be 1930. The buyer's claim for damages for breach of warranty failed in the Court of Appeal. In this case the interval between the negotiations and the contract was well marked and the statement was not a term. However, the interval is not always so well marked and in such cases there is a difficulty in deciding whether the statement is an inducement or a term.

Oral statements later put into writing

If the statement was oral and the contract was afterwards reduced to writing, then the terms of the contract tend to be contained in the written document and all oral statements tend to be pre-contractual inducements. Even so the court may still consider the apparent intentions of the parties and decide that they had made a contract which was part oral and part written (see *Evans* v *Merzario* (1976) in Chapter 15).

Special skill and knowledge or lack of same

Where one of the parties has special knowledge or skill with regard to the subject matter of the contract, then the statements of such a party will normally be regarded as terms of the contract. In addition, it will be difficult for an expert to convince the court that a person with no particular knowledge or skill in regard to the subject matter has made statements which constitute terms of the contract.

Oscar Chess Ltd v *Williams*, 1957 – Effect of special skill and knowledge (**153**)

Conditions and warranties

Having decided that a particular statement is a term of the contract and not a mere inducement, the court must then consider the importance of that statement in the context of the contract as a whole. Not all terms are of equal importance. Failure to perform some may have a more serious effect on the contract than failure to perform others. The law has applied special terminology to contractual terms in order to distinguish the vital or fundamental obligations from the less vital, the expression *condition* being applied to the former and the expression *warranty* to the latter. A condition is a fundamental obligation which goes to the root of the contract. A warranty on the other hand is a subsidiary obligation which is not so vital that a failure to perform it goes to the root of the contract.

This distinction is important in terms of remedies. A breach of condition is called a repudiatory breach and the injured party may elect either to repudiate the contract or claim damages and go on with the contract.

It should be noted that the claimant must go on with the contract and sue for damages if he has affirmed the contract after knowledge of a breach of condition. He may do this expressly as where he uses the goods, or by lapse of time as where he simply fails to take any steps to complain about the breach for what in the court's view is an unreasonable period of time. A breach of warranty is not repudiatory and the claimant must go on with the contract and sue for damages.

Whether a term is a condition or warranty is basically a matter for the court which will be decided on the basis of the commercial importance of the term. As we have seen, the words used by the parties are, of course, relevant, but are not followed slavishly by the court which may still decide differently from the parties on the basis of the commercial importance of the term.

It should be noted that the word *warranty* is sometimes used in a different way, e.g. by a manufacturer of goods who gives a *warranty* against faulty workmanship offering to replace parts free. The term *warranty* is used by the manufacturer as equivalent to a guarantee. We are concerned here with its use as a term of a contract.

Poussard v *Spiers and Pond*, 1876 – Condition: a vital commercial undertaking (**154**)

Bettini v *Gye*, 1876 – Warranty: a collateral undertaking (**155**)

Innominate terms

In modern law there are also terms which the parties call conditions and where the breach has *in fact* had a serious result on the contract. The court will then agree that the breach should be treated as a breach of condition and the contract can be repudiated. There are also terms which the parties call warranties and where the breach has *in fact* not been serious. The court will then agree that the breach shall be treated as a breach of warranty and the contract cannot be repudiated. The parties must go on with it though the person injured by the breach has an action for damages.

There are also what are called *innominate terms*. The effect of these on the contract will depend upon how serious the breach has turned out to be *in fact*. If the breach has turned out to be serious the court will then treat the term as a condition, so that the contract can be repudiated. If *in fact* the breach has not had a serious effect on the contract, the court will treat it as a breach of warranty, so that the parties must proceed with the contract, though the injured party will have an action for damages.

Thus, if Dodgy Motors advertises a car for sale as having done 32,000 miles, this statement is likely to be a warranty giving an action for damages only if in fact the car has done, say, 34,000 miles. If, however, the car had done 60,000 miles the court would be likely to regard the statement as a condition allowing repudiation of the contract.

The Hansa Nord, 1975 – The innominate term illustrated (**156**)

Implied terms – generally

Before leaving the topic of the contents of the contract it must be appreciated that in addition to the express terms inserted by the parties, the contract may contain and be subject to implied terms. Such terms are derived from custom or statute, and in addition a term may be implied by the court where it is necessary in order to achieve the result which in the court's view the parties obviously intended the contract to have.

Customary implied terms

A contract may be regarded as containing customary terms not specifically mentioned by the parties.

Hutton v *Warren*, 1836 – A contract containing a customary term (**157**)

Judicial implied terms

Implication according to parties' intentions

The court may imply a term into a contract whenever it is necessary to do so in order that the express terms decided upon by the parties shall have the effect which was presumably intended by them. This is often expressed as the giving of 'business efficacy' to the contract, the judge regarding himself as doing merely what the parties themselves would *in fact* have done in order to cover the situation if they had addressed themselves to it.

The Moorcock, 1889 – When the court implies a term (**158**)

Implication as a matter of law

Sometimes, however, the courts imply a term which is quite complex so that the parties would not, *in fact*, have addressed themselves to it. Here the judge is saying *as a matter of law* how the contract should be performed. This is illustrated by *Liverpool City Council* v *Irwin* [1977] AC 239 where the House of Lords held that it was an implied term of a lease of a maisonette in a block of properties owned by the Council that the landlord should take reasonable care to keep the common parts of the block in a reasonable state of repair, although the obligation to do so would *not* have been accepted by the landlord.

When *Irwin*'s case was in the Court of Appeal, Lord Denning, in deciding that there should be an implied term regarding maintenance, rejected the business efficacy test as the only test, saying that the court could imply a term whenever it was *just and reasonable* to do so, whether the term was strictly *necessary* to the performance of the contract or not. Although the House of Lords implied a term relating to maintenance, it did not go along with the view of Lord Denning that the test should be reasonableness regardless of necessity. The Court of Appeal returned to the 'necessary' approach in *Mears* v *Safecar Security* [1982] 2 All ER 865 and refused to imply a term into a contract of service that payment should be made to an employee during sickness. Stephenson, LJ was of opinion that the term could not be implied because, although it might be *reasonable* to imply a term relating to sick-pay, it was not *necessary* in a contract of employment. The term relating to maintenance in *Irwin* was in a sense not absolutely vital to performance of the contract in that the tenants could have walked up the stairs, even in the dark, to their flats if lift and light maintenance had not been carried out, but it was much closer to being necessary to *performance* of the contract than was the sick-pay term in *Mears*.

The Court of Appeal also decided in *Morley* v *Heritage plc* (1993) 470 IRLB 11 that a contract of employment does not contain an implied term that an employee will receive pay in lieu of unused holiday entitlement. A claim that the term should have been implied on the basis of custom and practice failed because there was no such custom or practice in the company. If there had been, the claim might well have succeeded.

The decision in *Morley* was distinguished in *Janes Solicitors* v *Lamb-Simpson* (1996) 541 IRLB 15. In that case the Employment Appeal Tribunal decided that there was an implied contract term to pay accrued holiday pay. Ms Lamb-Simpson had not been given written particulars of her employment as required by the Employment Rights Act 1996 (see Chapter 19) and the EAT felt able to imply the term. In *Morley* there was a detailed written contract between the parties which dealt with holiday entitlement and holiday pay but said nothing about accrued holiday pay. It seemed therefore that the parties had addressed themselves to the relevant area and if something was not covered it was because it was not intended.

It should be noted that payment for accrued holiday leave is now payable under the Working Time Regulations 1998 (see further Chapter 19). The maximum leave under the regulations is currently four weeks so the above materials have application where a claim is made for accrued holiday pay beyond four weeks.

Implied terms in consumer law – sale of goods

The law relating to the sale of goods is to be found in the Sale of Goods Act 1979 (as amended). This is a consolidating measure bringing together a number of previous Acts, but in particular the Sale of Goods Act 1893. Also relevant are rules of the common law not dealt with by legislation. Section references are to the Sale of Goods Act 1979 (as amended) unless otherwise indicated.

Title

The rules governing title are as follows.

Implied condition as to title

Section 12(1) provides that, unless the circumstances show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell, he will have the right to sell the goods at the time when the property (ownership) is to pass.

Usually the ownership of goods passes to the buyer when the contract is made, but in an agreement to sell it does not. For example, a contract for goods yet to be made is an agreement for sale.

Rowland v *Divall*, 1923 – Section 12 and total failure of consideration (**159**)

The decision in *Rowland*, which has been applied in subsequent cases (see *Karflex Ltd* v *Poole* [1933] 2 KB 251), produces an unfortunate result in that a person who buys goods to which the seller has no title is allowed to recover the whole of the purchase price even though he has had some use and enjoyment from the goods before he is dispossessed by the true owner. It is thus difficult to suggest that there has been total failure of consideration. The Law Reform Committee (see 1966 Cmnd 2958, para 36) has recommended that, subject to further study of the law relating to restitution, an allowance in respect of use and enjoyment should be deducted from the purchase price and the balance returned to the claimant. It should be noted that the 1979 Act does not deal with this matter.

Section 12(1) might be construed as meaning that the seller must have the power to give ownership of the goods to the buyer, but if the goods can only be sold by infringing a trade mark, the seller has no right to sell for the purposes of s 12(1).

Niblett Ltd v *Confectioners' Materials Co Ltd*, 1921 – A sale which infringed a registered mark (**160**)

Implied warranties as to title

Section 12(2) provides that there is:

> An implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

This does not apply where a limited interest is sold, but ss 12(4) and 12(5) do and contain similar provisions (see below).

It is not easy to see what rights this sub-section gives over those in s 12(1). The law does not recognise encumbrances over chattels unless the person trying to enforce them is in possession of the goods or in privity of contract with the person who is in possession (*Dunlop* v *Selfridge* (1915) – see Chapter 10). Thus, if A uses his car as security for a loan from B then:

(*a*) if B takes the car into his possession, the charge will be enforceable if necessary by a sale of the vehicle;
(*b*) the charge is equally enforceable against the car while it is still in A's possession, though if A sells it to C, B will be prevented by lack of privity of contract from enforcing any remedies against the vehicle once it is in the possession of C.

Thus, if situation (*a*) above applied, the sub-section is unnecessary since A could not deliver the vehicle even if he sold it and would therefore be liable in damages for non-delivery to C. If situation (*b*) above applied, then the encumbrances would not attach to the vehicle once C had taken possession. C would not, therefore, require a remedy.

However, the usefulness of s 12(2) is illustrated by the decision of the Court of Appeal in *Microbeads AC* v *Vinhurst Road Markings Ltd* [1975] 1 All ER 529. In this case A sold road-marking machines to B. After the sale C obtained a patent on the machines so that their continued use by B was in breach of that patent and C was bringing an action against B in respect of this. In a claim by A against B for the purchase price, B wished to include in their defence breach of ss 12(1) and 12(2). It was held by the Court of Appeal that they could include breach of s 12(2) but not breach of s 12(1). There had been no breach of s 12(1) at the time of the sale so that A had not infringed that sub-section but since B's quiet possession had been disturbed after sale, A was in breach of s 12(2).

Sales under a limited title

Under s 12(3), the sale of a limited interest is now possible. Where the parties intend only to transfer such a title as the seller may have, there is an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made (s 12(4)), and an implied warranty that the buyer's quiet possession will not be disturbed (s 12(5)). There is an action by the buyer for breach of these warranties if, for example, he is dispossessed by the true owner. Furthermore, the seller is not able to contract out of this liability.

Sales under a limited title are common where the sale is of goods taken in execution by the bailiffs to satisfy a judgment debt.

Sales by description

Section 13(1) provides that, where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description.

(*a*) A sale is by description where the purchaser is buying on a mere description having never seen the goods. A classic example occurs in the case of mail-order transactions.
(*b*) A sale may still be by description even though the goods are seen or examined or even selected from the seller's stock by the purchaser, as in a sale over the counter, because most goods are described if only by the package in which they are contained. Therefore a sale in a self-service store would be covered by s 13 though no words were spoken by the seller.

Beale v *Taylor*, 1967 – Application of s 13 where the goods are seen (**161**)

If s 13 applies it is enforced strictly, and every statement which forms part of that description is treated as a condition giving the buyer the right to reject the goods, even though the misdescription is of a minor nature. There is no such thing as a 'slight breach' of condition.

Buyers have been allowed to reject goods on seemingly trivial grounds, e.g. misdescriptions of how the goods are packed, and regardless of the fact that no damage has been suffered.

Moore & Co v *Landauer & Co*, 1921 – Packaging is part of the description (**162**)

However, if the defect is a matter of quality and/or condition of the goods rather than an identifying description, s 14 (see below) rather than s 13 applies. Although the Sale of Goods Act applies in the main to sales by dealers, s 13 applies even where the seller is not a dealer in the goods sold (*Varley* v *Whipp* [1900] 1 QB 513).

There can be no contracting out of s 13 at all where a business sells to a consumer or the contract is between persons in a private capacity. In a non-consumer sale contracting out is allowed to the extent that it is 'fair or reasonable' (see further Chapter 15).

Where the sale is by sample as well as by description, s 13(2) provides that the bulk must correspond with both the sample and the description. Thus in *Nichol* v *Godts* (1854) 10 Ex 191 a purchaser bought by sample 'foreign refined rape oil'. It was held that the goods must not only correspond with the sample, which they did, but also be in fact 'foreign refined rape oil' and not a mixture of rape and hemp oil which was inferior.

Sale by description and misrepresentation distinguished

It should be noted that the description must be an identifying description to come under s 13 as in *Beale* v *Taylor* (above). Statements regarding the state of a car's tyres, e.g. 'they were fitted 5,000 miles ago', are concerned more with quality and/or condition of the goods and s 13 probably does not apply, the claim being for misrepresentation. If s 13 did apply, then every trivial statement about the goods would be a breach of condition and the law relating to misrepresentation would have no place – a rather unlikely situation.

Statements such as the one above do not identify the goods. Suppose I were to say to a student: 'The notes you require are in the boot of my car. Here are the keys. My car is the one which had new tyres fitted 5,000 miles ago.' How would the student find the car? Not easily: the statement does not identify the vehicle!

Sales in the course of a business

Although ss 12 and 13 of the 1979 Act apply to private sales as well as business sales, the s 14 implied terms of fitness and satisfactory quality apply only to sales *in the course of a business*. A problem may, therefore, arise where a milkman sells his old float in order to buy a new one. If the float is not fit for the purpose and/or of satisfactory quality, to what extent will the implied terms of s 14 (see below) be available to the person who has bought the float? Is it a private sale or a sale in the course of a business? It was decided by the Court of Appeal that it could be in the course of a business and that s 14 should be interpreted widely (see *Stevenson* v *Rogers* [1999] 1 All ER 613). Earlier statute law on sale of goods had confined s 14 to situations where the seller *dealt* in the goods, but the 1979 Act, following recommendations of the Law Commission, required only that the goods be sold *in the course of a business*, so that even an irregular sale of business property could be included and carry the implied conditions of fitness and satisfactory quality. If the sale is integral to the business, that is enough, even though the goods are not routinely sold by the business. Thus in *Stevenson* the sale by a person in business as a fisherman of one of his boats was within the 1979 Act and the condition of satisfactory quality applied. The decision in *Stevenson* runs contrary to the decision of the Court of Appeal in the *R & B Customs Brokers* case (1988) (see Chapter 15) where, because the purchase of a car by a business was irregular and not an integral part of the business, the company was treated as a consumer for the purpose of exclusion clauses. The Court of Appeal considered this case in *Stevenson*, but said that since it was an interpretation of the Unfair Contract Terms Act 1977, it could stand in that field, but the reasoning was not to be applied to the Sale of Goods Act 1979.

Implied conditions as to fitness

Section 14(3) lays down the following conditions.

Where the seller sells goods in the course of a business and the buyer (or debtor in a credit sale) expressly, or by implication, makes known (a) to the seller, or (b) to the dealer in a credit sale any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer (or debtor) does not rely, or that it is unreasonable for him to rely, on the skill or judgement of that seller or dealer.

There is no need for the buyer to specify the particular purpose for which the goods are required when they have in the ordinary way only one purpose, e.g. a hot-water bottle. If ordinary goods in everyday use are required for a particular purpose, this must be made known to the seller.

Priest* v *Last, 1903 – Where the goods have only one purpose (**163**)

Griffiths* v *Peter Conway Ltd, 1939 – Where the goods must cope with the claimant's abnormalities (**164**)

Fitness for the purpose: meaning of reliance

In these days of national advertising under brand names it is somewhat unrealistic to assume that the buyer very often relies on the seller's skill and judgement. However, in order

to make the law work, reliance will readily be implied even to the extent of saying that, at least in sales to the general public as consumers, the buyer has gone to the seller because he relies on the seller having selected his stock with skill and judgement. The buyer must show that he has made known the purpose for which the goods are being bought. Reliance will then be presumed, unless it can be disproved, or if the seller can show that reliance was unreasonable.

The court has to decide what amounts to 'unreasonable reliance'. However, presumably the seller can disclaim responsibility. For example, suppose B goes into S's general stores and sees some tubes of glue. If he then asks whether the glue will stick metal to plastic and S says: 'I am not expert enough to say', then if B buys the glue and it does not stick metal to plastic it would surely be unreasonable for B to suggest that he relied on S's skill and judgement.

There will in general be no implication of reliance where the buyer knows that the seller deals in only one brand of goods, e.g. where a public house sells only one brand of beer.

Grant v *Australian Knitting Mills Ltd*, 1936 – Reliance on seller's skill and judgement readily implied (**165**)

Wren v *Holt*, 1903 – Position where seller obliged to sell only one product (**166**)

Fitness: application to non-manufactured goods

The rules relating to fitness for the purpose under s 14(3) apply also to non-manufactured goods. Thus in *Frost* v *Aylesbury Dairy Co Ltd* [1905] 1 KB 608 the defendants who were retailers of milk were held liable under s 14(3) when they sold milk containing germs which caused the claimant's wife to die of typhoid fever.

Fitness: second-hand goods

In deciding the matter of fitness for the purpose in the case of second-hand goods the buyer must expect that defects are likely to emerge sooner or later. However, if defects occur fairly quickly after sale this is strong evidence that the goods were not reasonably fit at the time of sale.

Crowther v *Shannon Motor Company*, 1975 – Fitness and second-hand goods (**167**)

Fitness and satisfactory quality distinguished

Before proceeding to consider satisfactory quality, we must distinguish the two heads of liability, i.e. fitness and satisfactory quality. Under s 14(2) an article is regarded as not satisfactory because of a manufacturing defect so that a perfect article would have served the purpose, or in other words it is the right article but it is faulty. Under s 14(3) an article is regarded as not fit for the purpose because of its design or construction. It may be perfect in terms of its manufacture but its construction or design does not allow it to fit the purpose and consequently no amount of adjustment or repair will ever make it right. In other words, it is a perfect article but the wrong article for the purpose.

Baldry v *Marshall*, 1925 – Where goods not fit but satisfactory (**168**)

Satisfactory quality

By s 14(2) (as amended by the Sale and Supply of Goods Act 1994) *where the seller sells goods in the course of a business* there is an implied condition that the goods supplied under the contract are of satisfactory quality, except that there is no such condition:

(*a*) as regards defects specifically drawn to the buyer's attention before the contract is made; or
(*b*) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

If the seller does not normally deal in goods of the type in question, there is no condition as to fitness (nor as to satisfactory quality unless the sale is by sample which is dealt with below). The *only* condition in such a case is that the goods correspond with the description. This arises because s 14(1) provides that except as provided by s 14 and s 15 (sale by sample), and subject to any other enactment, there is no implied condition or warranty about the quality or fitness for any particular purpose of goods supplied under a contract of sale. If, therefore, S (who is not a dealer) sells a car to B with no express terms as to quality and fitness, the court is prevented by s 14 from implying conditions or warranties, even though S seems, from the circumstances, to have been warranting the car in good order.

The s 14 provision regarding satisfactory quality applies where the sale is by a dealer who does not ordinarily sell goods of precisely the same description. Thus if B ordered an 'X' brand motor bike from S who has not formerly sold that make, s 14 applies if the motor bike is unfit or unsatisfactory.

There is no need under s 14(2) for the buyer to show that he relied on the seller's skill and judgement, and the seller is liable for latent defects even though he is not the manufacturer and is merely marketing the goods as a wholesaler or retailer. Such a seller can, however, obtain an indemnity from the manufacturer if the buyer successfully sues him for defects in the goods.

Sales through an agent

Section 14(5) is concerned with the problem of a private seller who sells through an agent. The sub-section provides that the implied conditions of fitness and satisfactory quality operate if the agent is selling in the ordinary course of business unless the principal is not acting in the course of business and the buyer is aware of this, or reasonable steps have been taken to bring it to his notice. Thus, for example, an auctioneer acting for a private seller could exclude these sections by making it clear that the principal was a private seller.

Examination of the goods

The buyer is not obliged to examine the goods but if he does do so he will lose the protection of s 14(2) if he fails to notice obvious defects, at least in respect of such defects as where a new washing machine is examined and the buyer misses a rather obvious scratch on the front of the machine. The buyer can also lose his right to complain where the seller actually points out the defects.

The price paid

The interpretation of the word 'merchantable' (now 'satisfactory') has often been discussed in the courts. Section 14(6) provides: goods of any kind are of merchantable (now satisfactory)

quality within the meaning of this Act if they are as fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.

The price paid by the buyer is therefore a factor to be taken into account. Goods (provided they are not defective) are not unsatisfactory simply because their resale price is slightly less than that which the buyer paid, though they may be if the difference in purchase and resale price is substantial.

B S Brown & Son Ltd v *Craiks Ltd*, 1970 – Satisfactory quality and the resale price (**169**)

How were the goods described?

As regards the description applied to the goods, old cars or other mechanical items which are sold and described as scrap need not be of satisfactory quality. Furthermore, 'shop-soiled', 'fire-damaged', 'flood-salvage' and so on might imply non-satisfactory lines. In addition, old items, such as antiques and curios would not presumably be required to be in perfect working order. However, as we have seen it was held in *Cavendish-Woodhouse* v *Manley* (1984) 82 LGR 376 that the phrase on an invoice 'bought as seen' merely confirms that the purchaser has seen the goods. It does not exclude any implied terms as to quality or fitness.

Duration of satisfactory quality

As regards the time during which the goods must be satisfactory, the law is not clear. So far as perishable goods are concerned, the decision in *Mash and Murrell* v *Joseph I Emmanuel* [1961] 1 All ER 485 is relevant. In that case potatoes, though sound when loaded in Cyprus, were rotten by the time the ship arrived in Liverpool, though there was no undue delay. It was held by Diplock, J that the sellers were liable under s 14(2) because the goods should have been loaded in such a state that they could survive the normal journey and be in satisfactory condition when they arrived. In addition, the seller is liable for defects inherent in the goods when they are sold and will not escape merely because the defects do not become apparent until a later time. Circumstances such as those seen in *Crowther* v *Shannon Motor Co* (1975) provide an illustration of this situation.

Goods partially defective

Where part only of the goods is unsatisfactory it seems to depend on how much of the consignment is defective. In *Jackson* v *Rotax Motor and Cycle Co Ltd* [1910] 2 KB 937 the claimants supplied motor horns to the defendants and one consignment was rejected by the defendants who alleged they were unmerchantable (now unsatisfactory). Half the goods were dented and scratched because of bad packing and the Court of Appeal held that the buyers were entitled to reject the consignment.

In this connection we have already considered s 15A of the Sale of Goods Act 1979 (as inserted by the Sale and Supply of Goods Act 1994) under which a consumer can reject goods where the breach is slight but a business buyer will, where the breach is slight, have to take delivery and sue for any loss. Clearly in the *Jackson* case s 15A would have allowed rejection in a business context as well as a consumer context. The breach was hardly slight!

Satisfactory quality: the current test

Section 1 of the Sale and Supply of Goods Act 1994 inserts in s 14 of the Sale of Goods Act 1979 a reformed definition of the concept of quality, and merchantable quality has gone. There was always doubt about its scope and minor defects were not necessarily covered. Thus in *Millars of Falkirk Ltd* v *Turpie* 1976 SLT 66 it was decided that a new car with a slight leak of oil in the power-assisted steering was even so of merchantable quality. Similarly, a scratch on the dashboard of a new car would not prevent it from being merchantable.

Now a sale in the course of business carries an implied condition that the goods are of 'satisfactory quality'. To be of such quality the goods must meet the standard that a reasonable person would regard as satisfactory taking into account any description, price and other relevant circumstances. This is a general test but the section then explains that the quality of the goods includes their state and condition and gives specific and non-exhaustive aspects of quality:

- fitness for the purpose for which the goods are commonly supplied;
- appearance and finish;
- freedom from minor defects;
- safety;
- durability.

As before, defects specifically brought to the buyer's attention before the contract or if the buyer has examined the goods those he ought to have noticed are not covered. Nevertheless, many more defects will now be covered, and the Law Commission, in Working Paper 85 (which advocated the satisfactory quality test), took the view that in the *Millars* case the car would have failed the new test which it proposed.

The above rules also apply to goods supplied under a contract for work and materials, e.g. an oil filter supplied when servicing a car (see further later in this chapter).

Fitness and satisfactory quality

Private sales

The rules as to fitness for purpose and satisfactory quality do not apply to private sales of second-hand goods and there is still a fairly wide application of the maxim *caveat emptor* (let the buyer beware). In practice only manufacturers, wholesalers, retailers and dealers in new or second-hand goods will be caught by the implied conditions. The courts cannot imply conditions and warranties into private contracts similar to those implied by the Act into sales by dealers, because, as we have seen, s 14(1) forbids it.

Extension to items supplied with goods

The implied terms relating to fitness and satisfactory quality extend also to other items supplied under the contract of sale of goods, e.g. containers, foreign matter and instructions for use.

Geddling v ***Marsh***, 1920 – Fitness and satisfactory quality: returnable bottles (**170**)

Wilson v ***Rickett, Cockerell & Co Ltd***, 1954 – Where foreign matter is supplied with the goods (**171**)

Wormell v ***RHM Agriculture (East) Ltd***, 1986 – Application to instructions for use (**172**)