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FITNESS FOR PURPOSE UNDER DESIGN AND BUILD CONTRACTS:
Trebor v ADT

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Section 4 of the Supply of Goods and Services Act 1982 provides that:

- where under a contract for the transfer of goods, the transferor transfers the property in goods in the course of a business;
- and the transferee, expressly or by implication, makes known to the transferor any particular purpose for which the goods are being acquired;
- there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose, whether to nor that is a purpose for which such goods are commonly supplied.

This fitness for purpose obligation is more onerous than the duty to merely exercise reasonable skill and care, which is an implied term in a contract for the supply of services.

The distinction between "goods" and "services" is obvious in certain situations; for example if you are supplying widgets from a factory or in business as a consultant. In the construction industry, the position is less clear-cut in the context of design and build, where the contractor is responsible for the design and construction of the works.

The position was generally thought to be that the courts will readily imply a term of fitness for purpose of the completed works, unless excluded by the express terms of the contract or other particular circumstances[1]. In the case of *IBA v EMI and BICC* (1978), the House of Lords considered that a main contractor might be liable upon an implied term of fitness for purpose for the negligent design of a sub-contractor.

However, in the recent case of *Trebor Bassett Holdings Ltd v ADT Fire and Security plc* [2012], the Court of Appeal found that a contract for the design and construction of a fire suppression system did not include an implied term of fitness for purpose.

The claimants in this case were Trebor and Cadburys. Cadburys produced popcorn in an extension to Trebor's factory in Pontefract. Cadburys entered into a contract with ADT to

[1] *Keating on Construction Contracts* (9th Edition), 3-055.

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design, supply, install and commission a fire suppression system for the popcorn production area. In 2005, a fire started in that area that destroyed the factory. The fire suppression system did not extinguish the fire and the claimants sued ADT.

At first instance, the judge held that ADT owed Cadbury a contractual duty to exercise reasonable skill and care in carrying out the design of the system and had breached this duty. However, Cadbury was found to be partly responsible for the damage suffered.

On appeal, Cadbury argued that the contract was one for the supply of services, pursuant to which goods were also to be supplied. Under sections 4(2) and 4(4) of the Supply of Goods and Services Act 1982, there were implied conditions in the contract that the fire suppression system was to be of satisfactory quality and reasonably fit for purpose.

The Court of Appeal found that the fire suppression system was not "*goods*" for the purposes of the Act. In his judgment, Tomlinson LJ said:

> "*...the system does not have any inherent characteristics which can be independently assessed as indicative that, as a free-standing system, it is or is not of good quality. Furthermore there are no purposes for which this system is commonly supplied. It is a one-off bespoke system, designed for one particular application. All this tends to support my view that it is not a natural or accurate use of language in this context to regard "the system" as simply "goods" attracting without more the well-known statutory incidents of quality and fitness for purpose. What ADT was agreeing to supply was primarily design skills and reasonable care in exercising them, not goods, and the goods which they supplied were of good quality.*"

What products might constitute a "*system*", in distinction to "*goods*", will no doubt need to be considered further (Tomlinson LJ emphasised its bespoke nature). While the compatibility of this decision with that of the House of Lords in *IBA v EMI* has been questioned, it should not be overlooked that the relevant comments in *IBA v EMI* were *dicta* and not binding.

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