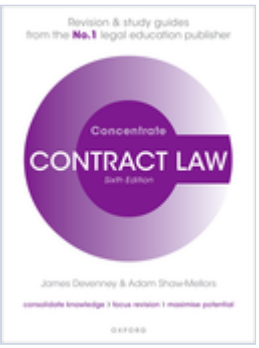

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5. Terms and breach of contract

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https://doi.org/10.1093/he/9780198904618.003.0005
Published in print: 05 August 2024
Published online: August 2024

Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses how to identify the contractual obligations assumed by the parties in their contract, distinguishing terms (promises) and representations (non-promissory inducements to contract), and identifying the express and implied terms. It also looks at standards of performance, how to identify broken promises as a prelude to considering the remedies for breach of contract, and whether it is possible to opt not to continue to perform further contractual obligations following the other party's breach.

Keywords: contract terms, Consumer Rights Act 2015, implied terms, breach of contract, discharge of a contract, repudiatory breach, termination, innominate term, anticipatory repudiatory breach, legitimate interest

Key facts

- During contractual negotiations the parties may make various statements. Not all of these statements will necessarily become terms of any resulting contract. A term is a statement intended (assessed objectively as is the normal approach in contract law—see Chapter 1) to constitute a contractual promise. If the term/promise is broken, it amounts to a breach of contract, giving rise to remedies for breach of contract (see Chapter 7).
- On the other hand, some pre-contractual statements do not become terms but are merely **representations**. Broadly, representations are statements which induce the contract but do not involve any binding promise. If a representation turns out to be false, there will be legal remedies in misrepresentation

(see Chapter 9) which are not the same as remedies for breach of contract. In the consumer context, consumers are given certain 'rights to redress' for misleading actions under the **Consumer Protection from Unfair Trading Regulations (CPUTRs) 2008** and these may replace the remedies otherwise available such as the ability to recover damages for misrepresentation under other legislation (**s. 2(4) Misrepresentation Act 1967**). (Please note that, at the time of writing, the Digital Markets, Competition and Consumers Bill proposes to repeal the **CPUTRs** and replace them with updated provisions within the proposed Act).

- Sometimes one party will, for example, claim that the resulting contract contains a particular clause proposed, displayed, or advanced by them (e.g. written terms on a coach ticket purchased from the booking office). In order to form part of the contract such clauses need to have been incorporated as such into the contract (see discussion in Chapter 6).

- The terms of the contract, whether the contract is written, oral, or both oral and written, will consist of those promises expressly undertaken or agreed to by the parties. However, the terms may also consist of
p. 97 implied terms which the parties do not mention expressly but which are nevertheless implied into the contract. These terms are implied: (i) by statute (e.g. in contracts for the sale of goods or supply of goods and services, including those with digital content in the consumer context); (ii) because the courts consider the term should be implied; or (iii) as a result of custom or trade usage. (The statutory implied terms are referred to as 'statutory rights' in the consumer context because they cannot be excluded or restricted (**Consumer Rights Act (CRA) 2015**; see also Chapter 6).)

- A breach of contract will occur where, without lawful excuse (e.g. **frustration**; see Chapter 8), a party either fails or refuses to perform a performance obligation imposed upon it under the terms of the contract or performs that obligation defectively, in the sense of failing to meet the required standard of performance.

- Every breach of contract will give rise to a right to claim damages. However, unless the breach constitutes a **repudiatory breach**, the contract will remain in force. If the breach is repudiatory, the non-breaching party will have the option either to accept the breach as terminating the contract (in which case both parties' future obligations will be discharged) or to affirm the contract (in which event the contract remains in force for both parties).

- Breaches of certain statutory rights (relating to goods and services) in the consumer context under the **CRA 2015** give rise to a special extended range of remedies which are not limited to the right to reject, e.g. the right to repair or replacement of non-conforming goods or digital content, the right to a price reduction, and the right to repeat performance of a defective service. These rights are set out in the **CRA 2015**.

- Breaches of certain types of terms (**conditions**) are, in the main, repudiatory breaches and breaches of **innominate terms** will be repudiatory breaches if the effects of the breach are serious. However, the process of identifying conditions and innominate terms is uncertain and there are risks for the non-breaching party in deciding to treat a breach as repudiatory as this may constitute wrongful repudiation.

- The repudiatory breach may be an **anticipatory breach**, i.e. breach occurs before the time for performance because, for example, one party indicates that they will not be performing. The innocent party has the usual election to terminate, in which event they need not wait until the date for performance before claiming damages, or to **affirm**. There are risks in affirming but it may be possible to continue with performance and claim the contract price.

5.1 Introduction

This chapter examines how we identify the contractual obligations assumed by the parties in their contract, distinguishing terms (promises) and representations (non-promissory inducements to contract) and identifying both express and implied terms. It also looks at how we identify broken promises as a prelude to considering the remedies for breach of contract and whether it is possible to opt not to continue to perform further contractual obligations following the other party's breach. ↵

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Think like an examiner

There are a number of possible questions that an examiner can ask and this topic can be divided into a number of sub-areas of law, any one of which could feature as the focus of a question. However, central to this broader topic is a knowledge of the distinction between terms and representations, not least because knowledge of this is required to answer problem questions concerning misrepresentations (see Chapter 9), implied terms, and identification and the consequences of repudiatory breach (since these matters are important for future studies in commercial law). Problem questions may combine identification of terms (including implied) and the basic remedies for breach of those terms—plus the possible inclusion of remedies in the event of anticipatory repudiatory breach. It is more likely, since the **CRA 2015** and given time constraints, that examiners will focus problem questions in contract law on commercial scenarios leaving the detail of the consumer provisions for subsequent modules.

Essay questions are more likely to focus on the circumstances in which the courts will imply terms (and this relationship with contractual construction) or a critique of the circumstances justifying the option to terminate or affirm for breach.

5.2 Terms

Practical example

During negotiations between Alex and Becky for the purchase of Alex's bicycle shop, Alex states that there are 55 bicycles in stock which are to be included in the sale contract. He adds that Becky need not count them as he guarantees that the number is correct. Becky states that she is not interested in purchasing the shop business unless the annual turnover is at least £75,000 per annum and Alex assures her that it has been in excess of that figure for each of the preceding three years. She asks if she can live in the premises above the shop and Alex tells her that that will not be a problem. In fact, the written purchase contract, which they complete a month later, contains a provision limiting the

use of the premises above the shop to a stockroom and expressly prohibiting their use for residential purposes. In addition, although it was not discussed and there is no provision in the contract to this effect, Becky assumed that the premises came with a parking space.

Becky has now discovered that there are only 35 bicycles in stock, the turnover has been no more than £55,000 per annum in the preceding three years, she cannot live in the premises above the shop, and there is no parking space.

5.2.1 Topic 1: Has a statement made in the pre-contractual negotiations become a term of the contract?

This involves distinguishing statements which constitute binding promises (terms) from representations (inducements to contract). (There is a third type of pre-contractual statement—the mere puff—but this is an extravagant advertising gimmick which is not intended to have any legal consequences.)

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Why make this distinction at all?

Binding promises and representations which are broken or false give rise to legal remedies but they are very different remedies. The differences are highlighted in Table 5.1.

Table 5.1 The significance of the distinction between terms and representations in the context of commercial contract

Statement	If Broken/False?	Right to Claim Damages	Basic Aim of Damages	Remoteness (Recovery for Losses)
Term—binding promise	Remedies for breach of contract: damages election to terminate or affirm if repudiatory breach.	Right to claim damages for breach on proof of breach.	Contractual damages seek to put the claimant in the position the claimant would have been in had the contract been properly performed (shoots forwards to compensate for lost expectation—discussed in Chapter 7).	Recovery of all losses which were within the parties' reasonable contemplations at the time they made the contract as likely to be incurred in the event of breach.
Representation—false statement inducing making of contract	Remedies for misrepresentation: rescission (avoid contract) damages for misrepresentation.	Damages can generally only be claimed if the statement- maker was fraudulent or negligent.	Damages for misrepresentation seek to restore the claimant to the position they were in before the misrepresentation was made (restores the status quo through the recovery of wasted expenditure).	**Remoteness** is likely to allow recovery of all direct losses regardless of foreseeability (fraud and **s. 2(1) Misrepresentation Act 1967**).

Therefore, the right to claim damages and the measure of those damages (including recovery of consequential losses) will be quite different in a claim for breach of contract (term) and misrepresentation. Prior to the mid-1960s, and recognition of the ability to recover damages for negligent misstatements, this distinction was vital since damages could be recovered only if the untrue statement was either a term or the statement-maker made the statement fraudulently (and fraud is difficult to establish). This position sometimes led to statements being interpreted as terms despite the fact that they did not appear to be binding promises of their truth.

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How to distinguish a term and a representation?

The distinction is based on the intention of the parties (objectively assessed). In other words, did the parties intend the statement to be a *binding promise*? If yes, the statement is a term. If no, it may be a representation inducing the contract rather than a binding promise that it is true. The courts have developed guidelines to assist in making the distinction (see Table 5.2).

Table 5.2 Making the distinction between terms and representations

Term	***Accepting responsibility*** for the truth of statement (guaranteeing it is true): it is likely to be a term, ***Schawel v Reade*** *(1913)*—no need to carry out inspection of horse.	**Importance attached test**. The person to whom the statement was made: • considered the statement to be so important that he would not otherwise have contracted; *and*	***Statement made by person with special knowledge of subject matter (professional or expert).*** More likely to be a term: ***Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*** *(1965)*—statement by car dealers as to a car's mileage.
		• he made that importance clear to the statement-maker prior to that statement being made. ***Bannerman v White*** *(1861)*: would not purchase if hops treated with sulphur. Told they had not been.	Depending on the precise facts, such statements might also be 'collateral warranties'—**promise that the 'expert forecast' was made with reasonable care and skill rather than a promise that the forecast was correct** (it will only be broken if there was no reasonable care and skill exercised): ***Esso Petroleum Co. Ltd v Mardon*** *(1976)*—statement by expert as to likely throughput of petrol station.
Representation	**Written contract makes no mention of earlier oral statement. The assumption is that it was not intended to be included, i.e. not intended to be a term of the contract. However, it is possible to rebut this using the other guidelines, e.g. statement made by an expert during negotiations.**	**Asking the other party to check the reliability of the statement or to verify it, *Ecay v Godfrey*** *(1947)*—suggesting purchaser has independent survey.	**Statement-maker has no special knowledge of the subject matter but relies on (incorrect) official document, *Oscar Chess Ltd v Williams (*** *1957)*—sale of car to motor dealers. Statement that was 1948 model (relying on registration book). In fact, it was 1939 model. Not a term so no remedy in damages at this time.

Revision tip

The law in this area is complicated by the fact that there are two types of promises that can be recognized as terms:

(i) **a promise that guarantees a result**, e.g. A promises to pay B or A promises to deliver goods to B;

(ii) **a promise that reasonable care and skill has been, or will be, exercised**. This type of promise does not involve a guarantee of result and was sometimes utilized, prior to the mid/late 1960s, to avoid the non-availability of damages for non-fraudulent misrepresentation. The courts found that the statement-maker had made a promise, perhaps in addition to a representation, to exercise reasonable care and skill. If reasonable care and skill have not been exercised, that promise will be broken and damages for breach of promise can be awarded, despite the fact that there is no guarantee of result being made by that statement-maker. (These promises are known as collateral warranties.)

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Guidelines

Practical example

Is there a claim for breach of contract (breach of one or more terms)?

(i) Fifty-five bicycles in stock and Alex takes responsibility for the truth of this statement by telling Becky that she need not count them as he guarantees the number is correct (***Schawel v Reade***): probably a term—a binding promise that the statement is true. It is false so this is a breach.

(ii) Importance attached test applies to Alex's statement about the turnover of the business since Becky had made the importance of this statement clear to Alex before he made it (***Bannerman v White***). This statement as to turnover is also probably a term so that there is a claim for breach of contract.

We will return to the other statements shortly.

5.2.2 Topic 2: Where the contract is in writing can we look outside the writing for terms of the contract?

What is the position if it is alleged that there is a contradictory oral statement made during negotiations?

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Practical example

During the negotiations Becky asked if she could live in the premises above the shop and Alex told her that would not be a problem. This contradicts the terms of the written purchase contract. The writing provides that the premises above the shop are to be used as a stockroom and expressly prohibits their use for residential purposes. Becky says she would not have signed that written contract but for the earlier oral statement. However, is that statement (i) a term and (ii) can it override the terms of the written contract?

Definition

The parol evidence rule states that **if the contract is written** then the writing will constitute the whole contract and the parties cannot adduce extrinsic evidence to add to, vary, or contradict that writing.

However, it is relatively straightforward to avoid this 'rule' since it does not apply to exclude the implication of terms and, in the absence of an **entire agreement clause**, it does not apply if oral terms also exist since the contract is not then a wholly 'written' contract. (The 'rule' is circular.)

If there is an oral statement and, on the importance attached test, it is classified as a term, then this 'term' may override inconsistent terms of the written contract

Couchman v Hill (1947)

An oral statement that the heifer was 'unserved' overrode a written exemption clause in the auctioneer's catalogue stating that the auctioneer was not responsible for any description of a lot.

City and Westminster Properties (1934) Ltd v Mudd (1959)

FACTS: The written new lease of a lock-up shop which the tenant was asked to sign contained a prohibition on using the premises 'for lodging, dwelling or sleeping'. The tenant was told that if he signed the lease, then no objection would be made if he continued to live in the shop. He signed. The landlord later claimed that the tenant was in breach of covenant by living in the shop.

HELD: The tenant had only signed the lease because of the oral promise and this term overrode the prohibition in the lease.

Practical example

The facts of ***City & Westminster*** bear a strong resemblance to the facts in the practical example concerning the contradictory oral promise that Becky could live in the premises above the shop. It follows that, in the absence of an entire agreement clause in the contract between Alex and Becky, the oral promise is a term of the contract and overrides the contradictory written prohibition.

J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd (1976) (CA)

FACTS: An oral assurance was given that containers would be shipped below deck. However, the written contract gave the carriers freedom to decide the method of transportation and exempted them from loss or damage to the goods.

HELD: The oral assurance overrode the written terms. The majority considered that this was because the oral assurance was a term of the contract which was partly written and partly oral. This oral term overrode the printed conditions. The minority judge, Lord Denning MR, considered that there were two contracts: a written contract to which the parol evidence rule applied and an oral collateral contract which prevailed. See also the collateral contract as a device to avoid privity issues: ***Shanklin Pier v Detel Products Ltd*** *(1951)* (see '4.2.3 Common law devices to avoid privity in the context of an intended third party beneficiary').

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Entire agreement clauses

In practice, the majority of contracts will contain an entire agreement clause. This states that all the terms of the parties' agreement are contained in the written document and there are no other terms. This usually prevents a party from alleging that there are separate oral terms: ***Inntrepreneur Pub Co. v East Crown Ltd***

(2000). Such clauses may also prevent a party from relying on a collateral oral or written contract although in ***MWB Business Exchange Centres Ltd v Rock Advertising Ltd*** *(2018)* Lord Sumption stated that such clauses would not prevent a truly independent collateral agreement with its own consideration from being enforceable. Similarly, an entire agreement clause will not generally prevent the implication of terms in appropriate cases: ***JN Hipwell & Son v Szurek*** *(2018)*.

5.2.3 Topic 3: Are there any implied terms?

Terms are implied by:

- **statute**—into contracts of certain types, sometimes irrespective of the wishes of the parties;
- custom or as a result of trade usage/business practice;
- **the courts**—either into all contracts of a particular type on the basis that the term is a necessary incident of that type of contract, or into the particular contract to give efficacy to the contract and reflect the parties' assumed intentions (as understood by the reasonable person).

Statutory implied terms

Certain terms are implied, often irrespective of the wishes of the parties into contracts of specific types in order to provide protection which the law considers necessary. In contract law you are most likely to encounter the types of contract in Table 5.3 which have statutory implied terms—Table 5.3 distinguishes contracts between businesses (B2B contracts) and contracts between a business and a consumer (B2C contracts).

Table 5.3 Types of sale and supply contracts

Type of Contract	Description	Example
Contract for the sale of goods (B2B)	**Section 2(1) Sale of Goods Act (SGA) 1979**: a contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.	Purchase stationery for a business (B2B).
Sales contract (B2C)	**Section 5 CRA 2015**: a contract whereby the trader transfers or agrees to transfer ownership of goods to the consumer and the consumer pays or agrees to pay the price.	Purchase of a newspaper, bottle of milk, a new sofa (B2C).
Contract for supply of services in B2B	**Section 12 Supply of Goods and Services Act (SGSA) 1982: this is a commercial contract under which the supplier agrees to carry out a service**.	Provide legal services, accountancy services.

Type of Contract	Description	Example
Contract to supply a service in B2C	**Section 48 CRA 2015**: this is a consumer contract by which a trader supplies a service to a consumer.	Providing window cleaning or gardening service.
Mixed contracts: services and goods (work and materials)	There are two elements to such a contract: the services or work element and the transfer of goods (materials) that is incidental to carrying out that service: **B2B—s. 1 SGSA 1982**; **B2C—s. 1 CRA 2015**.	Installing central heating so that the property in the valves and radiators needs to be transferred; servicing a car involving the labour of the mechanic and the new parts (goods) which are transferred in the process.
Contract for hire of goods	**B2B—s. 6 SGSA 1982**: a contract by which one person bails (hires) or agrees to bail goods to another. Under such a contract one party acquires possession of the other's goods (see also **B2C—s. 6 CRA 2015**).	Hiring equipment such as a carpet cleaner or a specialist drill.

Where it applies, the **CRA 2015** refers to all consumer contracts involving sales, hire, and transfer of goods as 'contracts to supply goods' (**s. 3(4) CRA 2015**).

p. 104 ↵ Focusing on goods contracts and service contracts, there are implied terms as set out in Tables 5.4 and 5.5 (B2B) and Tables 5.6 and 5.7 (B2C) imposed on the seller/supplier (B2B) or trader (B2C), which you must be familiar with.

Table 5.4 Sale of Goods Act 1979 (as amended): B2B sale of goods contract

Section 12—title	Implied term that the seller has a right to sell the goods or will have such right (in the case of an agreement to sell) when the property is to pass.
Section 13—sale by description	Contract for sale by description—there is an implied term that the goods will correspond with the description.
Section 14(2)—satisfactory quality	**Where the seller sells goods in the course of a business**—there is an implied term that the goods supplied are of satisfactory quality. **Section 14(2A)**: the goods meet the standard that a reasonable person would regard as satisfactory taking account of any description, the price, and all other relevant circumstances. **Section 14(2C**): this does not cover specific defects which might otherwise make the goods unsatisfactory where before the contract is made these were (i) specifically drawn to buyer's attention, or (ii) the buyer examines the goods and that examination ought to have revealed these defects.
Section 14(3)—fitness for particular purpose	Where the seller sells goods in the course of a business and the buyer expressly or by implication makes known to the seller any particular purpose for which the goods are required, there is an implied term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him or her to rely, on the skill or judgement of the seller.

Section 15—sale by sample	Where there is a sale by sample, there is an implied term that the bulk will correspond with the sample in quality—and if the sale is by sample and description (**s. 13(2)**), the bulk must correspond with both the sample and the description.

Table 5.5 Supply of Goods and Services Act 1982: B2B contract for supply of a service

Section 13—standard of service	**Where the supplier is acting in the course of a business**—there is an implied term that the supplier will carry out the service with reasonable care and skill.

Table 5.6 Consumer Rights Act 2015, Part 1 Chapter 2: B2C contracts to supply goods statutory rights

Section 9—satisfactory quality	**Every contract to supply goods is treated as including a term that the quality of the goods is satisfactory** (**s. 9(1)**). **Section 9(2)**: goods should meet the standard that a reasonable person would regard as satisfactory, taking account of any description, the price, and all other relevant circumstances (including any public statement by trader or producer). **Section 9(3)**: quality includes state and condition of the goods as well as, where appropriate, fitness for all usual purposes, appearance and finish, freedom from minor defects, safety, and durability are all aspects of quality. **Section 9(4)**: it does not cover anything making the goods unsatisfactory (i) which is specifically drawn to consumer's attention pre-contract, or (ii) where the consumer examined the goods pre-contract and which the examination ought to have revealed.
Section 10—fitness for particular purpose	**Where the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods, the contract is to be treated as including a term that the goods are reasonably fit for that purpose**—whether or not that is a purpose for which such goods are usually supplied, except where the circumstances show that the consumer does not rely, or that it is unreasonable for the consumer to rely, on the skill or judgement of the trader.
Section 11—goods to be as described	**Every contract to supply goods by description is to be treated as including a term that the goods will match the description.**
Section 13—goods to match a sample	Where the contract is to supply goods by reference to a sample that is seen or examined by the consumer before the contract is made, that **contract includes a term that the goods will match the sample** except to the extent of any differences brought to the consumer's attention pre-contract, and that the goods will be free from any defect making their quality unsatisfactory and that would not be apparent on a reasonable examination of the sample.
Section 17—trader's right to supply the goods	Every contract to supply goods is to be treated as including a term that the trader has the right to sell or transfer the goods at the time when ownership is to be transferred, or in the case of hire of goods the trader must have the right to transfer possession of the goods by way of hire at the beginning of the period of the hire.

Table 5.7 Consumer Rights Act 2015: B2C contract to supply a service to a consumer

Section 49—standard of service	Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.
Section 50—information about trader or service	**Every contract to supply a service is to be treated as including as a term anything that is said or written to the consumer by or on behalf of the trader about the trader or the service** if it is taken into account by the consumer when deciding to enter into the contract or if it is taken into account by the consumer when making any decision after entering into the contract.

There are similar obligations relating to the 'goods' or 'materials' for B2B contracts in both (i) mixed
p. 105 contracts for work and materials (**ss. 2–5 SGSA 1982**) and (ii) hire (**ss. 7–10 SGSA 1982**). ↵

p. 106 ## Customary implied terms

Terms may be implied on the basis of an *established* custom or usage of the relevant trade (***Hutton v Warren** (1836)*), unless such a term would be inconsistent with an express term of the contract. For an example of implication based on business practice, see ***British Crane Hire v Ipswich Plant Hire** (1975)*.

Terms implied by the courts

Courts can imply terms in law or in fact.

Terms implied in law

Terms are implied in law as a matter of policy into all contracts of a particular type, e.g. employment contracts, as a 'necessary incident' of the type of contract.

Liverpool City Council v Irwin (1977) (HL)

FACTS: Tenants of a council tower block claimed that the council landlord was in breach of an implied obligation to repair and maintain the common parts of the building, i.e. to ensure the lifts and lighting worked and that the rubbish chutes were not blocked. There was nothing stated expressly on this matter in the lease.

HELD: The nature of the contract required an implied term, but it was not a guarantee obligation only an obligation to use reasonable care to keep the common parts in reasonable repair and use. The council was not in breach of this (qualified) implied contractual obligation.

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Terms implied in fact

Terms are implied in fact into the particular contract as a 'one-off' on the basis of the unexpressed intention (objectively assessed) of the parties. The courts are cautious about implying terms in fact into contracts so as not to rewrite the parties' contract (and in ***Bou-Simon v BGC Brokers LP*** *(2018)* the Court of Appeal (CA) warned of the dangers of hindsight in this process). Thus the courts may restrict the implication of terms in fact to terms needed as a matter of 'necessity' to make the contract workable.

In ***Attorney General of Belize v Belize Telecom Ltd*** *(2009)* Lord Hoffmann stated that sometimes a process of construction would reveal that the omission of an express term was deliberate, and the court should accept that conclusion and let the loss lie where it falls. Lord Hoffmann also linked the implication of terms to the construction (interpretation) of the contract. However, in ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd*** *(2015)* Lord Neuberger (with whom Lords Sumption and Hodge agreed) stated that Lord Hoffmann's 'observations should … be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms'. Thus the courts will revert to previous tests and it is particularly noteworthy that Lord Neuberger regarded the 'business necessity and obviousness' tests as alternatives (see also ***Duval v 11–13 Randolph Crescent Ltd*** *(2020)* where such an approach was echoed).

Implication of terms in fact usually recognizes terms which are 'necessary' and therefore must already exist in order to render the contract effective and workable, as the parties must have intended in accordance with the rest of its terms (***Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc., The Reborn*** *(2009)*). However, it seems that the test is not one of absolute necessity (e.g. as in ***Equitable Life Assurance Society v Hyman*** *(2002)* and the need to avoid frustration of the parties' reasonable expectations) and sometimes the courts have used an alternative test of whether, if an 'officious bystander' had suggested a particular term at the time the contract was being negotiated, the parties would have agreed to that term as a matter of course (***Shirlaw v Southern Foundries*** *(1939)*). The scope of the potential implied term is also relevant

p. 108 to whether or not it is obvious: see ***Yoo Design Services Ltd v Iliv Realty PTE Ltd*** *(2021)*. ↵

The Moorcock (1889) (CA)

FACTS: The Ds had contracted to allow the Ps to load and unload at the Ds' wharf on the River Thames. It was known to both parties that at low tide any vessel at the wharf would be grounded, but there was no express provision governing this in the contract. The Ps' ship moored at the wharf and was damaged because of the condition of the river bed.

HELD: A term had to be implied whereby the Ds warranted that they had taken reasonable care to see that the berth was safe. The Ds were in breach of this term.

Practical example

As the Alex/Becky contract says nothing about the parking space and it is not even possible to argue for an oral pre-contractual promise, there can be no express term to this effect. It follows that Becky's only argument would have to be that there was an implied term that the property came with a parking space. This is not a situation where statute implies such a term; will the courts imply it?

Should all contracts for the sale of business premises necessarily contain the provision of a parking space? If not, then the implication will not be made in law.

Should this particular contract be interpreted as involving such a promise in order to make the contract work? It is far from clear that this would have been the parties' intentions. It might have been Becky's desire but this is not the same thing. A parking space is not necessary in order to make this contract workable. There can be no implied term in fact.

Revision tip

Arguments based on implied terms in fact are difficult to spot precisely because there is often nothing explicit. Consider the decision in ***Shell UK Ltd v Lostock Garage Ltd*** *(1976)*.

Shell had subsidized two of their other tied garages in the neighbourhood, but not the D's. When sued for breaking the tie (obtaining supplies of petrol elsewhere), the D alleged that the agreement was subject to an implied obligation placed upon Shell not to discriminate abnormally against the D in favour of competing and neighbouring garages so as to render the D's petrol uneconomic.

The majority of the CA refused to imply the term on the basis that it was not necessary and Shell certainly would not have considered that it was needed to make the agreement work.

Try to use this analogy when checking your problem case facts. The other difficulty with terms implied in fact (***Shell v Lostock***) is being able to formulate the desired term with sufficient precision to render it workable, even if it appears 'necessary'.

5.3 Breach

5.3.1 Topic 4: Is there a breach of contract? If so, what are the consequences for the parties? Is there a repudiatory breach?

Key point

A breach of contract occurs where, without lawful excuse (e.g. frustration, Chapter 8), **a party either (i) fails or refuses to perform a performance obligation** imposed upon it under the terms of the contract, **or (ii) performs that obligation defectively, in the sense of failing to meet the required standard of performance**.

To determine (ii) it is necessary to identify the nature of the performance obligation imposed. There are **two types of performance obligations in contracts**, which are explained in Table 5.8.

Table 5.8 Performance obligations: strict and qualified

Strict contractual obligation	**Absolute**	Breach occurs (subject only to *de minimis*—minute discrepancies) where the obligation is not completely and precisely performed in accordance with its terms.	Examples: obligation to deliver by particular date; **s. 14(2) SGA 1979**—B2B goods to be of satisfactory quality and all of the statutory rights relating to goods in the **CRA 2015, Part 1 Chapter 2**.
Qualified contractual obligation	**Duty to exercise reasonable care and skill**	Breach occurs only where reasonable care and skill are not exercised.	Examples: contract for surgery; **s. 13 SGSA 1982** and **s. 49 CRA 2015**—performance of a service; ***Liverpool City Council v Irwin***.

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Performance obligations

For example, a surgeon is contracted to operate and provide breast implants. What contractual obligations do you think they would owe?

Revision tip

First determine the type of contract and consider the statutory implied terms.

What are the consequences of breach?

(i) Subject only to the operation of an effective exemption or limitation clause excluding or limiting this right (see Chapter 6), on proof of breach there is an automatic right to claim damages for breach (compensation for losses caused by that breach). The failure to perform a primary (or performance) obligation under the contract automatically gives rise to a secondary obligation to pay damages (or to pay the contract price).

(ii) However, unless the breach is regarded as a repudiatory breach, the contract will continue in force and both parties must continue to perform their obligations under it.

(iii) If the breach is repudiatory then, in addition to the right to claim damages for loss suffered, **the innocent party has a choice or election** to either (i) accept the repudiatory breach as terminating the contract (so discharging all future obligations under the contract), or (ii) affirm the contract despite that repudiatory breach so that both parties must continue with future performance (and see Table 5.9 for the correct terminology to use in relation to repudiatory breach).

Table 5.9 Avoid confusing your terminology

Discharge of a contract	Contract is validly formed but some event such as repudiatory breach or frustration brings future performance of the contractual obligations to an end. Performance obligations in this contract stop dead on discharge but the contract does exist.	The contract itself and its terms remain valid, e.g. exemption clauses and agreed damages clauses.
Contract not validly formed—void (e.g. for uncertainty) or voidable (and rescinded/set aside), e.g. for duress, undue influence, or misrepresentation	The contract is treated as if it never existed. It is wiped from existence.	The contract and its terms do not exist and cannot be relied upon for any purpose.

Don’t fall into the trap

If the innocent party elects to treat the contract as terminated, it is only the *future* obligations which are discharged. The contract itself survives and its terms (such as any exemption clauses or **agreed damages clauses**) may be relevant for the purpose of assessing remedies.

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Recognizing a repudiatory breach: The classification of terms

The most likely focus of your examiner’s attention will probably be reserved for the type of term broken and whether the breach of that term constitutes a repudiatory breach. The types of terms and whether their

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breach is repudiatory is explained in Table 5.10. ↵

Table 5.10 Summary of types of terms

Condition	Important term which 'goes to the root' of the contract.	Breach of condition is a repudiatory breach so that there is always the option to terminate (repudiate) the contract or affirm.	***Poussard v Spiers*** *(1876)*: obligation of lead singer to perform at first performance went to the root of the contract and its breach amounted to a breach of condition.
Innominate term	It is difficult to define an innominate term other than in terms of its effect but it would seem likely that a term would be defined as innominate where a range of possible breaches could occur, some of which may have serious consequences and some only minor. In ***Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd (The Arctic)*** *(2019)* the CA, in the context of a charterparty, held that, unless it is clear that a term is intended to be a condition (or indeed a **warranty**), it would be treated as an innominate term if the consequences of breach could be trivial or very serious.	May or may not be repudiatory depending on how serious the consequences of the breach turn out to be. Breach will be repudiatory if the breach deprives the innocent party 'of substantially the whole benefit which it was intended he should obtain from the contract'.	***Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd*** *(1962)*: seaworthiness obligation could be broken in a number of different ways not all of which would be serious. Here not serious as after repairs there were still 17 of original 24 months of charter left. ***Cehave NV v Bremer Handelsgesellschaft GmbH, The Hansa Nord*** *(1976)*: shipment of citrus pulp pellets for animal feed to be made in 'good condition'. Innominate term and effects of breach not serious since original buyer acquired the cargo and used for animal feed.
Warranty	**Less important term whose breach can be adequately compensated with a payment of damages** and is not likely to be fatal to the contractual performance as a whole.		***Bettini v Gye*** *(1876)*: obligation to attend rehearsals for six days. Failed to attend the first three. The rehearsal obligation did not go to the root of the contract. It was only a warranty giving rise to a claim in damages but not to the ability to terminate the contract.

Key point

If the term broken is either (i) a condition, or (ii) an innominate term and the effects of breach of that innominate term are serious, the breach will be repudiatory (giving rise to the option for the innocent party to terminate or affirm).

Looking for extra marks?

Where an oral statement has become a 'term' on the basis of the importance attached test (***Bannerman v White***, ***Couchman v Hill***) it will necessarily 'go to the root' of the contract and be classified as a condition.

Practical example

To return to the practical example, since the importance attached test applied to Alex's statement about the turnover of the business, the statement was not only a term but the fact that it is wrong would constitute a breach of condition, i.e. it would be a repudiatory breach giving rise to the option to terminate or affirm (in addition to the damages claim).

Difficulties with the identification of conditions in the B2B context

Statutory classification: s. 15A Sale of Goods Act 1979

Although the 'goods' obligations imposed on commercial sellers by **ss. 13–15 SGA 1979** (as amended) are classified as 'conditions' in those statutory provisions, a breach may not be treated as a breach of condition and may instead be treated as a breach of warranty.

Section 15A SGA 1979 (as amended)

Where the buyer would have the right to reject (terminate) for breach of a **s. 13, 14**, or **15** condition but the actual breach is so slight that it would be unreasonable for him or her to reject, the breach is not to be treated as a breach of condition but **may be treated as a breach of warranty** (i.e. *no option to terminate and limited to damages only*).

There are equivalent provisions, modifying remedies, in **ss. 5A** and **10A SGSA 1982**.

p. 112 **Party classification of a term as a condition may not be effective**

L Schuler AG v Wickman Machine Tool Sales (1974) (HL)

Use of the word 'condition' is not conclusive.

FACTS: It was a condition of an exclusive distribution contract (over a period of four and a half years) that the distributor 'shall send its representative to visit (the six largest UK motor manufacturers) at least once in every week' to solicit orders. The distributor failed to make a number of these visits and the agreement was terminated.

HELD: This term was not a condition in the sense that a single breach, however trivial, would entitle the innocent party to terminate the contract. It followed that the distribution contract had been wrongfully terminated.

These difficulties in being sure that the broken term is a condition can lead to uncertainties in terms of reacting to a breach and whether the innocent party should be treating the breach as repudiatory. When coupled with the inherent uncertainties of the innominate term and its 'wait and see' approach to a remedy, the difficulties for the innocent party are compounded.

5.3.2 Breaches of statutory rights relating to goods: CRA 2015

Termination (or the right to reject the goods in the context of the sale and supply of goods) may no longer be the main remedy in the context of breaches of statutory rights (see Table 5.6) in B2C contracts. Instead, a range of remedies may be available to the consumer depending upon the circumstances (**ss. 19–24 CRA 2015**: short-term right to reject, partial right to reject, right to repair or replacement, right to a price reduction or a refund in the case of a contract relating to digital content). There are also additional possible remedies for

breaches of **ss. 49** and **50 CRA 2015** (see Table 5.7) (services contract), e.g. right to repeat performance and the right to a price reduction (**ss. 54**, **55**, and **56**). Be guided by your syllabus. These statutory provisions relating to remedies may be included in the syllabus of a consumer or commercial law module.

5.3.3 Topic 5: What are the options when an anticipatory repudiatory breach occurs?

Definition

An **anticipatory repudiatory breach** occurs when, after the contract was entered into but before the time fixed for performance, one party breaches by renouncing (rejecting) their contractual obligations.

Practical example

Anticipatory repudiatory breach

By a contract entered into on 1 April, Alex employs Becky as a consultant to undertake an appraisal of his staff. This work is due to commence on 1 June. However, on 1 May Alex informs Becky that he has changed his mind and no longer needs her to perform this work. What options are available to Becky who wanted to include this prestigious assignment on her CV?

p. 113 ↵ As this involves renouncing the contractual obligations, it is a repudiatory breach on 1 May. However, it is an *anticipatory* repudiatory breach since performance was not due to commence under the contract until 1 June.

Since it is a repudiatory breach there is the usual election. Becky can elect to:

(i) Terminate the contract immediately and claim damages at the date of termination (1 May) rather than waiting until the date fixed for performance (1 June): ***Hochster v De La Tour*** *(1853)* (and ***YJB Port Ltd v M&A Pharmachem Ltd*** *(2021)* provides a reminder of the need to demonstrate appropriate loss caused by the breach). However, Becky will need to mitigate her loss from 1 May by looking for another assignment.

(ii) **Alternatively, Becky could decide to affirm on 1 May and claim the performance due on 1 June.** In effect, she would be ignoring his statement and giving Alex a second chance to perform. If she does this and Alex still does not want her services on 1 June, Becky can accept this actual (as opposed to

anticipatory) repudiatory breach despite her earlier affirmation. However, if Becky affirms on 1 May for the anticipatory breach, she cannot claim damages until 1 June (and then only if Alex is in actual breach) and in the meantime runs the risk that she will lose this right of action.

What could happen in the intervening period?

(i) Becky could (perhaps unwittingly) commit a breach of contract and could not then argue that the earlier anticipatory breach excused her from her obligation to perform under the contract since she had decided to keep the contract alive for all purposes (***Fercometal SARL v Mediterranean Shipping Co. SA, The Simona*** *(1989)*).

(ii) Alex could rely upon supervening frustration in the period between affirmation (1 May) and the date fixed for performance (1 June), e.g. if personnel appraisals are declared illegal. Becky would then lose her right to remedies for the initial anticipatory breach (***Avery v Bowden*** *(1855)*).

However, is it always open to Becky to insist on ignoring Alex's anticipatory breach and continue with performance of the contract from 1 June on the basis that she wants to be able to put this assignment on her CV? Could she perform and then claim the contract fee?

The answer turns on the controversial decision in ***White and Carter (Councils) Ltd v McGregor*** which suggests that in principle she normally can.

White and Carter (Councils) Ltd v McGregor (1962) (HL)

FACTS: The Ps were to advertise the D's business on litterbins for three years. Before the date when contractual performance was to begin, the D repudiated and asked the Ps to cancel the agreement. The Ps refused and went ahead and performed their side of the agreement for the three-year period. They made no attempt to minimize their loss by finding other advertisers to take the D's place. They then sued the D for the contract price (i.e. an agreed sum rather than damages).

HELD (3:2): The Ps could continue and claim the contract price. They were not bound to accept the repudiation and sue for damages.

p. 115 ↵ ↵ However, in practice there are significant limitations (Lord Reid in ***White and Carter v McGregor***) which may prevent Becky from pursuing this option. These limitations are explained in Table 5.11.

Table 5.11 Lord Reid's limitations on the operation of *White and Carter*

Limitation on the ability to affirm rather than terminating and claiming damages	A party cannot affirm if it has no legitimate interest in performing the contract rather than claiming damages. Burden on guilty party to show this (i.e. to establish that the innocent party cannot affirm). The test is that affirmation 'is wholly unreasonable'. ***Clea Shipping Corp. v Bulk Oil International Ltd, The Alaskan Trader*** *(1984)*: charterers indicated the chartered vessel would not be required. However, the owners went ahead with expensive repairs and maintained a crew ready to sail. Held that the owners had acted wholly unreasonably. ***The Puerto Buitrago*** *(1976)*: following a repudiation by the charterers, the owners wanted to claim the charter hire (for the remaining term while the vessel was idle because repairs would cost more than the value of the vessel) rather than damages but damages would be an adequate remedy. The owners had no legitimate interest in continuing with the charter.
	But in practical terms it must be an exceptional situation where an innocent party would be denied the option to affirm, i.e. damages would be adequate and keeping the contract operating 'would be unreasonable', ***Ocean Marine Navigation Ltd v Koch Carbon Inc., The Dynamic*** *(2003)*. In ***MSC Mediterranean Shipping Co. SA v Cottonex Anstalt*** *(2016)* the CA did not react warmly to a suggestion that this limitation was based on a concept of 'good faith' (see Chapter 2).
Limitation on the ability to perform and claim the contract price	**A party cannot perform and claim the price if it cannot continue performance without the cooperation (active or passive) of the guilty party: *Hounslow LBC v Twickenham Garden Developments Ltd*** *(1971)*.

Isabella Shipowner SA v Shagang Shipping Co. Ltd, The Aquafaith (2012)

This case is an example of a ***White and Carter*** application despite these limitations.

FACTS: Charterers stated that they would redeliver the vessel early in anticipatory breach. The owners refused this early redelivery, thereby affirming, so that the charterers would be liable for the charter hire for the minimum term. The charterers claimed (i) that the owners could not affirm as they had no legitimate interest in performing rather than claiming damages and (ii) they could not claim the hire since the charter involved the cooperation of the charterer.

HELD:

(i) Affirmation would not be prevented on the basis that there was no legitimate interest in keeping the contract alive simply because damages would be an available remedy on the facts. Affirmation had to be 'beyond all reason' or 'perverse' before there was no legitimate interest in performing. That involved considering whether there was any benefit to the owners, however small, as compared to the loss to the charterers; and

(ii) The owners did not need the cooperation of the charterers to keep the ship available to them. Earning the hire was not dependent on any performance by the charterers of their obligations.

Practical example

Does Becky have a legitimate interest in affirming, i.e. in performing rather than claiming damages? She wanted to use the work to enhance her personal profile and there is nothing 'wholly unreasonable' or 'perverse' in wanting to do that. Generally, the courts will look to allow affirmation as an option. However, Becky could not perform and claim the contract price without access to Alex's premises and employees—and hence his cooperation (***Hounslow LBC v Twickenham Garden Developments Ltd***).

Key debates

1. Implication of terms by the courts

This is the most likely essay-style question on terms, particularly in the light of Lord Hoffmann's explanation of the basis for the implication of terms in fact in ***Attorney General of Belize v Belize Telecom Ltd*** and the subsequent restatement of the traditional position in ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co. (Jersey) Ltd*** *(2015)*:

- Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' (2004) 63 CLJ 384.
- McLauchlan, 'Construction and Implication: In Defence of *Belize Telecom*' [2014] LMCLQ 203.
- Peel, 'Terms Implied in Fact' (2016) 132 LQR 531.

In addition, there is some debate about the basis for terms implied in law:

- ***Crossley v Faithful & Gould Holdings*** *(2004)* (see also ***James-Bowen v Commissioner of Police of the Metropolis*** *(2018)*).
- Peden, 'Policy Concerns behind Implication of Terms in Law' (2001) 117 LQR 459.

2. Circumstances in which termination for breach is, or should be, available

p. 116 ↵ In particular, there has been some debate about opportunism and motives, so-called 'good' and 'bad' reasons justifying withdrawal from a contract:

- Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83.
- Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 LQR 117.

Another favourite debate for an essay concerns the dangers of wrongful repudiation as in ***Reardon-Smith Line Ltd v Hansen-Tangen*** *(1976)*, ***Hong Kong Fir***, and ***The Hansa Nord***, i.e. the inherent uncertainties and choices facing the innocent party if it is far from clear whether the term broken is a breach of condition, or the need to 'wait and see' the effects of breach if it is an innominate term and to make a judgement as to their seriousness.

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Key cases

Case	Facts	Principle
Bannerman v White	D wanted to buy hops and said that he did not want to purchase from P if the hops had been treated with sulphur. P, seller, then confirmed (incorrectly) that the hops had not been treated with sulphur. Held: the statement was so important to the purchaser that it amounted to a contractual promise (term) by the seller.	Importance attached to the statement test indicates that the statement is a term. It is not merely that the statement is important to the recipient but that he makes this importance clear to the statement-maker ahead of any statement being made.
Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd *(CA)*	P wanted Ds, car dealers, to acquire a 'well-vetted Bentley'. The dealers confirmed that the particular car had travelled only 20,000 miles since being fitted with a new engine and gearbox. In fact, the statement as to mileage was untrue. The statement as to mileage amounted to a warranty (term).	The statement as to mileage was made by a person professing to have specialist knowledge and therefore was a term or collateral warranty (promising that reasonable care and skill had been taken).
J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd *(CA)*	An oral assurance was given that containers would be shipped below deck. However, the written contract gave the carriers freedom to decide the method of transportation and exempted them from loss or damage to the goods. The goods were damaged and the carriers sought to rely on the writing. The majority of CA held that oral assurance was a term of the contract which was partly written and partly oral. This oral term overrode the written conditions.	An oral promise can be so important to the decision to enter the contract that it overrides conflicting written terms.
Liverpool City Council v Irwin *(HL)*	Tenants of a Council tower block claimed that the Council landlord was in breach of an implied obligation to repair and maintain the common parts of the building, i.e. to ensure that the lifts and lighting worked and that	Implication of term in law as a necessary incident of the type of contract. However, the implied term may be a qualified

Case	Facts	Principle
	the rubbish chutes were not blocked. There was nothing stated expressly on this matter in the lease. HL held that the nature of the contract required an implied term but it was not a guarantee obligation, only an obligation to use reasonable care to keep the common parts in reasonable repair and use. The Council was not in breach of this (qualified) implied contractual obligation.	contractual obligation (reasonable care and skill) rather than a strict (guarantee) obligation.
L Schuler AG v Wickman Machine Tool Sales *(HL)*	It was a 'condition' of an exclusive distribution contract (over a period of four and a half years) that the distributor 'shall send its representative to visit [the six largest UK motor manufacturers] at least once in every week' to solicit orders. The distributor failed to make a number of these visits and the agreement was terminated. The majority of HL held that this term was not a condition in the sense that a single breach, however trivial, would entitle the innocent party to terminate the contract.	The fact that a term is called a 'condition' is not conclusive.
Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd *(CA)*	Breach of a 24-month charter as the ship was not seaworthy on departure. It broke down and needed repairs. The charterers terminated but the ship was returned to seaworthy condition when there were still 17 months of the original 24-month term remaining. CA held that the term broken was not a condition but an innominate term and since the effects of the breach were not sufficiently serious to justify termination, the charterers had no right to terminate when they did.	Breach of an innominate term may or may not constitute a repudiatory breach depending on whether the effects of the breach were sufficiently serious to deprive the innocent party of substantially the whole benefit they were intended to get under the contract.
White and Carter (Councils) Ltd v McGregor *(HL)*	Ps were to advertise D's business on litterbins for three years. Before the date when contractual performance was to begin, D repudiated and asked Ps to cancel the agreement. Ps refused and went ahead and performed their side of the agreement for the three-year period. They made no attempt to minimize their loss by finding other advertisers to take D's place. They then sued D for the contract price (i.e. an agreed sum rather than damages). HL (3:2) decided Ps could continue and claim the contract price. They were not bound to accept the repudiation and sue for damages.	Following anticipatory repudiatory breach, the innocent party may affirm (assuming legitimate interest in continuing to perform rather than terminating and claiming damages) and can (if able to do so without the other party's cooperation) continue to perform the contract and claim the contract price (as action in debt—no duty to mitigate).

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Exam questions

Problem question

Melhuish Motors Ltd sell luxury motor homes from its premises in Cardiff. Earlier this year, Barbara visited Melhuish Motors Ltd and noticed a second-hand motor home which had recently been imported from Canada. She wished to buy such a motor home for her motor home rental business. During discussions with Melhuish Motors Ltd, Barbara was (incorrectly) told that this particular motor home had only 'done 30,000 miles'. Barbara was concerned that the motor home might actually be too large for UK roads. However, her concerns were eased by a statement by Melhuish Motors Ltd that 'it is perfectly legal to drive it on UK roads … trust us!' This was incorrect—the motor home was too wide to be lawfully driven on UK roads. Barbara purchased the motor home and the written contract, which contained an entire agreement clause, made no mention of these statements. Two weeks later, the engine of the motor home exploded and it is beyond repair.

Barbara wishes to know of any contractual remedies she might have against Melhuish Motors Ltd.

Head to the Outline Answers *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-5-outline-answers-to-essay-questions?options=showName>* **section of the online resources for help with this question.**

Essay question

Critically discuss the situations in which a court might imply a term into a contract.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-5-outline-answers-to-essay-questions?options=showName>*
- Interactive key cases *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-5-interactive-key-cases?options=showName>*
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