



The Law Commission

(LAW COM. No. 156)

LAW OF CONTRACT

IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF SERVICES

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

*Presented to Parliament by the Lord High Chancellor
by Command of Her Majesty*

April 1986

LONDON

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£5.10 net

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IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF SERVICES

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IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF SERVICES

Summary

In this report the Law Commission reviews the law governing contracts for the supply of services in the light of the Supply of Goods and Services Act 1982, Part II, which provides for certain terms to be implied in such contracts. It concludes that it would be premature to amend or add to the statutory implied terms, the rules which prohibit their exclusion and the remedies for their breach. The report therefore contains no recommendations for legislation.

THE LAW COMMISSION

LAW OF CONTRACT

IMPLIED TERMS IN CONTRACTS FOR THE SUPPLY OF SERVICES

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

PART I

INTRODUCTION

1.1. In July 1982 you asked us pursuant to section 3(1)(e) of the Law Commissions Act 1965—

“To consider in the light of Part II of the Supply of Goods and Services Act 1982,

- (a) what reforms, if any, should be made to the terms to be implied by law in a contract for the supply of a service;
- (b) whether, as against a consumer, the exclusion or restriction of the supplier's liability for breach of any such implied terms should be prohibited; and
- (c) the consequences of breach by a supplier of any such terms; and to make recommendations.”

1.2. This reference arose out of the introduction into Parliament of the Bill that became the 1982 Act. Part II of the Act¹ consists of a codification of certain terms implied at common law into contracts for the supply of services.² The three terms in question are set out in sections 13, 14 and 15 of the Act, which respectively provide that:

- (i) the supplier will carry out the service with reasonable care and skill;
- (ii) where the contract does not provide for the time in which the service is to be performed and the question is not determined by the course of a dealing between the parties, the supplier will carry out the service within a reasonable time; and
- (iii) where the consideration to be paid for the service is not provided for by the contract or determined by the course of dealing between the parties, the customer will pay a reasonable charge.³

¹ Part I does not relate to contracts for services; it makes provision in relation to the terms to be implied in certain contracts for the transfer or for the hire of goods and gives effect to the recommendations in our report on that subject published in 1979: see Law Com. No. 95.

² Part II of the Act is set out, for convenience of reference, in an Appendix to this report.

³ The first two terms apply only if the supplier acts in the course of a business.

1.3. Part II of the 1982 Act is based (with some modifications) upon the recommendations contained in a report published by the National Consumer Council in 1981,⁴ in which it was suggested⁵ that the codification of the relevant terms would have three advantages—namely, (i) that it would enable the outcome of disputes between suppliers and their customers to be predicted with greater certainty, (ii) that it would make for ease of reference by the parties and their advisers and (iii) that it would draw public attention to the existence of the terms. The Bill which became the 1982 Act was introduced into Parliament by a private member.⁶ The Government's response to the Bill was twofold. First, it supported Part II of the Bill⁷ on the ground that, despite the absence of consultation with interested parties,⁸ it would be undesirable to miss the opportunity for "quick legislation" as an interim measure. Secondly, the Government indicated that the topic would be referred to the Law Commission.⁹

1.4. We explained¹⁰ when the reference was made to us that we should be unable to begin our consideration of the topic before the completion of the joint working paper on supply of goods on which we and the Scottish Law Commission were then engaged. The working paper was published in October 1983; and in the event our resources did not permit us to start work on the present exercise until the end of 1984.

1.5. Normally, the review by the Commission of a particular area of the law, whether the subject of a special reference or undertaken pursuant to an item in an authorised programme of law reform, stems from the identification of an apparent defect in the law or a rule which has become unsuitable under modern circumstances, and the exercise often widens to the consideration of associated rules. The Commission's usual practice is to consult individuals and organisations interested in the topic in question, generally by circulating a working paper which sets out the current law, identifies its shortcomings, canvasses the possible avenues of reform and sets forth the Commission's provisional conclusions. Subsequently, after considering the response to consultation, the Commission publishes a report containing final recommendations and, where appropriate, accompanied with draft legislation. However, as we have explained above,¹¹ the origin of the present reference is different. The reference expressly requires us to examine the law in the light of Part II of the 1982 Act and therefore to a large extent involves consideration of the practical operation of that Act.

⁴ *Service please—Services and the law: a consumer view*, to which we refer as the "N.C.C. Report".

⁵ N.C.C. Report, pp. 23–24.

⁶ Mr F. Willey.

⁷ Except as to a clause which provided, in consumer transactions, for the automatic invalidation of contract terms that purported to exclude or restrict liability for breach of the terms implied under the Bill. The clause was withdrawn during the passage of the Bill through Parliament. The issue constitutes the second limb of our terms of reference.

⁸ Only three months elapsed between the publication of the N.C.C. Report and the introduction of the Bill. See the comments of the Minister for Consumer Affairs during the Second Reading debate in the House of Commons: *Hansard* (H.C.), 22 January 1982, vol. 16, cols. 537 and 571.

⁹ *Ibid.*, cols 539–540.

¹⁰ See our Seventeenth Annual Report 1981–1982 (1983), Law Com. No. 119, para. 2.7.

¹¹ Para. 1.3.

1.6. In view of this background, we decided as a first step to conduct a preliminary study for the purpose of determining the scope and aims of the reference. We also made enquiries of the Department of Trade and Industry, the Office of Fair Trading, the National Consumer Council and the Consumers' Association as to their experience of the working of the 1982 Act. Subsequently the National Consumer Council made available to us a paper¹² commissioned and supported by the Council. The present law and practice are reviewed in the paper, which contains proposals for legislative reform in relation to the terms implied in contracts for services, the statutory control of exclusion clauses, and remedies.¹³ The paper is based in part upon the practical experience of the authors¹⁴ and others of whom they made enquiries.¹⁵ However, they refer to the absence of research into, and economic analysis of, the impact of consumer legislation in this country and explain that they have not themselves embarked upon such research or analysis.

1.7. We have concluded in the light of our study that it would be premature to embark upon a comprehensive review of this topic. In Parts II-IV of this report we give a detailed account of the work that we have done and of the reasons for the conclusions that we have reached. In this Part we deal with these matters in outline.

1.8. In recent years a number of surveys have produced evidence of considerable dissatisfaction on the part of consumers with the services that they have purchased.¹⁶ We should emphasise, however, that there are many difficulties which are experienced by consumers in practice and which give rise to dissatisfaction, such as poor workmanship or delays in performance, that cannot be met by altering the substantive law. Problems of this kind arise because of a supplier's failure to comply with standards that are acceptable. The law can set those standards, and in our view it already does so. The introduction of higher standards into the law would not of itself have a significant effect upon the quality of services received by consumers.

1.9. One matter that we considered in the course of our preliminary study was the ambit of the word "services", which is not confined by the 1982 Act in any way¹⁷ (other than by the specific exclusion of contracts of employment¹⁸). The term is wide enough to cover an almost infinite variety of contracts, from

¹² The paper ("the 1985 paper") was prepared by Messrs Graham Stephenson and Peter Clark of the Lancashire Polytechnic School of Law.

¹³ However, the recommendations in the paper that they regard as the most important relate to changes concerning codes of practice dealing with particular categories of services: see n. 43, para. 4.17 below. The paper also contains proposals for the imposition upon suppliers of a pre-contractual duty to advise and disclose information to consumers, and for the introduction of an obligation on the part of suppliers to define contractual obligations in "clear everyday language". These further proposals are outside the scope of this report.

¹⁴ As advisers with the Preston Free Legal Information Service.

¹⁵ By means of a "relatively small" survey by way of questionnaire to Citizens' Advice Bureaux in Lancashire and discussions with senior consumer advisers employed by the Merseyside County Council. The authors also obtained information on courses provided by them for workers in Citizens' Advice Bureaux, consumer advisers and trading standards officers.

¹⁶ See the N.C.C. Report, pp. 5-21 and the recent report of the Office of Fair Trading referred to in nn. 83 and 84, para. 4.30 below.

¹⁷ See paras. 2.8-2.12 below.

¹⁸ Sect. 12(2).

(for example) the transport of daily supplies to an offshore oil rig to the repair of a domestic washing machine. In the past, legislation has dealt with particular categories of contracts for services,¹⁹ and non-legislative action has also been taken in relation to the services offered by individual trades.²⁰ Under both these heads this is clearly a useful approach for dealing with particular problems. However, as the Commission explained when the reference was made,²¹ it would not be appropriate or practical for us to undertake a detailed investigation of the ways in which individual service industries operate. It follows that any proposals which we might make must be such as are suitable for general application, and our study must be guided accordingly.

1.10. Although this general approach to the law relating to services was adopted in the 1982 Act, it gives rise to difficulty in the present context. This is because by contrast, for example, with contracts for the sale of goods, contracts for services have not hitherto been regarded as constituting a separate branch of the law. Indeed, most legislation which applies generally to such contracts applies also to other kinds of contract. The introduction of rules which apply only to contracts for services would tend to provoke litigation in borderline cases for the purpose of determining whether or not those rules govern the contract in question, i.e. whether or not the contract falls within the definition adopted of contracts for services. While it may sometimes be necessary to create a distinction between different kinds of transactions, we consider it unnecessary and therefore undesirable to do so here.

1.11. To the extent that our study relates expressly to the 1982 Act, Part II of which came into force on 4 July 1983, an assessment of its effect would be premature. Not surprisingly, our enquiries indicate that there is no general experience of the operation of the Act,²² and the material for a full study is not yet available. Nevertheless, we have been able to consider whether the Act has satisfactorily codified the common law rules. One of the matters which we consider in relation to that question is the power conferred on the Secretary of State²³ to grant exemptions from sections 13-15, bearing in mind that it has been exercised for the purpose of excluding activities to which the relevant common law principles did not apply.²⁴ We have concluded that, taking into account the exercise of this power, the codification effected by the Act is accurate. However, the original proposal for the codification stemmed from the suggestion that consumers would be better served if the rules of law from

¹⁹ e.g., the Pawnbrokers Acts 1872 and 1960 (now superseded by the Consumer Credit Act 1974, ss. 114-122); the supply of services by public authorities, such as the British Gas Corporation (under the Gas Act 1972) and the Post Office (under the Post Office Act 1969); the carriage of passengers, baggage or cargo by air (see the Carriage by Air Act 1961 and the Carriage by Air (Supplementary Provisions) Act 1962, which implement international conventions); the Solicitors Act 1974; the Estate Agents Act 1979.

²⁰ In particular, the negotiation by the Office of Fair Trading of voluntary codes of practice with trade associations: see para. 4.15 below.

²¹ See our Seventeenth Annual Report 1981-1982 (1983), Law Com. No. 119, para. 2.6, and *Hansard* (H.C.), 20 July 1982, vol. 28, Written Answers, col. 104.

²² The National Consumer Council, the Office of Fair Trading and the Consumers' Association inform us that no problems under the 1982 Act have come to their attention; and the National Consumer Council believes it likely that the Council would have been quickly informed of any difficulties encountered. We are not aware of any reported decision on the interpretation of the terms implied under the Act.

²³ By the 1982 Act, s. 12(4).

²⁴ See paras. 2.15-2.17 below.

which they could benefit in this field were clearly set out and easily available to them;²⁵ it is too early for us to determine the extent to which this object has been achieved.

1.12. It is also necessary to consider whether, even if the present statutory implied terms are satisfactory, others should be added. However, the evidence of the consumer surveys to which we have referred²⁶ indicates two major trends: first, the complaints relate overwhelmingly to particular trades and secondly, the difficulties are with the standards of performance of the tradesmen in question, and not with the guarantees expressly or impliedly given in the contracts. Since many, if not most, cases of dissatisfaction already involve breach of a term implied by the 1982 Act, they would not be met by tightening or extending its provisions. A preliminary study of comparative legislation in this field enacted in other common law jurisdictions²⁷ suggests a number of other ways in which those supplied with services by professional and trade suppliers could be protected by contractual terms automatically implied by statute.

1.13. However, for the very reason that there has not been enough time to assess the effectiveness of the 1982 Act as a measure of consumer protection, it is premature to judge whether further measures are required. Until one can identify a deficiency in this branch of the law which is actually causing hardship, there is no need to deal with it. Moreover, if a need were established, a study would have to be undertaken for the purpose of determining whether or not the need related only to particular trades. It is seriously open to question whether it would be appropriate to enact general legislation, covering all contracts for the provision of services, in order to remedy difficulties arising in particular sectors.

1.14. We have also considered the remedies which are available against suppliers for breach of their obligations under contracts for the supply of services.²⁸ Some consumer dissatisfaction stems from a feeling that satisfactory remedies are not available to them for the purpose of enforcing their rights when the supplier fails to perform his obligations, because (for example) he is insolvent and accordingly unable to meet an award of compensation made by the court. Again, we appreciate that, despite the introduction a few years ago of a small claims procedure into the county court,²⁹ in many cases consumers are reluctant to go to court. A reform of the current procedural or legal aid rules might resolve some of the practical difficulties in this respect,³⁰

²⁵ See para. 1.3 above.

²⁶ See para. 1.8 above.

²⁷ See paras. 2.37-2.42 below.

²⁸ As we are required to do by the third limb of our terms of reference: see para. 1.1 above.

²⁹ Under this procedure claims not exceeding £500 are dealt with in an informal way, and normally no legal costs are awarded: C.C.R., 0.19, r. 2. The procedure is to be reviewed: see the next footnote.

³⁰ This would be relevant to the complete and systematic review of civil procedure currently being conducted by the Lord Chancellor's Department, the main purpose of which is to develop the present system and, if necessary to re-structure it, in order to achieve "the most expeditious, economical and convenient disposal of business": see The Government Response to the Report of The Royal Commission on Legal Services (1983), Cmnd. 9077, pp. 31-32. We understand that, as part of the review, work has commenced on a study of the small claims procedures in the county courts for the purpose of identifying ways of reducing the delays, cost and complexity of the procedures.

but it is probable that cases would remain in which, for a variety of reasons, a dissatisfied customer would be unwilling to have recourse to litigation.³¹ This problem cannot be resolved by creating new remedies to be granted by the court or extending those that exist at present. There are, however, alternative procedures, to which we refer below,³² that may prove helpful in meeting this difficulty.

1.15. The general rules governing remedies for breach of contracts for services are those which apply to contracts in general. It is true that the personal nature of many services rendered under contracts means that other considerations have to be taken into account. Sometimes what is important to the customer is to be able to ensure that the service is indeed fully and properly rendered,³³ at other times, he may wish to be able to terminate the contract and be no further bothered by the supplier with whom he originally contracted.³⁴ However, these matters fall within the scope of the general law governing contractual remedies, and we see no necessity to introduce separate rules applicable only to remedies for breach of a contract for services. As we explained in paragraph 1.10 above, we consider that for this reason it would be undesirable to recommend the introduction of a distinction between the remedies relating to contracts for services and those applicable to other contracts.

1.16. There have recently been developments helpful to consumers, which arise from the work of the Director General of Fair Trading. First, with the encouragement of the Director General,³⁵ a number of trade associations have provided voluntary codes of practice giving their members guidance in safeguarding consumers' interests. Many codes incorporate arbitration procedures, which allow consumers' claims to be resolved quickly, simply and cheaply; and awards are backed by sanctions imposed by the associations upon their members.³⁶ Many of these procedures have not been in operation for very long, and some have recently had their detailed rules revised. In our view, adequate time should be allowed to assess the extent to which these arrangements can meet consumer dissatisfaction, before major legislative changes are proposed.

1.17. The second development is a proposal made by the Director General of Fair Trading for the imposition by statute upon all traders, whether or not members of trade associations, of a general duty to "trade fairly"; it is envisaged that this general duty would be complemented by codes of practice which would specify the supplier's detailed obligations in relation to particular trades.³⁷ The Director General is currently conducting consultations upon this proposal and expects to publish a discussion paper in 1986. It would be premature, in the light of this far-reaching recommendation, to make proposals in the present context.

³¹ We consider other available remedies in paras. 1.16 and 4.12-4.17 below.

³² Para. 1.16.

³³ The relevant rules are outlined in paras. 4.9-4.11 below.

³⁴ See paras. 4.4-4.8 below.

³⁵ In accordance with his duty under the Fair Trading Act 1973, s. 124(3). See paras. 4.15-4.16 below.

³⁶ See para. 4.16 below.

³⁷ See para. 4.17 below.

1.18. We have considered whether in consumer transactions a supplier should be permitted to exclude or restrict the operation of the terms that are implied by law in contracts for the supply of services.³⁸ At present any provision in the contract by which he purports to do so is not in general³⁹ automatically invalid, although it must pass the test of reasonableness.⁴⁰ By contrast, in contracts for the sale or supply of goods to a consumer, in which certain terms are implied by statute on the part of the seller (in respect of such matters as the quality of the goods and their fitness for a particular purpose), the seller is prohibited from attempting to exclude or restrict liability for breach of these terms.⁴¹ In the course of the Parliamentary debates on the Bill that became the 1982 Act there was much discussion about whether a similar rule should be introduced in relation to consumer contracts for services.⁴² The National Consumer Council's argument for a complete ban on "contracting out" by the supplier⁴³ seems to have been based solely on the ground of consistency with the rule governing the sale of goods or as a protection against possible future evasion.⁴⁴ We doubt whether this is a satisfactory ground for eroding freedom of contract. It is possible that, just as the enactment of the 1982 Act was intended to help consumers by making them more aware of their existing rights, suppliers will also become better informed of those rights and more anxious in consequence to restrict their liability. However, for the reasons referred to below⁴⁵ this is a matter upon which any action would for the moment be premature.

1.19. We are conscious that the pressure on Parliamentary time means in practice that it is unlikely that legislation on contracts for services can often be introduced. Such is the importance of this topic, particularly to consumers, that we wish to avoid putting forward premature proposals relating to its less significant aspects if that could result in delaying the implementation of more considered suggestions, formulated after adequate experience of the 1982 Act and the other current developments. In considering possible immediate reforms we have, therefore, sought to bear in mind whether their desirability is such as to justify staking an urgent claim for a place in the legislative programme, and have concluded that it is not.

1.20. Although we have formed the view that no immediate action is required, we have borne in mind that there is widespread consumer dissatisfaction in relation to contracts for services, which are of considerable practical significance and affect a large number of people. It may be that the time will come when, in the light of further experience, the need arises for the topic to

³⁸ In accordance with the second limb of our terms of reference: see para. 1.1 above.

³⁹ However, provisions which purport to exclude or restrict liability for death or personal injury resulting from negligence are invalid: see para. 3.5 below.

⁴⁰ Under the Unfair Contract Terms Act 1977. See paras. 3.6-3.8 and 3.28-3.29 below.

⁴¹ Unfair Contract Terms Act 1977, ss. 6(2), 7(2).

⁴² See, e.g., *Hansard* (H.C.), 22 January 1982, vol. 16, cols. 533, 537-541, 566, 578 and, in Committee, *Hansard* (H.C.), Standing Committee C, 3 February 1982, cols. 8-9.

⁴³ N.C.C. Report, pp. 27-29. The argument is repeated in the 1985 paper.

⁴⁴ It was not suggested by the National Consumer Council either in its 1981 Report or the 1985 paper that evidence exists of the abuse of exclusion clauses by suppliers of services. The lack of evidence of oppressive contract terms which purported to exclude or restrict suppliers' obligations that were implied at common law is equally significant in relation to the terms now implied by statute, because Part II of the 1982 Act is a codification.

⁴⁵ See paras. 3.13-3.24.

receive further consideration. We believe that when it is judged to be the appropriate time for contracts for services to be reconsidered, it will be necessary to decide (among other issues) (i) whether or not the review should be confined to particular categories of services in which difficulty has been experienced by consumers, (ii) whether consumer contracts should be treated separately from other contracts and (iii) what is the appropriate body to examine these matters.

1.21. In Parts II, III and IV of this report we consider in detail the subject matter of each limb of our terms of reference.

Summary of the conclusions in this report

1.22. To summarise, our conclusions are as follows:

- (a) Part II of the 1982 Act constitutes a satisfactory codification of the parts of the common law which it covers and calls for no immediate amendment.
- (b) It would be premature to consider whether further terms should be implied by statute in contracts for services.
- (c) It would also be premature to consider whether there is a need to restrict the freedom to exclude or restrict the supplier's liability for breach of contractual terms further than is done by the Unfair Contract Terms Act 1977.
- (d) Whether there should be changes in the consequences to a supplier of services of the breach of such terms should be judged in the light of experience of new remedies now becoming available.
- (e) When the appropriate time arrives to reconsider these questions, among the matters to be determined will be (i) whether or not the review should be limited to particular categories of services in which difficulty has been experienced by consumers, (ii) whether there is a need to treat consumer and other contracts separately and (iii) what is the appropriate body to consider the questions.

PART II

IMPLIED TERMS

A. THE TERMS IMPLIED UNDER PART II OF THE 1982 ACT

(1) General

2.1. In this Part of the report we consider the first limb of our terms of reference, namely what reforms, if any, should be made to the terms to be implied by law in a contract for the supply of service. We have concluded, first, that Part II has satisfactorily codified the relevant common law rules and secondly, that no further terms need be introduced at present.

2.2. The central feature of Part II of the 1982 Act is the three implied terms referred to respectively in sections 13, 14 and 15 of the Act. Section 13 provides for a term that the supplier of the service will carry it out with reasonable care and skill;¹ section 14 provides that where the parties have not agreed a time within which performance is to take place, the service will be carried out within a reasonable time;² and under section 15 a reasonable charge falls to be paid in the case in which the price for the supply of the services was not agreed by the parties at the outset.³ In order to put these three terms into context, we deal first with some general matters under Part II of the Act.

(a) The terms implied by the Act are not exhaustive

2.3. Section 16 of the Act makes it clear that the terms implied by sections 13 to 15 do not constitute an exhaustive list of the obligations implied in a contract for services.

2.4. In the first place, Part II of the Act has effect "subject to any other enactment which defines or restricts the rights, duties or liabilities" of the parties.⁴ This relates, for example, to the provisions of international conventions entered into by the United Kingdom and implemented here by legislation⁵ and to the Defective Premises Act 1972, section 1 of which imposes a duty on builders, subcontractors, architects and others who take on work for or in connection with the provision of dwellings to see that the work is done in a workmanlike or, as the case may be, professional manner.

2.5. Secondly, section 16(3)(a) specifically preserves "any rule of law which imposes on the supplier a duty stricter" than that implied under section 13 (to exercise reasonable care and skill) or section 14 (to perform within a reasonable time where no time is fixed by the contract or determined by the course of dealing between the parties).⁶ We consider this matter further below.⁷

2.6. Finally, subject to an important qualification, the terms implied by sections 13 to 15 may be negated or varied by express agreement, by the course of dealing between the parties or by "such usage as binds" them. The qualification is that the capacity of the parties to "contract out" of Part II of the Act is expressly made subject to the Unfair Contract Terms Act 1977. We consider the relevant provisions of the 1977 Act below.⁸

¹ See paras. 2.19–2.27 below.

² See paras. 2.28–2.29 below.

³ See paras. 2.30–2.33 below.

⁴ Sect. 16(4). The term "enactment" includes subordinate legislation: s. 18(1).

⁵ e.g. the 1929 Warsaw Convention (as amended at The Hague in 1955), set out in the Carriage by Air Act 1961, Ch. III of which governs, *inter alia*, the liability of air carriers for injuries to passengers and for loss of or damage to registered baggage and cargo. Sect. 503(1) of the Merchant Shipping Act 1894, which provides that shipowners should not be liable beyond certain amounts for injury, death or damage to property "without their actual fault or privity", is another example of a provision which, by virtue of s. 16(4) of the 1982 Act, will be unaffected by that Act.

⁶ The purpose of the reference to a stricter duty than is implied under section 14 is not easy to understand. If it signifies a date earlier than one which is "reasonable", it seems otiose, since s. 14 only applies where no time is fixed by the contract (or the parties' course of dealing).

⁷ See paras. 2.34–2.36 below.

⁸ See paras. 3.4–3.8 and 3.29–3.30 below.

(b) The terms are implied only in contracts

2.7. Part II of the Act relates to a “contract for the supply of a service”.⁹ Accordingly, where a service is supplied under an arrangement which lacks an essential ingredient of a contract (because, for example, the work is done free of charge) the Act does not apply,¹⁰ although, as we explain below,¹¹ an action in tort for negligence would be available to the recipient of the service in an appropriate case. Again, a claim founded upon a breach of a term implied by the Act is available only against the supplier of the service, not a subcontractor to whom the supplier has delegated all or part of the work, because the doctrine of privity precludes an action on the contract against someone who is not a party to it.¹² So, too, where services are provided pursuant to a statutory obligation, as in the case of medical treatment under the National Health Service, the Act will not apply, since the element of compulsion is inconsistent with the consensual basis of the law of contract.¹³ On the other hand, the consideration for the service need not take the form of money.¹⁴ Thus (for example), a contract under which A agrees to supply a service to B in return for services or goods to be supplied by B is within the scope of the Act.

(c) The meaning of “a service”

2.8. Certain services, which we consider below,¹⁵ are specifically excluded from the Act, but the term “service” is not defined. Its scope is wide-ranging and the Act covers (to cite just two instances) the dry-cleaning of clothes and the provision of security guards for the protection of a factory against theft or vandalism.

2.9. In one extensive category of contract, namely a contract for “work and materials”, the agreement provides for both the performance of a service and the supply of goods. Part II of the Act applies to the services element of such contracts.¹⁶

2.10. We have considered a development that has taken place in recent years in decisions on the Trade Descriptions Act 1968, section 14 (which creates offences concerning false statements made in relation to “services, accommodation or facilities”), in which a distinction has been drawn between

⁹ Sect. 12(1).

¹⁰ There is a further requirement, in relation to the terms implied under ss. 13 and 14, that the supplier must act in the course of a business: see paras. 2.19 and 2.18 below.

¹¹ See para. 2.21.

¹² The significance of this doctrine may have been reduced by the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.* [1983] 1 A.C. 520, in which a claim for negligence in respect of purely economic loss was successfully brought by the owner of a factory against a third party to whom certain work in the factory had been subcontracted. The decision enables the customer now to recover damages in respect of losses which he could not have recovered previously by reason of the privity rule. However, it would now appear that the decision was based on its particular facts, upon (among other matters) the very close relationship between the parties, and that the extension of the law which it made is very limited: *Muirhead v. Industrial Tank Specialists Ltd.* [1985] 3 W.L.R. 992, 1007, 1013.

¹³ *Pfizer Corporation v. Ministry of Health* [1965] A.C. 512. However, as we explain in paragraph 2.21 below, a duty of care is owed to the patient in tort.

¹⁴ Sect. 12(3).

¹⁵ See paras 2.13–2.17.

¹⁶ Sect. 12(3).

services on the one hand and facilities on the other. The former, it has been stated, involve actively doing something for someone, whereas the latter consist in the passive provision of things that are made available for those who wish to make use of them, such as a car-park, or a swimming-pool.¹⁷ In some instances the distinction would seem to be somewhat refined. In one case, for example, the provision of insurance was held to be a facility,¹⁸ while in another the view was expressed that the provision of credit was a service.¹⁹

2.11. We do not believe that the distinction which has been drawn between services and facilities, as those terms are used in the 1968 Act, is relevant in the present context. The 1982 Act does not refer to facilities; as it is not self-evident that "services" must exclude "facilities", there is no reason why an activity which is regarded as a facility for the purposes of the earlier Act should not be a service for those of the later enactment.²⁰ Although the question whether the passive provision of a benefit may constitute a service has not often arisen in other contexts for judicial determination, it would seem from the few cases in which it has that the expression "services" may extend to such provision.²¹

2.12. In our view the term "service" does not require legislative definition: we consider that bearing in mind, in particular, the need for flexibility in this wide-ranging field, the question whether or not in particular cases a contract is or is not one for the supply of a service can be most appropriately resolved by judicial decision.

(d) Exclusions

(i) Contracts of service

2.13. Contracts of "service or apprenticeship" are specifically excluded from the scope of the Part II of the 1982 Act.²² This exclusion reflects the traditional and well known distinction between a contract of service (that is to say, a contract of employment) on the one hand and a contract for services (described

¹⁷ See *Westminster City Council v. Ray Alan (Manshops) Ltd.* [1982] 1 W.L.R. 383, 386 (per Ormrod L. J.); *Newell v. Hicks* (1983) 148 J.P. 308; (1983) 128 S.J. 63; *Kinchin v. Ashton Park Scooters Ltd.* (1984) 148 J.P. 540.

¹⁸ *Kinchin v. Ashton Park Scooters Ltd.*, above.

¹⁹ *Newell v. Hicks*, above.

²⁰ In relation to a contract between hotel-keeper and guest, a question arose in a New Zealand case as to the matters which fell within the term "services" under an enactment providing for a statutory tribunal to have the function of fixing prices for "goods and services". It was held by the New Zealand Court of Appeal that "services" extended to a wide range of benefits supplied by the hotel-keeper, even on the narrowest construction of that term. They included the provision of a bedroom and furnishings; the temporary occupation of the table in the dining-room; and the provision of chairs in dining-rooms and sitting-rooms: *Dwyer v. Hunter* [1951] N.Z.L.R. 177, 189-190.

²¹ e.g., in *Hall & Co. v. The London, Brighton and South Coast Railway Co.* (1885) 15 Q.B.D. 505, the question arose whether, for the purposes of a private Act which prescribed rates of remuneration for a railway company, the provision of station accommodation was incidental to the business of, on the one hand, a "carrier" or, on the other, a "conveyer". In relation to this question it was stated that this benefit "appear[s] to us to be capable of falling under the definition of 'services incidental to the duty or business of a carrier' and *prima facie* to do so": *ibid.*, 540 (per Willes J.).

²² Sect. 12(2).

in the Act as a contract for the supply of a service), to be rendered by an "independent contractor", on the other.

2.14. Difficulty arises in some cases in distinguishing between the two categories of contract,²³ and in the field of employment law there is a large body of authority on the tests to be applied, which have not remained stable.²⁴ In our view, whatever criteria are from time to time applied in the context of employment law are appropriate also in relation to the 1982 Act.

(ii) *Exclusions by Ministerial order*

2.15. Section 12(4) of the Act confers power upon the Secretary of State to provide by order that any of sections 13-15 should not apply to "services of a description specified in the order".²⁵ The provision is so worded that a particular kind of service under a contract may be excluded without affecting other services supplied under the contract.

2.16. Although the Act does not indicate the grounds on which an order may be made, it was emphasised by the then Minister for Consumer Affairs during its passage through Parliament that the sole purpose of the provision was to enable existing exemptions at common law to be preserved.²⁶ Three orders have been made, the first two of which came into force on the same day as Part II of the Act itself. All three exclude only the term implied under section 13 of the Act (relating to performance by the supplier with reasonable care and skill). The first concerns the services of an "advocate"²⁷ and those rendered to a company by its directors.²⁸ The second exempts the services of

²³ Although, as Denning L.J. stated in *Stevenson Jordan and Harrison Ltd. v. Macdonald and Evans* [1952] 1 T.L.R. 101, 111, "it is often easy to recognise a contract of service when you see it", instancing a ship's master, a chauffeur and a reporter on the staff of a newspaper as employed under a contract of service, and a ship's pilot, a taxi-man and a newspaper contributor as employed under a contract for services. He went on to point out that a person employed under a contract of service might perform work outside the contract, citing as an example *Byrne v. Statist Co.* [1914] 1 K.B. 622, where a man on the regular staff of a newspaper made a translation for the newspaper in his spare time, and was held to have made the translation under a contract for services.

²⁴ See, e.g., *Chitty on Contracts*, 25th ed. (1983), vol. II, paras. 3388-3406; Rideout and Dyson, *Rideout's Principles of Labour Law*, 4th ed. (1983), pp. 4-14.

²⁵ The power is exercisable by statutory instrument, and an order may be annulled by resolution of either House of Parliament: *ibid.*, s. 12(5).

²⁶ See *Hansard* (H.C.), 3 February 1982, Standing Committee C, cols. 4-5. When subsequently an attempt was made to annul an order relating to the services of advocates and company directors (see the next two footnotes), the Minister for Consumer Affairs successfully resisted it on the ground that the order simply ensured that the present law remained unchanged by the Act: see *Hansard* (H.C.), 3 February 1983, vol. 36, cols. 515-530.

²⁷ S.I. 1982 No. 1771, art. 2(1). The exemption extends to services performed before a court or before "any tribunal, inquiry or arbitrator" and to preliminary work directly affecting the conduct of the hearing. It reflects *Rondel v. Worsley* [1969] 1 A.C. 191.

²⁸ S.I. 1982 No. 1771, art. 2(2). At common law, although a director owes a duty of care to his company in the management of its affairs, he need show only the care that he would be expected to have if he were acting on his own behalf: *Re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407, 428. It has been explained judicially that to found liability the director's negligence "must be not the omission to take all possible care; it must be much more blameworthy than that: it must be in a business sense culpable or gross": *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392, 435 (*per* Lindley M.R.).

building society directors,²⁹ and the third, which came into force on 1 March 1985, relates to services rendered by an arbitrator or umpire.³⁰

2.17. The power contained in section 12(4) was included for the purpose of ensuring that the terms implied under sections 13–15 of the Act extended only to contracts into which similar terms were implied at common law. Part II of the Act was not intended to change the law, but merely to bring into one place some of the obligations of a supplier of services under the existing law, and accordingly the need arose for a simple technique for the purpose of ensuring that, in relation to particular categories of services, liabilities were not created by the Act which did not arise at common law. Experience has shown that the power has been used only for that purpose; and it would be possible at some opportune time to incorporate in primary legislation the exceptional categories of contracts for services to which the 1982 Act does not apply.

(2) Sections 13–15 of the Act

(a) *The nature of the terms implied under the Act*

2.18. By contrast with the sale of goods legislation, the terms which before the 1982 Act were implied at common law into contracts for services were not categorised as either conditions (breach of which entitles the customer to terminate the contract) or warranties. The 1982 Act preserves the common law in relation to the terms implied under sections 13–15 by using the neutral expression “term”. It would seem therefore that in accordance with common law principles, the question whether or not in a particular case the statutory implied term has the remedial consequences of a condition would be resolved by construction of the contract.³¹

(b) *The term implied under section 13*

2.19. Section 13 provides that:

“In a contract for the supply of a 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.”

The term “business” is partially defined by section 18(1) of the Act as including a profession and the activities of government departments and of local and public authorities.

²⁹ S.I. 1983 No. 902, which applies also to services “rendered to a society registered or deemed to be registered under the Industrial and Provident Societies Act 1965 . . . by any member of the committee or management or other directing body of such a society.” It would seem that similar principles govern the services referred to in this order as those relating to company directors: *Sheffield & South Yorkshire Permanent Building Society v. Aizlewood* (1889) 44 Ch. D. 412.

³⁰ S.I. 1985 No. 1. At one time it was axiomatic that at common law an arbitrator was not liable for loss resulting from a failure to take reasonable care in the performance of his duties. In recent years, however, the rationale of this immunity and the question to what services it extends have been reviewed by the House of Lords, and the law is now not clear: see *Sutcliffe v. Thackrah* [1974] A.C. 727 and *Arenson v. Casson Beckman Rutley & Co.* [1977] A.C. 405. For a detailed examination of the issues, see Mustill and Boyd, *Commercial Arbitration* (1982), pp. 190–196.

³¹ We further consider the question whether a breach of a statutory implied term gives rise to a right to terminate the contract in paras. 4.4–4.8 below.

2.20. The common law required suppliers of services to exercise reasonable care and skill. This requirement has been restated by section 13. Accordingly, the common law authorities on what constitutes reasonable care and skill in the particular case provide detailed guidance in the construction of the section. There is much relevant authority, but we need refer here only to some salient features of the subject.

2.21. A duty of care arises, independently of contract, under the law of tort; and the *standard* of care is normally the same in contract as in tort—namely, that of the reasonable and prudent man.³² For example, a doctor owes a duty of care to his patients in respect of medical treatment which he supplies under the National Health Service, notwithstanding that he has no contract with his patient.³³ In recent years the courts have adopted the approach in many cases that the duty of care in tort is not excluded by the existence of a contractual duty of care,³⁴ and in those cases, therefore, the supplier under a contract for the supply of a service is under a duty of care both in contract and in tort.

2.22. Section 13 refers to the exercise of reasonable skill as well as of reasonable care. In the case where the use of some special skill or competence is involved the standard is that of the ordinary skilled man professing to have that special skill;³⁵ it is not sufficient in such a case for the supplier merely to act to the best of his own skill and judgment.³⁶ In determining this question the supplier's capabilities and experience are irrelevant: the standard is that of the reasonably competent person in the particular field.³⁷ Conformity with general practice is evidence that proper care was taken,³⁸ but it is not conclusive, because in some cases the general practice may not conform to the standard of care required.³⁹ Conversely, a failure to act in accordance with common practice is not conclusive proof of negligence.⁴⁰

³² See, e.g., *Blyth v. Birmingham Waterworks* (1856) 11 Ex. 781, 784 (*per* Alderson B.).

³³ See para. 2.7 above.

³⁴ See, e.g., *Midland Bank Trust Co. Ltd. v. Hett, Stubbs and Kemp* [1979] Ch. 384 (which involved a claim against a solicitor).

³⁵ *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586 (*per* McNair J.). This test has been approved by the House of Lords: *Whitehouse v. Jordan* [1981] 1 W.L.R. 246; *Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634; *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871.

³⁶ See, e.g., *Jones v. Bird* (1822) 5 B. & Ald. 837, 845. It was held in that case that contractors who caused the fall of some chimneys by their work on certain sewers were liable because they had not done all that a skilful person could reasonably be required to do in such circumstances.

³⁷ See, e.g., *Nettleship v. Weston* [1971] 2 Q.B. 691, in which it was held that the standard of care owed by a learner driver both to members of the public and to a passenger (whether or not the latter knew of the driver's inexperience) was the same as that of a qualified driver.

³⁸ e.g., *Morris v. West Hartlepool Steam Navigation Co. Ltd.* [1956] A.C. 552; *Graham v. Co-operative Wholesale Society Ltd.* [1957] 1 W.L.R. 511.

³⁹ See, e.g., *Lloyds Bank Ltd. v. Savory and Co.* [1933] A.C. 201 (in which the bank was held liable notwithstanding that it had followed a practice adopted by all other banking concerns); *Cavanagh v. Ulster Weaving Co. Ltd.* [1960] A.C. 145. In *Greaves & Co. (Contractors) Ltd. v. Baynham Meikle and Partners* [1975] 1 W.L.R. 1095, 1102, Lord Denning M.R. stated, in relation to a claim against consultant structural engineers arising from defects in the design of a building, that in the particular circumstances the fact that other competent designers might have omitted to take measures against certain risks was not an excuse, since "other designers might have fallen short too".

⁴⁰ *Brown v. Rolls Royce Ltd.* [1960] 1 W.L.R. 210.

2.23. If a supplier holds himself out as having skill appropriate to the rendering of a service, he must generally perform his obligations under the contract with the degree of expertise normally to be expected of a competent practitioner in that field.⁴¹

2.24. In our view, the standard of “reasonable care and skill” laid down by section 13 has two advantages. First, a large part of the value of the standard that it provides consists in its flexibility and in the fact that what is reasonable depends upon the circumstances of the particular case.⁴² Secondly, decided cases can supply, and will continue to supply, guidance as to how the principle can properly be applied to situations of a particular class.⁴³ We have therefore concluded that the present position is satisfactory.

2.25. Three points remain. First, it has been suggested that, because section 13 states that “... the supplier will carry out the service...”, it may have altered the common law principles that govern the right of the supplier to delegate performance of the contract in whole or in part to a subcontractor.⁴⁴ At common law, whether a supplier may delegate performance depends in the particular case on “the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances.”⁴⁵ Some contractual obligations are clearly too personal to admit of performance by anyone other than the contracting party—for example, a contract to sing at a concert. Again, the duty imposed under a contract which involves a bailment of goods cannot normally be delegated, since (in the absence of an agreement to the contrary) the customer is regarded as having selected the supplier for his personal skill and ability.⁴⁶ Furthermore, the contract may contain implied terms which prohibit delegation of performance. However, although section 13 does not state expressly whether or not the supplier of a service is bound

⁴¹ It may be, though the position is not entirely clear, that a lower standard is expected if someone undertakes a skilled task in which he does not claim proficiency. Thus, in *Phillips v. William Whiteley Ltd.* [1938] 1 All E.R. 566 it was held that a jeweller who pierced the plaintiff's ears so that she might wear earrings need not do the work with the care that a surgeon would have exercised, as distinguished from the care to be expected of a jeweller. See also *Wells v. Cooper* [1958] 2 Q.B. 265, 271, in which it was said that the standard of care owed in tort by an amateur carpenter was lower than the standard required in contract on the part of a professional carpenter.

⁴² See the N.C.C. Report, p. 28. (The Council made this point in relation to its proposal, referred to in n. 25, para. 3.13 below, that exemption clauses which purport to exclude liability for breach of the term implied under s. 13 should be banned.) However, in the 1985 paper the Council criticises this standard on the grounds that it imposes too low a standard upon suppliers and that it gives rise to uncertainty in its application to particular cases.

⁴³ “... it is a question of fact whether in a particular situation the defendants behaved negligently or not. The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation... But, of course, one can look at decisions in other cases... to see how that basic rule can properly be applied to situations of a particular class”: *Hazell v. British Transport Commission* [1958] 1 W.L.R. 169, 171.

⁴⁴ See Palmer, (1983) 46 M.L.R. 619, 628–629, who suggests that the section leaves unclear the position of a supplier who subcontracts performance in a case in which a clear permission to delegate would have been inferred at common law.

⁴⁵ *Davies v. Collins* [1945] 1 All E.R. 257, 250.

⁴⁶ See, e.g., *Edwards v. Newland and Co.* [1950] 2 K.B. 534 (a contract to store furniture); *Garnham, Harris and Elton Ltd. v. Alfred W. Ellis (Transport) Ltd.* [1967] 2 Lloyd's Rep. 22 (a contract for the carriage of goods).

to perform his obligations personally, we believe it unlikely that the section would be construed by the court as affecting the common law principles which determine whether vicarious performance of a particular obligation is permissible.

2.26. The second point concerns the activities of a person who, although he has a regular job or business, contracts to provide services quite separately from that job or business, in his spare time. The doubt raised is whether those services are supplied "in the course of a business". We entertain no doubt that the term "business" includes all such activities conducted regularly, though not on a "full-time" basis, with a view to profit. A similar approach has been adopted, albeit not to the precise words of section 13, in other areas of the law, such as partnership and taxation.

2.27. Finally, our attention has been drawn to the question whether the phrase "in the course of a business" includes the provision of a service by a charity. This expression appears not only in section 13 (and section 14, which relates to the time for performance) but in other legislation in the field of commercial law. It is used, for example, in the statutory terms as to quality and fitness for purpose implied in contracts for the sale⁴⁷ or the supply⁴⁸ of goods, and in connection with the definition of the term "consumer" in the Unfair Contract Terms Act 1977.⁴⁹ It may well be that under the present law at least some commercial activities commonly engaged in by charities are carried on "in the course of a business" for the purpose of these provisions. However, we do not consider that it would be appropriate in the present, limited context of contracts for the supply of services to consider the question whether a charity ought to be exempt in whole or in part from the rules which govern commercial activities in general.

(c) The term implied under section 14

2.28. Section 14(1) provides that where the contract does not fix or stipulate a method for determining the time for performance (and that time cannot be determined by a course of dealing between the parties), there is an implied term that the service will be carried out within a reasonable time; and under section 14(2), what is a reasonable time is a question of fact. The term is implied only if the supplier acts in the course of a business.

2.29. This provision incorporates a long established common law principle. However, the principle is subject to the qualification that it applies only where performance depends entirely upon the supplier: if "both parties... are to concur, and both bind themselves to the performance of [the act]", then in the absence of a contrary intention a term is implied, instead, on the part of both parties that each will "use reasonable diligence in performing his part."⁵⁰ This qualification is not abrogated by section 14. Whether the obligation to supply the service within a reasonable time has been fulfilled is determined

⁴⁷ Sale of Goods Act 1979, s. 14.

⁴⁸ Supply of Goods and Services Act 1982, s. 4.

⁴⁹ We consider this definition in paras. 3.25-3.27 below.

⁵⁰ *Ford v. Cotesworth* (1868) L.R. 4 Q.B. 127, 133-134 (*per* Blackburn J.)

on the evidence of the circumstances encountered by the supplier between the date of the contract and the date of his alleged failure to perform. Necessarily, if the supplier's performance of the contract depends on the co-operation of the customer, and the customer causes or contributes to delay, he cannot then contend that the delay has made the time taken by the supplier unreasonable. In our view no amendment of the section is needed.

(d) The term implied under section 15

2.30. Under section 15(1), where the consideration to be paid by the customer is not provided for by the contract (or determined by a course of dealings between the parties), he must pay a "reasonable charge". Section 15(2) provides that what is a reasonable charge is a question of fact.⁵¹ In contrast to the terms implied under sections 13 and 14, this provision applies whether or not the supplier acts in the course of a business.

2.31. One area in which concern has been expressed has been that in which the supplier obtains the agreement of a consumer to pay a specified and exorbitant charge when the contract is made. This difficulty is not met by section 15 as it stands, since the agreed charge is recoverable by the supplier as a matter of contract.⁵² We deal later⁵³ with the possible creation of a new general remedy to deal with this situation.

2.32. Section 15 does not apply, further, to the case where, no price having been agreed at the outset, the supplier charges a sum which exceeds what is reasonable but which the customer pays or promises⁵⁴ to pay. The possible new remedy to which we have referred in the previous paragraph and which we consider below would apply also in these circumstances.⁵⁵

2.33. However, so far as the case with which it is designed to deal is concerned, the term implied under section 15 appears to be unexceptionable, and represents the common law as it previously applied.⁵⁶

B. TERMS IMPLIED OTHERWISE THAN UNDER THE 1982 ACT

(1) Implication of terms in fact and by law

2.34. At common law there are in practice two kinds of implication, although the courts do not always make clear under which head they imply a term. The first kind of implication (implication in fact) is based on the presumed intention

⁵¹ For the approach adopted by the court in assessing what is reasonable remuneration, see *Bowstead on Agency*, 15th ed. (1985), pp. 210-213.

⁵² There are some services in which, exceptionally, by statute a charge agreed in advance cannot be enforced if it is unreasonably high—e.g. a solicitor's charges under a "contentious business agreement" (see the Solicitors Act 1974, ss. 59 and 61), and service charges payable by the tenant of a flat (see the Landlord and Tenant Act 1985, s. 19, which comes into force on 1 April 1986 and consolidates earlier provision).

⁵³ Paras. 4.18-4.21 below.

⁵⁴ *Kennedy v. Broun* (1863) 13 C.B. (N.S.) 677, 740; *Pau On v. Lau Yiu Long* [1980] A.C. 614, 629.

⁵⁵ See para. 4.20 below.

⁵⁶ See *Chitty on Contracts*, 25th ed. (1983), vol. I, para. 2050.

of the parties: the test has been judicially stated to be whether the term is so obvious that the parties presumed that it was unnecessary to include it expressly.⁵⁷ If either party is ignorant of the matter which is said to be implied, or if it is not clear that both parties would have agreed to the inclusion of the term, this test is not satisfied; and the courts will not imply a term simply because it would be reasonable to do so.⁵⁸ The other kind of implication (implication by law) arises when the court lays down a general rule that, in all contracts of a certain kind, a certain term will be implied unless the implication of the term would be contrary to the express words of the contract.⁵⁹ In the present context we are concerned primarily with the process of implication by law.

2.35. It should be borne in mind that, quite apart from any question of implication, the court must ascertain the nature of the obligation that was undertaken in the particular case. For example, where the defendants, experts in "laminating", contracted to stick a permanent shiny surface upon printed boards owned by the plaintiffs, Cumming-Bruce L.J. held that if the surface came off, the defendants were liable whether or not they had taken reasonable care in performing their contractual obligations. He explained that he:

"... would not look for an implied term on the facts of this case. I would look at the contract, I would look at the work which the defendants promised to do ... I find simply a promise by the defendants to stick on to the plaintiffs' boards a shiny surface which, once applied, would permanently stick on. If the shiny surface began to come off within a matter of days or weeks ... there was a total failure of consideration ... by the defendants".⁶⁰

2.36. In general the courts have not held that a duty stricter than one of care⁶¹ is implied in a contract for the supply of a service, and this approach applies with particular force to services rendered by professional men,⁶² such as doctors and solicitors; thus, for example, a doctor does not normally guarantee that the treatment which he prescribes will effect a cure.⁶³ However,

⁵⁷ See, e.g., *Shirlaw v. Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 277, in which the criterion is expressed as being whether, had an officious bystander suggested an express provision when the parties were making their bargain, they would "testily suppress him with a common, 'Oh, of course'." The test has also been formulated as whether it is necessary to imply the term in order to "give to the transaction such business efficacy as the parties must have intended": *Luxor (Eastbourne) Ltd. v. Cooper* [1941] A.C. 108, 137.

⁵⁸ See, e.g., *Liverpool City Council v. Irwin* [1977] A.C. 239.

⁵⁹ *Chitty on Contracts*, 25th ed. (1983), vol. I, para. 842. See, e.g., *Liverpool City Council v. Irwin* [1977] A.C. 239, where the House of Lords held that a term was implied by law, notwithstanding that (see at pp. 255, 258-259, 266) neither of the tests referred to in n. 57 to this para. was satisfied.

⁶⁰ *G.K. Serigraphics v. Dispro Ltd.*, 15 December 1980, unreported, C.A.T. No. 916 of 1980, at p. 16. Griffiths L.J., at p. 23, expressed a similar view. Cumming-Bruce L.J. also held, alternatively, that a term to the like effect was implied by law: *ibid.*, at pp. 12-14.

⁶¹ In some circumstances the known dangers of the activity will call for a very high standard of precautions for the purpose of discharging the duty of care: see, e.g., *The Pass of Ballater* [1942] P. 112, 118.

⁶² There are numerous decisions on the point. See, e.g., *Clark v. Kirby-Smith* [1964] Ch. 506 (solicitor); *McNealy v. The Pennine Insurance Co. Ltd.* [1978] 2 Lloyd's Rep. 18 (insurance broker); *Whitehouse v. Jordan* [1981] 1 W.L.R. 246 (consultant obstetrician).

⁶³ *Greaves & Co. (Contractors) Ltd. v. Baynham Meikle & Partners* [1975] 1 W.L.R. 1095, 1100 (*per* Lord Denning M.R.). A doctor will not be held to have guaranteed the success of any operation or treatment unless he has said as much in clear and unequivocal terms: *Thake v. Maurice* [1986] 2 W.L.R. 337.

there are cases in which a term which imposes a higher standard has been implied. In *Independent Broadcasting Authority v. E.M.I. (Electronics) Ltd.*,⁶⁴ for example, the Authority employed E.M.I. as main contractor for the design, construction and erection of a television mast, but insisted that much of the work was to be subcontracted to a specified third party. Owing to defects in design the mast collapsed. The Court of Appeal found that the third party had not been negligent, but nevertheless held that E.M.I. were liable for the breach of an obligation that the design of the mast should be reasonably fit for the purpose for which it was required.⁶⁵ In the House of Lords it was held that the subcontractor had been negligent and it was accordingly unnecessary to determine the issue of E.M.I.'s liability.⁶⁶ However, it was stated, obiter, that a term would be implied that, if the recipient of the service relied upon the skill of the supplier to design and supply a mast, it should be reasonably fit for the known purpose for which it was required.⁶⁷ Again, in *Basildon District Council v. J. E. Lesser (Properties) Ltd.*⁶⁸ a term was implied, in a contract entered into by a firm of expert "system builders" with a local authority, that buildings designed by the builders as dwellings should be fit for habitation, because it was not a case in which an architect employed by a builder's customer had been instructed to design the buildings. In these "design" cases the term implied by the courts is analogous to the statutory term as to fitness for the purpose which is implied in contracts for the sale⁶⁹ or supply⁷⁰ of goods.

(2) Legislation in other jurisdictions

2.37. We have examined legislation in two other common law countries with a view to determining whether any terms implied into contracts for services by such legislation may be relevant to the present reference.

(a) *The Irish Republic*

2.38. The Sale of Goods and Supply of Services Act 1980, section 39, provides for the implication of terms into a contract for the supply of a service which are substantially similar to that contained in section 13 of the English Act. The drafting of the Irish enactment differs slightly from the English provision, in that two terms are implied—namely, (i) that the supplier has the necessary skill to render the service⁷¹ and (ii) that he will supply the service with due skill, care and diligence.⁷²

⁶⁴ (1980) 14 B.L.R. 1.

⁶⁵ (1978) 11 B.L.R. 29, 52 (*per* Roskill L.J.).

⁶⁶ (1980) 14 B.L.R. 1.

⁶⁷ *Ibid.*, 26 (*per* Viscount Dilhorne), 47 (*per* Lord Scarman).

⁶⁸ [1985] Q.B. 839.

⁶⁹ Sale of Goods Act 1979, s. 14(3).

⁷⁰ Supply of Goods and Services Act 1982, s. 4(4)-(6).

⁷¹ We consider in para. 2.44 below whether the absence in the 1982 Act of a corresponding term is of practical significance.

⁷² See n. 76, para. 2.39 below.

(b) Australia

(i) Commonwealth legislation

2.39. Section 74(1) of the Australian Trade Practices Act 1974 implies into a contract "for the supply by a corporation⁷³ in the course of a business of services⁷⁴ to a consumer⁷⁵", a warranty that the services will be rendered with due care and skill.⁷⁶ Section 74(2) of the 1974 Act, to which, so far as services are concerned, there is no corresponding provision in English legislation, provides that where the consumer makes known the purpose for which the services are required or the result that he wishes to achieve, a warranty is implied that the services will be reasonably fit for that purpose or are such that they might reasonably achieve that result, unless the consumer does not rely on the corporation's skill or judgment or it is unreasonable for him to do so.

(ii) Victoria

2.40. In Victoria, the Goods Act 1958⁷⁷ provides for conditions to be implied concerning the quality of services⁷⁸ supplied which resemble the terms implied, in relation to the supply of goods, under sections 4 and 5 of the 1982 Act.

2.41. Section 91 of the Victorian enactment provides that there should be implied, first, a condition that the services will be rendered with due care and skill and secondly, that they will be reasonably fit for the purposes for which services of that kind are commonly bought. Under section 92 of the Act a condition is implied which is similar to the warranty implied under section 74(2) of the Commonwealth Act.⁷⁹ It would seem that this term applies only where some special purpose or result has been made known to the supplier.

2.42. Section 93 deals with the supply of services on the strength of a demonstration of the results which they will achieve. It provides for the implication of (i) a condition that the services will correspond in nature and quality with those shown in the demonstration and (ii) a condition that they will be free from any defect rendering them unfit for the purposes for which such services are commonly bought.⁸⁰

⁷³ It is for constitutional reasons that the relevant provisions of the Act are limited to contracts for the supply of services by corporations.

⁷⁴ Only a limited range of services is covered by this provision, and most professional services are excluded from its scope: s. 74(3). However, under the Trade Practices Amendment Bill introduced into the Commonwealth Parliament on 9 October 1985, the definition of "services" would be greatly expanded; it would include professional services.

⁷⁵ A consumer is defined as a legal or natural person who pays a price less than the "prescribed amount" of, currently, \$15,000 or who buys services "of a kind or directly acquired for personal, domestic or household use or consumption". To provide for inflation, the Bill referred to in the preceding footnote would increase the prescribed amount to \$40,000.

⁷⁶ It has been suggested that "due care and skill" constitutes a higher standard than "reasonable care and skill". See Palmer and Rose, "Implied Terms in Consumer Transactions—The Australian Approach", (1977) 26 I.C.L.Q. 169, 187-189; Law Com. No. 95 (1979), para. 63.

⁷⁷ As amended by the Goods (Sales and Leases) Act 1981, s. 2(2).

⁷⁸ "Services" is defined in the same sense as in the (Commonwealth) Trade Practices Act 1974: see n. 74, para. 2.39 above.

⁷⁹ See para. 2.39 above.

⁸⁰ In Tasmania the Law Reform Commission has recommended the introduction of legislation containing (i) provisions along the lines of s. 74 of the Commonwealth Act, referred to in para. 2.39 above and (ii) a provision similar to s. 93 of the Victorian Act, Report No. 33 (1983), para 3.8, and clauses 8-10 of the draft Bill accompanying the report.

C. OUR CONCLUSIONS

2.43. Two questions arise under the first limb of our terms of reference (which requires us to consider whether, in the light of the 1982 Act, any reforms should be made to the terms to be implied by law in contracts for services). The first is whether the terms implied by sections 13-15 of the Act are satisfactory; and we have concluded that since those provisions have accurately codified the relevant common law principles, they do not call for amendment in this respect. Neither their interpretation nor their implementation seems as yet to have given rise to any problems.

2.44. The second question is whether the terms implied under the 1982 Act should now be supplemented by further provisions along the lines, for example, of the Irish or Australian legislation to which we have referred to above.⁸¹ For two reasons, the absence in the 1982 Act of a term similar to one of those implied under the Irish legislation (namely that the supplier *possesses* the necessary skill) would seem to be of little practical significance. In the first place, the customer will not sustain damage in consequence of a breach of the term implied under the Irish enactment unless the supplier fails to *exercise* reasonable skill.⁸² Secondly, a term is implied at common law on the part of a supplier of services that he possesses the necessary skill.⁸³ Since the 1982 Act does not affect any term implied by law otherwise than under the Act (provided that it is not inconsistent with the terms implied under sections 13 to 15),⁸⁴ this common law term will normally continue to be implied in contracts made after the Act.

2.45. There is as yet no clear evidence of a positive need for an extension of the range of terms implied under the 1982 Act, and in the absence of such evidence we consider that it would be inappropriate at present to put forward proposals for reform. The Australian legislation appears to cover different ground from the terms implied under English law. It will be useful later to review the effect of that legislation in coping with any injustice with which our law is unable to deal, and this may indicate a possible area for reform. To the extent that there is dissatisfaction on the part of consumers with their remedies for the breach of the terms that are implied under the 1982 Act, administrative remedies to which we refer below⁸⁵ might be helpful for the purpose of resolving at least some of the practical difficulties. If, in future,

⁸¹ See paras. 2.38 and 2.39-2.42. The National Consumer Council recommends in the 1985 paper that legislation should be introduced along the lines of the Australian Trade Practices Act 1974, referred to in para. 2.39 above. It also recommends, with regard both to that proposed provision and to the term implied under the 1982 Act, s. 13, that guidelines as to what is "reasonable" should be spelled out in the legislation. The Council further proposes that the criteria for determining reasonableness should be further defined by reference to codes of practice relating to particular categories of services.

⁸² "Nor can I see any valid reason for saying that a distinction is to be made between possessing skill and exercising it. . . . Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes also to use it?": *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, 573 (*per* Viscount Simonds).

⁸³ *Harmer v. Cornelius* (1858) 5 C.B. (N.S.) 236, 246. In *Lister v. Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555, it was stated that this proposition had never been questioned (*ibid.*, 572, *per* Viscount Simonds). Although *Harmer v. Cornelius* concerned a contract of employment, the principle was expressed in terms that extend to contracts for services.

⁸⁴ 1982 Act, s. 16(3)(b).

⁸⁵ See paras. 4.12-4.17.

evidence emerges of defects in the law which might appropriately be met by legislation, it would be necessary first to consult across a wide range of interested organisations and individuals. Should it appear at that time that the requirements of individual trades differ widely, it would seem to be appropriate for a body other than the Law Commission to conduct consultations in respect of particular categories of services.

2.46. To summarise, we have concluded that no immediate reform is needed to the terms to be implied by law in contracts for the supply of services.

PART III

EXCLUSION CLAUSES¹ IN CONSUMER TRANSACTIONS

A. STATUTORY CONTROL IN GENERAL

3.1. Under the second limb of our terms of reference we are required to consider whether, "as against a consumer", the purported exclusion of a supplier's liability under a contract for services for breach of a term implied by law in that contract should be prohibited. We examine that question in this Part of the report, and we conclude that at present it would be premature to make proposals for changing the law.

3.2. For the purposes of statutory control, exclusion clauses fall into one of three categories. The first comprises those which are not subject to control.² The second category consists of exclusion clauses which are rendered completely ineffective by statute. Examples of clauses within this category are, under the Unfair Contract Terms Act 1977 ("the 1977 Act"), a contract term which excludes liability for death or personal injury resulting from negligence,³ or one which excludes liability for breach of the statutory terms as to quality and fitness for purpose in a contract with a consumer for the supply of goods.⁴ Again, in some contracts for services "contracting out" of a term implied under a particular statute is prohibited by that statute.⁵ The third category, with which we are concerned in the present context, because all exclusion clauses (other than those which exclude liability for death or personal injury caused by negligence) affecting the terms implied under the 1982 Act fall into it, comprises the wide range of exclusion clauses which are declared by the

¹ Unless the context indicates otherwise, we use the expression "exclusion clause" to signify a contract term which either excludes or restricts liability; and similarly, "exclude" includes "restrict".

² See the list of exceptions in the Unfair Contract Terms Act 1977, Sch. 1, which includes contracts of insurance.

³ Sect. 2(1); s. 13(1).

⁴ Sects. 6 and 7.

⁵ e.g., the Defective Premises Act 1972, s. 6(3), which invalidates a term of an agreement excluding the duty imposed by the Act (referred to in para. 2.4 above) to see that work taken on in relation to the provision of a dwelling is done in a workmanlike or, as the case may be, a professional manner; the Carriage by Railway Act 1972 (as amended) and the Carriage of Passengers by Road Act 1974 (as amended), which regulate the international carriage of passengers and their luggage and contain prohibitions against "contracting out".

1977 Act to be ineffective except in so far as they satisfy the statutory requirement of "reasonableness". The issue for consideration here is whether, in relation to contracts for services, exclusion clauses which at present are subject to that requirement ought, in the general interest, to be automatically rendered ineffective in consumer transactions.⁶

B. THE UNFAIR CONTRACT TERMS ACT 1977

3.3. In this section we first consider the effect of the 1977 Act on exclusion clauses relating to the term implied under section 13 of the 1982 Act, one of the issues which lie at the heart of this reference. We then examine the effect of the 1977 Act upon terms implied at common law, and upon the terms implied under sections 14 and 15 of the 1982 Act. The provisions of the 1977 Act apply only where the supplier of a service acts in the course of a business.⁷

(1) The term implied under section 13 of the 1982 Act

(a) *The general rule*

3.4. The statutory control of the term implied under section 13 of the 1982 Act (relating to performance by the supplier with reasonable care and skill) constitutes the central issue under the second limb of our terms of reference.

3.5. The primary provision of the 1977 Act in this respect is section 2, which relates to loss or damage occurring as the result of negligence; the section invalidates any contract term which excludes liability for death or personal injury and provides that liability for other loss or damage should be subject to the requirement of "reasonableness". We consider the nature of this requirement below.⁸ In phraseology that is reflected in section 13 of the 1982 Act, "negligence" is defined (so far as is material) as being the breach of an obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in its performance.⁹ Section 2 applies not only to the exclusion by means of a contract term of *liability* for negligence but also to the purported exclusion by that means of the relevant duty itself.¹⁰

(b) *The statutory requirement of reasonableness*

(i) *The provisions of the 1977 Act*

3.6. Section 11(5) of the 1977 Act assists the recipient of a service who contends that an exclusion clause is ineffective (on the ground that it does not

⁶ As introduced, the Bill which became the 1982 Act contained a prohibition of any contract term in a consumer transaction which purported to exclude liability for breach of the term implied under s. 13 of the Act.

⁷ Sect. 1(3)(a); it is, however, immaterial whether the business is that of the supplier or another person.

⁸ Paras. 3.6-3.8.

⁹ 1977 Act, s. 1(1)(a). Sect. 2 applies also to contract terms and notices which purport to exclude liability for negligence in tort: s. 1(1)(b).

¹⁰ Sect. 13(1).

satisfy the requirement of reasonableness) by placing upon the supplier the burden of proving the reasonableness of the clause. However, in relation to a contract other than one for the supply of goods,¹¹ the Act gives guidance only in very general terms: section 11(1) merely defines the requirement of reasonableness as being that the relevant exclusion clause should be “a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made”.

3.7. Where a contract term does not entirely exclude liability but restricts it to a specified sum of money, the court is directed by section 11(4) of the Act to have regard, in particular, to (i) the resources which the party for whose benefit the term would operate could “expect to be available to him for the purpose of meeting the liability should it arise” and (ii) how far it was “open to him to cover himself by insurance”. Furthermore, it would seem that these factors may also be taken into account in the case where liability is completely excluded¹² or where the restriction of liability takes a form other than that of a specified sum of money.¹³

3.8. No guidance other than that to which we have referred above¹⁴ is provided by the Act in relation to contracts in general. However, the Act contains detailed guidelines concerning the requirement of reasonableness in respect of certain exclusion clauses in non-consumer contracts for the supply of goods;¹⁵ and in appropriate cases those guidelines will be applied by analogy to other categories of contract.¹⁶ Section 11(2) and Schedule 2 direct that regard is to be had in particular to “any of the following [matters] which appear to be relevant”—namely:

- “(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer’s requirements could have been met;
- “(b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
- “(c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- “(d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the

¹¹ See para. 3.8 below.

¹² *Phillips Products Ltd. v. Hyland* (1984) 4 Tr. L. 98; (1984) 129 S.J. 47.

¹³ As in *Woodman v. Photo Trade Processing Ltd.* (1981), a county court decision, where the restriction took the form of a term that liability was limited to the cost of replacing the film: see para. 3.10 below.

¹⁴ Paras. 3.6–3.7.

¹⁵ Sects. 6(3), 7(3).

¹⁶ e.g., *Keeton Sons & Co. Ltd. v. Carl Prior Ltd.* (C.A.), 14 March 1985, unreported.

time of the contract to expect that compliance with that condition would be practicable;

“(e) whether the goods were manufactured, processed or adapted to the special order of the customer.”

(ii) *Examples of the judicial application of the requirement of reasonableness*

3.9. Certain broad principles, to which we refer in the following paragraphs, may be deduced from such decisions relating directly to contracts for services as there have been.¹⁷ It should be borne in mind that no distinction is drawn by the 1977 Act between consumer and non-consumer transactions in the case of contracts for the supply of services.

3.10. A significant factor is whether the customer had a choice to enter into a contract with the same or another supplier in terms which did not include the exclusion clause.¹⁸ In this respect, the availability, or the absence, of a “two-tier” system in the particular trade, consisting of a normal service with an exclusion of liability and a special service at a higher charge with acceptance of liability may in appropriate cases be a factor of considerable weight, on the ground that such a system gives the customer a choice. Thus, in a county court case, *Woodman v. Photo Trade Processing Ltd.*,¹⁹ a reel of the film of a wedding was given for processing to the defendants, who lost it. A clause in the contract stipulated that the defendants’ responsibility was limited to the cost of replacing the film and as the whole trade had adopted the stipulation, the consumer had no choice but to accept it. Primarily on that ground, the clause was held to be unreasonable.²⁰

3.11. By contrast, in *Stevenson v. Nationwide Building Society*²¹ a term in the Society’s form of mortgage application provided that no responsibility was accepted for the value or condition of the property in question by reason of the report and valuation to be made by the Society’s valuer. The term was held to be reasonable, on the ground (among others) that the applicant had been offered, but had not exercised, the option of paying for a full structural survey to be effected at the same time.

¹⁷ For reviews of decisions on the statutory requirement of reasonableness, see Lawson, “Precedents under the Unfair Contract Terms Act 1977”, (1985) 82 L.S.G. 2393; “more notes from an assiduous collector”, (1985) 4 Tr. L. 205; “The Unfair Contract Terms Act: Litigation”, (1986) 83 L.S.G. 711.

¹⁸ See the 1977 Act, Sch. 2, para. (b), set out in para. 3.8 above.

¹⁹ (1981).

²⁰ In *Waldron-Kelly v. British Railways Board* [1981] C.L.Y. 303, a county court decision, a suitcase was delivered to one railway station for carriage to another on “owner’s risk” conditions. The conditions contained two limitations of liability. First, the Board was not to be liable unless the owner proved wilful misconduct. Second, in the event of non-delivery, the Board’s liability was to be assessed by reference to the weight of the goods, not their value. It was held that the relevant term was not reasonable. However, it seems that the owner could have contracted on “carrier’s risk” conditions at a higher charge, and it is possible that had it not been for the first limitation, the second would have been upheld.

²¹ (1984) 272 E.G. 663. The claim was founded on negligence in tort, to which a similar test applies: see the 1977 Act, s. 11(3). It has been suggested, however, that the 1977 Act did not arise for consideration, because the relevant words on the application form constituted a disclaimer (rather than an exclusion clause), which prevented liability from arising in the first place: see Holyoak, *Professional Negligence* (1985), vol. 1, 49. For a contrary view, see Stanton, *Professional Negligence* (1985), vol. 1, 132.

3.12. More recently, the question of the customer's choice arose in *Phillips Products Ltd. v. Hyland*.²² In that case, the plaintiffs, who were factory owners, hired an excavator and driver. A term of the contract provided that the plaintiffs would be responsible for all claims arising in connection with the driver's operation of the plant. The Court of Appeal had to determine whether, in relation to damage caused to the plaintiffs' factory through the driver's negligence, that clause was reasonable; and in finding that it was not, Slade L.J. (who delivered the judgement of the court) gave as one reason for his decision the fact that the form of contract was used by all the members of the trade federation to which the suppliers belonged; he pointed out that even if the plaintiffs had understood and been worried by the effect of the term in question before concluding the contract, they would not have thought they could do otherwise than accept it.²³ Slade L.J. emphasised that the question for determination is not whether the exclusion clause is valid or invalid in every contract entered into on the same terms, but only in relation to the particular contract before the court.²⁴

(c) *Matters for consideration*

3.13. The question whether contract terms which purport to exclude liability for negligence should be invalidated by legislation, first, for commercial and consumer transactions alike and secondly, in consumer contracts alone²⁵ was considered by the Law Commission and the Scottish Law Commission in their joint Second Report on Exclusion Clauses,²⁶ which was published in 1975 and on which the 1977 Act is substantially based. For the reasons which we outline below²⁷ and which in our view are still valid, the two Commissions rejected that approach. We turn to consider in turn the arguments for and against adopting it now.

3.14. It has been suggested²⁸ that where a service is supplied to a consumer, the supplier should never be able to exclude liability for performing his obligations negligently. In our view, however, there is no objection of principle to the present rule, whereby a purported exclusion of liability for negligence is valid only to the extent that the supplier can establish its reasonableness. This ensures that suppliers observe acceptable standards of fairness, while at the same time permitting a degree of flexibility which allows the courts to take into account all the circumstances, including the particular customer's conduct and understanding and the extent to which he accepted the risks involved.

²² (1984) 4 Tr. L. 98; (1984) 129 S.J. 47.

²³ (1984) 4 Tr. L. 98, 115.

²⁴ (1984) 4 Tr. L. 98, 113; (1984) 129 S.J. 47. This point was also made in *Stevenson v. Nationwide Building Society* (1984) 272 E.G. 663, 671, referred to in para. 3.11 above, in the following terms: "The test is a subjective one. It may be fair and reasonable to disclaim [liability] against X where it would not be fair and reasonable against Y."

²⁵ The National Consumer Council argued for such a ban in its 1981 Report. It maintains this view in the 1985 paper, and proposes there that the ban should extend to exclusion clauses relating to the new implied term which it recommends (see n. 81, para. 2.44 above).

²⁶ Second Report on Exemption Clauses, Law Com. No. 69/Scot. Law Com. No. 39, paras. 54-58.

²⁷ Paras. 3.18-3.19.

²⁸ e.g., by the Commission of the European Communities: see discussion paper, "Unfair terms in contracts concluded with consumers", Bulletin of European Communities, Supplement 1/84, para. 50.

3.15. Two stronger arguments for the imposition of a ban are based on practical considerations. One is that the present law places the consumer at a disadvantage in respect of bargaining power, since normally he has no option but to accept the terms of a contract (commonly in standard form) which has been drafted by the supplier or his advisers. The other is that cases may well arise in which an exclusion clause would, if tested in litigation, be found by the court to be unreasonable, but in which the consumer is deterred from commencing proceedings for breach of the term implied under section 13 of the 1982 Act because he does not know with certainty that the clause is invalid; an outright prohibition would resolve this particular difficulty.²⁹

3.16. A fourth argument is based upon a comparison with the rules governing exclusion clauses in contracts for the supply of goods. In consumer transactions the Unfair Contract Terms Act 1977, sections 6(2) and 7(2), automatically invalidate a purported exclusion of the statutory implied terms as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose. Accordingly, in a contract for work and materials the goods are subject, from the consumer's point of view, to a more favourable rule than that which governs the "service" element of the contract. For example, in a consumer contract for the installation of a gas-fired central heating system, if the system operates defectively because the boiler is unsatisfactory, the supplier will be unable to rely upon an exclusion clause in the contract. However, if the fault is due to the supplier's failure to exercise reasonable care and skill in installing the system, a term of the contract which excludes his liability other than for personal injury or death³⁰ is valid if it satisfies the requirement of reasonableness. Since in either event, however (according to this argument), the system is not working properly the supplier should have to bear the cost of putting it right.³¹

3.17. We note, finally, that in Australia the statutory terms implied on the part of suppliers under the Commonwealth and the Victorian legislation to which we have referred above³² cannot in general be restricted or excluded.³³ The latter provision is reinforced with a criminal sanction imposed upon a supplier who includes a void exclusion clause in the contract.³⁴

3.18. We turn now to the factors which, in our view, militate against altering the law at present. The first consists of the grounds on which the Law Commission and the Scottish Law Commission concluded, in their joint Second

²⁹ The National Consumer Council, which recommended in its 1981 Report that legislation should invalidate clauses purporting to exclude liability for negligence in consumer transactions, gave as one reason that "it is desirable that the consumer should know for certain that the rights implied into his contracts by statute cannot be taken away..." (*ibid.*, at p. 28).

³⁰ Unfair Contract Terms Act 1977, s. 2(1).

³¹ This argument was advanced by the National Consumer Council in both its 1981 Report, at p. 28, and the 1985 paper.

³² Paras. 2.39 and 2.40-2.42.

³³ Trade Practices Act 1974, s. 68; Goods Act 1958, s. 95, inserted by the Goods (Sales and Leases) Act 1981, s. 2(2). (There is an exception in the 1974 Act in relation to services "not of a kind ordinarily acquired for personal, domestic or household use or consumption": *ibid.*, s. 68A.)

³⁴ Goods Act 1958, s. 96, inserted by the Goods (Sales and Leases) Act 1981, s. 2(2). Although the Commonwealth Act contains no provision which corresponds precisely, it is an offence under ss. 53(g) and 79 of that enactment for the supplier corporation to make a false statement concerning the existence, effect or exclusion of a condition, warranty, right or remedy.

Report on Exemption Clauses in 1975,³⁵ that an absolute prohibition of exclusion clauses would not be appropriate. The Commissions consulted a large number of organisations,³⁶ including those representing the insurance industry and consumer interests; and they examined the conflicting arguments in some detail, balancing the practical effectiveness of the rights of consumers in cases of breach against the increased costs of services which, if the proposal were implemented, would be borne by consumers in general.³⁷ These increased costs would arise because, if in every case the supplier is liable without limit for negligence, the cost of meeting that liability will ultimately fall upon his customers, whether he chooses to cover his potential liability by insurance or by meeting claims out of the resources of his business: in either event he will increase his charges to all his customers. Furthermore, in many kinds of contract, where there can be consequential loss, suppliers cannot know the amount of cover which will be adequate, and will tend to over-insure in order to be certain that they have protected themselves against any claim, however large. The two Commissions were advised by insurance experts that the high administrative costs which would fall on insurers in handling a large number of small claims in some types of service (for example, dry cleaning) would tend to inflate premiums to a level that suppliers could not afford or even to deter them from offering cover at all; and if the supplier could not insure his liability, consumers would often be forced to run the risk of suing a supplier who could not meet the claim. The Commissions concluded that these considerations, which in our view remain valid, tilted the balance against the introduction of a complete ban on clauses excluding liability for negligence.

3.19. Secondly, a complete ban upon clauses excluding liability for negligence would have a prejudicial effect upon the choice that the consumer enjoys at present under the "two-tier" system operated in some trades (for example, laundering) under which he may choose to pay either at a basic rate with a limited right to compensation or at a higher rate in return for more generous compensation arrangements. As to this, there is a body of opinion that this option constitutes a valuable right for consumers.³⁸

3.20. Thirdly, in balancing the interests of consumers against those of the suppliers of services, it is necessary to take into account, in particular, the effect that the automatic invalidation of exclusion clauses would have upon small traders. The court is directed by the 1977 Act, in determining whether the relevant clause satisfies the statutory requirement of reasonableness where

³⁵ Law Com. No. 69/Scot. Law Com. No. 39.

³⁶ *Ibid.*, para. 10. They are listed in Appendix D to that report.

³⁷ *Ibid.*, paras. 56-58.

³⁸ This point was one of those made by the two Commissions in their 1975 report in support of their conclusion that a complete ban on exclusion clauses should not be introduced in consumer transactions (see Law Com. No. 69/Scot. Law Com. No. 39, para. 58); it was emphasised by the then Minister for Consumer Affairs during the Second Reading of the Bill which became the 1982 Act (see *Hansard* (H.C.), 22 January 1982, vol. 16, cols. 537-538); and the absence of a two-tier system was one reason why the exclusion clause in *Woodman v. Photo Trade Processing Ltd.*, referred to in para. 3.10 above, was found to be unreasonable. However, a contrary view was expressed in the N.C.C. Report, in which the National Consumer Council suggested that "the consumer would rather pay a little more for a service knowing that compensation will be forthcoming if the supplier is careless, than to pay less for the doubtful advantage of testing the reasonableness of an exemption clause in the courts" (*ibid.*, at p. 29).

liability is restricted to a specified sum of money, to have regard to the resources of the supplier and to the extent to which he can cover himself by insurance;³⁹ and in respect of other types of exclusion clause as well, the court may take those matters into account. An exclusion clause may therefore be found to be reasonable in the case of a contract with a small trader where, other things being equal, it would not be upheld in the case of a larger business. Thus, a complete ban would prevent a small trader from excluding or restricting his liability in circumstances in which it would be reasonable for him to do so; and it would destroy the flexibility of the present approach by assimilating the liability of small traders to those of larger concerns. A complete ban is likely, therefore, to have a detrimental effect upon small businesses.⁴⁰

3.21. The fourth factor relates to criminal sanctions. In relation to contracts for the sale of goods, there was a long history of litigation chronicling sellers' attempts to exclude or limit guarantees to buyers.⁴¹ Eventually, the exclusion of a consumer's statutory rights was rendered automatically invalid by statute.⁴² Only three years later, it was found necessary to make such exclusion an offence.⁴³ This experience suggests that, to be effective in practice, legislative provision rendering exclusion clauses invalid in consumer contracts for the supply of services would require similar reinforcement by means of corresponding offences. However, we take the view that offences should not be created unless the conduct which they are designed to counter clearly justifies the penalties and the stigma that attach to those who commit them, and we are not convinced that such justification exists in the present context. There is no large body of reported cases in which suppliers of services have sought to reduce their customers' rights; and the National Consumer Council did not, in its 1981 report, cite any such evidence in support of its recommendations.

3.22. A further consideration is the meaning of the term "consumer", since the second limb of our terms of reference⁴⁴ distinguishes between consumer and non-consumer transactions. We explain below⁴⁵ that in some circumstances a contract may be regarded by the law as being entered into by someone as a consumer who, from a commercial (rather than a legal) point of view, might not be so regarded. However, the question what test should be applied to distinguish those who are genuine consumers from those who are not concerns a much wider range of activities than the supply of services. It would be confusing and illogical, and therefore not a satisfactory reform of the law, to

³⁹ See para. 3.7 above.

⁴⁰ In relation to the professions generally (not only solicitors), the Royal Commission on Legal Services recommended in its final report (1979) that an inquiry should be set up into the desirability of a limit on the level of damages which may be awarded for negligence (Cmnd. 7648, para. 23.30), having regard to the cost of insurance cover (*ibid.*, paras. 23.23-23.28). The limitation of professional liability is now under review by a sub-committee of the United Kingdom Inter-Professional Group: see The Government Response to the Report of the Royal Commission on Legal Services (1938), Cmnd. 9077, p. 23.

⁴¹ See, e.g., *L'Estrange v. F. Graucob Ltd.* [1934] 2 K.B. 394 and the other cases cited in *Benjamin's Sale of Goods*, 2nd ed. (1981), paras. 967-970.

⁴² Sale of Goods Act 1893 s. 55(3)-(11), inserted by the Supply of Goods (Implied Terms) Act 1973, s. 4, now superseded by the Unfair Contract Terms Act 1977, ss. 6 and 12.

⁴³ S.I. 1976 No. 1813 (as amended by S.I. 1978 No. 127). The order was made under the Fair Trading Act 1973, s. 22.

⁴⁴ See para. 3.1 above.

⁴⁵ Para. 3.27.

adopt a definition in connection with the supply of services which differed from those in other, related fields. As we are here concerned only with the supply of services, it would be inappropriate to consider the issue in this report.

3.23. Finally, we refer for completeness to a suggestion that a ban on exclusion clauses would operate to impose liability upon a skilled tradesman (or his employer) in the case where, while engaged on a task which lies within his field, he agrees to do his best to do some other job which (as his customer knows) falls outside it.⁴⁶ This is because it is arguable that, apart from the question of the exclusion of liability, the tradesman is liable, at least in some cases, for a failure to perform the additional task with the skill which it would be reasonable to expect from an expert. On this view, to prohibit the exclusion of such liability would be to leave him without protection from a claim based upon his failure to exhibit a skill which his customer knew, when the contract was made, that he does not possess. A countervailing argument is that the standard of skill that the tradesman is required to exercise under the contract is lower than that expected of an expert and that therefore no question of exclusion of liability arises.⁴⁷ It may be that no general proposition can be formulated, and that every case turns on its facts. In the absence of clear authority, the position is uncertain.

(d) Our conclusion

3.24. We have concluded that we would not be justified at present in proposing the introduction of a complete ban on the exclusion of the term implied under section 13 of the 1982 Act. In arriving at this conclusion, we have borne in mind, in particular, first that the present law strikes a balance between suppliers' and consumers' interests, secondly the problems relating to insurance and expense to which a prohibition might give rise and thirdly that no evidence exists of widespread abuse in practice of differences in bargaining power. Longer experience of the practical operation of the current rules may make it appropriate for a full review of the issue to be conducted at a later date.

(e) The meaning of "consumer"

3.25. We now explain why we suggested in paragraph 3.22 above that a prohibition of exclusion clauses in consumer contracts for services would apparently extend to many cases in which the transaction was of a commercial nature.

3.26. Section 12(1) of the 1977 Act provides that a party to a contract is a consumer if (i) he does not enter into the contract in the course of a business (and does not hold himself out as doing so) and (ii) the other party does enter

⁴⁶ This point was made by way of objection to a complete ban during the passage through Parliament of the Bill that became the 1982 Act. It was thought to be not uncommon, and a positive advantage, for the customer to say to a tradesman who had called to do one job, "While you are here, will you look at this [another job known to lie outside the tradesman's field of expertise]?" on the basis that the tradesman would see what he could do (see *Hansard* (H.C.), 22 January 1982, vol. 16, col. 566). A similar point was made in respect of a task given to a person "who calls at the door" and whom the householder "knows full well" not to be skilled: *ibid.*

⁴⁷ See n. 41, para. 2.23 above.

into the contract in the course of a business. The term "business" is partially defined to include a profession and the activities of government departments and of local or public authorities.⁴⁸

3.27. The construction of the expression "in the course of a business" has arisen in cases relating to contracts for the supply of goods; it appears that a trader who buys (or sells) goods in connection with his business does not act "in the course of a business" unless it is part of his business, *as part of its normal practice*, to deal in those goods.⁴⁹ It would seem that, by parity of reasoning, in many cases the recipient of a service might enter into a contract, in a broad sense, in the course of a business, and yet be a consumer for the purposes of the 1977 Act. We do not think it necessary in the present context to consider whether the present rules governing this question are satisfactory, since whatever might be the view that we formed on the matter, it would be inappropriate to recommend a change in the present law in relation only to the supply of services and not to other categories of contract to which the 1977 Act applies.⁵⁰

(2) Terms implied at common law

3.28. Section 3 of the 1977 Act extends to contracts in general but, in its application to contracts for services, it relates to a contract term which purports (a) to exclude liability on the part of the supplier for breach of contract,⁵¹ or (b) to entitle the supplier to render a performance "substantially different from that which was reasonably expected of him" or to render no performance at all.⁵² Under the section, where the recipient of the service deals as consumer (or on the supplier's "written standard terms of business"), such a term is invalid except in so far as it satisfies the statutory test of reasonableness.⁵³ The section would apply to the purported exclusion of the terms implied at common law in those contracts under which the supplier undertakes an obligation stricter than a duty of care.⁵⁴ We are not aware, despite criticism of section 3 by some commentators,⁵⁵ that it has given rise to difficulties in

⁴⁸ Sect. 14.

⁴⁹ *Havering London Borough Council v. Stevenson* [1970] 1 W.L.R. 1375; *Peter Symmons & Co. v. Cook* (1981) 131 N.L.J. 758; *Davies v. Sumner* [1984] 1 W.L.R. 1301 (H.L.). The first-mentioned authority concerned a prosecution for the offence, under s. 1(1)(b) of the Trade Descriptions Act 1968, of supplying in the course of a trade or business goods to which a false trade description was applied. Similarly, the last-mentioned decision related to a prosecution under s. 1(1)(a) of that Act for applying to goods in the course of a trade or business a false trade description. The reasoning in both cases would seem to be equally applicable to the 1977 Act. See, in particular, the statement in the latter case, at p. 1305, that "the expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity . . ." (emphasis added).

⁵⁰ For example, contracts for the sale of goods (for which the Act lays down special rules in respect of consumer transactions: see para. 3.2 above).

⁵¹ Sect. 3(2)(a).

⁵² Sect. 3(2)(b).

⁵³ This requirement is considered in paras. 3.6-3.8 above.

⁵⁴ See para. 2.36 above. Sect. 3 would also apply to the case in which (quite apart from any implied term) a strict obligation is undertaken by the supplier; see para. 2.35 above.

⁵⁵ See, e.g., Cheshire and Fifoot, *Law of Contract*, 10th ed. (1981), p. 162, where the section is criticised on the ground that it is not founded upon any coherent theory of the relationship between terms which exclude liability and those which define it. However, this question was taken into account by the Law Commission and the Scottish Law Commission in their Second Report on Exemption clauses (1975) on which the 1977 Act is based: see Law Com. No. 69/Scot. Law Com. No. 39, para. 146.

practice, and the considerations to which we have referred in paragraphs 3.13–3.23 above, in relation to the term implied under section 13 of the 1982 Act, apply also to terms implied at common law. We have therefore concluded that the matter does not call for further consideration in the present context.

(3) Section 14 of the 1982 Act

3.29. In relation to the term implied under section 14 of the 1982 Act (that the service will be carried out within a reasonable time), the question of exclusion of liability would seem to be of limited practical significance. This is because a supplier who is concerned to make provision as to the time within which performance is to take place will normally do so by stipulating in the contract the date by which the service is to be carried out. In that situation the term referred to in section 14, which applies only where the contract does not provide for the time for performance, will not be implied. However, a case might arise in which, although the contract made no provision as to the time for performance (so that a term was implied under section 14 that the supplier would perform the service within a reasonable time), it contained, for example, a clause restricting to a specified maximum amount the supplier's liability for breach of any obligation relating to the time for performance. If the contract was a consumer transaction (or made on the supplier's written standard terms of business), the statutory requirement of reasonableness under the 1977 Act would apply to the validity of such a clause.⁵⁶ Several of the considerations to which we have referred above⁵⁷ in relation to the purported exclusion of the term implied under section 13 of the 1982 Act apply also to the term arising under section 14, and we have arrived at a similar conclusion concerning the latter provision—namely, that in the present context a recommendation that a complete ban on exclusion clauses should be introduced would not be justified.

(4) Section 15 of the 1982 Act

3.30. The term referred to in section 15 of the 1982 Act (relating to the payment of a reasonable charge) is not implied where the contract fixes the charge. In such a case, therefore, the question of excluding the term does not arise. However, it is conceivable that cases exist in which the contract, although it does not fix a charge, contains a provision which nevertheless excludes the operation of the term implied under section 15. An example of such a provision might be that the customer should pay a specified minimum amount, which in the event exceeds a reasonable charge for the work done by the supplier. A provision of this kind is not subject to statutory control.⁵⁸ We are not aware that in practice there is dissatisfaction with stipulations of this nature, as distinguished from a contractual obligation to pay a specified exorbitant price.⁵⁹ However, any problems arising would be of a similar kind to those which arise in relation to that obligation, and could conveniently fall for consideration under that head.⁶⁰

⁵⁶ Sects. 3(2)(a), 13(1)(b).

⁵⁷ Paras. 3.18–3.23.

⁵⁸ The 1977 Act does not apply to an exclusion, in favour of the supplier, of the term implied under the 1982 Act, s. 15. This is because the term creates an obligation on the part of the customer, not the supplier: see the 1977 Act, s. 3.

⁵⁹ See para. 2.31 above.

⁶⁰ See paras. 4.18–4.21 below.

C. SUMMARY OF CONCLUSIONS

3.31. Our conclusions concerning the question whether, as against a consumer, the exclusion or restriction of the supplier's liability for breach of a term implied by law in a contract for services are as follows:

- (a) It would be premature to make proposals at present to alter the rules governing the exclusion or restriction of liability for breach of the terms implied under Part II of the 1982 Act.
- (b) No change is called for in relation to the exclusion or restriction of terms implied into contracts for the supply of services by the common law.

PART IV

REMEDIES

A. INTRODUCTION

4.1. Under the third limb of our terms of reference we are required to consider the consequences of the breach by the supplier of the terms implied by law in a contract for the supply of a service. In this Part we first outline the legal remedies for breach of contract which are available at present.¹ We go on to outline certain other remedies, including the work of, and proposals currently under consideration by, the Office of Fair Trading in relation to unfair trading practices and to codes of practice.² We then canvass the possible introduction of certain new remedies.³ Finally we set out our conclusions.⁴

B. THE PRESENT LEGAL REMEDIES FOR BREACH OF CONTRACT

(1) Compensation

4.2. In practice, the main legal remedy for the breach of the supplier's obligations under a contract for services, as in the case of breach of contract in general, is an award of compensation in the form of damages, the purpose of which is to compensate the plaintiff for the damage, loss or injury that he has sustained. The principles which govern the award of damages for breach of a contract for services are those which apply generally to the law of contract. There is much authority as to the rules relating to what items of loss or damage should be reflected in an award and to the method of assessing the amount which constitutes appropriate compensation in respect of those items. The law concerning damages has substantially been laid down by the courts rather than by legislation and although the general principles are well established, their detailed application in particular categories of breach of contract remains subject to continuing judicial development. At one time, for example, damages

¹ Paras. 4.2-4.11 below.

² Paras. 4.12-4.17 below.

³ Paras. 4.18-4.29 below.

⁴ Paras. 4.30-4.34 below.

could not be awarded in any action for breach of contract in respect of injury to feelings,⁵ but this principle has been eroded in recent years.⁶

4.3. For some consumers, the right to compensation is reinforced by the Consumer Credit Act 1974⁷ under which if services are acquired on credit supplied by a third party, in certain circumstances⁸ he is made liable, with the supplier of the services, for a breach of contract on the part of the latter. Clearly this is a valuable right from the point of view of the consumer where, for example, the supplier is insolvent and his customer is entitled, in consequence of this provision, to claim against a solvent finance company.

(2) Termination of the contract

(a) *Stipulations other than those relating to time*

4.4. All breaches of contract give rise to a right to damages;⁹ some entitle the innocent party, in addition, to terminate the contract. We need refer here only briefly to certain salient features of the law.¹⁰

4.5. The court will give effect to an express provision in a contract that a breach of the term implied under section 13 of the 1982 Act (relating to the exercise by the supplier of reasonable care and skill)¹¹ should automatically give rise to a right for the customer to terminate the contract (i.e., that the term should have the remedial consequences of a condition).¹² Where there is no such provision, the construction of the contract may indicate an implied agreement to that effect. In most cases, however, it is likely that the term will be construed not as a condition,¹³ but as one that entitles the customer to

⁵ *Addis v. Gramophone Co. Ltd.* [1909] A.C. 488.

⁶ e.g., in *Jarvis v. Swans Tours Ltd.* [1973] Q.B. 233, damages in respect of a disappointing holiday were awarded for the disappointment, distress, annoyance and frustration caused by the travel agents' breach of contract, and in *Hooberman v. Salter Rex* (1984) 274 E.G. 151, damages were awarded for (among other matters) inconvenience and anxiety against surveyors who, in a structural survey commissioned by the plaintiff, negligently failed to report the existence of structural defects in a maisonette purchased by the plaintiff in reliance on the survey (*ibid.*, 156). The scope of this development is not yet clear.

⁷ Sect. 75.

⁸ There are several limitations upon the scope of the remedy conferred by s. 75. For example, the section applies only if credit is given under a pre-existing arrangement between the supplier and the third party (so that a customer who merely borrows money from his bank to pay for services is outside the section); it does not apply to "running-account" credit where, as in the case of some charge-cards, the credit is repayable by a single payment; and many small claims are excluded because, to fall within the section, the customer's claim must not relate to "any single item" in respect of which the cash price is £100 or less.

⁹ If, however, no loss or damage is suffered in consequence of the breach, only nominal damages will be awarded.

¹⁰ For a detailed discussion, see, e.g., *Chitty on Contracts*, 25th ed. (1983), vol. I, paras. 1616 and 1620-1622; Treitel, *The Law of Contract*, 6th ed. (1983), pp. 592-603.

¹¹ Sect. 15 relates to the customer's obligation. As to the remedies for breach of the term implied under s. 14, see paras. 4.7-4.8 below.

¹² The fact that a term is described in the contract as a "condition" does not necessarily indicate an express agreement that any breach of the term should give rise to a right to terminate the contract: *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.

¹³ Except in relation to stipulations as to time in commercial contracts "... there has developed a marked reluctance in recent years to classify terms as conditions, it being felt that this approach is more consistent with the parties' contractual intentions, and introduces a desirable degree of flexibility into the law...": see *Compagnie General Maritime v. Diakan Spirit S.A. (The Ymnos)* [1982] 2 Lloyd's Rep. 574, 583 (*per* Robert Goff J.).

terminate the contract only if the breach gives rise to an event that deprives him of substantially the whole benefit which he was intended to obtain from the contract.¹⁴

4.6. The principles to which we have referred in paragraph 4.4 above do not constitute the only ground on which the customer may terminate a contract. For example, different considerations apply if the supplier “renounces” the contract by stating expressly that he does not intend to continue to perform his obligations under it; in that event the customer may at once terminate the contract. Even in the absence of an express refusal, a similar result will follow where the supplier’s conduct is such as to lead to the reasonable conclusion that he no longer intends to be bound by the contract.¹⁵ Again, if the supplier’s obligation is “entire and indivisible”—that is to say, if the contract provides for complete performance by the supplier before he is to be entitled to any payment—the customer is not bound to pay anything for partial performance.¹⁶

(b) Stipulations as to time

4.7. A failure by a supplier to perform his obligations within the time provided for by the contract gives rise to a right to damages.¹⁷ Under section 14 of the 1982 Act, where the contract does not expressly stipulate the time within which performance must take place, a term is implied that the supplier’s obligations will be performed within whatever may be a reasonable time. Accordingly if in such a case he does not carry out his obligations within a reasonable time he commits a breach of the implied term, for which he is liable in damages. The answer to the further question whether the customer may cancel the contract depends upon two principles. The first is whether the supplier’s delay is “so gross and inexplicable” as to make it clear that he does not intend to perform his part of the contract;¹⁸ if so, the customer may terminate the contract. The second principle, which comes into play in cases which fall outside this category, is based upon whether or not time is of the essence of the supplier’s obligation. Time is regarded as of the essence if either the contract expressly provides that the term must be strictly complied with or the nature of the surrounding circumstances shows that time was intended to be of the essence.¹⁹

¹⁴ i.e., as an “intermediate” term. A term is likely to be so classified if, as in the case of the obligation implied under s. 13, its breach may or may not have serious consequences: see *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, 70.

¹⁵ See, e.g., *Universal Cargo Carriers Corporation v. Citati* [1957] 2 Q.B. 401, 436 (aff’d in part [1957] 1 W.L.R. 979 and reversed in part [1958] 2 Q.B. 254); *The Hermosa* [1982] 1 Lloyd’s Rep. 570.

¹⁶ See, e.g., *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009, in which a builder recovered nothing under a contract to install a central heating system for £500, although the defects in his work cost only £170 to put right and the customer’s other damages were assessed at £15. The Law Commission recommended (by a majority) changes in the law relating to entire contracts, but its recommendations were rejected by the Lord Chancellor on the grounds that (i) the present law does not cause an unnecessary hardship or injustice and (ii) the introduction of a “complex set of rules” would lead to increased litigation without any substantial corresponding benefit: see the Law Commission’s Nineteenth Annual Report 1984–85 (1985), Law Com. No. 140, para. 2.11.

¹⁷ *Rainieri v. Miles* [1981] A.C. 1050. Before this decision the authorities were in some confusion: see Treitel, *The Law of Contract*, 6th ed. (1983), p. 625.

¹⁸ See, e.g., *London & Manchester Assurance Co. Ltd. v. G. A. Dunn & Co.* (1982) 265 E.G. 39, 135.

¹⁹ See, e.g., *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904.

4.8. Where time is not of the essence of the contract and the supplier has not performed within a reasonable time, the customer may give notice requiring him to perform his obligation within a further period of time which is specified in the notice and which is reasonable in the circumstances.²⁰ If the supplier fails to comply with the notice within the time specified, the customer may treat the contract as terminated.

(3) Ensuring performance

4.9. The question whether on application by the customer the court will, either directly or indirectly, compel the supplier to perform any of his obligations under the contract involves a consideration of the principles which govern the grant of the equitable remedies of specific performance and injunction.

(a) Specific performance

4.10. Traditionally, there were two principles governing the exercise of the court's discretion to make an order for specific performance which had the effect of rendering this power of limited practical significance in relation to contracts for services. The first, and more general, principle is that an order will not normally be made if an award of damages would be an "adequate" remedy (which it normally would be in the case of a contract for services)²¹ in relation to the particular type of contract. The second principle is that specific performance will not usually be granted either of a contract for personal work or services²² or one which involves continuous acts which would require supervision by the court.²³ There is some modern authority for the view that the test is no longer whether damages are an adequate remedy but whether an order for specific performance would "do more perfect and complete justice than an award of damages";²⁴ and it has been suggested judicially that the difficulty involved in supervision of performance is not now a bar to specific

²⁰ See, e.g., *Charles Rickards Ltd. v. Oppenheim* [1950] 1 K.B. 616; *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904, 946 (per Lord Simon of Glaisdale). The National Consumer Council suggests in the 1985 paper that this remedy should be put on a statutory footing.

²¹ e.g., *Ryan v. Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116, 125-126 (in which a decree was refused of a covenant to provide a resident porter for a block of flats). However, in *Posner v. Scott-Lewis*, *The Times*, 12 December 1985, a decree was granted in respect of a similar covenant; see n. 23 below.

²² e.g., a contract to act as an agent. The courts will not normally grant a decree of specific performance of the continuation of a contract of agency, because the relationship between the parties is of a fiduciary character and depends upon mutual confidence. For example, in *Chinnock v. Sainsbury* (1861) 30 L.J. Ch. 409, specific performance was refused of an agreement under which an auctioneer was allowed to sell a collection of works of art; and in *Page One Records Ltd. v. Britton* [1968] 1 W.L.R. 157, the court emphasised the importance of continued confidence when refusing an injunction to the manager of a very successful group of young musicians which would have had the effect of enforcing his agency contract.

²³ e.g., *Ryan v. Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116, referred to in n. 21 to this para., in which the fact that the relevant covenant provided that a resident porter should be "constantly in attendance" was stated to be a further ground on which specific performance should be refused; *ibid.*, 125. However, in *Posner v. Scott-Lewis*, *The Times*, 12 December 1985, Mervyn Davies J. granted a decree of specific performance in respect of a similar covenant. He explained that he did so in the light of more recent authorities (including those referred to in nn. 24 and 25 below), and pointed out that the covenant did not require the performance of personal services or a continuous series of acts, but merely "the execution of an agreement which contained a provision for such services".

²⁴ *Tito v. Waddell (No. 2)* [1977] Ch. 106, 322.

performance but merely one of the factors to be taken into account by the court²⁵ in determining whether to make an order. It remains true, however, that the remedy does not in general play a significant part as a remedy for breach of a contract for services.

(b) *Injunction*

4.11. The court has power to grant an injunction forbidding the breach of an *express* negative promise contained in a contract. The question has arisen whether an injunction will be granted of such a promise if it is ancillary to a contract to perform personal services—as in the case, for example, of a contract between A and B which provides, first, that A will for a specified period render services to B and secondly, that during that period A will not render similar services to any other person. The general principle is that, although the court may grant an injunction,²⁶ it will not do so if the effect would be indirectly to drive the person enjoined “either to starvation or to specific performance”²⁷ of his positive obligations in circumstances in which a decree of specific performance would not have been granted.²⁸

C. OTHER REMEDIES

(1) *General*

4.12. The governing bodies of several professions have power²⁹ to impose penalties upon practitioners who do not provide services in a satisfactory way, judged by general professional standards rather than the terms of individual contracts. In relation to some services there is statutory provision for the

²⁵ *Ibid.*, 321–322, in which Megarry V.-C. stated that “the real question is whether there is a sufficient definition of what has to be done in order to comply with the order of the court”. In an earlier case, *C. H. Giles & Co. Ltd. v. Morris* [1972] 1 W.L.R. 307, 318–319, he expressed the hope that the courts would one day look again at the “so-called rule that contracts for personal services or involving the continuous performance of services will not be specifically enforced.” He suggested that the rule was not absolute and that since an order for specific performance of a contract for personal services could be enforced by committal, supervision by the court was unnecessary. He went on to suggest that it ought not to be assumed that, wherever there is an element of personal service, specific performance will be refused; rather, the principle should be whether “the inconvenience and mischief” of such an order would outweigh the advantages. He conceded, however, that the adoption of this new approach would in general still lead to a refusal of the remedy.

²⁶ *Lumley v. Wagner* (1852) 1 De G.M. & G. 604.

²⁷ *Warner Bros. Pictures Inc. v. Nelson* [1937] 1 K.B. 209, 216.

²⁸ *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416, 427; *Page One Records Ltd. v. Britton* [1968] 1 W.L.R. 157.

²⁹ e.g., The Law Society has made rules under the Solicitors Act 1974, s. 31, as to the professional practice, conduct and discipline of solicitors, and the Solicitors' Disciplinary Tribunal has jurisdiction to hear and deal with complaints arising out of a breach of those rules (see *ibid.*, ss. 31(2) and 46–49). The Administration of Justice Act 1985 (introducing a new section, 44A, into the Solicitors Act 1974), contains provisions (not yet in force) conferring powers upon the Tribunal, where the “professional services provided by a solicitor . . . were in any respect not of the quality that could reasonably have been expected of him as a solicitor”, *inter alia*, to direct the solicitor to rectify at his own expense the relevant error, omission or deficiency and to refund or remit all or part of his costs. In the case of estate agents the Director General of Fair Trading has power to prohibit a person from carrying on estate agency work (for some specified aspect of such work) if satisfied that such person is “unfit” to carry out such work for any of certain specified reasons: see the Estate Agents Act 1979, s. 3. To 30 September 1985, 19 prohibition orders have been made under this section (see the O.F.T.'s Bee Line No. 39 (1985), p. 9).

compensation of those who sustain loss in consequence of the conduct of the supplier.³⁰

(2) The work of the Office of Fair Trading

4.13. As regards consumer transactions, the Office of Fair Trading plays an important part in the present context. The Fair Trading Act 1973 created the post of Director General of Fair Trading³¹ and conferred upon him various powers. We briefly consider here two of those powers that in our view are of particular significance in relation to remedies.

4.14. The first power arises when it appears to the Director General that a supplier has, in carrying on a business,³² persisted in a course of conduct which is detrimental to the economic or other interests of consumers and which is "unfair" to them.³³ However, this term is limited to contraventions of rules enforceable by proceedings, either civil or criminal.³⁴ There is no general duty to "trade fairly". In such a case the Director General must try to obtain an assurance from the trader that the practice will be discontinued, and if such assurance is not given he can obtain an order from the Restrictive Practices Court to restrain the conduct in question.³⁵

4.15. The second power concerns codes of practice in relation to particular categories of services. Section 124(3) of the Fair Trading Act 1973 provides that it should be the duty of the Office of Fair Trading to encourage trade associations to prepare and disseminate to their members codes of practice for "guidance in safeguarding and promoting the interests of consumers . . .". About twenty codes of practice have been negotiated, most of which relate to contracts for the supply of services, including those relating to (for example) laundering and dry cleaning, funerals, the service and repair of electrical goods, and package holidays, and (more recently) the sale, servicing and repair of motor cycles.³⁶ In some cases the codes have led to the adoption of standard

³⁰ e.g., under the Air Travel Reserve Fund Act 1975 a fund, provided by means of a levy on "air travel organisers", may be applied for the benefit of their customers who, by reason of an air travel organiser's inability to meet financial commitments, suffer loss arising out of an air travel contract. The administration of the fund and the protection afforded by it have recently been improved: see S.I. 1986 No. 155.

³¹ Sect. 1. Sect. 2(1) of the Act imposes two general duties upon the Director. The first is to keep under review the carrying on of commercial activities "which relate to services supplied for consumers . . . and to collect information with respect to such activities, and the persons by whom they are carried on, with a view to his becoming aware of, and ascertaining the circumstances relating to, practices which may adversely affect the economic interests of consumers . . .". The Director's second general function is to review and collate evidence relating to such activities, and in this case the relevant consumer interests are not limited to those of an economic character.

³² "Business" includes a professional practice and any undertaking that supplies goods or services otherwise than free of charge: Fair Trading Act 1973, s. 137(2).

³³ *Ibid.*, s. 34(1).

³⁴ *Ibid.*, s. 34(2) and (3).

³⁵ *Ibid.*, ss. 35, 37. The Office of Fair Trading stated in its Bee Line No. 39 (July-September 1985), at p. 8, that a total of 509 assurances, undertakings or orders had been obtained. Details are published by the Director: see, e.g., *ibid.*, pp. 17-19.

³⁶ In September 1985 the Office of Fair Trading published a report on household insurance, which recommends, among other matters, the establishment of a single system of arbitration for the whole insurance industry: see *Household Insurance: a report by the Director General of Fair Trading*, para. 7.7. At present the Insurance Ombudsman Bureau, which was established by a large group of insurance companies in 1981, is available to resolve disputes by a policyholder with a member company, but the policyholder need not accept the Bureau's decision.

contracts which are much more favourable to consumers than those previously in use.³⁷ The codes are not, however, legally enforceable.³⁸

4.16. Some codes of practice contain provision for arbitration in the case of a dispute. In the light of a review of arbitration procedures conducted by the Office of Fair Trading in 1980,³⁹ a new "model" scheme has been developed by the Institute of Arbitrators in consultation with the Office and it has been stated⁴⁰ that the Institute is to request various trade associations to bring their arbitral procedures into line with the scheme. An award may be enforced in the usual way—that is, by means of its conversion into a judgment or order of the court.⁴¹

4.17. The Office of Fair Trading is actively engaged in consulting interested individuals and organisations on the far-reaching question whether a general statutory duty should be imposed on all traders (whether or not they are members of a trade association) to "trade fairly", with codes of practice supplying the details of what such duty involves in relation to particular categories of service.⁴² No concluded view has yet been formed by the Office of Fair Trading on whether the proposed general duty or the supporting codes of practice should give rise to rights directly enforceable by consumers against the supplier in particular transactions.⁴³

³⁷ See Borrie, (1971) 74 L.S.G. 70.

³⁸ Although it would seem that, in accordance with the general principles of the law of contract, an advertisement or notice by a supplier that he subscribes to a particular code of practice may in a particular case form part of a contract subsequently entered into with a consumer.

³⁹ See "Redress procedures under Codes of Practice" (1981). The Office of Fair Trading concluded that arbitrations should always be on a "documents only" basis; that targets should be set as to the time within which the various steps in the arbitration process should be completed; that arbitrators should give reasons for their decisions; and that a standard scale of arbitration fees should be introduced.

⁴⁰ See the Office of Fair Trading's Bee Line No. 32 (1983), p. 9.

⁴¹ By an action on the award or, normally, under the summary procedure provided by the Arbitration Act 1950, s. 26. However, the relevant trade association would normally bring pressure upon the trader to comply voluntarily with the award.

⁴² See the discussion paper on home improvements (1982) published by the Office of Fair Trading, paras. 6.5–6.8, and its Annual Report (1984), pp. 15–16, which refers to further developments in respect of the consultations, including a seminar held in November 1984 attended by "academics and lawyers, and by representatives of trade associations, consumer bodies, trading standards departments and others who had responded" to a consultative letter circulated in November 1983. The Office of Fair Trading is to publish a discussion paper on the topic in 1986. The Director General of Fair Trading has expressed the view that a general statutory duty to trade fairly in consumer transactions backed by codes of practice would involve some form of ministerial or Parliamentary approval of the codes: "Laws and Codes for Consumers", [1980] J.B.L. 315, 324. A similar view was expressed on behalf of the Government by the Lord Advocate in a recent Parliamentary debate on Codes of Practice and Legislation: *Hansard* (H.L.), 15 January 1986, vol. 469, col. 1100.

⁴³ In the 1985 paper the National Consumer Council makes certain proposals concerning codes of practice, which it regards as the most important aspect of its recommendations. They include: (i) that codes of practice should supplement certain obligations implied under primary legislation (e.g., by assisting the court to determine what is a reasonable time or a reasonable charge under the 1982 Act, ss. 14 and 15); (ii) that they should not, as at present, be limited to contracts entered into by members of trade associations; (iii) that breach of the provision of a code should give rise to a rebuttable presumption that the supplier is in breach of the relevant obligation arising under the primary legislation.

D. POSSIBLE NEW REMEDIES

(1) Reopening the contract

4.18. As we pointed out above,⁴⁴ the term relating to the payment of a reasonable charge which is implied under section 15 of the 1982 Act does not assist the recipient of a service in the case in which an excessive charge is agreed in advance; in that case the principle is that he is bound by his bargain.⁴⁵ In relation to consumer transactions, it was suggested by the National Consumer Council in their 1981 report, "Service please",⁴⁶ that this principle was harsh, and they instanced very high call-out charges which in some cases were agreed in advance for the servicing of electrical, heating or other equipment at the consumer's home; and we are not aware of any evidence that there has been any change in this respect since the publication of that report. The Council went on to suggest in very general terms that a discretionary power should be conferred upon the court to reopen agreements in cases of "blatant exploitation" along the lines of the power created by the Consumer Credit Act 1974⁴⁷ in relation to "extortionate credit bargains".⁴⁸ We accordingly turn now to consider the nature of that power.

4.19. The purpose of reopening the agreement is to relieve the debtor from payment of any sum in excess of what ought fairly to be due and (among other powers) the court may set aside the whole or part of the debtor's obligation and require the creditor to repay all or part of any money that he has received under the agreement.⁴⁹ However, the cases to which the Act

⁴⁴ Para. 2.31.

⁴⁵ Exceptionally, solicitors' charges are subject to review by the court under the present law. A solicitor may enter into an agreement as to his remuneration in respect of non-contentious or contentious business (Solicitors Act 1974, ss. 57(1), 59(1)). However, where the agreement is made in respect of contentious business, it cannot be enforced by action but only on application to the court, which has power to reopen the agreement (*ibid.*, s. 61). In the case of an agreement relating to non-contentious business, the court may order the solicitor to deliver a bill if the client can show that "there is something which as a matter of general principle or private right, or both, the court ought to look into" and order the bill to be taxed (i.e. assessed by an officer of the court (*Rutter v. Sheridan-Young* [1958] 1 W.L.R. 444, 453); and if on taxation the client objects to the agreement as "unfair or unreasonable", the court may set aside the agreement or reduce the amount payable under it (Solicitors Act 1974, s. 57(5)).

⁴⁶ At p. 26. In the 1985 paper the National Consumer Council refers to the problem of a demand by a supplier of an emergency service for full payment of an exorbitant charge in advance, but the Council does not favour the introduction of a general rule to deal with the matter, which it suggests might appropriately be dealt with in codes of practice.

⁴⁷ Sects. 137-139.

⁴⁸ A credit bargain is extortionate for the purposes of the Act if it requires the debtor (or a relative of his) to make payments which are "grossly exorbitant" or if it "grossly contravenes ordinary principles of fair dealing". The expression "grossly exorbitant" is not defined, but s. 138(2)-(5) lists certain factors to which the court is directed to have regard in determining the issue. The authorities, most of which are unreported, involve loans, most of them secured by mortgages of land; and the court did not reopen the contract in any of the decisions that we have examined. In *A. Ketley Ltd. v. Scott* [1981] I.C.R. 241, a mortgage loan of £20,500 for three months at a rate of 48 per cent per annum was held not to be extortionate; the court took into account, among other matters, the fact that the speed with which the transaction took place limited the creditor's ability to enquire into the debtor's financial position and thereby increased the creditor's risk. In *Woodstead Finance Ltd. v. Petrou* (1986) 136 N.L.J. 188, a mortgage loan to a husband and wife for six months at a rate of interest equivalent to 42 per cent per annum was held not to be extortionate in the light of evidence that, given the circumstances and the "appalling" payment record of the husband, the loan arrangement was normal for a risk of that kind.

⁴⁹ Sect. 139(2).

applies are restricted to those where "credit" is given. The mere fact that the recipient of a service receives a benefit before payment falls due under the contract does not bring the agreement within the ambit of the 1974 Act. This is because the relevant principle for the purposes of the Act is that debt is not deferred and credit⁵⁰ therefore not extended, unless the time fixed for payment by the contract is "significantly later than the time at which payment would have fallen due in the absence of a contrary contractual provision . . .".⁵¹ Furthermore, even in those contracts for services which involve credit in this sense, the court is concerned with the charge made for the granting of such credit, not with the cash price of the services. The court is, however, directed to take into account, among other factors, whether or not a "colourable" cash price was quoted for any goods or services that were included in the credit bargain.⁵²

4.20. A related issue arises in relation to the case in which (i) the charge for the supply of a service is not fixed by the contract and in consequence a reasonable sum is payable in accordance with the term implied under section 15 of the 1982 Act, (ii) after completion of the work the supplier demands a sum in excess of what is reasonable, (iii) the customer pays the sum in the erroneous belief that it is legally recoverable and (iv) subsequently wishes to recover the excess.⁵³ As to this, it has been suggested that a statutory right should be conferred upon a consumer to recover that part of the payment he has made which exceeds what is reasonable.⁵⁴ We have therefore considered whether a general power should be conferred upon the court to reopen contracts for services where either (i) an excessive price is agreed at the outset or (ii) no price is then agreed but after completion of the work the customer pays, or agrees to pay, more than a reasonable sum.⁵⁵

⁵⁰ The term "credit" is partially defined by the Act as including a cash loan and "any other form of financial accommodation": s. 9(1).

⁵¹ Goode, *Consumer Credit Legislation*, Div. I, para. 214. Thus, for example, an agreement by a decorator to paint every room in a house for a specified lump sum which is to be paid when the work is completed is outside the Act: as payment is not due until the work has been done, no question of credit arises. Again, if a designer is instructed to design and install a kitchen for a specified lump sum, of which (say) 20 per cent is to be paid on completion of drawings, 60 per cent on arrival of the units at the house and the balance on completion, no "credit" is given to the customer, since no obligation to make payment is deferred to a date later than that on which it would otherwise fall due (*ibid.*, paras. 223-229).

⁵² Sect. 138(4)(c). The term "colourable" is not defined in the Act, but it is directed at the case in which part of an apparently reasonable credit charge is concealed by expressing the services themselves to be supplied for a specified charge which is greater than would ordinarily be made by someone supplying similar services for cash.

⁵³ Under the present law the customer will not normally be able to recover that part of the payment which exceeds a reasonable sum. This is because, although it would seem that in general money paid under a mistake of fact is prima facie recoverable, there is no right of recovery if the payment is made, as in this case, for good consideration, in particular to discharge a debt owed to the payee: see *Barclays Bank Ltd. v. W. J. Simms Sons & Cooke (Southern) Ltd.* [1980] Q.B. 677, 695. Nor is it certain that a mistaken view of what constitutes a reasonable charge would be regarded as a mistake of fact for this purpose, since it is "notoriously difficult" to make an authoritative statement of the principles on which recovery is based (see *Chitty on Contracts*, 25th ed. (1983), vol. I, paras. 1949-1952).

⁵⁴ See *Hansard* (H.C.), Standing Committee C, 3 February 1982, col. 21.

⁵⁵ We are not concerned here with the position where the supplier has done work on property belonging to the customer which the supplier refuses to release except on full payment of his charge; that question is considered separately in paras. 4.22-4.27 below.

4.21. We know that dissatisfaction has been expressed with regard to this issue,⁵⁶ but in our view it would be inadvisable to give detailed consideration to the possible creation of a power for the court to reopen only contracts for the supply of services and not other categories of contract. We accordingly make no proposal in the present context that the court should be given such a power.⁵⁷

(2) Sums paid to secure the release of property

4.22. The present question arises where the supplier refuses to release the customer's goods which are in his possession unless the customer pays a charge which is not provided for by the contract and which is unreasonably high. This is a situation in which the customer is placed at a disadvantage. In many cases the supplier has a lien in respect of the goods—that is to say, the right which arises at common law wherever “a person has expended labour and skill in the improvement or repair . . . of a chattel bailed to him for that purpose . . . to retain it until his charge is paid”.⁵⁸ There is, however, no lien where the goods have merely been maintained,⁵⁹ and it would seem that a claim to a lien based on both maintenance and improvement cannot succeed if the two bases of claim cannot be severed.⁶⁰

4.23. We have not considered the far-reaching question whether the existence of liens in general is justifiable under the modern law. This would merit a separate study. We have, however, examined whether the effect of a lien upon the customer's bargaining power is a matter that calls for treatment by legislation.

4.24. Two rules of the present law are relevant. First, where A pays money to B by wrongful compulsion B must restore it; and accordingly if it is paid simply for the purpose of recovering possession of goods wrongfully retained

⁵⁶ See, e.g., the reference to the following kind of case, made during the passage through Parliament of the 1982 Act. “A roofing contractor mends a roof, but . . . no price was agreed prior to the gentleman coming on site. He mends the roof and submits an astronomical bill to the lady who pays it because she knows no better. The lady then realises that she has been rooked and, understandably, wishes to go to court to recover the excess”: *Hansard* (H.C.), Standing Committee C, 3 February 1982, col. 21.

⁵⁷ It may be that, when implemented, the E.C. Directive on “doorstep selling” to which we refer in para. 4.29 below will meet some of the problems in this area by providing a “cooling off” period within which the customer may cancel the contract.

⁵⁸ *Halsbury's Laws of England*, 4th ed. (1979), vol. 28, para. 537 (footnotes omitted). The term “lien” has several other meanings, which however are not in point here. Examples of suppliers of services entitled to a lien are: a garage proprietor in respect of a car that he has repaired (*Green v. All Motors Ltd.* [1917] 1 K.B. 625), an architect upon plans prepared by him (*Hughes v. Lenny* (1839) 5 M. & W. 183), an insurance broker in respect of policies of insurance effected by him (*Fisher v. Smith* (1878) 4 App. Cas. 1), a tailor on the clothes he has made (*Blake v. Nicholson* (1814) 3 M. & S. 167, 169), and a warehouse-keeper, upon goods in his possession, for packing them into containers (*K.Chellaram & Sons (London) Ltd. v. Butlers Warehousing and Distribution Ltd.* [1977] 2 Lloyd's Rep. 192).

⁵⁹ e.g., *Hatton v. Car Maintenance Co. Ltd.* [1951] 1 Ch. 621, 624. This limitation produces rather capricious results: a garage proprietor is entitled to a lien if he effects a trifling repair to his customer's car but not if he cleans it.

⁶⁰ *Re Southern Livestock Producers Ltd.* [1964] 1 W.L.R. 24, 29.

by B, A can recover the sum paid.⁶¹ A number of the relevant authorities relate to liens. In one case, for example, the defendants, who had a lien for repairs to the plaintiff's ship, wrongfully claimed an additional charge relating to another matter. The plaintiffs paid the latter item under protest and were subsequently held entitled to its recovery.⁶² The second rule is that if a person voluntarily meets a claim which he knows to be unfounded he cannot recover the money that he has paid;⁶³ this operates when his conduct indicates that he does not wish to dispute the matter further, because (for example) he simply does not wish to incur the trouble of contesting the demand.

4.25. In practice it may often be difficult to determine which of the two rules referred to in the preceding paragraph is applicable in the particular circumstances. In one case,⁶⁴ for example, where for some years the plaintiff had regularly paid, under protest, certain tolls under threat of seizure of his goods, the question arose whether his protests for a period of years had "degenerated into a sort of grumbling acquiescence and were ineffective",⁶⁵ but it was held that the payments were not voluntary, because notwithstanding that the protests had come to be regarded as matter of form, the plaintiff's conduct did not amount to "a closing of the transaction . . . upon the footing that, whether the defendant was right or wrong, the plaintiff was minded to pay."⁶⁶ The fact that payment is expressed to be made "under protest" is not conclusive: on the one hand, in some circumstances it may not of itself establish that the payment was not "voluntary" and, on the other hand, payments which are not in terms made under protest may be held nevertheless to have been made under compulsion and, in consequence, to be recoverable. A protest is merely some evidence, when accompanied by other circumstances, that the payment was not made for the purpose of putting an end to the matter.⁶⁷

4.26. There are no doubt cases in which the recipient of a service cannot obtain the release of his goods without meeting a demand for an amount thought by him to be excessive and in which he pays the charge to which he (inwardly) objects without, however, expressing his objection and indicating that he does not submit to it. It may be thought unsatisfactory that no remedy is available in such circumstances. However, the question whether the court should be empowered to order the repayment of the excess involves considerations similar to those to which we have referred in paragraph 4.21 above;

⁶¹ The leading case in relation to the release of goods is *Astley v. Reynolds* (1732) 2 Stra. 915; the fact that A could have brought an action founded on B's wrongful detention of the goods is immaterial, because he "might have such an immediate want of his goods, that an action . . . would not do his business" (*ibid.*, 916).

⁶² *Somes v. British Empire Shipping Co.* (1860) 8 H.L.C. 338.

⁶³ In such circumstances the payment is "in law like a gift": *Maskell v. Horner* [1915] 3 K.B. 106, 118.

⁶⁴ *Maskell v. Horner* [1915] 3 K.B. 106.

⁶⁵ *Ibid.*, 119.

⁶⁶ *Ibid.*, 125.

⁶⁷ *Ibid.*, 120, 124, 126. It has been explained in an Australian case that ". . . there is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled", and that "the word 'protest' is itself equivocal. It may mean the serious assertion of a right or . . . no more than a statement that the payment is grudgingly made": *Mason v. The State of New South Wales* (1959) 102 C.L.R. 108, 143.

and we have accordingly arrived at a similar conclusion in relation to the present issue and make no proposals now for changing the law.⁶⁸

4.27. There is, however, one matter of concern, relating to the powers of the courts, which could be adjusted without the need for primary legislation. If the customer disputes the supplier's claim and sues for the recovery of his goods, the court may, pending the trial, make an order for their return upon his payment into court of the amount claimed by the supplier.⁶⁹ In the present context this power is of little use to the customer since, unless the supplier's claim is made fraudulently, the court has no jurisdiction to direct the supplier to return the goods otherwise than upon payment into court of the whole amount claimed by the supplier.⁷⁰ In our view this limitation upon the courts' power should be removed. We suggest that consideration should be given to an amendment of the Rules of the Supreme Court which would enable the court⁷¹ to order the return to the customer of the goods held under a lien upon his paying into court such sum (not exceeding the sum claimed by the supplier) as the court considers just.

(3) Quotations of charges

4.28. One problem that arises in practice is that of the supplier who gives an estimate for the work to be done but, after completing it, charges considerably more. It would seem that under the present law the supplier is not bound by the estimate (as distinguished from a quotation, i.e. an offer which, if accepted, is incorporated into the contract⁷²). We have accordingly considered whether to propose the imposition by statute of a general obligation upon suppliers to supply a quotation before the contract is made, from which no departure would be permitted.⁷³ However, although the adoption of the general principle that customers should be informed in advance of the supplier's charge is attractive, its application would clearly be impracticable in the many circumstances in which, owing to the nature or extent of the work, the supplier could

⁶⁸ The National Consumer Council puts forward two alternative proposals in the 1985 paper. One is that legislation should provide that a supplier should have a lien only to the extent that a specific price was previously agreed; the other is that the matter should be dealt with by codes of practice in respect of those services where the problem commonly arises.

⁶⁹ R.S.C., O.29, r.6, extended to county courts by C.C.R., O.13, r. 7(1)(a). The court may direct that the payment into court should include a further sum for interest and costs.

⁷⁰ *Gebruder Naf v. Ploton* (1890) 25 Q.B.D. 13. It is immaterial that the result is "extraordinary or harsh" in a particular case (*ibid.*, 15).

⁷¹ i.e., either the High Court or a county court. No amendment would be required to the County Court Rules, because they provide that "the provisions of the R.S.C. with regard to [this matter] shall apply in relation to proceedings . . . in a county court as they apply in relation to proceedings . . . in the High Court . . .": see C.C.R., O.13, r. 7(1)(a).

⁷² If the supplier's statement of the charge is in substance an offer, it is no less binding because it is described as an estimate: *Croshaw v. Pritchard* (1899) 16 T.L.R. 45.

⁷³ The Estate Agents Act 1979, s. 18, is an example of this type of obligation in relation to a particular sector. The section provides that before a person enters into a contract under which he will engage in "estate agency work" (an expression which does not cover all the functions normally performed by estate agents) on behalf of the other party to the contract, he must give to the latter certain information regarding remuneration. Should he fail to do so, the contract cannot be enforced by him without the leave of the court.

not fix the charge in advance.⁷⁴ Furthermore, this approach would not be effective in practice unless the customer had an opportunity to consider whether to enter into the contract in the light of the quotation; and clearly there are cases (for example, where the services are required in an emergency) where there is effectively no such opportunity. Accordingly, we have concluded that this question is one which calls for exploration in relation only to particular categories of service and is not suitable for treatment by way of a single general rule.⁷⁵

(4) "Doorstep selling"

4.29. In its final report published in 1962 the Committee on Consumer Protection⁷⁶ referred to evidence received by it that the activities of some door-to-door salesmen were causing concern and that their high pressure sales methods had led families into taking on more hire-purchase commitments than they could afford owing to inadequate time for reflection. To deal with this problem, the Committee recommended a cooling-off period for "doorstep agreements". Its recommendation was implemented by the Hire-Purchase Act 1965 in respect of hire-purchase agreements which were signed elsewhere than on trade premises, and this provision has in turn been replaced and extended by the Consumer Credit Act 1974 to most credit transactions not signed on trade premises: sections 67-73 of the Act provide that a person who enters into a credit transaction otherwise than at the creditor's business premises may cancel the agreement within a "cooling-off" period of five days. A European Community Directive,⁷⁷ which would confer a similar right in relation to contracts for the supply of goods or services, was adopted by the Council of Ministers on 20 December 1985.⁷⁸ The Directive requires member states to introduce legislation within two years⁷⁹ giving consumers a right to cancel a contract with a trader⁸⁰ which is concluded otherwise than at his business premises within seven days of the making of the contract. Certain categories of contract, including contracts of insurance, are excluded from the Directive.⁸¹ It would be inappropriate for us to deal with the implementation of the Directive, and pointless for us further to consider the matters contained in it until it has been implemented.

⁷⁴ It would appear, however, that in some circumstances the supplier has a duty to take reasonable care to supply an accurate estimate of the charge in the light of *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.* [1964] A.C. 465; see the Canadian decision *Kidd v. Mississauga Hydro-Electric Commission* (1979) 97 D.L.R. (3d) 535 and *J. & J. C. Abrams Ltd. v. Ancliffe* [1981] 1 N.Z.L.R. 244 (a decision of the New Zealand Court of Appeal).

⁷⁵ In the 1985 paper the National Consumer Council refers to the difficulties and uncertainties in this area, but expresses the view that the problem is not suitable for primary legislation and should be dealt with in codes of practice.

⁷⁶ Under the chairmanship of J. T. Molony Q.C. (Cmnd. 1781).

⁷⁷ "Directive to protect the consumer in respect of contracts negotiated away from business premises", set out in the Official Journal of the European Communities, No. L 372, 31 December 1985.

⁷⁸ *Hansard* (H.L.), 23 January 1986, vol. 470, Written Answers, cols. 429-430.

⁷⁹ Art. 9(1).

⁸⁰ "Trader" includes a company, and a trader's agent: art. 2.

⁸¹ Art. 3(2). Member states may, if they wish, apply the Directive only to contracts with a value above a specified sum not exceeding 60 European units of account (about £35): art. 3(1).

E. OUR CONCLUSIONS

(1) The present legal remedies

4.30. We turn now to consider whether, in relation to contracts for services, we should review in detail the principles that currently govern the remedies for breach of contract outlined above.⁸² In approaching this question we are aware that there is evidence of considerable dissatisfaction on the part of users of services in the consumer field. In 1981, for example, the National Consumer Council referred in its report "Service please" to a variety of problems encountered by consumers,⁸³ and recently the Office of Fair Trading commissioned a survey⁸⁴ which revealed that those dissatisfied with goods and services which they had purchased in the previous twelve months represented more than 40 per cent of the adult population.⁸⁵ However, the question for our consideration here is whether, in consequence of this widespread dissatisfaction, any changes are required in respect of the legal remedies for breach of contract, bearing in mind that we are concerned not with the needs of consumers alone but with striking the right balance between consumer interests on the one hand and those of suppliers of services in general (in respect both of consumer and business contracts) on the other.

4.31. It has emerged from the response to the survey commissioned by the Office of Fair Trading to which we referred in the previous paragraph that consumers' discontent is directed not at their contractual rights or legal remedies, with which, so far as we are aware, there would appear to be no evidence of dissatisfaction, but, for example, at poor workmanship and the manner in which complaints are dealt with.⁸⁶ The Office of Fair Trading is actively considering whether to recommend the creation of a new statutory duty to trade fairly,⁸⁷ and an investigation now by the Law Commission of this question would be premature.

4.32. We should emphasise that the legal remedies for breach of contract apply not only to contracts for services but to contracts in general, and any alteration of the relevant rules in relation only to services might well produce anomalous distinctions between the consequences of the breach of a contract for services and, for example, those which arise from a breach of a contract

⁸² Paras. 4.2-4.11.

⁸³ At pp. 5-21. The Council referred to a Consumer Concerns survey that it had commissioned, from which it appeared that as many as one person in five was dissatisfied with some aspect of the service that he or she had received. The report concentrated on particular types of service—namely, cars, domestic appliances, home improvements and house repairs, but the Council suggested that these categories were merely the most common source of difficulty and caused "the greatest aggravation" and that similar problems also arose with "virtually every other kind of consumer service": *ibid.*, 21.

⁸⁴ See *Consumer Dissatisfaction: A Report on surveys undertaken for the Office of Fair Trading* (February 1986).

⁸⁵ *Ibid.*, para. 2.3.

⁸⁶ Another problem concerns the insolvency of suppliers who have received advance payments. As to this, in June 1985 a private member's Bill was introduced by Mr. Michael Hirst for the purpose of obliging traders offering long-term guarantees when providing goods or services to make suitable arrangements to ensure that the guarantees remain effective in the event of the trader ceasing to trade: see *Hansard* (H.C.), 19 June 1985, vol. 81, cols. 299-301. However, the Bill did not proceed to Second Reading.

⁸⁷ See para. 4.17 above.

for the supply of goods. We appreciate that the application of the general principles governing the remedies for breach of a contract to supply a particular kind of service may give rise to (at least) an argument for a change in the law in relation to that type of service,⁸⁸ but, as we have explained in paragraph 1.9 above; we do not consider it appropriate in this exercise to embark upon an examination of the operation of the law in particular sectors. Although there is scope for an argument that the court's power to compel the performance of a contract⁸⁹ should be widened, the exercise of that power would clearly be inappropriate in respect of certain services (for example, those required in an emergency) and an examination of the circumstances in which such an extension would or would not be justified would involve a detailed consideration of a wide range of services.

4.33. To summarise, we have arrived at the conclusion that in relation to contracts for services a review of the legal remedies for breach of contract would not be appropriate in the present context.

(2) Possible new remedies

4.34. We have further concluded that in this report it would be premature and inappropriate to make proposals concerning the creation by statute of new remedies relating to the following matters:

- (a) Conferring a new discretionary power on the court to reopen a contract for the supply of a service at a charge which, though exorbitant, was fixed by the contract, or paid or agreed to be paid by the recipient of the service after completion of the work in the erroneous belief that the charge is legally recoverable (paragraphs 4.18–4.21).
- (b) Creating a new remedy for the recipient of a service who, when no charge was fixed by the contract, pays an unreasonably high one to secure the release of property upon which work was done under the contract (paragraphs 4.22–4.27).
- (c) Imposing on suppliers of services a general duty to quote in advance the charge to be made for the service, from which no departure would be permitted (paragraph 4.28).
- (d) Introducing rules governing “doorstep selling” (paragraph 4.29).

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

J. G. H. Gasson, *Secretary*
24 March 1986

⁸⁸ For example, the present rule whereby a surveyor instructed to report to his client upon the condition of a building who negligently fails to report the existence of defects in the building is not necessarily liable to pay, as part of an award of damages, the cost of rectifying the defects: *Phillips v. Ward* [1956] 1 W.L.R. 471; *Perry v. Sidney Phillips & Son* [1982] 1 W.L.R. 1297.

⁸⁹ See para. 4.10 above.

APPENDIX

Supply of Goods and Services Act 1982

PART II

SUPPLY OF SERVICES

The contracts concerned.

12.—(1) In this Act a “contract for the supply of a service” means, subject to subsection (2) below, a contract under which a person (“the supplier”) agrees to carry out a service.

(2) For the purposes of this Act, a contract of service or apprenticeship is not a contract for the supply of a service.

(3) Subject to subsection (2) above, a contract is a contract for the supply of a service for the purposes of this Act whether or not goods are also—

(a) transferred or to be transferred, or

(b) bailed or to be bailed by way of hire,

under the contract, and whatever is the nature of the consideration for which the service is to be carried out.

(4) The Secretary of State may by order provide that one or more of sections 13 to 15 below shall not apply to services of a description specified in the order, and such an order may make different provision for different circumstances.

(5) The power to make an order under subsection (4) above shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Implied term about care and skill.

13. In a contract for the supply of a 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.

Implied term about time for performance.

14.—(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.

(2) What is a reasonable time is a question of fact.

Implied term about consideration.

15.—(1) Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

16.—(1) Where a right, duty or liability would arise under a contract for the supply of a service by virtue of this Part of this Act, it may (subject to subsection (2) below and the 1977 Act) be negated or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.

Exclusion of implied terms, etc.

(2) An express term does not negative a term implied by this Part of this Act unless inconsistent with it.

(3) Nothing in this Part of this Act prejudices—

(a) any rule of law which imposes on the supplier a duty stricter than that imposed by section 13 or 14 above;

or

(b) subject to paragraph (a) above, any rule of law whereby any term not inconsistent with this Part of this Act is to be implied in a contract for the supply of a service.

(4) This Part of this Act has effect subject to any other enactment which defines or restricts the rights, duties or liabilities arising in connection with a service of any description.

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