BUSINESS LAW – KEY ELEMENTS (lecture 4) TERMS

Any term of a contract must be clear and certain. If there is any ambiguity, there can be no agreement – Gibson v Manchester CC. Mere puff (hypothetical ambiguous statements - Dimock v Hallet), which is not actionable, and mere representation (statement of fact) are NOT terms. A term is a contractual promise. The first step in relation to terms is to see if the statement is incorporated into the contract. There are ‘express terms’ (both parties are aware of them), including pre-contractual statements made during negotiations, and agreed terms written into the contract. ‘Implied terms’ (terms that neither party has necessarily seen), which can be implied by the courts at common law: in law (necessary to contract) OR in fact (business efficacy to contract – intention imputed to parties), and can be implied by statute.

EXPRESS TERMS
Terms that are specifically agreed between the parties either orally or in writing are said to be express.

1. Was the statement when it was made, was it clear the statement was important? – Bannerman v White. The court decided that it was a term of the contract that the hops had not been treated with sulphur.

2. Timing (just before or at the point of contracting in order for it to be a term) – Routledge v McKay


COURT CONSIDERS:

1. Specialist knowledge – Oscar Chess v Williams; Bentley v Harold Smith (motors)

2. Assumption of responsibility – if you haven’t been allowed to verify then it will be a term of the contract – Schauel v Read. However, in Trackway, t delay was too long i.e the sale was made a day later.

PAROL EVIDENCE RULE
Extrinsic evidence may not be adduced to vary an express written contract – Jacobs v Batavia

Avoiding the Rule

1. Not wholly written contracts -J Evans & Sons v Andrea Merzario. Ct decided it was a part contract.

2. Collateral contracts – City of Westminster v Mudd


Avoiding the argument

Include the entire agreement clause – Inntrepreneur Pub Co. v East Crown Ltd

IMPLIED TERMS
Implied terms are those to which no direct reference has been made during negotiations.

TERMS IMPLIED IN LAW
A term implied in law into all contracts of a particular type because it is necessary – Liverpool City Council v Irvin; Mahmund v BCCI; Crossley v Faithful & Gould Holdings Ltd

TERMS IMPLIED IN FACT
Trade custom (two businesses in same business) – British Crane Hire v Ipswich Plant

Course of dealing (it must be regular and consistent) - McCutcheon v MacBrayne; Hollier v Ramblers Motors; Hills v Arc. However, in Photolibrary Ltd v Burda Senator Verlag at the course of dealing

It is parties’ intentions reasonable material facts; specialist knowledge as common contract – AG v Belize v Belize Telecom Ltd

Business efficacy: The Moorcock
The test: “something so obvious that it goes without saying” – Shirlaw v Southern Foundries. Contrast: Ultraframe (uk) ltd v tailored roofing systems with equitable life assurance society v hynan

IMPLIED BY STATUTE
Sale of Goods Act 1979
S12 Title (can’t see something you don’t own) ie nemo dat qui non habet – Bowland v Divall
S13 Description – Arcos v Ronaasen
S14 Quality or fitness – Priest v East
S15 Sample – Godley v Perry

Sale of Goods & Services Act 1982
S13 – with due care and skill
S14 – within reasonable time
S15 – pay reasonable consideration

BREACH OF A TERM
The breach of a term gives rise to two possible options:

If a term is a CONDITION, the innocent has a right to either terminate the contract and claim damages OR affirm and claim for damages.

If the term is a WARRANTY, the innocent person only has a right to sue for damages only, not to terminate.

CONDITION OR WARRANTY?
Povosard v Spiers – held it was a condition as it “went to the root of the contract”. Agent was entitled to terminate. However, in Bettini v Gye – held it was a warranty. Not such a serious breach as he only missed a few days of rehearse.

CONDITION
Promissory conditions ie promises which are fundamental to contract.

Contingent conditions i.e condition in the contract by which the contract hangs. Two types: condition precedent (contract will only happen if some event happens and condition subsequent (if specific happens then whole contract is over).

HOW IS A CONDITION CLASSIFIED? - Statute, parties intentions, judiciary.

Statutory classification
SGA 1979 – S12(5A), S13(1A), S14(6), S15(3). All conditions unless s15(A) applies ie if business buying from another business and breach if so slight as to make termination so unreasonable S13-15 (the breach) might be treated as a warranty - Arcos v Ronaasen

Sale and Supply of Goods Regs 2002 Amendments to SGA 79 – S48(A), (B), (C), (D) SGA 79 – reasonable period of time, without causing significant inconvenience to the consumer, repairing or replacing the goods.

Classification by the parties
Courts usually give effect to parties intention – Lombard North Central v Butterworths, BUT not always – Schuker v Wickman

INNOMINATE TERMS
Contract doesn’t specify that it is a C or W, OR the terms cannot be categorised as being a C or W. Court looks ‘to seriousness of the consequences of the breach’ – Hong Kong Fir v Kawasaki; Aerial Advertising Co v Batchelor Peas

Note: S13 SGSA 1982 “reasonable & skill” is always an innominate term.

Breach of innominate term
Innocent party’s rights may be uncertain and possibility of wrongful repudiation – Hong Kong Fir.