The recent Court of Appeal judgment in *Trebor Bassett Holdings Ltd and the Cadbury UK Partnership v ADT Fire & Security* [2012] EWCA Civ 1158 (*Cadbury v ADT*) has clarified the circumstances in which fitness for purpose obligations will be implied into contracts for the design, supply and installation of goods and materials.

**Implied term for fitness for purpose**

Under s 4 of the *Supply of Goods and Services Act 1982* (the *SGSA*), there is an implied term that the goods and materials supplied under a contract will be reasonably fit for their purpose if the purchaser has made that purpose known to the supplier, unless the term is excluded by agreement, or the circumstances show that the purchaser does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the supplier. In *Cadbury v ADT* the Court of Appeal provided clarification as to when fitness for purpose obligations will be implied.

**Background**

In September 2003 Cadbury engaged ADT Fire & Security (ADT) to design, supply, install and commission a fire suppression system (the System) in relation to new popcorn production lines at a factory in Pontefract owned by Trebor Bassett. The System was to replicate a system used at another factory owned by Trebor Bassett in Leeds.

The contract between the parties (the contract) was formed by way of an exchange between Cadbury and ADT. On 28 August 2003, ADT submitted a quotation to Cadbury for £9,009, which attached its terms and conditions (including a limit of liability of approximately £14,000) and a specification stating that their fire fighting systems are ‘designed, manufactured and installed to suit the specific requirements of the risks to be protected’. On 3 September 2003, Cadbury accepted ADT’s quotation subject to Cadbury’s standard...
terms and conditions, which stated that all goods supplied and/or services carried out must be of good quality, and must meet the specification and Cadbury’s standards. In June 2005, a fire started in a hopper in the popcorn production area. Factory staff attempted to stamp out the burning popcorn on the floor, causing it to scatter. The system did not prevent the fire spreading and the entire factory was destroyed. The court later found that Cadbury’s own acts and omissions had been a major contributory factor, because they had failed to segregate the relevant popcorn production areas from the rest of the factory, or to install sprinklers or take other action to prevent the spread of the fire.

The case at first instance
Cadbury issued a claim against ADT for £110 million, being the alleged losses suffered by them as a result of the destruction of the factory in Pontefract. Cadbury’s case was that the contract included terms that the System (and the equipment that comprised it) must be of satisfactory quality and reasonably fit for the purpose for which it was being procured. During the trial, ADT argued that Cadbury’s negligence had been a major contributory factor to the spread of the fire. In response, Cadbury relied on the statement in the specification that ADT’s fire-fighting systems are ‘designed, manufactured and installed to suit the specific requirements of the risks to be protected’ and argued that this amounted to a guarantee that the system would prevent any fire from escaping the hopper, on the basis that a defence of contributory negligence would not be available for breach of the guarantee.

ADT denied that the contract included implied terms as to quality and fitness for purpose in relation to the system, on the footing that the design, supply and installation of the system was not tantamount to the supply of goods and materials, and that in any event Cadbury had failed to communicate the particular purpose for which it was acquiring the system. ADT argued furthermore that the contract was based on its own standard terms and conditions and not Cadbury’s and that therefore its liability was limited to £14,000. ADT also argued that the fire in the factory at Leeds in June 2004 (where a fire suppression system which was later replicated at Pontefract had been installed) broke the chain of causation since Cadbury had continued to operate the production line without taking measures to prevent a recurrence despite being aware that the System had not been effective to suppress the earlier fire. In making this argument, ADT relied on Schering Agrochemicals Ltd v Resibel NV SA [1992] WL 1351400, in which it was held that a purchaser of defective fire safety devices had broken the chain of causation by voluntarily continuing to operate a production line following a small fire.

Coulson J held that ADT owed Cadbury a contractual duty to exercise reasonable skill and care in the design and installation of the system, and a concurrent duty in tort (see [2011] EWHC 1936 (TCC)). ADT was in breach of these duties as it failed properly to consider how the system would deal with a fire in the hopper. The court held that the contract included Cadbury’s terms and conditions and not ADT’s, on the basis that in the ‘battle of forms’, Cadbury had fired the ‘last shot’. Accordingly, Cadbury could rely upon the express term that goods would be of good quality, whilst ADT could not rely upon a limit of liability. Coulson J held that the system was not tantamount to ‘goods’ for the purposes of the SGS so no fitness for purpose obligation could be implied pursuant to the SGS. Although the System was made up of various pieces of equipment, which were goods, what made it a system was the design and the most important part of ADT’s scope was the work carried out by its designers. Coulson J held furthermore that the implied fitness for purpose obligation under s 4 of the SGS did not apply in any event because Cadbury had not informed ADT of the particular purpose for which the System was being acquired (as opposed to the ‘general’ purpose of suppressing fires), ie exactly what fire risks were required to be eliminated or reduced.

Cadbury’s argument that the specification (and the contract of which it formed a part) amounted to a guarantee was also rejected. The system was designed to address the risk of a ‘developed fire’ escaping from the hopper area, but the fact that the fire escaped from this area did not necessarily mean ADT had failed to comply with their contractual obligations. There was nothing in the specification to impose a more onerous duty than reasonable skill and care.

Coulson J found that Cadbury’s acts and omissions had contributed to the spread of the fire, but did not break the chain of causation. Cadbury was found to be contributorily negligent and the damages awarded to them were accordingly reduced by 75%. Coulson J remarked obiter that if ADT had guaranteed that the
fire would not escape from the hopper, the fire in the Leeds factory in 2004 would have broken the chain of causation (following the Schering Agrochemicals case relied on by ADT) since it demonstrated that the claimant did not rely on the defendant’s skill or judgment at all given that it voluntarily continued to operate the production line at Pontefract notwithstanding its knowledge that the system had not been effective to suppress the earlier fire.

The appeal
Cadbury appealed arguing that ADT had breached an absolute obligation to ensure the system complied with the specification, which, it alleged, required the system to suppress any ‘developed fire’ that might escape the hopper. Cadbury also maintained that the contract was for the supply of goods and that there was an implied term that the system would be fit for the purpose of addressing a ‘developed fire’. ADT cross-appealed, submitting that the actions of Cadbury employees in the immediate aftermath of the discovery of the fire, by emptying the burning popcorn from the hopper onto the floor (in accordance with accepted procedure), caused the spread of the fire, thus breaking the chain of causation. The Court of Appeal upheld Coulson J’s judgment in all key respects, including the award of damages to Cadbury having provided for a reduction by 75% to reflect its contributory negligence. It was held that the wording in the specification was not precise enough to amount to a guarantee and that ‘very clear words would be required to bring about the result that a designer and supplier of a fire suppression system had contracted to extinguish all fires occurring in … the hopper.’ The ability to suppress a fire would depend on many variables beyond ADT’s control and it was therefore unreasonable to interpret the specification in that way.

It was also held that the contract was not solely for the supply of goods. ADT had offered to undertake the design of a bespoke product which was to be tailored to suit the specific needs of the risks to be protected. The importance of the system was not the inherent quality of the constituent parts but rather their selection for use. The system as a whole did not have any inherent characteristics which could be independently assessed as being of good quality. The shortcomings in the system were considered to be matters of design, ‘not the inherent quality of the goods which were also supplied’. It was therefore ‘wholly artificial to regard ADT as having contracted to supply a system which can be equated with goods’. ADT primarily agreed to exercise reasonable skill and care in designing the System, not to supply goods. Furthermore, Cadbury had not made known to ADT the particular purpose for which the System was being acquired, and accordingly, there was no implied term that the System must be fit for its purpose. Finally, the Court of Appeal held that Cadbury’s employees’ actions following the fire did not break the chain of causation since they were foreseeable in the circumstances in issue.

The one point on which Court of Appeal took issue with Coulson J was in relation to his obiter remark (see above). The court held that ADT had not demonstrated that Cadbury had sufficient knowledge of the circumstances surrounding the earlier fire at a sufficiently senior level for the court to conclude that Cadbury had voluntarily continued to operate the production line in the knowledge that the System was defective.

Key conclusions
Contracts draftsmen will draw the lesson from Cadbury v ADT that in a design, supply and installation contract which involves more than simply the provision of an ‘off the shelf’ product, clear express words should be used (including a clearly stated particular purpose for the goods and materials concerned) if a fitness for purpose obligation or other guaranteed performance is desired. The case will be of great interest to all who design, supply and install goods and materials in the course of their business. Included in this category are, of course, Design and Build (D&B) contractors who will take comfort from the confirmation that not all ‘design, install and supply’ contracts will include an implied fitness for purpose obligation, even in the absence of express terms negating such an obligation. However, the facts of Cadbury v ADT are by no means typical of a D&B contract. D&B contractors should continue to assume that (following the line of authority which is independent of the SGM and which goes back to Independent Broadcasting Authority v EMI Electronics Ltd and Bice Construction Ltd (1980) 14 BLR 1) they will be under an obligation to ensure that the works which they are contracted to design and build will be reasonably fit for their purposes, in the absence of a term limiting their design liability to the use of ‘reasonable skill and care’ such as cl 2.17 of the JCT Design and Build form.

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