

CHAPTER 6

CONTRACT: GENERAL PRINCIPLES

English law of contract is contained principally in case law. It is only during the present century that statutes have begun to play any significant part. Historically the law of contract has been built up by the judges as a coherent whole so that there exists a body of principles which apply generally to all contracts including building and engineering contracts. In this chapter the general principles are discussed under the headings: (1) the formation of a contract, (2) contracts which though validly formed may not be binding, and (3) the discharge of contracts. In later chapters there are considered some particular types of contract including building and engineering contracts. These particular contracts, in addition to the general principles set out in this chapter, have their own characteristics, and some are governed by individual statutes.

The law of contract is based on the mutual exchange of obligations, in that each side must contribute something to the agreement to make it binding. The only exception to this principle is a contract made by deed. Such contracts were formerly referred to as "under seal," but seals are now abolished¹ and have been replaced by the simpler requirement for signature in the presence of a witness. It may be that references to contracts under seal will continue for some time in view of their long history. A contract by deed binds its maker without need of any exchange of obligations. Contracts other than those made by deed are called simple contracts, whether made orally or in writing. Although the practice is not universal, the term "agreement" can be used to denote a mutual understanding between the parties, and the term "contract" for an agreement which is binding in law. In such terms there can be an agreement without a contract, but every contract must embody an agreement, except a contract by deed.

Parties to a contract are in general free to make any terms they choose, but certain limits may be placed upon them by the common law and by statute. For example, terms may be implied into a contract which will mitigate the severity of an agreement; or one party may have relief

¹ Law of Property (Miscellaneous Provisions) Act 1989.

against the other for a misrepresentation outside the terms of the contract itself. Apart from such limits, the function of the courts is to enforce contracts according to the terms agreed. However unjust the terms are, or however unjust they may become, the courts have no power to rewrite the terms of an agreement. Thus, if a contractor has contracted to carry out works at such prices that they are bound to make a loss, they must still carry out the works or pay damages for breach of contract.

FORMATION OF CONTRACT

If a simple contract is to be legally binding, there must be an offer from one party which is accepted by the other, and each party must contribute something to the bargain. The contribution is called consideration. If a contract exists, the courts will determine what its terms are, for instance, when part of the agreement is in writing and part oral, or when there are implied terms. These points are considered in order.

Offer and acceptance

An offer must consist of a definite promise to be bound on specified or ascertainable terms, and it may be made to a particular person or class of persons, or even the public at large (see Ch.5). The exhibition of goods for sale is not an offer but an invitation to make an offer. A shopkeeper may therefore accept or reject an offer from a customer to buy. They are not bound to sell the goods at the price shown. The same applies to an invitation to tender for the construction of building works. The invitation to tender, whether to the public or to an individual builder, is no more than an offer to negotiate. The contractor's tender constitutes an offer which the client may accept or not. Once accepted it forms a binding contract. This is so, despite any provisions as to subsequent execution of formal documents.² A proviso that the client is not bound to accept the lowest or any tender is generally unnecessary.

The offer and the acceptance may be in writing or oral, or may even be inferred from the parties' conduct. A person who gets into a taxi will be bound to pay for the service even though no words are spoken except the destination. If a particular method for communicating acceptance is prescribed, it must normally be adopted. However, an equally expeditious method may be sufficient. For example, if an offer requires acceptance by return of post, a fax is likely to be held sufficient. Email raises

² See ICE, cl.9.

presentation outside the terms of the contract. If the terms are agreed, the function of the courts is to enforce them. However, if the terms are not agreed, the courts have no power to rewrite them. Thus, if a contractor has contracted to carry out work and they are bound to make a loss, they must pay damages for breach of contract.

FORMATION OF CONTRACT

For a contract to be legally binding, there must be an offer accepted by the other, and each party must give consideration. The contribution is called consideration. The courts will determine what its terms are, whether the agreement is in writing and part oral, or entirely oral. These points are considered in order.

A definite promise to be bound on specified or unspecified terms may be made to a particular person or class of persons (see Ch.5). The exhibition of goods or services is an invitation to make an offer. A shopkeeper displays goods as an offer from a customer to buy. They are bound to accept the price shown. The same applies to an offer of building works. The invitation to a contractor or to an individual builder, is no more than an offer. The contractor's tender constitutes an offer, whether or not. Once accepted it forms a binding contract. The provisions as to subsequent execution of the contract are that the client is not bound to accept the offer if it is unnecessary.

The offer may be in writing or oral, or may even be made by conduct. A person who gets into a taxi will be bound to pay the fare even though no words are spoken except the driver's statement of the method for communicating acceptance is to be adopted. However, an equally expedient method may be adopted. For example, if an offer requires acceptance by a particular method, it is likely to be held sufficient. Email raises

particular issues which the courts have not yet settled, but there is no reason why parties should not expressly agree to accept email communications. When the post is used the rule is that the acceptance is effective and the contract made at the moment of posting. Silence cannot normally constitute acceptance. But there is an exception when goods are taken on a sale or return basis. There will be an implied acceptance if they are not returned within a reasonable time.

An acceptance must be unqualified. A conditional acceptance is, in law, a counter offer which may destroy the original offer so that it cannot be accepted later. The traditional form of acceptance "subject to contract" is not binding at all.

Essential terms

Frequently a contract will be concluded after a period of negotiation involving offers which are accepted in part, so that the applicable terms are gradually agreed. Particularly in the case of construction contracts, it is often found that the parties begin to perform the contract on the assumption there is, or will shortly be, a concluded agreement. Subsequently, the parties may contend that an important term has not been agreed and that there is, in consequence, no contract. The attitude of the courts is that a contract will be upheld if the parties have agreed upon the essential terms, such as the price, scope of works, commencement date and duration, etc. Minor omissions will not prevent a contract coming into existence. In a number of cases the TCC judges have upheld apparently binding contracts even though terms which might be considered important were not agreed. In *Drake & Scull v Higgs & Hill*,³ lengthy negotiation between the parties resulted in agreement of all matters except Drake & Scull's daywork rates. It was held that a contract came into existence despite this, on the basis that a term could be implied that the sub-contractor would be paid a reasonable sum. In *Mitsui Babcock Energy v John Brown Engineering*,⁴ negotiations led to the signing of a contract despite the failure to agree on a term covering performance tests and liquidated damages. The clause was struck out and noted as "to be discussed and agreed". It was held that a contract nevertheless came into existence on the basis that the parties had "made a coherent and workable contract". Failure to agree on one or more terms regarded as essential may prevent an apparent agreement from having legal effect. However in *RTS Flexible Systems Ltd v Molkerei Alois*

³ (1995) 11 Const. L.J. 214.

⁴ (1996) 51 Con. L.R. 129.

Muller GmbH,⁵ a dispute as to whether a contract had come into existence following a letter of intent, partial agreement of terms and substantial performance led to a decision of the High Court that a contract had been agreed, a decision of the Court of Appeal that it had not, and a decision of the Supreme Court that it had, albeit for different reasons. The Supreme Court decided that even if significant terms had not been agreed, an objective appraisal of the parties' words and conduct may lead to the conclusion that they did not intend the terms to be a pre-condition to the agreement becoming legally binding. In this case the parties had, by their conduct, waived a clause providing that the agreement would not become effective until each party had executed it.

Retrospective acceptance

Acceptance of a contract may have retrospective effect if this is the intention of the parties. In a case where a contractor was instructed to proceed and started work while the contract for the works was still under negotiation, it was held that the parties had intended such works to be governed by the contract as eventually made: *Trollope & Colls v Atomic Power Construction*.⁶ The judgment of Megaw J. included the following:

"Frequently, in large transactions a written contract is expressed to have retrospective effect, sometimes lengthy retrospective effect; and this in cases where the negotiations on some of the terms have continued up to almost, if not quite, the date of the signature of the contract. The parties have meanwhile been conducting their transactions with one another, it may be for many months, on the assumption that a contract would ultimately be agreed on lines known to both the parties, though with the final form of various constituent terms of the proposed contract still under discussion. The parties have assumed that when the contract is made—when all the terms have been agreed in their final form—the contract will apply retrospectively to the preceding transactions . . . I can see no reason why, if the parties so intend and agree, such a stipulation should be denied legal effect."

In some types of building contract (and many other commercial transactions) the principles of implied or retrospective acceptance need often to be applied to identify the legal basis of a contract which neither party has ever doubted was binding. A problem which frequently occurs is where the parties enter into correspondence as to the precise terms on which they are to contract. This happens often between main contractor and sub-contractor. The contractor places an "order" on their standard terms

⁵ [2010] B.L.R. 337.

⁶ [1963] 1 W.L.R. 333.

whether a contract had come into existence, a partial agreement of terms and substance of the High Court that a contract had been made. The Court of Appeal found in favour of the plaintiff, and a decision was made, albeit for different reasons. The court held that even if significant terms had not been agreed, the parties' words and conduct may lead to the inference that they intended the terms to be a pre-condition of a binding contract. In this case the parties had agreed to provide that the agreement would be binding if the other party had executed it.

have retrospective effect if this is the case where a contractor was instructed to execute a contract for the works while the parties had intended such works to be made: *Trollope & Colls v Atomic*. The judgment of Megaw J. included the following:

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and many other commercial transactions, retrospective acceptance need often to be a condition of a contract which neither party has made. A situation which frequently occurs is where there is no agreement as to the precise terms on which the contract is made, often between main contractor and subcontractor, and an "order" on their standard terms

and the sub-contractor "accepts" on their standard terms, which are inconsistent with the order. Correspondence follows in which some terms are agreed and others not. At some point the sub-contractor starts the work. The principles to be applied to such problems are that the last letter is deemed to be accepted if the recipient then starts or continues the work (or permits the other party to do so). But if the parties show by their continuing negotiation that they do not regard themselves as bound, there may be no contract. Equally, if the parties are not agreed as to some important term there will be no contract. In the absence of a binding contract, a party who has carried out work at the request of the other will be entitled to payment of a reasonable sum (see Ch.5).

Revocation

Revocation of an offer is effective only when it reaches the offeree. A promise to keep an offer open for a certain period does not prevent the offer from being revoked prematurely, unless the promise is itself a binding contract, such as an option to purchase shares. An agreement for the periodic supply of goods to order has the legal effect of a standing offer from the supplier which creates a binding contract each time goods are ordered. The offer may accordingly be revoked by the supplier except in respect of orders already placed. If there is no fixed period an unaccepted offer may lapse after a reasonable time. In some countries there exists a doctrine under which an offer may not be revoked once the offeree has relied on it, for example, through a main contractor tendering on the basis of sub-contract tenders. No such doctrine exists in English law, under which contracts are either binding or not and parties to would-be contracts seeking redress must bring their claims within other legal principles (see Ch.5).

Standard terms of business

Most construction work is undertaken through tendering based on one party's standard conditions of contract. Questions which arise regarding formation of the contract are often concerned with whether other documents (such as programmes or qualifying letters) have been incorporated, in addition to the standard terms. In other transactions, typified by sub-contract orders, wider questions arise when standard terms of business are used by both parties. These may be incorporated by reference or printed on the back of order forms or "acceptance" forms. Such terms may compete with each other, for example, each purporting to exclude the other; and there may be particularly onerous provisions hidden within such standard clauses.

The attitude of the courts to such problems has a long history, covering many types of transaction involving tickets, receipts and the like which contain or refer to standard conditions. The courts have evolved principles requiring that particularly onerous clauses should be brought fairly to the attention of the party adversely affected. This area of law is now fundamentally affected by the Unfair Contract Terms Act (see below), which refers to the question whether the "customer" knew or ought reasonably to have known about the terms being relied on. Where the Act does not apply the common law principles will still be effective, permitting the court to refuse to enforce onerous conditions. In a case decided before the Unfair Contract Terms Act,⁷ Lord Denning remarked that:

"Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

The notice principles were applied in the case of *Interfoto v Stiletto*,⁸ in which the defendant hired 47 transparencies from a lending library, the transaction being subject to printed conditions which required return within 14 days or a fee of £5 a day plus V.A.T. for each one retained. The defendant, who had not read the conditions, returned the transparencies four weeks later and was given a bill for £3783.50. Judgment was given for the plaintiff in the County Court, but the Court of Appeal held that the plaintiff had failed to show that the relevant clause had been brought fairly to the defendant's attention, and therefore substituted a reasonable charge of £3.50 per transparency per week. Dillon L.J. in giving judgment said:

"In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other party's attention to the printed conditions or they would not be part of the contract. It is, in my judgment, a logical development of the common law into modern conditions that it should be held . . . that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party. In the present case, nothing whatever was done by the plaintiffs to draw the defendant's attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties."

⁷ *Spurling v Bradshaw* [1956] 1 W.L.R. 461.

⁸ [1989] Q.B. 433.

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L.R. 461.

Battle of forms

Where each of the parties is trying to impose its terms on the other, the question of notice is unlikely to be relevant. This exchange of standard conditions is sometimes referred to as "the battle of the forms" and the principles which are applied here are simply those of offer and acceptance which, however, may be complicated by the conditions themselves.

The general principle was stated in *Butler Machine Tools Co. v Ex-cell-o Corp.*,⁹ where the plaintiff gave a quotation providing that orders were accepted only on terms of the quotation, which included a price variation clause. The defendant gave an order subject to their own terms and conditions, having no price variation clause, but having a tear-off acknowledgement for signature and return which accepted the order "on the terms and conditions thereon." The plaintiff signed and returned the acknowledgement but with a covering letter stating that delivery was to be "in accordance with our revised quotation." The Court of Appeal construed the acknowledgement as an acceptance which did not bring back the plaintiff's price variation clause. Lord Denning M.R. explained the law as follows:

"It will be found that in most cases where there is a "battle of the forms" there is a contract as soon as the last of the forms is sent and received without objection being taken to it . . . the difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions: and if they are not objected to by the other party, he may be taken to have agreed to them . . . in some cases the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back: and the buyer orders the goods purporting to accept the offer-on an order form with his own different terms and conditions on the back-then if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together."

A further matter of potential difficulty is provisions which are inconsistent with or repugnant to the remainder of the document. The leading case is *Glynn v Margetson*,¹⁰ which concerned the shipment of oranges from Malaga to Liverpool. The bill of lading provided for liberty to

⁹ [1979] 1 W.L.R. 401.

¹⁰ [1893] A.C. 351.

proceed to a variety of other ports for any purpose. The port of shipment was left blank and was filled up in writing. The ship deviated to another Spanish port with the result that, when the oranges were delivered to Liverpool, they were damaged. The case is authority on the question of a written clause prevailing over printed clauses. However, the House of Lords also dealt with the question of clauses inconsistent with the main purpose of the contract. Lord Halsbury said:

"It seems to me that in construing this document, which is a contract of carriage between the parties, one must in the first instance look at the whole of the instrument and not at one part of it only. Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract. The main purpose of the contract was to take on board at one port and to deliver to another port a perishable cargo."

The repugnancy principle is not to be applied lightly, but does provide authority for enforcing the main purpose of a contract where other provisions are inconsistent.

Consideration

Each party to a contract (other than one made by deed) must provide consideration if the contract is to be binding. The most common forms of consideration are payment of money, provision of goods, or performance of work. But it may also consist in any benefit accruing to one party or detriment to the other. For example, A may promise to release B from a debt if he will dig A's garden. The courts are not concerned with whether the bargain was a good one. If B's debt was £1,000 and the garden small, that is still good consideration.

There are, however, certain acts and promises which cannot constitute good consideration. Anything which has already been done is no consideration. If B voluntarily dug A's garden yesterday, today's promise of reward is not binding because B gives no fresh consideration to the bargain. Further, if a party promises to do nothing more than they are already bound to do they provide no consideration. If B is A's gardener, A's promise of additional reward is not binding.

The courts have, however, on many occasions shown a highly liberal attitude towards what may constitute consideration. In *Williams v Roffey Bros.*¹¹ the defendant, the main contractor, concerned that the plaintiff, a carpentry sub-contractor, might not be able to complete on time, orally

¹¹ [1991] 1 Q.B. 1.

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promised additional payments if the work was completed on time. The
Court of Appeal upheld the decision of the trial judge that this promise
was enforceable, the consideration being the benefit, or the avoidance of
detriment to the defendant. In any such case, the defendant may argue
that the plaintiff has done nothing more than he was already bound to do.
But if the sub-contractor agrees, for example, to accelerate (which he
may have no obligation to do) this could amount to good consideration,
and the court would not be concerned with the adequacy of the bargain.

Intention to be legally bound

Sometimes, despite the undoubted existence of offer, acceptance and
consideration, one party may allege that the contract is not binding
because there was no intention to create legal relations. This is not
uncommon in family arrangements and it is presumed that domestic
agreements are not intended to create legal relations. It is therefore up to
the party seeking to enforce such a contract to rebut the presumption.¹²
In commercial agreements there is naturally a strong presumption that
there was an intention to create legal relations. Nevertheless, the inten-
tion may be rebutted. The parties may go further and make it an express
condition that the contract is not to be binding in law. This is invariably
a condition under which football pool companies accept entries, and the
effect is to prevent an enforceable contract coming into existence. A
similar result is achieved by a clause purporting to exclude the parties'
rights to bring actions in the courts upon the contract. Such a clause will
be treated as of no effect by the courts, but may make the contract void
and unenforceable. It is to be noted, however, that the new Arbitration
Act 1996 permits the parties to agree that their dispute is to be decided in
accordance with "such other considerations as are agreed by them or
determined by the tribunal",¹³ as opposed to the principles of law. This
refers to so-called "equity" clauses or other provisions permitting arbi-
trators to apply principles of fairness of good conscience. The result of
such an arbitration will be enforceable¹⁴ but in court the parties are bound
by the law as it stands, or by nothing.

Form of contract

Simple contracts may, in general, be in any form and are enforceable
despite a complete absence of documentation. However, a few special

¹² See *Hussey v Palmer* noted in Ch.5.

¹³ Section 46(1).

¹⁴ See Ch.3 generally.

types of contract are unenforceable unless evidenced in writing. These are, principally, contracts for the sale or disposition of land or an interest in land, and some others such as a contract of guarantee. Such a contract need not be made in writing, but some written evidence is necessary which must be signed by or on behalf of the defendant and which states the material terms. However, a contract which does not comply with these requirements may sometimes be enforceable in equity if there has been a part performance of the contract by the person seeking to enforce it, such as a buyer who has entered into possession of a house.

Terms of a contract

The final step in the formation of a contract is the identification of the terms and their effect. If the contract is wholly in writing, the problem is one of construction. But often there are additional terms. Statements made by the parties during their negotiations may have contractual effect. There may also be terms implied in the contract. An express term purporting to exclude or limit liability may raise special problems of interpretation. These points are discussed below.

A statement made during the negotiation of a contract may amount to a representation (see below) or it may become a term and have full contractual effect. There is no decisive test, but a statement is more likely to become a binding term if it is made immediately before agreement is reached, if the maker of the statement had special knowledge, or if the contract itself was not reduced to writing.

Implied terms

In addition to the express terms, there may be other terms implied into a contract which, although not specified by the parties either in writing or orally, are nevertheless as binding as express terms. The leading case on the general implication of terms into contracts is *Liverpool C.C. v Irwin*,¹⁵ in which tenants in a multi-storey council block sought to establish against the local authority a duty to repair and maintain common parts, including lifts and staircases, which were frequently unusable because of vandalism and defects. The House of Lords, in holding the Council under a duty to take reasonable care, considered the contractual basis of the arrangement, which was based on a tenancy agreement silent as to the matters in issue. Lord Wilberforce dealt with the question of implication of terms as follows:

¹⁵ [1977] A.C. 239.

enforceable unless evidenced in writing. These for the sale or disposition of land or an interest such as a contract of guarantee. Such a contract is binding, but some written evidence is necessary for or on behalf of the defendant and which states, however, a contract which does not comply with the requirements sometimes be enforceable in equity if there has been a contract by the person seeking to enforce it entered into possession of a house.

Identification of a contract is the identification of the contract. If the contract is wholly in writing, the problem is often there are additional terms. Statements made during their negotiations may have contractual terms implied in the contract. An express term which limits liability may raise special problems of which are discussed below.

In the negotiation of a contract may amount to a promise or it may become a term and have full legal effect. A decisive test, but a statement is more likely to be a term if it is made immediately before agreement is reached. A statement had special knowledge, or if the statement was reduced to writing.

Where there are express terms, there may be other terms implied into the contract not specified by the parties either in writing or by binding as express terms. The leading case on implied terms into contracts is *Liverpool C.C. v. Irwin & Mitchell*,¹⁵ where a multi-storey council block sought to impose a duty to repair and maintain common areas, which were frequently unusable. The House of Lords, in holding the council liable, considered the contractual relationship was based on a tenancy agreement silent on repairs. Lord Wilberforce dealt with the question of

"To say that the construction of a complete contract out of these elements involves a process of 'implication' may be correct; it would be so if implication means the supplying of what is not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where 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 . . . There is a third variety of implication, that which I think Lord Denning M.R. favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long and undesirable way beyond sound authority. The present case, in my opinion, represents a fourth category or I would rather say a fourth shade on a continuous spectrum. The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied."

An example of an attempt to imply a term in the third category, namely one that would be reasonable, occurred in the case of *Trollope and Colls v. N.W. Met. Hospital Board*,¹⁶ where the parties had made a contract for construction work to be carried out in phases, but had omitted to make any provisions for the consequences of the first phase overrunning. It would doubtless have been reasonable to introduce a term which regulated the timing of subsequent phases, but the contract made no such provision and the judgment of the House of Lords illustrates the limitations on the power of the Court to do what is reasonable. Lord Pearson expressed himself thus:

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give

¹⁶ [1973] 1 W.L.R. 601.

business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

An example of the application of established usage or trade custom occurred in the case of *William Lacey v Davis*¹⁷ (see also Ch.5) where, in relation to the contractor's claims for costs of tendering work, the judge said:

"Mr. Daniel rightly conceded that if a builder is invited to tender for certain work, either in competition or otherwise, there is no implication that he would be paid for the work—sometimes the very considerable amount of work—involved in arriving at his price: he undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of contracts as are made as a result of tenders which prove to be successful. This generally accepted usage may also—and I think does also—apply to amendments of the original tender necessitated by bona fide alterations in the specification and plans."

In more recent cases the courts have emphasised that the implication of an unwritten term is close to and often an alternative to the process of construction of the written terms. In *Attorney General of Belize v Belize Telecom*,¹⁸ the Privy Council held that an implied term should be seen as spelling out in express words what the contract, read against the relevant background, would reasonably be understood to mean.

There are certain types of contract into which terms are implied by statute, such as under the Sale of Goods Act (see Ch.7). The principles of this Act have been extended to contracts for the supply of services, by the Supply of Goods and Services Act 1982 which applies, whether or not goods are also transferred, so that it will govern ordinary construction contracts. Sections 13, 14 and 15 of the Act provide that such contracts are subject to implied terms that the supplier will carry out a service with reasonable care and skill and that, in the absence of agreement, the service will be carried out within a reasonable time and for a reasonable charge. These terms may be negated or varied by express agreement subject, however, to the effect of the Unfair Contract Terms Act (see below).

Implied terms in building contracts

Terms which have been implied in decided cases may act as precedents for similar contracts and therefore give rise to what may be called

¹⁷ [1957] 1 W.L.R. 932.

¹⁸ [2009] 1 W.L.R. 1988.

contract, a term which, though tacit, formed part of the terms made for themselves."

tion of established usage or trade custom in *Lacey v Davis*¹⁷ (see also Ch.5) where, in claims for costs of tendering work, the judge

led that if a builder is invited to tender for certain work or otherwise, there is no implication that he undertakes the very considerable amount of work at his price: he undertakes this work as a gamble, and his overhead expenses of his business which he makes on the profits of contracts as are made as a result of successful. This generally accepted usage may apply to amendments of the original tender and alterations in the specification and plans."

ts have emphasised that the implication of a term is often an alternative to the process of construction. In *Attorney General of Belize v Belize Telecom Ltd* it was held that an implied term should be seen as what the contract, read against the relevant background, would be understood to mean.

contract into which terms are implied by the Sale of Goods Act (see Ch.7). The principles of implied terms for the supply of services, by the Supply of Services Act 1982 which applies, whether or not the contract is for the supply of services, is that it will govern ordinary construction contracts. Section 15 of the Act provides that such contracts are impliedly subject to the condition that the supplier will carry out a service with due care and skill, in the absence of agreement to the contrary, in a reasonable time and for a reasonable price, unless varied by express agreement. Section 16 of the Unfair Contract Terms Act

Contracts

ed in decided cases may act as precedents and therefore give rise to what may be called

a common law contractual duty, beyond the express terms of the contract. There are some important terms which are usually to be implied into building and engineering contracts. Such terms require that the building owner shall give possession of the site within a reasonable time, and give instructions and information at reasonable times.¹⁹ Similarly the contractor must carry out their work with proper skill and care or, as sometimes expressed, in a workmanlike manner. Goods and materials must normally be of good quality and reasonably fit for their purpose.²⁰ However, there will be no implied term where the matter in question is dealt with by express terms. Some of the matters mentioned may be covered by express provisions in the building contract, so that there may be no case for further implication.

There are some notable terms which are normally not to be implied into building and engineering contracts. Whilst there may be an express term to this effect, there will normally not be an implied term that the contractor will progress the work regularly and diligently,²¹ since the contractor is obliged to complete by the completion date and is entitled to arrange his programme of work within that overriding obligation. The employer gives no implied warranty of the nature or suitability of the site or subsoil, or as to the practicability of the design. Thus, where a contractor agreed to build a new bridge over the Thames using caissons, it was found they could not be used and the work proved much more expensive. There was held to be no implied warranty that the bridge could be built according to the engineer's design: *Thorn v London Dock Land Corporation*.²² In giving judgment the Lord Chancellor, Lord Cairns, observed:

"Can it be supposed for a moment, that the Defendants intended to imply any such warranty? My Lords, if the contractor in this case had gone to the Bridge Committee, then engaged in superintending the work, and had said: You want Blackfriars Bridge to be rebuilt; you have got specifications prepared by Mr. Cubitt; you ask me to tender for the contract; will you engage and warrant to me that the bridge can be built by caissons in this way which Mr. Cubitt thinks feasible, but which I have never seen before put in practice. What would the committee have answered? Can any person for a moment entertain any reasonable doubt as to the answer he would have received? He would have been told: You know Mr. Cubitt as well as we do; we, like you, rely on him—we must rely on him; we do not warrant Mr. Cubitt or his plans; you are as able to judge as we are whether his plans can be carried into effect or not; if you like to rely on them, well and good;

¹⁹ *L.B. Merton v Leach* (1985) 32 B.L.R. 51.

²⁰ *Young & Marten v McManus Childs* [1969] 1 A.C. 454.

²¹ *Leander Construction v Mulalley & Co* [2011] EWHC 3449 (TCC), per Coulson J.

²² (1876) 1 App. Cas. 120.

if you do not, you can either have them tested by an engineer of your own, or you need not undertake the work; others will do it.

My Lords, it is really contrary to every kind of probability to suppose that any warranty could have been intended or implied between the parties; and if there is no express warranty, your Lordships cannot imply a warranty, unless from the circumstances of the work some warranty must have been necessary, which clearly is not the case here, or, unless the probability is so strong that the parties intended a warranty, that you cannot resist the application of the doctrine of implied warranty."

The general question of responsibility for the site is dealt with in Ch.9. The other side of the coin is that where a contractor builds in accordance with detailed instructions, they will give no implied warranty as to the fitness of the finished product. Thus, where a builder constructed, as specified, a solid brick wall without rendering which allowed rain to enter the house, it was held that the builder was not liable for the defect: *Lynch v Thorne*.²³ In giving judgment, Lord Evershed held:

"If a skilled person promises to do a job, that is, to produce a particular thing, whether a house or a motor car or a piece of machinery, and he makes no provision, as a matter of bargain, as to the precise structure or article which he will create, then it may well be that the buyer of the structure or article relies on the judgment and skill of the other party to produce that which he says he will produce. That, however, is only another way of formulating the existence in such circumstances of an implied warranty. On the other hand, if two parties elect to make a bargain which specifies in precise detail what one of them will do, then, in the absence of some other express provision, it would appear to me to follow that the bargain is that which they have made; and so long as the party doing the work does that which he has contracted to do, that is the extent of his obligation."

Where the builder, in similar circumstances, is under an obligation to comply with the Building Regulations, it may be contended that there is an express obligation to ensure that the works are adequate. However, this is a matter of construction of each contract (see Ch.16). In *Jewson v Kelly*²⁴ the claimant sought to recover the cost of a number of electric boilers supplied to the defendant who was in course of converting self-contained flats for resale. The defendant was initially satisfied with the boilers after installation, but found subsequently that they contributed to the properties being designated as having low energy efficiency and the defendant lost money on selling the properties. The evidence was that there had been no discussion about the comparable merits or costs of

²³ [1956] 1 W.L.R. 303.

²⁴ (2003) C.I.L.L., 2042.

have them tested by an engineer of your own, the work; others will do it. Contrary to every kind of probability to suppose been intended or implied between the parties; and, your Lordships cannot imply a warranty, of the work some warranty must have been in the case here, or, unless the probability is so great as to imply a warranty, that you cannot resist the applied warranty."

Liability for the site is dealt with in Ch.9. where a contractor builds in accordance with the contract will give no implied warranty as to the work. Thus, where a builder constructed, as required, without rendering which allowed rain to enter the building, the builder was not liable for the defect. In *Wheeler v. Leake*, Lord Evershed held:

"To do a job, that is, to produce a particular motor car or a piece of machinery, and he enters into a bargain, as to the precise structure of the thing, then it may well be that the buyer of the thing relies on the judgment and skill of the other party to produce it. That, however, is only another instance in such circumstances of an implied warranty. If two parties elect to make a bargain which one of them will do, then, in the absence of anything to the contrary, it would appear to me to follow that the bargain is made; and so long as the party doing the work is contracted to do, that is the extent of his obligation."

In such circumstances, is under an obligation to complete the work, it may be contended that there is no implied warranty that the works are adequate. However, in each contract (see Ch.16). In *Jewson v. Whiston*, the cost of a number of electric motors was in course of converting self-acting was initially satisfied with the motors, but subsequently that they contributed to having low energy efficiency and the other properties. The evidence was that the comparative merits or costs of

different boilers or their effect on the energy efficiency of the flats. It was held that the boilers were fit for their purpose as boilers and there was no reliance on the skill and judgment of the supplier in relation to the particular flats into which they were to be installed. Consequently, the claimant was not in breach of contract.