

Lecture 8 – Terms in a Contract

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ID: 190 – 208 – 081

(questions 1 – 4)

Question 1



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3

Consideration needs to be (choose all that apply):

22



Sufficient and adequate

11 (50%)

Forbearance of a right can be a form of consideration

9 (40.91%) ✓

Performance of a legal duty is never a form of valid consideration

9 (40.91%)

Performance of a contractual duty can result in (additional) consideration if the performance becomes materially different

13 (59.09%) ✓

Performance of an existing contractual duty can result in (additional) consideration if the promisor receives a practical benefit

Correct responses

3 (5.17%)

Correct answer

Forbearance of a right can be a form of consideration

Performance of a contractual duty can result in (additional) consideration if the performance becomes materially different

Performance of an existing contractual duty can result in (additional) consideration if the promisor receives a practical benefit

Correct answer explanation

Consideration needs to be sufficient but not necessarily adequate (chocolate wrappers are a form of consideration).
Forbearance: *Plitt v PHH Asset Management* [1994] 1 W.L.R. 327
Legal duty: *Glasbrook v Glamorgan CC* [1925] A.C. 270 (HL)
Contractual duty: *Hartley v Ponsonby* (1857) 7 El & Bl 872
Practical benefit: *Williams v Roffey Bros* [1991] 1 Q.B. 1 (CA)



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CONSIDERATION NEEDS TO BE (CHOOSE ALL... 1/9



Question 2



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Which one of the following statements is incorrect in relation to the rules of acceptance?

47



Acceptance of an offer means unconditional agreement to all the terms of that offer.

4 (8.51%)

Unilateral contracts are usually accepted by conduct.

6 (12.77%)

Unilateral contracts are usually accepted by communication.

29 (61.7%)



Generally, remaining silent will not amount to acceptance.

8 (17.02%)

Correct responses

29 (61.7%)

Correct answer

Unilateral contracts are usually accepted by communication.



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WHICH ONE OF THE FOLLOWING...

2/9

⋮

⌂



Question 3



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What is the key principle established in the Pinnel's case (1602)?

39



Part payment of a debt is not good consideration for a promise to forego the balance

31 (79.49%) ✓

Performing an existing public duty is not a valid form of consideration

1 (2.56%)

Consideration must not be past

2 (5.13%)

Consideration must be sufficient but needs not be adequate

5 (12.82%)

Correct responses 31 (79.49%)

Correct answer

Part payment of a debt is not good consideration for a promise to forego the balance

Correct answer explanation

Part payment cannot be satisfaction for the whole, UNLESS some additional benefit is given to the promisor (e.g. early payment).



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WHAT IS THE KEY PRINCIPLE ESTABLISHED... 3/9



Question 4



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Which case established the doctrine of promissory estoppel?

40



D&C Builders v Rees (1966)

2 (5%)

Alan v El Nasr (1972)

0 (0%)

Woodhouse Israel v Nigerian Produce (1972)

2 (5%)

Central London Property Trust v High Trees House (1947)

36 (90%)



Correct responses

36 (90%)

Correct answer

Central London Property Trust v High Trees House (1947)



RE-OPEN



WHICH CASE
ESTABLISHED THE...

4/9



01

Statements and Terms

02

Incorporation of Terms
into a Contract

03

Implied Terms



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1. Terms in a Contract



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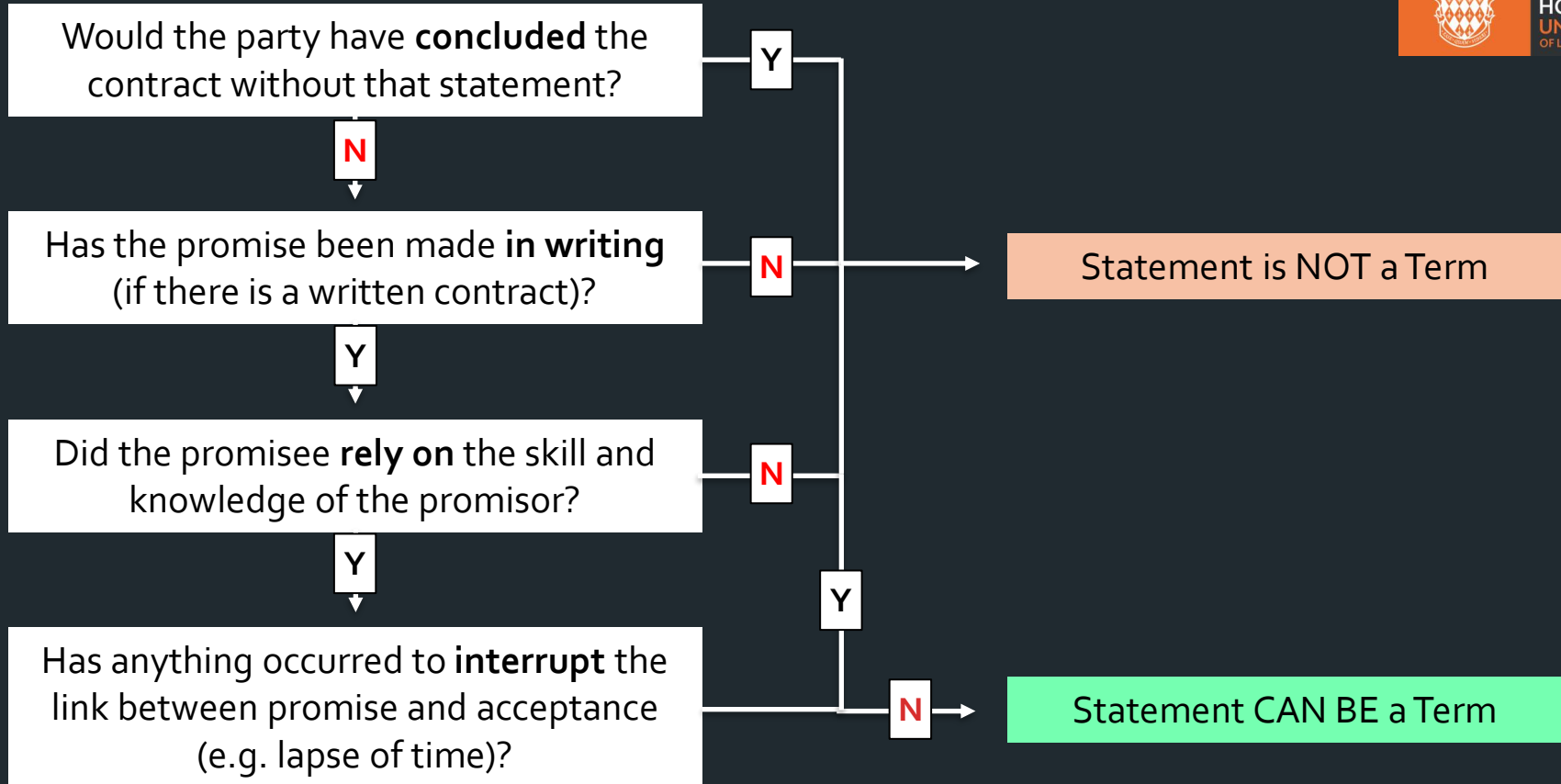
Statements during Negotiations



- During negotiations, parties make several statements, that can be classified as:
 - **Puffs;**
 - **Representations:**
 - Damages on proof of fault;
 - Innocent party to be put in the position had the contract not been made [more remote losses].
 - **Terms in a contract:**
 - Damages for breach of contract;
 - Performing party to be put in the position had the contract performed [loss in the reasonable contemplation of the parties].



"IMPORTANCE ATTACHED" Test





“[To assess if a statement is a term], a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge”.

—*De Lasalle v Guildford* [1901] 2 K.B. 215, 221

Importance Test



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Bannerman v White (1861) 10 CB NS 844



Sale of hops by sample. W asked if B used sulphur, adding that they were not interested otherwise. B said that no sulphur had been used. Upon inspection, sulphur was used in 1.75% of crop provided, but they were all mixed up.



Was W entitled to repudiate the contract (breach of a condition/term in a contract)?



Yes. The seller made a false, non-fraudulent misrepresentation. As W entered into the contract entirely on the faith of that representation, the contract could be repudiated.



Clause in Writing



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Couchman v Hill [1947] K.B. 554 (CA)



C bought from H at an auction a heifer. C wanted an “unserved” one (not yet had a calf). The auction catalogue stated that vendors were not liable in case of errors for the auctioned goods. Before buying, C got oral confirmation from H that the heifer was unserved. This was not the case.



Was there an oral, collateral warranty, which overrode the T&Cs in the contract?



Yes. To allow the written contract to override the oral agreement between the parties would undermine the basis on which the parties had agreed to contract.



Collateral Contracts



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City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129



CWP rented a shop to M. M used to sleep there. When the contract was renewed, CWP included a clause that prevented M from sleeping there. M refused to sign until he was given reassurances that CWM would not enforce it. CWP tried to enforce the clause.



Is there an oral collateral contract between the parties that prevent CWP from relying on the letter of the lease agreement?



Yes. It is a necessary incident to assume that M signed the written lease in consideration of the oral agreement excepting to it.



Special Knowledge



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Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623 (CA)



During negotiations for the purchase of a second-hand Bentley the seller said it had done only 20,000 miles since fitted with a replacement engine and gearbox. This was wrong, the true figure being nearer 100,000. The seller could have discovered by asking the manufacturer.



Was the statement about the engine and gearbox mileage to be intended as a term in the contract, or was it a simple innocent misrepresentation?



Term. If a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it by entering into the contract, that is *prima facie* ground for inferring that it was intended as a warranty (term).



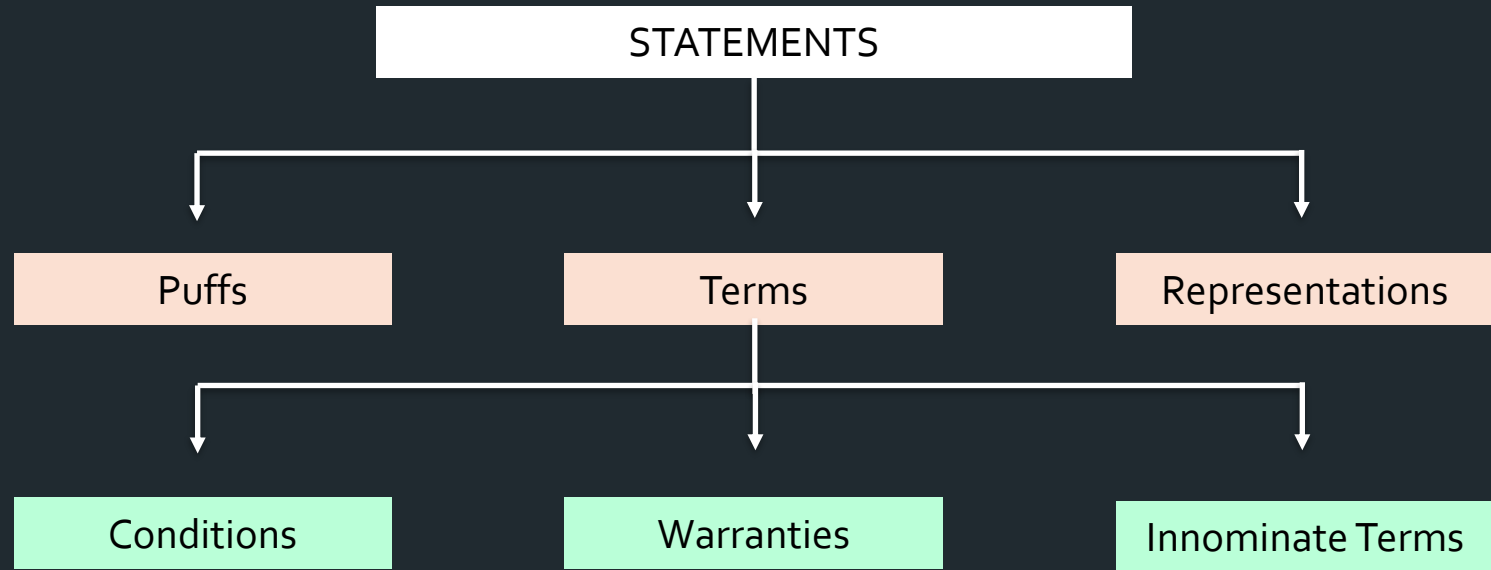
Terms in a Contract



If a statement turns out at being a term in a contract, such term may be a:

- **Condition:**
 - EXAMPLE: terms as to the time of delivery.
- **Warranty:**
 - EXAMPLE: general rules on payment.
- **Innominate or intermediate term.**





Conditions vs Warranties



- The actress signed a contract with a theatre for a full season, but was unable to take part in the first week of that season;
 - Was the requirement a condition or a warranty?
 - HELD: this was a **condition**, and the theatre was entitled to rescind the contract.
- The actress signed a contract, which stated that she must arrive for rehearsal 6 days before performance. She only arrived 3 days before performance was due to start;
 - Was the 6-day requirement a condition or a warranty?
 - HELD: this was a **warranty**, as it was an obligation ancillary to the main contract.



Poussard v Spiers and Pond (1876) 1 Q.B.D. 410



Bettini v Gye (1876) 1 Q.B.D. 183

Innominate Term = Warranty



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The Hongkong Fir [1962] 2 Q.B. 26 (CA)



February 1957: 2-year contract to charter a ship. Problems with engine and staff meant that the ship was not seaworthy until Sept 1957. The charterers repudiated the contract.



Was the “seaworthy” element of the contract a condition (repudiation valid) or a warranty?



Warranty. Although the owners were in breach of their obligations (thus resulting in damages), seaworthiness was not a condition, and the contract had not been frustrated.





“The shipowner's undertaking to deliver a seaworthy ship is neither a "condition" nor a "warranty" but one of that large class of contractual undertakings one breach of which may have the same effect as that ascribed to a breach of condition [...] or warranty”.

—*The Hongkong Fir* [1962] 2 Q.B. 26, 71
(Diplock LJ)

Innominate Term = Condition



Bunge Corp. v Tradax Export SA [1981] 1 W.L.R. 711 (HL)



T bought from B 15,000 tons of soya bean meal. T had to give at least one calendar month notice of the port in which they wanted the goods to be delivered. When they failed to do it (by 5 days), the seller (B) repudiated the contract.



Was the “timing” element of the contract a condition (repudiation valid) or a warranty?



Condition. In general, **time is of the essence** in a mercantile contract, and a term as to time of performance of an obligation by one party as a condition precedent to the performance of an obligation by the other party will generally be treated as a condition.



- To distinguish between conditions and warranties, consider the importance of the term, as well as the qualification provided by the parties;
- INNOMINATE Terms = terms that remain **unclassified** until a breach has occurred.



Conditions vs Warranties vs Innominate Terms



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Question 5



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To assess if a pre-contractual statement is a term, a court needs to look at (choose all that apply):

42



The subjective intention of the parties

15 (35.71%)

Whether the promise was made in writing

18 (42.86%) ✓

Whether the party relied on the promise

38 (90.48%) ✓

Whether the promise was still valid and binding when accepted

18 (42.86%) ✓

Correct responses

3 (3.37%)

Correct answer

Whether the promise was made in writing

Whether the party relied on the promise

Whether the promise was still valid and binding when accepted



Question 6



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Which of the following statements is true?

26



If a warranty in a contract is breached the injured party may treat the whole contract as discharged.

2 (7.69%)

If a condition in a contract is breached the injured party may treat the whole contract as discharged.

18 (69.23%) ✓

If a condition in a contract is breached the injured party may claim damages but must continue with the contract otherwise he will be in breach of contract.

5 (19.23%)

If a warranty in a contract is breached the injured party has no remedy.



RE-OPEN



WHICH OF THE FOLLOWING...

6/9

⋮

🔄



Correct responses 18 (69.23%)

Correct answer

If a condition in a contract is breached the injured party may treat the whole contract as discharged.

Correct answer explanation

If a warranty in a contract is breached the injured party may claim damages but must continue with the contract otherwise he will be in breach of contract. If a condition in a contract is breached the injured party may treat the whole contract as discharged but may elect to carry on with the contract and claim damages.

Question 7



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Where a term of a contract is worded broadly to cover a number of potential breaches and it is not possible to decide whether breach of the term would have important or trivial consequences that term is described as:

40



A condition

3 (7.5%)

A representatio

4 (10%)

A warranty

2 (5%)

An innominate term

31 (77.5%)

Correct responses

31 (77.5%)

Correct answer

An innominate term

Correct answer explanation

A term of a contract may be classed as an innominate or intermediate term where it is not possible to decide the seriousness of the breach and whether a party had been deprived of substantially the whole benefit of a contract until the breach occurred.

A smartphone with a yellow case lies on a document with various text and tables. The document is placed on a dark surface. The phone's screen is dark and reflects the surroundings. A yellow sticky note with the word 'HERE' is partially visible under the phone.

2. Incorporation



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Statements during Negotiations



- Pre-contractual statements can be incorporated in a contract by:
 - “Importance attached” test;
 - Collateral contract device.
- Contractual statements can be incorporated in a contract by:
 - **Signature;**
 - **Reasonable Notice;**
 - **Consistent course of dealing;**
 - **Common understanding** of the parties.



Signature



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L'Estrange v Graucob Ltd [1934] 2 K.B. 394



E bought from G a cigarette vending machine. The order form contained a very broad exemption of liability in very small print on poor-quality paper. E tried to claim for damages for breach of warranty.



Was the exclusion of liability incorporated in the contract by signature?



Yes. As the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents.





“When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not”.

—*L’estrane v F Graucob Ltd*
[1934] 2 K.B. 394, 403

- Signed clauses/contracts are binding unless the signature was obtained with fraud or misrepresentation;
- Courts adopt a more stringent approach if the misleading party is an experienced business person;
- Statutes now regulates unfair terms in consumer contracts (UCTA 1977);
- Not all signed documents can amend a binding contract between the parties.



Incorporation by Signature

Reasonable Notice



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Chapelton v Barry Urban DC [1940] 1 K.B. 532 (CA)



C hired a deck chair by taking it from a pile. Notice asked to take a ticket, but no waiver of liability. The waiver of liability was on the back of the ticket. The chair gave way, and C brought an action against BUDC. The plea was unsuccessful at first instance, but permission for appeal granted.



Did the BUDC gave sufficient notice of the waiver of liability, to the effect that it was incorporated in the contract?



No. The contract was concluded when the chairs were taken from the pile. The ticket was merely a receipt of the money paid.



Reasonable Notice



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Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1988] Q.B. 433



IPL sent some transparencies to SVP. The delivery note stated that delays in returning the transparencies will result in charges. IPL forgot of the transparencies, was billed £3,783 for the delay.



Had reasonable notice been given of that statement, and was the statement incorporated in the contract?



No. Clear and reasonable efforts must be made to bring any particularly onerous and unusual conditions to the attention of the other party if they are to form part of a contract.



- Where a document records performance of a contractual obligation (e.g. tickets, invoices), this is unlikely to be able to include new T&Cs to a contract;
- T&Cs can be incorporated by reference, if it is not feasible to include them in the document signed by the parties;
- T&Cs must be accessible and must be given “in time” + special rules for onerous conditions.



Incorporation by Notice

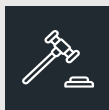


Consistent Course of Dealing



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- A driver used a ferry service on a regular basis. Sometimes he was asked to sign an exclusion clause. When the ferry sank and his car was lost, he had not signed such contract;
- HELD: incorporation by course of dealing did not apply because the parties did not behave in a consistent manner.
- Parties negotiated contracts on the phone, and the contract was later sent by telex. The telex contract incorporated exclusion and no set-off clauses;
- HELD: Even if negotiations were limited to 5 prior cases, the parties behaved in a consistent manner and the clauses were incorporated in the contract.



McCutcheon v David MacBrayne Ltd
[1964] 1 W.L.R. 125



Petrotrade Inc. v Texaco Ltd
[2000] C.L.C. 1341

- If the parties have dealt with each other on a regular basis on standard T&Cs, these need not be incorporated in all contracts between the parties;
- However, the practice needs to be sufficiently consistent to ensure that a reasonable, intelligent bystander would conclude that the T&Cs have been incorporated in the contract.



Incorporation by Course of Dealing



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- Where parties operate in the same business, and standard T&Cs apply to the transactions they enter into, these T&Cs are incorporated in their contracts even if not formally mentioned in them.



British Crane Hire Corp. Ltd v Ipswich Plant Hire Ltd [1975] Q.B. 303



Grogan v Robin Meredith Plant Hire [1996] C.L.C. 1127



Incorporation by Common Understanding



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IMPLIED TERMS

VS

EXPRESS TERMS

3. Implied Terms



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- In case of written contracts, extrinsic evidence (e.g. oral promises) is inadmissible to add, vary or contradict the written agreement;
- Strong presumption, but exceptions apply.



Gillespie Bros & Co v Cheney, Eggar & Co
[1896] 2 Q.B. 59



Shogun Finance Ltd v Hudson [2003] UKHL 62

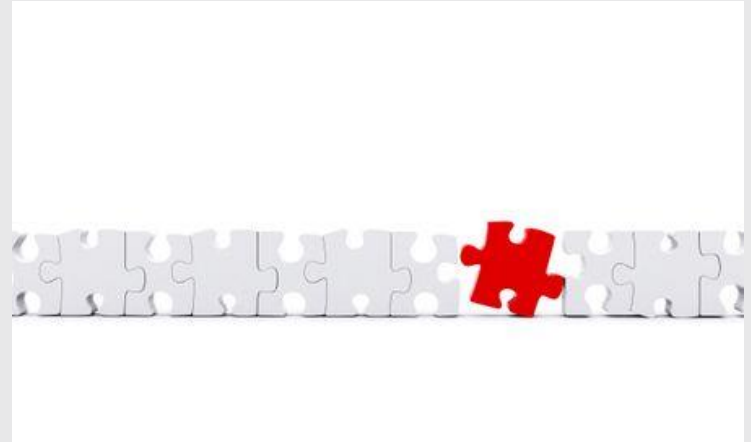


“Parole Evidence” Rule



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- Ambiguity – *Robertson v Jackson* (1845)
- Written agreement incomplete – *Allen v Pink* (1838)
- Collateral Contracts – *Couchman v Hill* (1947); *City and Westminster v Mudd* (1959); *Evans v Andrea Merzario* (1976)
- Custom – *Smith v Wilson* (1832)
- Starting or finishing date – *Pym v Campbell* (1856)



“Parole Evidence” Rule - Exceptions



Implied Terms



- Most frequently, implied terms add sth to a contract:
 - Only if necessary, and on an *ad hoc* basis;
 - Lord Hoffmann: it's a process of discovering the "true meaning" of a contract.
- More rarely:
 - To complete a bargain and make it into a contract;
 - To secure a policy objective.
- Courts should not "make" a contract, and should be able to imply sufficiently precise terms.



Terms Implied in Law



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Liverpool City Council v Irwin [1977] A.C. 239



I lived in a high-rise council house in Liverpool. The house was usually in poor conditions (rubbish, lifts not working, etc.). When the tenants stopped paying their rent, LCC tried to evict them and I resisted by saying LCC breached the agmt.



Could an obligation to keep common spaces clean and lifts working be implied in the tenancy agreement?



Yes. It is a necessary incident of all tenancy agreements that tenants are granted the use in common of staircases, corridors, lifts, etc.



Terms Implied in Fact – Officious Bystander



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Shirlaw v Southern Foundries (1926) Ltd [1939] 2 K.B. 206



S was employed by SF for a period of 10 years. The controlling shareholder changed SF's articles of association and dismissed S as director. S challenged the dismissal (even if technically this was possible under the amended contract).



Was there an implied term in the original contract which prevented SF's shareholders from removing S as director for 10 years?



Yes. An official bystander looking at the contract between the parties would say: "Of course you cannot unilaterally dismiss him without reasons!"



Terms Implied in Fact – “Business Efficacy” Test



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The Moorcock (1889) 14 P.D. 64



Claimant moored his ship at defendant's wharf on the Thames. At low tide bottom of ship came into contact with the river bed and it was damaged. Claimant claimed for damages, defendant resisted on the basis of not being responsible for the river.



Was there an implied term in the contract to take reasonable care to see that the berth at the wharf was safe?



Yes. The implication which the law draws from must be the intention of the parties, with the purpose of giving business efficacy to the transaction (you pay for something!).



Terms Implied in Fact – True Meaning



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Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10



A director was appointed by virtue of a specified shareholding in the company. When the shareholder became bankrupt, the director refused to step down.



Should the articles of the company be construed to imply that when the only person who can remove you is no longer part of the company, the appointed director shall resign?



Yes. In every case in which it was said that some provision ought to be implied in a contract, the question for the court would be whether such a provision would spell out in express words what the contract, read against the relevant background, would reasonably be understood to mean.



Terms Implied by Custom



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Hutton v Warren, Clerk (1836) 1 M & W 466



A tenant was asked to cultivate a farm in a "husbandlike manner". He was asked to terminate the tenancy before he could sow the crop. No mention in the written contract on whether H was entitled to compensation for the crops.



Was H entitled to compensation on the basis of a term in a contract, that should be implied based on local custom?



Yes. Where a written contract was silent on a particular point extrinsic evidence of a custom could be used to add clauses to written contract to deal with the point.



Terms Implied by Statute



- Certain obligations once imposed by the courts (terms implied in law) have now been given statutory force (terms implied by statute);
- Frequently found in Acts such as CRA 2015, SGA 1979 and SGSA 1982.



- ≠ from incorporation by...: implied terms were never spelled out;
- Strong presumption NO implied terms can be inferred if “parol evidence” rule or entire agreement clauses apply;
- Terms can be implied in law, in facts, by custom or by statutes.



Implied Terms



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Question 8



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Contractual statements can be incorporated in a contract by (choose all that apply):

26



signature

22 (84.62%) ✓

reasonable notice

24 (92.31%) ✓

"importance attached" test

11 (42.31%)

consistent course of dealings

15 (57.69%) ✓

law

0 (0%)

Correct responses

10 (13.89%)

Correct answer

signature

reasonable notice

consistent course of dealings

Correct answer explanation

The law is relevant to imply terms into a contract. The "importance attached" test operates with reference to pre-contractual statements.



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CONTRACTUAL
STATEMENTS CAN BE...

8/9



Question 9



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A term may be implied into a contract by 26
(please choose all that apply):



the courts



statutes



trade customs



terms cannot be implied



Correct responses 7 (26.92%)

Correct answer

the courts

statutes

trade customs



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Summary

1. **Statements and Terms**: “importance attached” test to distinguish between representations and terms in a contract; criteria to distinguish between conditions and warranties (and innominate terms).
2. **Incorporation** of contractual statements in new or ongoing contracts.
3. **Implied Terms**: parole evidence rule and its exceptions, and ways to imply the existence of un-written terms into a contract.