

CASES ON TERMS OF THE CONTRACT

1. THE PAROL EVIDENCE RULE

Evans v Andrea Merzario [1976] 2 All ER 930

The plaintiffs, who had shipped goods for many years with the defendants, who were forwarding agents, agreed to a changeover in the method of shipment to enable goods to be carried in containers stored below deck on the ship. The defendants gave an oral assurance that the goods would be carried below deck on the ship. In fact, goods were carried above deck and the containers were washed overboard in a storm. The printed standard conditions of the forwarding trade enabled the defendants to carry containers above deck if they wished to do so.

It was held that there was a breach of contract and that the defendants could not rely on the written agreement. Lord Denning MR said that the promise to carry goods below deck was an enforceable collateral contract. Roskill and Geoffrey Lane LJ also thought that the oral assurance was an express term of the contract of carriage, which was partly oral, partly in writing and partly by conduct.

Burgess v Wickham (1836) B&S 669

It was held that a person who takes out a policy of marine insurance can show that the insurer knew the ship to be unseaworthy, and so negative the usual implied warranty of seaworthiness.

Pym v Campbell (1856) 6 E&B 370

A written agreement for the sale of a patent was drawn up, and evidence was admitted of an oral stipulation that the agreement should not become operative until a third party had approved of the invention.

City & Westminster Properties v Mudd [1959] Ch 129

The defendant, who had been a tenant of the premises for six years, had resided at the shop. When the lease fell for renewal, the plaintiffs inserted a clause for use of the premises to be for business purposes only. The defendant asked if he could sleep there, was told that he could and he signed the lease. Even though this assurance contradicted the lease, evidence of it was held admissible to prove a collateral contract which the tenant could plead in answer to a claim for breach of contract.

2a. REPRESENTATIONS AND TERMS

Routledge v McKay [1954] 1 WLR 615

The defendant stated that a motor cycle, the subject matter of the proposed sale, was a 1942 model. In the written contract, signed a week later, no mention was made of the date of the model. The lapse of a week between the two events weighed with the court as a factor militating against construing the statement as a contractual term. (See further below)

Schawel v Reade [1913] 2 IR 64

The defendant told the plaintiff, who required a horse for stud purposes, that the animal was 'perfectly sound'. A few days later the price was agreed and, three weeks later, the plaintiff bought the horse. The statement was held to

be a term of the contract, but here the defendant, who was the owner of the horse, would appear to have had special knowledge.

Bannerman v White (1861) CB(NS) 844

The buyer of hops asked whether sulphur had been used in their cultivation. He added that if it had he would not even bother to ask the price. The seller assured him that it had not. This assurance was held to be a condition of the contract. It was of such importance that, without it, the buyer would not have contracted.

Couchman v Hill [1947] 1 All ER 103

The buyer asked for the assurance that the heifer he was contemplating purchasing at an auction sale was unserved, as he required it for servicing by his own bull. He also stated that without this assurance, he would not bid. Both the seller and auctioneer gave him this assurance. The heifer turned out to have been served.

The Court of Appeal held that the assurance was a term of the contract, despite the fact that this was in conflict with the printed conditions to which the auction sale was subject, which provided that no warranty was given. In the alternative, the Court of Appeal found that the statement was a collateral contract.

Routledge v McKay [1954]

In the written contract, signed a week later, no mention was made of the date of the model. It was held, on this point, that what the parties intended to agree on was recorded in the written agreement, and that it would be inconsistent with the written agreement to hold that there was an intention to make the prior statement a contractual term.

Birch v Paramount Estates (1956) 167 EG 196

The defendants made a statement about the quality of a house. The contract, when reduced to writing, made no reference to the statement. The Court of Appeal regarded the statement as a contractual term. But here the defendants had special knowledge.

Harling v Eddy [1951] 2 KB 739

The vendors of a heifer represented that there was nothing wrong with the animal but, in fact, it had tuberculosis from which it died within three months of the sale. A contributory factor leading the Court of Appeal to decide that the statement was a term of the contract was that the vendors were in a special position to know of the heifer's condition.

Oscar Chess v Williams [1957] 1 All ER 325

A private seller of a car obtained £290 in part exchange on the basis that it was a 1948 model. It was in fact, a 1939 model. The registration book had been fraudulently altered by a previous owner, but the seller was innocent of this. The price of a 1939 model was considerably lower. The plaintiff motor dealer would still have been prepared to buy the car, but at a lower price had they known the true facts.

The Court of Appeal held, by a majority, that the statement was not a term of the contract. The main reason for this decision was that the seller had no special knowledge as to the age of the car, while the buyers were car dealers,

and so in at least as good a position as the seller to know whether the statement was true.

***Dick Bentley Productions v Harold Smith Motors* [1965] 2 All ER 65**

A statement was made by a motor dealer to a private purchaser that the car had done only 20,000 miles since being fitted with a replacement engine and gearbox. The car had actually done nearly 100,000 miles since then. The Court of Appeal unanimously held that the statement was a contractual term (a warranty). Lord Denning MR distinguished *Oscar Chess v Williams* and said that the car dealer was clearly in a better position than the buyer to know whether the representation was true.

2b. CONDITIONS AND WARRANTIES

***Poussard v Spiers* (1876) 1 QBD 410**

Poussard was engaged to appear in an operetta from the start of its London run for three months. The plaintiff fell ill and the producers were forced to engage a substitute. A week later Poussard recovered and offered to take her place, but the defendants refused to take her back.

The court held that the defendant's refusal was justified and that they were not liable in damages. What chiefly influenced the court was that Poussard's illness was a serious one of uncertain duration and the defendants could not put off the opening night until she recovered. The obligation to perform from the first night was a condition of the contract. Failure to carry out this term entitled the producers to repudiate Poussard's contract.

***Bettini v Gye* (1876) 1 QBD 183**

Bettini, an opera singer, was engaged by Gye to appear in a season of concerts. He undertook to be in London at least six days before the first concert for the purpose of rehearsals. He arrived three days late because of a temporary illness. He gave no advance notice and Gye refused to accept his services.

It was held that the plaintiff had been engaged to perform for a 15week season and the failure to attend rehearsals could only affect a small part of this period. The promise to appear for rehearsals was a less important term of the contract. The defendant could claim compensation for a breach of warranty but he could not repudiate Bettini's contract.

***Hong Kong Fir Shipping* [1962] 1 All ER 474**

The defendants chartered a vessel from the plaintiffs for 24 months, "she being fitted in every way for ordinary cargo service." The engine room staff turned out to be inefficient and the engines were old with the result that she was held up for repairs for five weeks mid-voyage. It was then found that further repairs, requiring 15 weeks to complete, were necessary to make her seaworthy. Although the charterparty still had 20 months to run, the defendants repudiated the contract and claimed that the term as to seaworthiness was a condition of the contract, any breach of which entitled them to do so. The plaintiffs claimed damages for wrongful repudiation.

The Court of Appeal decided the term was neither a condition nor a warranty, and in determining whether the defendants could terminate the contract, it was necessary to look at the consequences of the breach to see if they deprived the innocent party of substantially the whole benefit he should have received under the contract. On the facts, this was not the case, because the charterparty still had a substantial time to run. The defendants could only claim damages.

Diplock LJ said that there are many contractual undertakings of a complex character which cannot be categorised as being conditions or warranties. Of such undertakings some breaches will and others will not give rise to an event which will deprive the innocent party of substantially the whole benefit which it was intended he should obtain from the contract. The legal consequences of a breach of such undertaking, unless expressly provided for in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a condition or warranty.

In the present case the shipowner's undertaking as to seaworthiness could be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which would result in a total loss of the vessel. Consequently, the undertaking was one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages.

***The Mihalis Angelos* [1971] 1 QB 164**

The owners of a ship let it to charterers, undertaking that the ship would be expected ready to load about 1 July, would proceed to a certain port for the loading of cargo, and that the charterer would have the option of cancelling the charter if the ship was not ready to load by July 20. The charterer was unable to get a cargo by July 17 and cancelled the charter, alleging that it was frustrated. The ship itself was not ready until July 23. At trial it was argued that the charterer was entitled to avoid the contract on July 17 because of a breach of contract by the shipowner, ie he had impliedly promised that he had reasonable grounds for believing that the ship would be ready to load on July 1, and that there were no such grounds. The trial judge held that there was a breach of this term, but the term was not a condition and the breach was not so fundamental as to give the right to terminate the contract.

The Court of Appeal held that the term was a condition and that the charterer had properly avoided the contract even though he had done so on the ground that the contract was frustrated when this was not the case. Lord Denning stated that "The fact that a contracting party gives a bad reason for determining it does not prevent him from afterwards relying on a good reason when he discovers it." Megaw LJ, discussing the term "expected ready to load ..." stated:

"... such a term in a charterparty ought to be regarded as being a condition of the contract, in the old sense of the word "condition"; that is that when it has been broken, the other party can, if he wishes, by intimation to the party in breach, elect to be released from performance of his further obligations under the contract; and he can validly do so without having to establish that, on the facts of the particular case, the breach has produced serious consequences which can be treated as "going to the root of the contract" or as being "fundamental," or whatever other metaphor may be thought appropriate for a frustration case."

***The Hansa Nord* [1976] QB 44**

Citrus pulp pellets for use in animal food had been sold for £100,000 under a contract which provided for "shipment to be made in good condition." Part of the goods had not been so shipped and in addition the market value in such goods had fallen at the delivery date. The buyers rejected the goods which were later resold pursuant to a court order and eventually reacquired by the original buyers for just under £34,000. The buyers then used the goods for the originally intended purpose of making cattle food, though the defective part of the goods yielded a slightly lower extraction rate than sound goods would have done.

The Court of Appeal held that rejection was not justified. The term as to shipment in good condition was neither a condition nor a warranty but an

intermediate term; and there was no finding that the effect of its breach was sufficiently serious to justify rejection. The buyers seem to have tried to reject, not because the utility of the goods was impaired, but because they saw an opportunity of acquiring them at well below the originally agreed price. In these circumstances their only remedy was in damages: they were entitled to the difference in value between damaged and sound goods at the agreed destination.

***Reardon Smith Line v Hansen-Tangen* [1976] 3 All ER 570**

In order to perform a charter, a steamship company nominated a vessel to be built by Osaka Shipbuilding Co and known as "Yard No. 354 at Osaka" (the name of the shipbuilder). She was built elsewhere, but by a company under Osaka's control and in accordance with the physical specifications in the charter. The tanker market fell and the charterers sought to reject.

It was held by the House of Lords that they were not entitled to do so. The phrase "Yard No. 354 at Osaka" was not part of the description but a mere substitute for a name: it was a means of identification, which, in the circumstances, had not failed. In order to reach this decision, the House looked at the background to the case. Lord Wilberforce expressed the view that the court must place itself in thought in the same factual matrix as that in which the parties were. In order to place himself in that factual matrix, he asked what was the commercial purpose of the charter parties and what was the factual background against which they were made.

***Bunge Corp. v Tradax* [1981] 2 All ER 513**

Under a contract for the sale and purchase of soya bean meal, it was agreed that a shipment was to be made in June, by the 30th. The buyers had to provide a vessel and to give at least 15 days' notice of its probable readiness. The sellers would then nominate a port for delivery. The buyer gave notice on June 17, less than 15 days before the end of the shipment period. The seller repudiated the contract arguing that there had been a breach.

The House of Lords held that this term was a condition, so that the sellers were entitled to rescind on the ground that the notice reached them five days too late. Two justifications were given for this classification: (1) the sellers could not, as a practical matter, perform their own obligation of nominating a port for delivery until the buyers had given them notice of the ship's readiness to load; and (2) the classification promoted certainty, for it enabled the sellers to tell, immediately on receipt of the notice of the ship's readiness to load, whether they were bound to deliver. The House of Lords thought that in mercantile contracts time would usually be of the essence and not an innominate term.

***Schuler v Wickman Machine Tools* [1974] AC 235**

Wickman were the exclusive selling agents in the UK for Schuler's goods. The agency agreement provided that it was a condition that the distributor should visit six named customers once a week to solicit orders. This entailed approximately 1,500 visits during the length of the contract. Clause 11 of the contract provided that either party might determine if the other committed 'a material breach' of its obligations. Wickman committed some minor breaches of this term, and Schuler terminated the agreement, claiming that by reason of the term being a condition they were entitled to do so.

The House of Lords held that the parties could not have intended that Schuler should have the right to terminate the agreement if Wickman failed to make one of the obliged number of visits, which in total amounted to nearly 1,500. Clause 11 gave Schuler the right to determine the agreement if Wickman committed a material breach of the obligations, and failed to remedy it within 60 days of being required to do so in writing.

The House had regard to the fact that the relevant clause was the only one referred to as a condition. The use of such a word was a strong indication of intention but it was not conclusive. Lord Reid felt that it would have been unreasonable for Schuler to be entitled to terminate the agreement for Wickman's failure to make even one visit because of the later clause. The word 'condition' made any breach of the clause a 'material breach', entitling Schuler to give notice requiring the breach to be remedied. But not, as Schuler sought, to terminate the contract forthwith without notice.

3. IMPLIED TERMS

Hutton v Warren (1836) 1 M&W 466

The tenant of a farm was given six months' notice to quit. His landlord insisted that he continue to cultivate the land during the notice period in keeping with custom. The tenant successfully argued that the same custom entitled him to a fair allowance for the seeds and labour he used on the land.

The Moorcock (1889) 14 PD 64

The owner of a wharf agreed to provide mooring facilities for 'The Moorcock'. The ship was damaged when it hit a ridge of rock at low tide. Although the defendants had no legal control over the riverbed, they could ascertain its state but they had not done so. The court held that honesty of business required an implied undertaking on the part of the wharf owner that it was a reasonably safe place to moor a ship. The wharf owner had broken his implied undertaking and was, therefore, liable in damages to the ship owner.

Wilson v Best Travel [1993] 1 All ER 353

Wilson booked a holiday in Greece with Best Travel. He fell through a glass door in the hotel and was injured and claimed that (a) there was an implied term that the hotel would be reasonably safe, or (b) there was a breach of a duty to provide services with care and skill under s13 of the Supply of Goods and Services Act 1982. In applying the officious bystander test, the court said that the defendants would not have said 'Oh, of course' to such a term, as the defendants had no control over the hotel. The hotels were inspected and as they met Greek standards (although not British ones) the defendants had acted with care and skill. Therefore the plaintiff's claim failed.

Liverpool City Council v Irwin [1976] 2 All ER 39

The condition of a council tower block deteriorated: there were defects in the stairs and lifts and internal rubbish chutes became blocked. The Irwins alleged a breach on the part of the council of its implied covenant for their quiet enjoyment of the property. The House of Lords held that it was an implied term of a lease of a maisonette in a Council block that the landlord should take reasonable care to keep the common parts of the block in a reasonable state of repair. The term was clearly not implied in fact: the "officious bystander" test was not satisfied; nor was the implication necessary to give business efficacy to the contract. The implication arose because the nature of the relationship made it desirable to place some obligation on the landlord as to the maintenance of the common parts of the premises. It amounted to the imposition of a legal duty, in spite of the fact that no term could be implied in fact. However, on the facts there had been no breach of the obligation.