

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 (hyperbolic ambiguous statements- *Dimmock 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 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*

3. **Reduction into writing** – *Inntrepreneur Pub Co v East Crown Ltd*

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 – *Schawel v Reade*. However, in *Tanqueray*, the 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*

3. Where terms ‘onerous’ – *Interfoto v Stiletto*. Can’t bury an onus clause in the contract – needs to be obvious.

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 Irwin; Mahmud v BCCI; Crossley v Faithful & Gould Holdings Ltd*

TERMS IMPLIED IN FACT

Trade custom (two business in same business) – *British Crane Hire v Ipswich Plant*

Course of dealing (it must be regular and consistent) –

McCutcheon v MacBrayne; Hollier v Rambler Motors; Hillas v Arcas. However, in *Photolibary Ltd v Burda Senator Verlag* there was course of dealing.

Parties’ intentions – reasonable man with the business knowledge and context of the contract – *AG of 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 hyman*

IMPLIED BY STATUTE

Sale of Goods Act 1979

S12 Title (can’t see something you don’t own ie nemo dat qui non habet) – *Rowland v Divall*

S13 Description – *Arcos v Ronaasen*

S14 Quality or fitness – *Priest v Last*

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?

Poussard 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 8 days of rehearsal.

CONDITION

Promissory conditions ie promises that are fundamental to contract.

Contingent conditions ie clause 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*

Judiciary

‘Use of the word ‘condition’ is an indication of the parties intentions, but it is by no means conclusive’ – *Schuler v Wickman*

Generally: Judiciary – *Hong Kong Fir v Kawasaki Kisen Kaishi* “goes to the root of the problem”. A term ‘breach of which deprives the innocent party of substantially the whole benefit of the contract’.

Specific terms: Judiciary – precedents which have established certain terms as conditions: expected ready to load (*The Mihalis Angelos*); time of performance (*Bunge v Tradax*)

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*.