into a contract

assumes that there is a concluded contract into which terms can be implied and it is not legitimate for the court, under the guise of the implying a term, to make the contract for the parties (see *Wells v Devani* [2016] EWCA Civ 1106, [2017] 2 W.L.R. 1391 at [19] and [81] and *Scancarriers A/S v Aotearoa International Ltd* [1985] 2 Lloyd's Rep. 419).


73. [1977] A.C. 239.
74. [1987] Ch. 216. cf. *Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority* [2007] EWCA Civ 240, [2007] B.L.G.R. 439 (firefighters' contracts).
75. [1992] 1 A.C. 294. cf. *University of Nottingham v Evett* [1999] 1 W.L.R. 594; *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.C.R. 1615; and see para.1-052, above; Vol.II, para.40-151.
76. But it is still subject to the test of necessity; *Liverpool CC v Irwin* [1977] A.C. 239, 254, 262, 266; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294.
77. *Liverpool CC v Irwin* [1977] A.C. 239, 255, 270.
78. *Young & Marten v McManus Childs Ltd* [1969] 1 A.C. 454, 465; *Liverpool CC v Irwin* [1977] A.C. 239, 262; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26, PC; *Inta Navigatori v Ranch Investments Ltd* [2009] EWHC 1216 (Comm), [2010] 1 Lloyd's Rep. 74; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [64]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [544]; *Arash Shipping Enterprises Co Ltd v Groupama Transport* [2011] EWCA Civ 620, [2011] 2 Lloyd's Rep. 607 at [41].
79. *Hamlyn & Co v Wood & Co* [1891] 2 Q.B. 488, 491; *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 K.B. 592, 598; *Re Comptoir Commercial Anversois v Power, Son and Co* [1920] 1 K.B. 868, 899; *George Trollope & Son v Martyn Bros* [1934] 2 K.B. 437, 443; *R. v Paddington and St Marylebone Rent Tribunal* [1947] K.B. 984, 990; *British Movietonews v London and District Cinemas Ltd* [1952] A.C. 166; *Bundar Property Holdings Ltd v J. S. Darwin (Successors) Ltd* [1968] 2 All E.R. 305; *Lupton v Potts* [1969] 1 W.L.R. 1749; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601; *Liverpool CC v Irwin* [1977] A.C. 239; *Duke of Westminster v Guild* [1985] Q.B. 688; *Holding and Management (Solitaire) Ltd v Ideal Homes Northwest Ltd* [2004] EWHC 2408, [2004] Const. L.R. 114; *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep. 517 at [32]; *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603, [2014] 2 E.G.L.R. 48 at [26].
80. *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609; *Express Newspapers v Silverstone Circuits, The Independent*, June 16, 1989, CA; *Att-Gen of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [16].
81. *Russell v Duke of Norfolk* [1949] 1 All E.R. 109.
82. *Liverpool CC v Irwin* [1977] A.C. 239, 266; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.L.J.R. 20, 26; *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1980] 1 Lloyd's Rep. 44; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 104; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 Const. L.R. 64, 71; *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 Lloyd's Rep. 797, 802; *Meridian International Services Ltd v Richardson* [2008] EWCA Civ 609, [2008] Info. T.L.R. 139; *Brookfield Construction Ltd v Foster & Partners Ltd* [2009] EWHC 307 (TCC), [2009] B.L.R. 246; *Arla Foods UK Plc v Barnes* [2008] EWHC 2851 (Ch), [2009] 1 B.C.L.C. 699; *Mediterranean Salvage and Towage Ltd v Seamar Trading & Commerce Inc (the "Reborn")* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 at [15]–[18]; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The "Zenovia")* [2009] EWHC 739 (Comm), [2009] 2 Lloyd's Rep. 139 at [23]; *AET Inc Ltd v Arcadia Petroleum Ltd* [2009] EWHC 2337 (Comm), [2010] 1 Lloyd's Rep. 593 at [39]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [65]; *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB); *Chantry Estates (South East) Ltd v Anderson* [2010] EWCA Civ 316, 130

Con. L.R. 11; *Re Agrimarche Ltd* [2010] EWHC 1655 (Ch), [2010] B.C.C. 775; *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] P.N.L.R. 9; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [544]; *Leander Construction Ltd v Mullaley & Co Ltd* [2011] EWHC 3449 (TCC) at [41]; *NSB Ltd v Worldplay Ltd* [2012] EWHC 927 (Comm); *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133; *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 B.C.L.C. 125; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All E.R. (Comm) 1244 at [41]; *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm), [2014] 1 All E.R. (Comm) 972 at [43]; *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603, [2014] 2 E.G.L.R. 48 at [26]. But in *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.C.R. 1615, Morritt V.C. expressed the view that, in the case of a contract of employment, it was better to focus on questions of reasonableness, fairness and the balance of competing policy considerations rather than on the elusive concept of “necessity”. However, the term sought to be implied in the latter case was a term implied in law where, as noted, in para.14-004 above, the courts take account of a wider range of considerations when deciding whether or not to imply a term of a particular type into a contract.

83. *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1197, 1201. See also *R. v Paddington and St Marylebone Rent Tribunal* [1947] K.B. 984, 990; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] A.C. 555, 574; *Trollope & Colls Ltd v N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 610, 614; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1978) 52 A.J.L.R. 20, 26; *Terkol Rederierne v Petroleo Brasileiro SA* [1985] 1 Lloyd's Rep. 395, 401; *Ashmore v Corporation of Lloyds (No.2)* [1992] 2 Lloyd's Rep. 620, 628; *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849 at [29]; *Armitage v Staveley Industries Plc* [2004] EWHC 2320, [2004] Pens L.R. 385; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558 at [105], [110]; *Fortis Bank SA/NV v Indian Overseas Bank* [2010] EWHC 84 (Comm), [2010] 2 Lloyd's Rep. 641 at [67]; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 C.L.C. 701 at [544]; *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] C.T.L.C. 133.
84. *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1204.
85. *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 A.J.L.R. 20, 26; *Duke of Westminster v Guild* [1985] Q.B. 688, 700; *Eurico Spa v Philipp Brothers* [1987] 2 Lloyd's Rep. 215, 219; *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403, 415; *Yorkshire Water Services Ltd v Sun Alliance & London Insurance Plc* [1997] 2 Lloyd's Rep. 21, 33; *Fast Ferries One SA v Ferries Australia Pty Ltd* [2000] 1 Lloyd's Rep. 534, 541; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] F.S.R. 29; *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 W.L.R. 2849 at [28]. *Hadley Design Associates Ltd v Westminster CC* [2003] EWHC 1617, [2004] T.C.L.R. 1; *Fairfax Gerrard Holdings Ltd v Capital Bank Plc* [2006] EWHC 3439 (Comm), [2007] 1 Lloyd's Rep. 171; *Wootton Trucks Ltd v Man ERF UK Ltd* [2006] EWCA Civ 1042, [2006] Eu. L.R. 1217; *Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd* [2009] EWCA Civ 16, [2009] 1 Lloyd's Rep. 391 at [26]–[27]; *Lancore Services Ltd v Barclays Bank Plc* [2009] EWCA Civ 752, [2010] 1 All E.R. 763; *Dominion Corporate Trustees Ltd v Capmark Bank Europe Plc* [2011] EWCA Civ 380; *Southwark LBC v IBM UK Ltd* [2011] EWHC 549 (TCC), 135 Con. L.R. 136; *Carey Group Plc v AIB Group (UK) Plc* [2011] EWHC 567 (Ch), [2011] 2 All E.R. (Comm) 461.
86. *Ali v Christian Salvesen Food Services Ltd* [1997] 1 All E.R. 721.
87. *Orman v Saville Sportswear Ltd* [1960] 1 W.L.R. 1055.
88. *Easton v Hitchcock* [1912] 1 K.B. 535.
89. *Hamlyn & Co v Wood* [1891] 2 Q.B. 488. See also *Rhodes v Forwood* (1876) 1 App. Cas. 256; But see Vol.II, para.31-150.
90. *Deyong v Shenburn* [1946] K.B. 277; *Edwards v West Herts Group Hospital Committee* [1957]

- 1 W.L.R. 415; Vol.II, para.40-113.
- [91.](#) *Reid v Rush & Tompkins Group Plc* [1990] 1 W.L.R. 212; cf. Employers' Liability (Compulsory Insurance) Act 1969; Vol.II, para.42-120.
  - [92.](#) *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] I.C.R. 1615.
  - [93.](#) *Re Railway and Electric Appliances Co* (1888) 38 Ch. D. 597.
  - [94.](#) *Barratt Southampton Ltd v Fairclough Building Ltd* (1988) 27 Const. L.R. 623.
  - [95.](#) *Porter v Tottenham U.D.C.* [1915] 1 K.B. 776.
  - [96.](#) *Duke of Westminster v Guild* [1985] Q.B. 688.
  - [97.](#) *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1980] 1 Lloyd's Rep. 44.
  - [98.](#) *Ben Shipping Co (Pte) Ltd v An-Board Baine* [1986] 2 Lloyd's Rep. 285.
  - [99.](#) *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G. Tsaviris & Sons Maritime Co* [1990] 1 W.L.R. 576.
  - [100.](#) *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80.
  - [101.](#) *Suriya & Douglas v Midland Bank Plc*, *The Times*, March 29, 1999.
  - [102.](#) *Cryne v Barclays Bank* [1987] B.C.L.C. 548.
  - [103.](#) *Yorkshire Water Services Ltd v Sun Alliance and London Insurance Plc* [1997] 2 Lloyd's Rep. 21.
  - [104.](#) *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1990] 1 Q.B. 818 (reversed on other grounds [1992] 1 A.C. 283).
  - [105.](#) *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 W.L.R. 974.
  - [106.](#) *Bonner v Cox* [2005] EWCA Civ 1512, [2006] 2 Lloyd's Rep. 152.
  - [107.](#) *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909.
  - [108.](#) *Hughes v Greenwich LBC* [1994] 1 A.C. 170.
  - [109.](#) *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 Const. L.R. 64, 72 (but see Vol.II, para.40-150, on contracts of employment).
  - [110.](#) *Interleasing (UK) Ltd v Morris* [2003] EWCA Civ 40.
  - [111.](#) *Ultraframe (UK) Ltd v Tailored Roofing System Ltd* [2004] EWCA Civ 585, [2004] 2 All E.R. (Comm) 692.
  - [112.](#) *Rennie v Westbury Homes (Holdings) Ltd* [2007] EWHC 164, [2007] N.P.C. 18.
  - [113.](#) *Multiplex Constructions UC Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC), (2006) 107 Const. L.R.1.
  - [114.](#) *Dashwood v Fleurets Ltd* [2007] EWHC 1610 (QB), [2007] 34 E.G. 84.
  - [115.](#) *CTI Group Inc v Transclear SA* [2007] EWHC 2070 (Comm), [2008] 1 Lloyd's Rep. 179 (affirmed [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526).




- [116.](#) *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639.
- [117.](#) *Arla Foods UK Plc v Barnes* [2008] EWHC 2851 (Ch), [2009] 1 B.C.L.C. 699.
- [118.](#) *Lancore Services Ltd v Barclays Bank Plc* [2009] EWCA Civ 752, [2010] 1 All E.R. 763.
- [119.](#) *Redmayne Bentley v Isaacs* [2010] EWHC 1504 (Comm).
- [120.](#) *Chantry Estates (South East) Ltd v Anderson* [2010] EWCA Civ 316, 130 Con. L.R. 11.
- [121.](#) *Emeraldian Ltd Partnership v Wellmix Shipping Ltd* [2010] EWHC 1411 (Comm), [2011] 1 Lloyd's Rep. 301.
- [122.](#) *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066.
- [123.](#) See Bateson [1960] J.B.L. 187; Burrows (1968) 31 M.L.R. 390, 402; Peden (2000) 15 J.C.L. 56. In the event that English law develops an implied term requiring the parties to act in good faith in performance of the contract (see para.14-031, below), it is possible that the duty to co-operate may be absorbed within the broader good faith duty: *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [139].
- [124.](#)  *Mackay v Dick* (1881) 6 App. Cas. 251, 263. See also *Hunt v Bishop* (1853) 8 Exch. 675; *Roberts v Bury Commissioners* (1870) L.R. 5 C.P. 310, 325; *Nelson v Dahl* (1879) 12 Ch. D. 568, 592 (affirmed (1881) 6 App. Cas. 38); *Sprague v Booth* [1909] A.C. 576, 580; *Kleinert v Abosso Gold Mining Co* (1913) 58 S.J. (PC) 45; *Harrison v Walker* [1919] 2 K.B. 453; *Colley v Overseas Exporters* [1921] 3 K.B. 302, 309; *Panamena Europa Navegacion v Frederick Leyland & Co Ltd* [1947] A.C. 428, 436; *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 118; *A. V. Pound & Co Ltd v M. W. Hardy & Co Inc* [1956] A.C. 588, 608, 611; *Sociedad Financiera de Bienes Raices v Agrimpex* [1961] A.C. 135; *Sunbeam Shipping Co Ltd v President of India* [1973] 1 Lloyd's Rep. 482, 486; *Schindler v Pigault* [1975] 1 C.L. 401; *Metro Meat Ltd v Fares Rural Co Pty Ltd* [1985] 2 Lloyd's Rep. 13, 14; *Merton LBC v Hugh Leach Ltd* (1985) 32 Build. L.R. 51; *Kurt A. Becher GmbH & Co K.G. v Roplak Enterprises SA* [1991] 2 Lloyd's Rep. 23, 30, 34; *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 27 Const. L.R. 138; *Nissho Iwai Petroleum Inc v Cargill International SA* [1993] 1 Lloyd's Rep. 80, 84; *Scottish Power Plc v Kvaerner Construction (Regions) Ltd* 1999 S.L.T. 721; *Goodway v Zurich Insurance Co* [2004] EWHC 137, (2004) 96 Const. L.R. 49; *General Trading Co (Holdings) Ltd v Richmond Corp Ltd* [2008] EWHC 1479 (Comm), [2008] 2 Lloyd's Rep. 475 at [87]; *Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2009] EWHC 2861 (Ch) at [119], [128], [136], [140]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [139]; *Swallowfalls Ltd v Monaco Yachtung & Technologies S.A.M.* [2014] EWCA Civ 186, [2014] 2 Lloyd's Rep. 50 at [32], [33]; *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [8]. See also below, para.24-033, Vol.II, para.37-075.
- [125.](#) *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep. 146, 161; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418 (affirmed [1999] 1 Lloyd's Rep. 482); *Kallang Shipping SA v AXG Assurances Senegal (The "Kallang")* (No.2) [2008] EWHC 2761 (Comm), [2009] 1 Lloyd's Rep. 124 at [79]; *Sotrade Denizcilik Sanayi Ve Ticaret AS v Amadou LO (The Duden)* [2008] EWHC 2762 (Comm), [2009] 1 Lloyd's Rep. 145 at [55].
- [126.](#) *Mackay v Dick* (1881) 6 App. Cas. 251, 263; *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rys Ltd* [1949] 2 All E.R. 1014; *Hargreaves Transport Ltd v Lynch* [1969] 1 W.L.R. 215; *Liverpool CC v Irwin* [1977] A.C. 239; *Kurt A. Becher GmbH & Co K.G. v Roplak Enterprises SA (The World Navigator)* [1991] 2 Lloyd's Rep. 23, 30, 31, 34; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1999] 1 Lloyd's Rep. 482, 492; *Jolley v Carmel Ltd* [2000] 2 E.G.L.R. 154, 159; *Brookfield Construction Ltd v Foster and Partners Ltd* [2009] EWHC 307 (TCC), [2009] B.L.R. 246; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [106].



- [127.](#) *Stirling v Maitland* (1864) 5 B. & S. 840, 852. See also *Rhodes v Forwood* (1876) 1 App. Cas. 256, 272, 274; *Turner v Goldsmith* [1891] 1 Q.B. 544; *Ogdens Ltd v Nelson* [1905] A.C. 109; *Warren v Agdeshman* (1922) 38 T.L.R. 588; *C. French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 A.C. 451; *Southern Foundries (1926) Ltd v Shirlaw* [1940] A.C. 701; *William Cory & Son Ltd v City of London Corp* [1951] 2 K.B. 476, 484; *A. Hamson & Son (London) Ltd v S. Martin Johnson & Co Ltd* [1953] 1 Lloyd's Rep. 553; *Shindler v Northern Raincoat Ltd* [1960] 1 W.L.R. 1038; *The Unique Mariner (No.2)* [1979] 1 Lloyd's Rep. 37; *Merton LBC v Hugh Leach Ltd* (1985) 32 Build. L.R. 51; *Martin-Smith v Williams* [1999] E.M.L.R. 571; *CEL Group Ltd v Nedlloyd Lines UK Ltd* [2003] EWCA Civ 1716, [2004] 1 Lloyd's Rep. 381 at [11], [22] and [23]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [139]. See also *Bateson* [1960] J.B.L. 187; *Burrows* (1968) 31 M.L.R. 390; above, para.2-162; Vol.II, para.37-074.
- [128.](#) See above, para.13-028.
- [129.](#) *Holme v Guppy* (1838) 3 M. & W. 387, 389; *Inchbald v Western Neilgherry Coffee, etc., Co* (1864) 17 C.B.(N.S.) 733; *Roberts v Bury Improvements Commissioners* (1870) L.R. 5 C.P. 310, 316; *Mackay v Dick* (1881) 6 App. Cas. 251; *Dodd v Churton* [1897] 1 Q.B. 562, 566; *Barque Quilpué Ltd v Brown* [1904] 2 K.B. 264, 271; *Hickman & Co v Roberts* [1913] A.C. 229; *Trollope v Martyn* [1934] 2 K.B. 436; *Amalgamated Building Contractors Ltd v Waltham Holy Cross U.D.C.* [1952] 2 All E.R. 452, 455; *Jebco Properties v Mastforce* [1992] N.P.C. 42; *Nissho Iwai Petroleum Co Inc v Cargill International SA* [1993] 1 Lloyd's Rep. 80; *Taylor v Rive Droite Music Ltd* [2005] EWCA Civ 1300, [2006] E.M.L.R. 4. See also below, para.24-033.
- [130.](#) *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 472; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] F.S.R. 29.
- [131.](#) *Locke v Candy and Candy Ltd* [2010] EWCA Civ 1350, [2011] I.R.L.R. 163.
- [132.](#) *Aspdin v Austin* (1844) 5 Q.B. 671; *European, etc., Mail Co v Royal Mail Steam Packet Co* (1861) 30 L.J.C.P. 247; *Rhodes v Forwood* (1876) 1 App. Cas. 256; *Hamlyn v Wood* [1891] 2 Q.B. 488; *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108; *William Cory & Son Ltd v City of London Corp* [1951] 2 K.B. 476; *Farr v Admiralty* [1953] 1 W.L.R. 565; *Thompson v Asda-MFI Group Plc* [1988] Ch. 241; *Davy Offshore Ltd v Emerald Field Contracting Ltd* (1991) 27 Const. L.R. 138; *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] E.M.L.R. 477; *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC), (2007) 111 Const. L.R. 78; see Vol.II, para.37-074.
- [133.](#) See above, para.13-085. cf. *Richco International Ltd v Alfred C. Toepfer International GmbH* [1991] 1 Lloyd's Rep. 136, 144; *Bulk Shipping A.G. v Ipco Trading SA* [1992] 1 Lloyd's Rep. 39, 43; *Petroplus Marketing AG v Shell Trading International Ltd (The "Niviae")* [2009] EWHC 1024 (Comm), [2009] 2 Lloyd's Rep. 611 at [17].
- [134.](#) *H.O. Brandt & Co v H.N. Morris & Co* [1917] 2 K.B. 784; *J.W. Taylor & Co v Landauer & Co* [1940] 4 All E.R. 335; *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All E.R. 552; *A.V Pound & Co Ltd v M.W. Hardy & Co Inc* [1956] A.C. 588; *Congimex Companhia Geral, etc., SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250. See Benjamin's Sale of Goods, 9th edn (2014), paras 18–356–18–380.
- [135.](#) *Re Anglo-Russian Merchant Traders Ltd and John Batt & Co (London) Ltd* [1917] 2 K.B. 679; *Brauer & Co (G.B.) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All E.R. 497. See also *Windschuegl Ltd v Pickering & Co Ltd* (1950) 84 Lloyd's Rep. 89, 93; *Société D'Avances Commerciales (London) Ltd v A. Besse & Co (London) Ltd* [1952] 1 T.L.R. 644, 646; *Compagnie Algerienne de Meunerie v Katana Societa de Navigazione Marittima SpA* [1959] 1 Q.B. 527; *Provimi Hellas A.E. v Warinco A.G.* [1978] 1 Lloyd's Rep. 373; *Coloniale Import-Export v Loumidis Sons* [1978] 2 Lloyd's Rep. 560, 562; Benjamin's Sale of Goods at paras 18–361–18–380.
- [136.](#) *Mitchell Cotts & Co (Middle East) Ltd v Hairco Ltd* [1943] 2 All E.R. 552; *Partabmull Rameshwar v Sethia (K.C.) (1944) Ltd* [1950] 1 All E.R. 51 (affirmed [1951] 2 All E.R. 352n); *Peter Cassidy Seed Co Ltd v Osuustukkukauppa I.L.* [1957] 1 W.L.R. 273; *Congimex Companhia Geral, etc.,*






- SARL v Tradax Export SA* [1983] 1 Lloyd's Rep. 250.
- [137.](#) *A.V. Pound & Co Ltd v M.W. Hardy & Co Inc* [1956] A.C. 588, 608, 611; *Kyprianou v Cyprus Textiles Ltd* [1958] 2 Lloyd's Rep. 60.
- [138.](#) Occupiers' Liability Act 1957 s.5(1), superseding the rule in *Francis v Cockrell* (1870) L.R. 5 Q.B. 501. See further on the background to s.5 *Maguire v Sefton* [2006] EWCA Civ 316, [2006] 1 W.L.R. 2550 at [20]–[24].
- [139.](#) s.2(2).
- [140.](#) See the Unfair Contract Terms Act 1977 ss.1, 2, 3 (below) and *Monarch Airlines Ltd v London Luton Airport Ltd* [1998] 1 Lloyd's Rep. 403.
- [141.](#) Occupiers' Liability Act 1957 s.2(1). See also *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409; *White v Blackmore* [1972] 2 Q.B. 651 (notices).
- [142.](#) s.3(1)–(4).
- [143.](#) s.5(2).
- [144.](#) s.5(3).
- [145.](#) *Hoskins v Woodham* [1938] 1 All E.R. 692; *Lynch v Thorne* [1956] 1 W.L.R. 303, 305.
- [146.](#) *Lawrence v Cassell* [1930] 2 K.B. 83; *Miller v Cannon Hill Estates Ltd* [1931] 2 K.B. 113; *Jennings v Taverner* [1955] 1 W.L.R. 932; *Hancock v B.W. Brazier (Anerley) Ltd* [1966] 1 W.L.R. 1317; *Billyack v Leyland Construction Co Ltd* [1968] 1 W.L.R. 471; *King v Victor Parsons & Co* [1972] 1 W.L.R. 801. See also below, para.14-037 and Vol.II, para.37-080.
- [147.](#) *Perry v Sharon Development Co Ltd* [1937] 4 All E.R. 390, 394; *Lynch v Thorne* [1956] 1 W.L.R. 303; cf. *King v Victor Parsons & Co* [1972] 1 W.L.R. 801.
- [148.](#) ss.1, 2, 6. See also s.3 and Vol.II, para.37-083.
- [149.](#) *Alexander v Mercouris* [1979] 1 W.L.R. 1270; *Andrews v Schooling* [1991] 1 W.L.R. 783; *Bole v Huntsbuild Ltd* [2009] EWCA Civ 1146, 127 Con. L.R. 154; *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), [2011] All E.R. (D) 140 (Jul).
- [150.](#) Defective Premises Act 1972 s.1. The duty arises only in respect of the provision of a new dwelling; *Jenson v Faux* [2011] EWCA Civ 423, [2011] 1 W.L.R. 3038; *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC), [2015] B.L.R. 37.
- [151.](#) *Hart v Windsor* (1843) 12 M. & W. 68; *Sutton v Temple* (1843) 12 M. & W. 52; *Robbins v Jones* (1863) 12 M. & W. 68, 87; *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 C.P.D. 507; *Bottomley v Bannister* [1932] 1 K.B. 458, 468. Contrast *Western Electric Ltd v Welsh Development Agency* [1983] Q.B. 796 (licence).
- [152.](#) *Edler v Auerbach* [1950] 1 K.B. 359; *Hills v Harris* [1965] 2 Q.B. 601.
- [153.](#) *Smith v Marrable* (1843) 11 M. & W. 5; *Collins v Hopkins* [1923] 2 K.B. 617.
- [154.](#) *Sarson v Roberts* [1895] 2 Q.B. 395; *Sleafer v Lambeth BC* [1960] 1 Q.B. 43, 56–57; *Duke of Westminster v Guild* [1985] Q.B. 688; *Adami v Lincoln Grange Management Ltd* [1998] I.C.L. 379. See also *Warren v Keen* [1954] 1 Q.B. 15. Contrast *Mint v Good* [1951] 1 K.B. 517, 522; *Edmonton Corp v Knowles & Son Ltd* (1961) 60 L.G.R. 124; Defective Premises Act 1972 s.4(4).
- [155.](#) Landlord and Tenant Act 1985 ss.8, 9, 10.

156. ss.11–17 (term less than seven years) as amended by s.116 of the Housing Act 1988.
157. *Miller v Hancock* [1893] 2 Q.B. 177; *Liverpool City Council v Irwin* [1977] A.C. 239. See also Occupiers' Liability Act 1957 s.3(4) and Landlord and Tenant Act 1987 Pt IV.
158. *Hutton v Warren* (1836) 1 M. & W. 466; *Dale v Humfrey* (1858) E.B. & E. 1004; *Tucker v Linger* (1882) 21 Ch. D. 18, 33, 34 (affirmed (1883) 8 App. Cas. 508); *Pike, Sons & Co v Ongley & Thornton* (1887) 18 Q.B.D. 708; *Fox-Bourne v Vernon & Co Ltd* (1894) 10 T.L.R. 647; *Lord Eldon v Hedley Bros* [1935] 2 K.B. 1; *E.E. & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 K.B. 302; *Mount v Oldham Corp* [1973] 1 Q.B. 309; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *Novorossisk Shipping Co v Neopetro Co Ltd* [1990] 1 Lloyd's Rep. 425, 431; *Tony Cox (Dismantlers) Ltd v Jim 5 Ltd* (1997) 13 Const. L.J. 209. See above, paras 13–130–13–136.
159. See above, para.13–131; below, para.14–026. An “entire agreement” clause (see above, para.13–107) may exclude any such implication: *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964, (Comm); [2003] 2 Lloyd's Rep. 686. However, an “entire agreement” clause will not usually be effective to exclude a term implied as a matter of fact: *Novoship (UK) Ltd v Mikhaylyuk* [2015] EWHC 992 (Comm) at [32].
160. *Yates v Pym* (1816) 6 Taunt. 446; *Daun v City of London Brewery Co* (1869) L.R. 8 Eq. 155, 161; *Nelson v Dahl* (1879) 12 Ch. D. 568, 575 (affirmed (1881) 6 App. Cas. 38); *Re Walkers, Winsor & Hamm and Shaw, Son & Co* [1904] 2 K.B. 152; *Ropner v Stoate Hosegood & Co* (1905) 10 Com. Cas. 73; *Cunliffe-Owen v Teather and Greenwood* [1967] 1 W.L.R. 1421, 1438, 1439; *Constan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust.) Ltd* (1986) 160 C.L.R. 226; *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep. 602, 615; *Danowski v Henry Moore Foundation, The Times*, March 19, 1996 CA; *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm); [2003] 2 Lloyd's Rep. 686 at [21].
161. *Cunliffe-Owen v Teather and Greenwood* [1967] 1 W.L.R. 1421, 1438; *General Reinsurance Corp v Forsakringsaktiebolaget* [1983] Q.B. 856, 874; *Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep. 602, 615; *Vitol SA v Phibro Energy A.G.* [1990] 2 Lloyd's Rep. 84, 90; *Sucre Export SA v Northern Shipping Ltd* [1994] 2 Lloyd's Rep. 266. But trade practice may be relevant as part of the factual matrix and admissible as an aid to construction or the implication of a term: *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 W.L.R. 2066 at [41].
162. *Raitt v Mitchell* (1815) 4 Camp. 146, 149; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 A.C. 314, 324.
163. *Hutton v Warren* (1836) 1 M. & W. 466, 475; *Gibson v Small* (1853) 4 H.L.C. 353, 397.
164. *Liverpool City Council v Irwin* [1977] A.C. 239, 253; *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 W.L.R. 974, 979.
165. *Sutton v Tatham* (1839) 10 A. & E. 27; *Bayliffe v Butterworth* (1847) 1 Exch. 425; *Reynolds v Smith* (1893) 9 T.L.R. 494; *Hunt v Chamberlain* (1896) 12 T.L.R. 186.
166. See Vol.II, para.40–049.
167. See Vol.II, para.40–049.
168. Above, para.1–088.
169. *Houlder v General Steam Navigation Co* (1862) 3 F. & F. 170; *Salsi v Jetspeed Air Services Ltd* [1977] 2 Lloyd's Rep. 57.
170.  It has been observed that it is “something of a misnomer to see these terms as being implied on any conventional basis. Rather, it is a question of what terms are to be incorporated as express terms. Implication only arises for consideration once the express terms have been identified and considered”: *J Toomey Motors Ltd v Chevrolet UK Ltd* [2017] EWHC 276 (Comm)

at [98].

- [171.](#) *Calton v Bragg* (1812) 15 East 223, 228; *Bruce v Hunter* (1813) 3 Camp. 467; *Newal v Jones* (1830) 1 Moo. & M. 449; *Re Marquis of Anglesey* [1901] 2 Ch. 548; cf. *Re Lloyd Edwards* (1891) 65 L.T. 453. But see Vol.II, para.39-285.
- [172.](#) *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 A.C. 31, 90, 91, 104, 105, 130. See also *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 451; *Transmotors Ltd v Robertson Buckley & Co Ltd* [1970] 1 Lloyd's Rep. 224; *Eastman Chemical International A.G. v N.M.T. Trading Ltd* [1972] 2 Lloyd's Rep. 25; *Roberts v Elwells Engineers Ltd* [1972] 2 Q.B. 586, 593; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; *S.I.A.T. di del Ferro v Tradax Overseas SA* [1980] 1 Lloyd's Rep. 53; *Lamport & Holt Lines Ltd v Coubro & M. & I. Scrutton Ltd* [1981] 2 Lloyd's Rep. 659 (affirmed [1982] 2 Lloyd's Rep. 42); *F.R. Lurssen Werft GmbH & Co KG v Halle* [2010] EWCA Civ 587, [2011] 1 Lloyd's Rep. 265. cf. *McCutcheon v David MacBrayne Ltd* [1964] 1 W.L.R. 125, HL; *Hollier v Rambler Motors (A.M.C.) Ltd* [1972] 2 Q.B. 71; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336. See *Hoggett* (1970) 33 M.L.R. 518 and above, para.13-011.
- [173.](#)  *London Export Corp Ltd v Jubilee Coffee Roasting Co Ltd* [1958] 1 W.L.R. 661, 675; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439, 445. An inconsistency for this purpose can be either linguistic or substantive: *Irish Bank Resolution Corp Ltd v Camden Markets Holding Corp* [2017] EWCA Civ 7 at [35].
- [174.](#) *Les Affréteurs Réunis Société Anonyme v Walford* [1919] A.C. 801. See generally on this point, above, para.13-131.
- [175.](#) *Re L. Sutro & Co v Heilbut, Symons & Co* [1927] 2 K.B. 348. See also *Humfrey v Dale* (1857) 7 E. & B. 266, 274; *Tucker v Linger* (1883) 8 App. Cas. 508, 511; *Westacott v Hahn* [1918] 1 K.B. 495; *Palgrave, Brown & Son Ltd v S.S. Turid* [1922] 1 A.C. 397.
- [176.](#) *Saltoun v Houston* (1824) 1 Bing. 433; *Easterby v Sampson* (1830) 6 Bing. 644; *Courtney v Taylor* (1843) 6 M. & G. 851; *Great Northern Ry v Harrison* (1852) 12 C.B.(N.S.) 576, 609; *Knight v Gravesend, etc., Waterworks Co* (1857) 2 H. & N. 6; *Farrall v Hilditch* (1859) 5 C.B.(N.S.) 840; *Jackson v North Eastern Ry* (1877) 7 Ch. D. 573; *Mackenzie v Childers* (1889) 43 Ch. D. 265.
- [177.](#) *Re Weston* [1900] 2 Ch. 164.
- [178.](#) *Corkling v Massey* (1873) L.R. 8 C.P. 395.
- [179.](#) See above, para.13-068.
- [180.](#) *Aspdin v Austin* (1844) 5 Q.B. 671, 684.
- [181.](#) *Dawes v Tredwell* (1881) 18 Ch. D. 354, 359.
- [182.](#)  *British Telecommunications Plc v Telefónica O2 UK Ltd* [2014] UKSC 42, [2014] 4 All E.R. 907 at [37]; *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* [1993] 1 Lloyd's Rep. 397, 404; *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685 at [31]; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm) 299 at [67]; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 538 at [60]–[69]; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [145]; *Marex Financial Ltd v Creative Finance Ltd* [2013] EWHC 2155 (Comm), [2014] 1 All E.R. (Comm) 122 at [57], [89]; see above, para.1-054. cf. *Paragon Finance Plc v Pender* [2005] EWCA Civ 760, [2005] 1 W.L.R. 3412. See also Vol.II, para.39-293 (interest rates); above, para.1-054, Vol.II, para.40-078 (bonuses). The cases in which a term of this nature has been implied are cases in which the contracting party had a choice to make among a range of options, taking into account the interests of both parties. Where, on the other hand, the discretion relates to the exercise of

an absolute contractual right, there is no room for the implication of a term placing a limit on the exercise of that contractual right: *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [83] and [138]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484; *Hockin v Royal Bank of Scotland* [2016] EWHC 925 (Ch) at [37]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm) at [242]–[276]; *Hockin v Royal Bank of Scotland* [2016] EWHC 925 (Ch) at [37]; *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm) at [242]–[276]; *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at [277]; *Brogden v Investec Bank Plc* [2016] EWCA Civ 1031, [2017] I.R.L.R. 90 at [20].

183. *Societa Explosivi Industriale SpA v Ordnance Technologies (VIC) Ltd* [2004] EWHC 48 (Comm), [2004] 1 All E.R. (Comm) 619. See also *Addison v Brown* [1954] 1 W.L.R. 779; *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151; *Eastleigh BC v Town Quay Developments Ltd* [2009] EWCA Civ 1391, [2010] 2 P. & C.R. 2; *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [145].
184. *Reda Ltd v Flag* [2002] UKPC 38, [2002] I.R.L.R. 747 at [45]; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 538; *Looney v Trafifura Beheer BV* [2011] EWHC 125 (Ch).
185. [1998] A.C. 20. See Vol.II, para.40-150.
186. See above para.1-052, Vol.II, paras 40-150-40-153. For the employee's duty of fidelity and good faith, see Vol.II, para.40-062.
187. *Gledhill v Bentley Designs (UK) Ltd* [2010] EWHC 1965 (QB), [2011] 1 Lloyd's Rep. 270. But see Vol.II, para.31-112.
188.  *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 451 at [51]; *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch); *Mr H TV Ltd v ITV2 Ltd* [2015] EWHC 2840 (Comm) at [43]–[51]. But see *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 (implied term as to good faith); see above, para.1-053.
189. See para.1-039, above.
190. [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [121]–[154]. Contrast *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105] and [150]; *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2013] B.L.R. 484; *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [85], [92]; and see above, paras 1-039, 1-053.
191. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [131].
192.  *Carewatch Care Services Ltd v Focus Care Services Ltd* [2014] EWHC 2313 (Ch) at [109]; *Greenclose Ltd v National Westminster Bank Plc* [2014] EWHC 1156 (Ch); *Fujitsu Services Ltd v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC); *TSG Building Services v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC), [2103] B.L.R. 484; *Globe Motors Inc v TRW Lucas Vary Electric Steering Ltd* [2016] EWCA Civ 396 at [68]. Indeed, in an arm's length commercial relationship the courts will generally incline against the implication of a good faith term and will put the onus on the parties to include an express term to this effect if they wish to be bound by such a duty: *Chelsfield Advisers LLP v Qatari Diar Real Estate Investment Co* [2015] EWHC 1322 (Ch) at [80].
193.  *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat); *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC); *Myers v Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch); *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) at



[276].

194.

❗ See, for example, *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [86] where the term proposed was taken to require “a contracting party to subordinate its own commercial interests to those of the other contracting party.” See also *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm) at [242]–[276].

195.

❗ *D&G Cars v Essex Police Authority* [2015] EWHC 226 (QB), [2015] All E.R. (D) 85 (Mar) at [173]; *Apollo Window Blinds Ltd v McNeil* [2016] EWHC 2307 (QB); *T and L Sugars Ltd v Tate and Lyle Industries Ltd* [2015] EWHC 2696 (Comm) at [152] (“while it would be right to imply a term that the Defendant would act in good faith and honestly in carrying out the process envisaged in clauses 3.7.1 and 3.7.3, there is no proper basis for the implication of the very much more onerous term for which the Claimant argues”).

196.

*Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [149].

197.

*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173, 195, 203; *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 Q.B. 556, 578; *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387, 1399–1403, 1405.

198.

*Re Spenborough U.D.C.’s Agreement* [1968] Ch. 139, 147. See also *Llanelly Rail and Dock Co v L. & N.W. Ry* (1873) L.R. 8 Ch. App. 942; (1875) L.R. 7 H.L. 550. cf. *Carnegie* (1969) 85 L.Q.R. 392.

199.

*Crediton Gas Co v Crediton Urban Council* [1928] Ch. 174, 447. See also *Beverley Corp v Richard Hodgson & Sons Ltd* (1972) 225 E.G. 799; *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387; *Tower Hamlets LBC v British Gas Corp*, *The Times*, March 23, 1982. Contrast *Kirklees Metropolitan BC v Yorkshire Woollen District Transport Co* (1978) 77 L.G.R. 448; *Power Co Ltd v Gore DC* [1997] N.Z.L.R. 537; *Harbinger UK Ltd v GE Information Services Ltd* [2000] 1 All E.R. (Comm) 166; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All E.R. (Comm) 457; *Servicepower Asia Pacific Pty Ltd v Servicepower Business Solutions Ltd* [2009] EWHC 179 (Ch), [2010] 1 All E.R. (Comm) 238.

200.

*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173; cf. *Australian Blue Metal Ltd v Hughes* [1963] A.C. 74.

201.

See Vol.II, paras 40-157, 40-161. Contrast *McClelland v Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594 where express terms prevented such implication.

202.

*Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 Q.B. 566. See Vol.II, para.31-151.

203.

*Milner & Son v Percy Bilton Ltd* [1966] 1 W.L.R. 1582.

204.

*Thomas v Sorrell* (1673) Vaughan 330; *Jones v Earl of Tankerville* [1909] 2 Ch. 440.

205.

*Walsh v Lonsdale* (1882) 21 Ch. D. 9 (or sufficient act of part performance).

206.

*Mellor v Watkins* (1874) L.R. 9 Q.B. 400.

207.

*Minister of Health v Bellotti* [1944] 1 K.B. 298; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 W.L.R. 761; *Australian Blue Metal Ltd v Hughes* [1963] A.C. 74.

208.

*Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173; *Bannister v Bannister* [1948] 2 All E.R. 133; *Errington v Errington* [1952] 1 K.B. 290; *Hounslow LBC v Twickenham Gardens Development Ltd* [1971] Ch. 233 (not followed in *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 N.Z.L.R. 309); *Tanner v Tanner* [1975] 1 W.L.R. 1346; *Verrall v Great*

- Yarmouth BC* [1981] Q.B. 202. cf. *Chandler v Kerley* [1978] 1 W.L.R. 693 (contractual licence impliedly revocable on reasonable notice). A licence may also be created by estoppel, or its revocation restrained in equity: see *Inwards v Baker* [1965] 2 Q.B. 29; *E.R. Ives Investment Ltd v High* [1967] 2 Q.B. 379; *Binions v Evans* [1972] Ch. 359; *D.H.N. Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 W.L.R. 852; *Hardwick v Johnson* [1978] 1 W.L.R. 683; *Pascoe v Turner* [1979] 1 W.L.R. 431; *Williams v Staite* [1979] Ch. 291; *Re Sharpe* [1980] 1 W.L.R. 219; *Greasley v Cooke* [1980] 1 W.L.R. 1306; *Grant v Edwards* [1986] Ch. 638; *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107; *Hammond v Mitchell* [1991] 1 W.L.R. 1127; cf. *Coombes v Smith* [1986] 1 W.L.R. 808. See also Moriarty (1984) 100 L.Q.R. 346 and above, para.4-139.
- [209.](#) *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173; *Foster v Robinson* [1915] 1 K.B. 149, 156. See also *Verrall v Great Yarmouth BC* [1981] Q.B. 202 (specific performance), and the cases in equity cited in n.204, above.
- [210.](#) *Kerrison v Smith* [1897] 2 Q.B. 445.
- [211.](#) *Hurst v Picture Theatres Ltd* [1915] 1 K.B. 1. Contrast *Wood v Leadbitter* (1845) 13 M. & W. 838; *Thompson v Park* [1944] K.B. 408; *Cowell v Rosehill Racecourse Ltd* (1936) 56 C.L.R. 605, but these cases are of doubtful authority: see *Verrall v Great Yarmouth BC* [1981] Q.B. 202.
- [212.](#) See Vol.II, paras 44-074 et seq. See also (on exclusion or restriction of liability) below, para.15-093.
- [213.](#) See Vol.II, paras 39-316, 39-382 et seq. See also (on exclusion or restriction of liability) below, para.15-093.
- [214.](#) See Vol.II, para.33-071. See also (on exclusion or restriction of liability), below, para.15-094.
- [215.](#) See above, para.14-026.
- [216.](#) *Yarm Road Ltd v Hewden Tower Cranes Ltd* [2002] EWHC 2265, (2002) 85 Const. L.R. 142.
- [217.](#) On the temporal application of the Consumer Rights Act 2015, see below, Vol.II, para.38-011.
- [218.](#) The use of this phrase rather than the more traditional language of “implied term” would not appear to be a change of substance but rather part of an attempt to make the language of the Act more accessible to non-lawyers: see Vol.II, para.38-444.
- [219.](#) On which see further Vol.II, paras 38-458 et seq.
- [220.](#) s.4(2) of the Consumer Rights Act 2015.
- [221.](#) As amended by Sch.2 para.6 to the Sale and Supply of Goods Act 1994. See *Charlotte Thirty Ltd v Croker Ltd* (1990) 24 Const. L.R. 46; *Jonathan Wren & Co Ltd v Microdec Ltd* (1999) 65 Const. L.R. 157. See also (on exclusion or restriction of liability), below, para.15-094.
- [222.](#) See *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454; *Gloucestershire CC v Richardson* [1969] 1 A.C. 480; Vol.II, para.44-026.
- [223.](#) *Samuels v Davis* [1943] K.B. 526.
- [224.](#) *G.H. Myers & Co v Brent Cross Service Co* [1934] 1 K.B. 46; *Herschthal v Stewart and Ardern Ltd* [1940] 1 K.B. 155; *Stewart v Reavell's Garage* [1952] 2 Q.B. 545.
- [225.](#) *Ingham v Emes* [1955] 2 Q.B. 366.
- [226.](#) *Reg Glass Pty v Rivers Locking System Pty* (1968) 120 C.L.R. 516. cf. *Davis & Co (Wires) v Afa-Minerva (EMI)* [1974] 2 Lloyd's Rep. 27.
- [227.](#) *Dodd and Dodd v Wilson and McWilliam* [1946] 2 All E.R. 691.



- [228.](#) *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 434.
- [229.](#) *Gloucestershire CC v Richardson* [1969] 1 A.C. 480.
- [230.](#) A “contract for transfer of goods” made on or after October 1, 2015 falls within the range of contracts covered by Ch.2 of the Act (see s.4(2)(d) and Vol.II, para.38-457).
- [231.](#) s.1(4).
- [232.](#) Supply of Goods and Services Act 1982 s.12(2).
- [233.](#) Supply of Goods and Services Act 1982 s.12(4). The following orders have been made: Supply of Services (Exclusion of Implied Terms) Order 1982 (SI 1982/1771); Supply of Services (Exclusion of Implied Terms) Order 1983 (SI 1983/902); Supply of Services (Exclusion of Implied Terms) Order 1985 (SI 1985/1).
- [234.](#) By Supply of Goods and Services Act 1982 s.18(1), “business” includes a profession and the activities of any government department or local or public authority.
- [235.](#) Unless excluded (Supply of Goods and Services Act 1982 s.16): *Eagle Star Life Assurance Co Ltd v Griggs* [1997] C.L.Y. 991. See also (on exclusion or restriction of liability), paras 15-084, 15-094; and see Vol.II, paras 33-053, 37-082. cf. *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm).
- [236.](#) *Harmer v Cornelius* (1858) 5 C.B.N.S. 236, 246; *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586; *Chin Keow v Government of Malaysia* [1967] 1 W.L.R. 813; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095, 1100, 1102; *Saif Ali v Sidney Mitchell & Co* [1980] A.C. 198, 218, 220; *Whitehouse v Jordan* [1981] 1 W.L.R. 246, 263; *Maynard v West Midlands Regional Health Authority* [1984] 1 W.L.R. 634, 639; *Thake v Maurice* [1986] Q.B. 644; *Wilson v Best Travel Ltd* [1993] 1 All E.R. 353; *Matrix-securities Ltd v Theodore Goddard* [1998] S.T.C. 1; *Bolitho v City and Hackney Health Authority* [1998] A.C. 232; *Barclays Bank Plc v Weeks Legg & Dean* [1999] Q.B. 309; *Midland Bank Plc v Cox McQueen* [1999] Lloyd’s Rep. P.N. 223; *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] P.N.L.R. 9; *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc* [2011] EWHC 1936 (TCC), [2011] B.L.R. 661.
- [237.](#) *Kimber v W. Willett Ltd* [1947] K.B. 570. See also Vol.II, paras 37-076, 37-082.
- [238.](#) *Samuels v Davis* [1943] K.B. 526; *Greaves & Co (Contractors) Ltd v Baynham Meikle and Partners* [1975] 1 W.L.R. 1095; *St Alban’s City and DC v International Computers Ltd* [1996] 4 All E.R. 481; *Zwebner v Mortgage Corp Ltd* [1998] P.N.L.R. 769. Contrast *Lynch v Thorne* [1956] 1 W.L.R. 303; *Thake v Maurice* [1986] Q.B. 644. See Vol.II, para.37-079. cf. *Platform Funding Ltd v Bank of Scotland Plc* [2008] EWCA Civ 930, [2009] Q.B. 426.
- [239.](#) See above, n.230.
- [240.](#) *Jonathan Wren & Co Ltd v Microdec Ltd* (1999) 65 Const. L.R. 157.
- [241.](#) On the temporal application of the Consumer Rights Act 2015, see below, Vol.II, para.38-011.
- [242.](#) s.49(1), on which see further Vol.II, para.38-531.
- [243.](#) s.51, on which see further Vol.II, para.38-538.
- [244.](#) s.52, on which see further Vol.II, para.38-537.
- [245.](#) s.50 on which see further Vol.II, paras 38-532-38-536.
- [246.](#) SI 2013/3134, amended by SI 2014/870. These Regulations implement most provisions of Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on

consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council. See further Vol.II, paras 38-056 et seq.

- [247.](#) As defined in reg.4.
- [248.](#) Listed in reg.6 (including, for example, contracts for services of a banking, credit, insurance, personal pension, investment or payment nature).
- [249.](#) reg.9. An “on-premises contract” is defined in reg.5 see further Vol.II, para.38-085.
- [250.](#) regs 10 to 12. An “off-premises contract” is defined in reg.5: see further Vol.II, paras 38-076-38-080.
- [251.](#) regs 13, 14 and 16. A “distance contract” is defined in reg.5: see further Vol.II, paras 38-081-38-084.
- [252.](#) regs 9(3), 10(5) and 13(6). See also s.50(3) of the Consumer Rights Act 2015 which gives further reinforcement to these terms.
- [253.](#) regs 7(2), (3) and (4).
- [254.](#) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 regs 9(3), 10(5) and 13(6).
- [255.](#) Consumer Rights Act 2015 ss.11(4) and 12 (goods), 36(3) and 37 (digital content) and 50(3) (services; this is without prejudice to s.51(1), which covers a wider range of information given by the trader).
- [256.](#) Consumer Rights Act 2015 ss.11(4) and 19(3) (goods), 36(3) and 42(2) (digital content) and 50(3) and 54(3) (services).
- [257.](#) Consumer Rights Act 2015 ss.12 and 19(5) (goods), 37 and 42(4) (digital content) and 54(4) (services: in this case the consumer is entitled to a price reduction). On these provisions, see further below, Vol.II, paras 38-477-38-488.
- [258.](#) Pt 2 Ch.2 reg.19: on which see further Vol.II, para.38-102.
- [259.](#) See above, para.14-042, Vol.II, para.38-128.
- [260.](#) reg.29 and see further Vol.II, paras 38-108 et seq.
- [261.](#) regs 40 and 41.
- [262.](#) regs 40(4), 41(2).
- [263.](#) SI 1992/3288, implementing Council Directive 90/314 [1990] O.J. L158/59, and amended by SI 1998/1208, SI 2003/1376, SI 2003/1400. For the relationship between the Regulations and the (Athens) International Convention on the Carriage of Passengers and their Luggage by Sea (below, para.15-134 and Vol.II, para.36-064) see *Lee v Airtours Holidays Ltd [2004] 1 Lloyd's Rep. 683*. See also Grant and Urbanowitz [2001] J.B.L. 253; Chapman [2004] I.T.L.J. (3) 129.
- [264.](#) 1992 Regulations reg.9.
- [265.](#) 1992 Regulations reg.10.
- [266.](#) 1992 Regulations reg.12; see Vol.II, para.39-124.
- [267.](#) 1992 Regulations reg.13.
- [268.](#) 1992 Regulations reg.14; *Charlson v Warner [2000] C.L.Y. 4043 Cty Ct.*

[269.](#) 1992 Regulations reg.15; *Charlson v Warner* [2000] C.L.Y. 4043; cf. *Evans v Kasmar Villa Holidays Ltd* [2007] EWCA Civ 1003, [2008] 1 W.L.R. 297.

[270.](#) Other than excepted contracts: Late Payment of Commercial Debts (Interest) Act 1998 s.2(5).

[271.](#) Defined in s.3.

[272.](#) s.1(1). See below, para.26-232.