

Chapter 8

Contract Development Through the Looking-Glass of Implied Terms*

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Great legal historians have documented the general history of the law of contract.¹ The task undertaken here is more modest – a mapping of the genesis of implied terms in contract law. That history necessarily mirrors changes that took place in the development of contract law, in particular, the changing importance of concepts of relational duties and the contracting parties' intentions. The earliest regulation of what are now considered contractual arrangements was done by the community and its regulatory bodies, such as the church and trade organisations. Obligations were recognised as attaching to types of commercial relationships, and through recognition of custom and trade usage they became the first "implied terms". However, by the 19th century the notion of the parties' intentions dominated all areas of contract law, including the implication of terms in fact; the nature of the relationship lost focus and was replaced by the "parties' presumed intentions", a concept that was often artificial and fictitious. Custom was marginalised and trade usage was moulded to fit the new regime. It has only been since the 20th century that courts have begun to discard the fictitious use of intention in frustration, anticipatory breach and implied terms. With the development of terms implied in law there is a reassertion of the importance of relationships, and the contract's nature and context, taking the process back to its starting point through a different rationalisation.

Early history

The history of English law has been intimately associated with social history and the development of legal doctrine depends on the social values in each

* This chapter draws on Chapter 3 in Peden, *Good Faith in the Performance of Contracts* (LexisNexis, Sydney, 2003).

1 See, for example, Simpson, *A History of the Common Law of Contract* (Clarendon Press, Oxford, 1975); Stoljar, *A History of Contract at Common Law* (Australian National University Press, Canberra, 1975); Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press, New York, 1990); and general works like Milsom, *Historical Foundations of the Common Law* (2nd ed, Butterworths, Toronto, 1981).