

ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS



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Lesson 3



- **ASPECTS OF CONTRACT AND NEGLIGENCE FOR BUSINESS**

- LO 1: Understand the essential elements of a valid contract in a business context

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The Basic Syllabus

- Understand the essential elements of a valid contract in a business context.
- Be able to apply the elements of a contract in business situations.
- Understand principles of liability in negligence in business activities
- Be able to apply principles of liability in negligence in business situations.

LEARNING OBJECTIVES



- At the end of the class, students should be able to:
 - Analyse terms in contracts with reference to their meaning and effect.

OVERVIEW



- Statements made by the parties may be classified as **terms or representations**. Different **remedies** attach to breach of a term and to misrepresentation respectively.

CONDITION



- A condition can be defined as follows:-
- 'An important term which is vital to a contract so that its breach will destroy the basis of the agreement. It
- may arise from an express agreement between the parties or may be implied by law. Thus conditions of contract are fundamental to what was agreed by the parties, and are so essential to the agreement that the failure to perform or perform improperly by the other party may be considered a substantial failure to perform the contract at all. For instance the following are likely to be conditions of contracts:

CONDITION



- In a contract for the supply of services, the obligation to supply the services; similarly for contracts the supply of goods;
- The obligation to pay for goods or services;
- Where delivery times are time sensitive, to deliver goods by the time;
- Where the contract is for delivery of a specified computer system, the obligation to deliver a computer system which matches the specification in all material respects;
- In a software distribution agreement, the distributor has the right to distribute the software;
- In an assignment of intellectual property rights, the assignor owns the intellectual property rights;
- In sale of shares, the person has title to the shares in order to convey title of the shares to the purchaser; and
- Where access to premises is required to perform services for the benefit of the other party;
- Express clauses requiring compliance with data protection legislation, especially where one of the parties has heavy reliance on onward use of data;
- In a maintenance and support agreement, maintaining the subject matter of the agreement such that it functions properly and consistently.

CONDITION



- *Bannerman v White 1861*
- *The facts:* In negotiations for the sale of hops the buyer emphasised that it was **essential** to him that the
- hops should not have been treated with sulphur adding that, if they had, he would not even bother to ask
- the price. The seller replied explicitly that no sulphur had been used. It was later discovered that a small
- proportion of the hops (5 acres out of 300) had been treated with sulphur. The buyer refused to pay the
- price.
- *Decision:* The representation as to the absence of sulphur was intended to be a **term** of the contract.

WARRANTY



- A warranty is a contractual assurance made by a seller to a buyer and may be implicit or explicit. For example an explicit warranty for a watch may specifically say that it will last for at least 10 years. Implicit in this is that the watch is able to tell the time accurately. Warranties provide consumers and the clients of a company with protection in a number of areas, such as including intellectual property rights, quality and performance of products, ownership of shares and employment issues.

WARRANTY



- Bettini v Gye 1876
- The facts: An opera singer was engaged for a series of performances under a contract by which he had to be in London for rehearsals six days before the opening performance. Owing to illness he did not arrive until the third day before the opening. The defendant refused to accept his services, treating the contract as discharged.
- Decision: The rehearsal clause was subsidiary to the main purpose of the contract.

INNOMINATE TERMS



- “Innominate terms” refer to contractual terms that lie in limbo. If the innominate term is an important one (i.e. a breach of the term would be so serious as to deprive the innocent party of substantially the whole benefit it was to obtain from the contract), the innocent party may terminate the contract and obtain other remedies. However, if it is read to be a minor term (i.e. a breach of the term would not be so serious as to deprive the innocent party of substantially the whole benefit it was to obtain from the contract), the innocent party may not terminate. It may only sue for damages and other remedies such as specific performance.

INNOMINATE TERMS



- *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisa Kaisha Ltd 1962*
- *The facts:* The defendants chartered a ship from the claimants for a period of 24 months. A term in the contract stated that the claimants would provide a ship which was 'in every way fitted for ordinary cargo service'. Because of the engine's age and the crew's lack of competence the ship's first voyage, from Liverpool to Osaka, was delayed for 5 months and further repairs were required at the end of it. The defendants purported to terminate the contract, so the claimants sued for breach; the defendants claimed that the claimants were in breach of a contractual condition.
- *Decision:* The term was innominate and could not automatically be construed as either a condition or a warranty. The obligation of 'seaworthiness' embodied in many charter party agreements was too complex to be fitted into one of the two categories.
- The ship was still available for 17 out of 24 months. The consequences of the breach were not so serious that the defendants could be justified in terminating the contract as a result.

EXPRESS



- An express contract is a legally binding agreement between two parties, where all the essential terms of the contract are explicitly stated, either orally or in writing. Under traditional principles of Anglo-American contract law, in order for a valid contract to be formed, there must be an offer by one of the parties, an acceptance of the offer by the other party, and consideration exchanged for their mutual promises. In order to determine if a binding, legally-enforceable contract has been formed, courts typically examine the nature of the communications between the parties and the context in which they were made during the formation phase.
- In order for a communication to constitute an offer, it must convey, with sufficient certainty, the essential terms of the agreement. These terms usually include the contract price, the quantity of the goods delivered or a description of the specific services rendered, as well as the time for performance. A communication that fails to state a material term of the contract will not suffice as an offer for purposes of contract formation.

EXPRESS



- Under common law rules, an acceptance must be unequivocal. That is, it must conform exactly to the terms of the offer. A party who indicates his assent, but responds by seeking to add additional terms and conditions not stated in the original offer, has not accepted but has made a counter-offer. Since a counter-offer constitutes an indefinite, or ambiguous, acceptance of the terms of the original offer conveyed, no express contract is formed.

IMPLIED



- A term deemed to form part of a contract even though not expressly mentioned. Some such terms may be implied by the courts as necessary to give effect to the presumed intentions of the parties. Other terms may be implied by statute, for example, the Sale of Goods Act.'
- Terms can be implied by:-
 1. Customs
- The parties may enter into a contract subject to customs of their trade. Any express term overrides a term which might be implied by custom.
- Hutton v Warren 1836.
- The facts: The defendant landlord gave the claimant, a tenant farmer, notice to quit the farm. He insisted that the tenant should continue to farm the land during the period of notice. The tenant asked for 'a fair allowance' for seeds and labour from which he received no benefit because he was to leave the farm.
- Decision: By custom he was bound to farm the land until the end of the tenancy; but he was also entitled to a fair allowance for seeds and labour incurred.

IMPLIED



SALE OF GOODS

- 2. Terms may be implied by statute. In some cases the statute may permit the parties to contract out of the statutory terms. In other cases the statutory terms are obligatory, for example the protection given by the Sale of Goods Act 1979 to a consumer who buys goods from a trader cannot be taken away from him.

IMPLIED



- Terms may be implied if the court concludes that the parties intended those terms to apply to the contract.
- The Moorcock 1889
- The facts: The owners of a wharf agreed that a ship should be moored alongside to unload its cargo. It was well known that at low water the ship would ground on the mud at the bottom. At ebb tide the ship settled on a ridge concealed beneath the mud and suffered damage.
- Decision: It was an implied term, though not expressed, that the ground alongside the wharf was safe at low tide since both parties knew that the ship must rest on it.

EXCLUSION CLAUSE AND THEIR VALIDITY



- An exclusion clause can be defined as a clause in a contract which purports to exclude liability altogether or to restrict it by limiting damages or by imposing other onerous conditions. They are sometimes referred to as exemption clauses.
- The statutory rules do permit exclusion clauses to continue in some circumstances. Hence it is necessary to consider both the **older case law** and the **newer statutory rules**.

EXCLUSION CLAUSE AND THEIR VALIDITY



- The courts have generally sought to protect consumers from the harsher effects of exclusion clauses in two ways.
- (a) Exclusion clauses must be incorporated into a contract before they have legal effect.
- (b) Exclusion clauses are interpreted strictly. This may prevent the application of the clause.

REVIEW QUESTIONS



- 1). To what is the injured party to a contract entitled in the event of breach of:
 - (a) A condition by the other party?
 - (b) A warranty by the other party
- 2). 1 Why is it important to distinguish between terms and representations?
 - A term may be implied into a contract by
 - 2 (i) Statute
 - (ii) Trade practice unless an express term overrides it
 - (iii) The court, to provide for events not contemplated by the parties
 - (iv) The court, to give effect to a term which the parties had agreed upon but failed to express because it was obvious
 - (v) The court, to override an express term which is contrary to normal custom
 - A (ii) and (iii) only
 - B (i), (ii) and (iv) only
 - C (i), (iv) and (v) only
 - D (i), (ii), (iv) and (v) only

REVIEW QUESTIONS



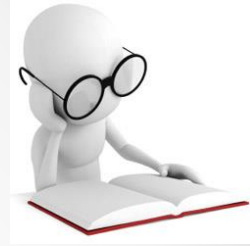
- 3) Fill in the blanks in the statements below, using the words in the box.
- A (1) is a vital term, going to the root of the contract, breach of which entitles the injured
- party to treat the contract as (2) and claim (3) A (4) is a term (5) to the main purpose of the contract.
- The consequence of a term being classified as innominate is that the court must decide what is the actual
- effect of its (6)
- • breach • condition • subsidiary
- • warranty • damages • discharged
- 4) Give an example of a statute which identifies implied terms specifically as conditions or warranties.
- 5) Terms implied by custom cannot be overridden
- True
- False

REVIEW QUESTIONS



- 6) Fill in the blanks in the statement below, using the words in the box.
- A contract is a consumer contract if the buyer neither makes the contract in course of (1)
 - nor holds himself out as doing so.
 - The other (2) does make the contract in course of (3)
- In the case of a contract governed by the law of (4), the goods are of a type ordinarily
 - supplied for (5)
 - • business • sale of goods • business
 - • party • private use or consumption
- 7) Match the laws to their jurisdictions under the law of contract
 - (a) Common law (1) All contracts with specific provisions for consumer contracts
 - (b) UCTA 1977 (2) Applies only to consumer contracts and to non-negotiated terms
 - (c) UTCCR 1999 (3) All contracts
- 8) What is the 'contra proferentem' rule?

Further readings



- Corporate and Business Law - BPP ACCA F4
- <http://legal-dictionary.thefreedictionary.com/>
- <http://www.drukker.co.uk/>
- Difference Between Breach of Contract & Breach of Warranty by Justin Schamotta
- <http://singaporelegaladvice.com/>
- What Is an Express Contract? - Written By: John Kinsellagh