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## The law of contract: Contracts in practice

### Terms

The terms within a contract form the rules that both parties agree to comply with in their contractual dealings with each other.

In a written contract, these terms are very easy to recognise simply because you can read them. These are examples of *express terms*. As we will see, there may well be other terms in a contract which legally exist but they are implied into the contract by law. These are *implied terms* and no matter how hard you try to find them in a written contract you'll never discover them. Terms, both express and implied, can exist in both written and verbal contracts.

Some of the terms in a contract are legally more important than others. Unfortunately for us, we can't always tell before a case is heard in a court which are the most important terms and which are of less importance. So, if there's been some legal dispute, we have to wait for the court's decision to find out whether a term is very important or not – bear with me here and all will be explained.

### Express and implied terms

Imagine that you agree to sell your car to a friend and you describe the type of car, its price and probably the registration number, colour and mileage. Assuming your friend agrees to your offer (accepts it) then whether you write down the above description and price etc. or whether this is done verbally, the details of the car as you've described it, are *express terms* which you're both agreeing to. One *implied term* in the contract, which you both probably won't even think of, is that you have the right to sell the car. That is, you actually own the car in the first place! This shows you how these implied terms tend to be a bit sneaky. They aren't always obvious and can creep up on you while your back is turned.

Another example which might be familiar to you if you have a part time job (and I encourage all students to have a part time job), is that of contracts of employment. Assuming that you have a job with a reputable employer (and not just a cash in hand job at the local chippy) then you must, by law, be given a contract of employment. In this (which incidentally isn't likely to be your full contract of employment), there will be details of your employer's name, your name and address, National Insurance number, place of work, hours of work and rate of pay, any holiday entitlement, etc. All of these are express terms of your contract of employment. If you have one, take a look at it now. It should include all the details mentioned above and quite possibly more.

What the contract of employment is unlikely to say is that you owe a duty to your employer of good faith, that you must not attempt to compete with your employer and you must not reveal confidential information about your work. But you really do have these duties whether you like it or not. This is because these duties, and many more, have been implied into such employment contracts by common law many years ago. I said they were a bit sneaky...

We'll take a look now at how implied terms can enter into contracts. They can arise in three main ways. They can come from common law (case law) as seen above. They can be implied by statute law, and they can arise by the nature of practices which have become common through long standing methods of trading and the customary way that contracts always have been made in certain localities. We'll take just a few examples of each of these but there are hundreds of examples should you wish to chase this further. I should only do this if it particularly interests you, as a handful of examples should be quite enough to explain the basic ideas.

### **Implied terms by case law**

As we have seen above in contracts of employment, case law has implied that the employee (and the employer) have certain duties towards each other. We'll take a closer look at these duties in the chapter on employment law. Apart from employment law, there are numerous examples where the law by statute, implies various terms into contracts. Take another look at the chapter on sources of law if you want to remind yourself about this. Particularly take notice of the Consumer Rights Act 2015 and the statutory rights given to all of us as consumers when we make any contract to buy anything from a retailer.

The following case is one I always use to show the importance of the courts in implying certain terms into a contract when such a term seems, for some reason, to be missing.

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### *The Moorcock (1889)*

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The facts of this case were that *The Moorcock* was the name of a ship carrying cargo which needed to be offloaded. To do this the ship owners made a contract with the owners of a wharf situated on the River Thames. Now, unfortunately, no one seemed to have realised at the time that the River Thames is a very highly tidal river (they've certainly realised this nowadays). So, when the *Moorcock* was moored alongside the jetty on the river and the tide went out, naturally the ship began to sink lower and lower into the water. Eventually the hull of the ship came to rest on the river bed and was badly damaged by a series of rocks lying along the bottom of the river. Oh dear. The ship owners naturally thought that the owners of the wharf should compensate the ship owners in contract law for a breach of contract. Unfortunately for the shipowners, the owners of the wharf didn't agree with this at all. Now comes what the wharf owners must have thought was the clever bit. They argued something like this: take a look at the contract which we made with you. Where in the contract does it state that we are to be responsible for any damage caused to your ship by the tide going out? The contract in fact made no mention of this. We are forced to ask today, where's the sense in a wharf owner contracting their wharf out to a ship, when they must have known (or at least suspected) that the wharf wasn't deep enough to contain a ship of this size and weight?

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Well of course this makes no sense at all looking at it from an objective point of view. Or, from any point of view I suspect. The court agreed with this because they implied a new term in their ruling into the contract as it stood. This term regarded the original contract as actually having to have contained a clause that the wharf was suitable for the ship to be offloaded safely. The court mentioned that the sole purpose of the contract was to moor the ship on the jetty to unload the ships' cargo. Crucially, it was inevitable that the ship would be lowered by the tide and hit the rocks.

Such a term was specified as having to be present in the contract for the purpose of 'business efficacy'. 'Efficacy', as used by L.J. Brown in *The Moorcock*, means the ability to bring about some intended result. In this case the intended result was the safe mooring and offloading of the ship. So according to the court, the original contract was to be considered to have such a term within it.