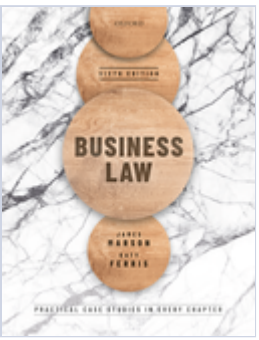

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8. Terms of a Contract

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Abstract

This chapter focuses on the terms or details of a contractual agreement, and considers the implications of what the parties intend to include in the agreement, what they did not mean to be included in the contract, and what significance different terms may have in the contract. It distinguishes between the terms of a contract and representations, and considers whether, when a term has been identified as such, it is a 'condition' or a 'warranty'. The chapter then studies how terms are implied into the contract and how this affects terms that have been expressed. It concludes by examining how parties may seek to exclude or limit a legal responsibility through the incorporation of an exclusion clause.

Keywords: contractual agreement, terms, representations, condition, warranty, legal responsibility, exclusion clause

Chapters 5, 6, and 7 have identified the features of a binding contract. Contracts are made up of various terms that identify the rights and obligations of the parties. However, which are the most important terms, and which are of lesser significance? How can they be distinguished and what can the parties do to ensure the significance of a term is reflected in the contract? Is it important to differentiate important and lesser terms? These points will be considered in this chapter. Further, there may be a period of negotiation between the parties before a contract is established. Will all of the statements made during this period be held as terms of a contract? Some may be considered representations that will affect the injured party in seeking a remedy. Finally, imagine you run a store that offers free parking to its customers. Are you liable if the customer's car is damaged whilst parked on your premises? Can you restrict a customer who has parked their car on your premises from seeking damages if their car is damaged? Having established that a contract exists, this chapter explores the contract in more detail.

Business Scenario 8

Beta Ltd (Beta) and Aspen Ltd (Aspen) enter into negotiations for the sale of Beta's technology merchant business. Beta informs Aspen that its annual turnover is £300,000 and this figure can go as high as £450,000 but has never dropped below £250,000 in the previous five years. Its current stock of Point of Sale (POS) software systems is 500 units. Beta guarantees Aspen that these numbers are correct and there is no need to check their veracity.

The sale includes access to Beta's high street shop which is subject to a lease with restrictions imposed. Beta enthusiastically informs Aspen that the property has a second floor above the ground floor sales room which, although in disrepair, is a fantastic asset as it could be developed for residential purposes. There is also a shared car parking space to the rear of the property and Beta says that they intended to block a gateway in the space to increase their outside storage facilities. However, following the conclusion of the negotiations and when the written contract is presented to Aspen it transpires that the lease restricts the use of the property, or any part of it, as an individual dwelling.

Later Aspen intends to ship a consignment of POS systems from London to Mexico and requires a vessel to transport the goods to the destination. Due to the problems encountered in the past, Aspen inserts the following clause into its contract with Paragon World Shipping:

It is a condition of this contract that the vessel is seaworthy.

Paragon World Shipping accepts this term and, following the first payment, Aspen takes possession of the ship. The contract for the hire of the ship is for a term of 18 months with Paragon World Shipping providing both the crew and maintenance of the vessel for the duration of the contract.

During the first five months of the charter, the ship has to return to the dock to be repaired for a period of three months. Aspen is very unhappy with this situation and ends the contract, hiring a new vessel with another supplier.

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Learning Outcomes

- Distinguish between a term of a contract and a representation (**8.2**)
- Differentiate between express and implied terms (**8.3.1**–**8.3.2**)
- Explain how terms are implied into contracts from the courts, through customs, and from statute (**8.3.2**)
- Identify the status of a term and the implications of it being described as a warranty or a condition (**8.4**–**8.4.1**)
- Identify exclusion/limitation clauses and the rules of incorporation established through the common law (**8.5**–**8.5.4**).

8.1 Introduction

Having identified a contract, the details of the contractual agreement have to be considered due to the implications of what the parties intend to include in the agreement, what they did not mean to be included in the contract, and what significance different terms may have in the contract. This chapter therefore considers the distinction between terms of a contract and **representations**; whether, when a term has been identified as such, it is a 'condition' or a 'warranty'; and how terms are implied into the contract and how this affects terms that have been expressed. The chapter concludes by examining how parties may seek to exclude or limit a legal responsibility through the incorporation of an **exclusion clause**.

8.2 Terms and representations

During the agreement stage of the formation of a valid contract, the offeror identifies terms by which they are willing to be bound. This is where the details of these terms of the contract are expressed. Those included in a written document entitled, for example, a 'contract'/'agreement' would most likely be accepted as a term. When interpreting contractual provisions the courts will generally adopt a commercial common sense perspective to the agreement as a whole, not restricting itself to reference to the provision of the contract in dispute. However, and particularly in relation to contracts established between sophisticated parties such as big businesses, the courts should be less willing to depart from a literal reading of the contractual terms and their nuances (see *Wood v Capita Insurance Services Limited*).

p. 177 ↵ However, contracts need not be in writing to be effective and the terms of the contract may therefore not have been reduced in writing. The parties may have negotiated the deal which involves statements being issued and these are either agreed to or subject to a counter-offer. Finally, an agreement is reached and the contract formed. However, not all the statements made will be considered to be terms. There are practical reasons for this. Suppose one party remarks to the other in the sale of a car, for example, that the car is 'a good runner that won't give you any problems'. Is this a term? Does the statement have any legal meaning and obligation that could be enforced? Is it a fact or merely an opinion (and it may be considered that an opinion is as valuable as the cost of obtaining it)? Therefore, it is necessary to consider how the courts have addressed the question of whether a statement is a term or representation. **Table 8.1** outlines the indicators of where statements will be held terms or representations.

Table 8.1 Distinguishing terms and representations

Term	Statement	Representation
	Made by a party with actual or reasonably expected lesser	→ knowledge of the contractual subject matter
←	Reasonable reliance on statement made by the other party	

Term	Statement	Representation
←	Stronger/more empathic statements (unless statement cannot establish a term)	
←	Statement made close to the agreement (inducing the contract to be concluded)	

- *Significance for available remedies:* If the statement has been held to be a term and that term is breached, the innocent party has the right to claim damages and possibly end (repudiate) the contract. If the statement is considered a representation and it is breached, there is no breach of contract, but a remedy may exist for misrepresentation, although since the enactment of the Misrepresentation Act 1967, statutory remedies are available for untrue statements. There are no strict rules as to what will constitute a representation and a term, but guidance is available from case law.
- *Relative degrees of the parties' knowledge:* If one party has a better knowledge, or could be expected to have a better knowledge of the contractual subject matter than the other party, statements made by the party with the lesser knowledge will be more likely to be regarded as a representation.

Oscar Chess Ltd v Williams (1957)

Facts:

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Mr Williams traded in a used Morris car for a new Hillman Minx from Oscar Chess (car dealers). Mr Williams described the Morris car as a 1948 model and produced the registration book as evidence. Oscar Chess checked the document and the first registration ↵ date, and gave £290 in part exchange. Approximately eight months later Oscar Chess discovered that the Morris car was not a 1948 model but was in fact registered in 1939. This was identified when the chassis and engine numbers were sent to Morris Motors Ltd. Had this been known when the part-exchange price was offered, Williams would have only received £175 for his car. Oscar Chess attempted to recover the overpayment but the Court of Appeal held that the statement of the age of the car was not intended to be a term but was instead a representation. Williams honestly believed the car was as he described and Oscar Chess, as car dealers (and therefore experts), should have the means to check the car's details more readily than the owner.

Authority for:

Statements made by a party with no special skill or knowledge, particularly with the other party who does possess this skill/knowledge, are likely to be considered representations rather than terms.

The case identified that if one party makes a statement and they have less knowledge on a particular topic or subject than the other party, such a statement will be more likely to be considered a representation than a term. The situation is reversed when a party making a statement has much greater knowledge. Each case is taken on its merits, but this is a good indication as to how the courts will view such negotiations.

Dick Bentley Productions v Harold Smith Motors (1965)

Facts:

Mr Bentley purchased a used motorcar from Smith on the representation that it had travelled only 20,000. After the purchase it was clear the vehicle had travelled many more miles than that stated by Smith (probably 100,000) and Bentley's action was to claim for this misrepresentation.

Authority for:

Bentley's action was successful and Smith's appeal dismissed. The representation when made in commercial dealings is presumed to act as a warranty and to be used as a way of inducing the contract. Smith was an experienced car dealer who should have been sufficiently diligent to identify the mileage of the vehicle, or at least he should not have made a false representation.

- *Reliance shown to be placed on the statement:* When the parties are involved in negotiations, if a party reasonably relies on the statement made by the other party without examining the truth, then reliance can elevate the statement to a term.

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Consider

The actual contract for the lease of the shop includes restrictive covenants including a right of way through the car park area and a restriction on converting the property into residential accommodation. Thus, the statement made by Beta is contrary to the written terms of the contract. Given that this statement is said with force and is issued as an incentive to conclude the agreement, it is likely to be held as a term. As such, its breach would enable Aspen to pursue damages.

Buyers should be as specific as possible about the requirements of a product of a contract, and if assurances are made that induce the contract, the statement will likely be considered a term.

Bannerman v White (1861)

Facts:

A contract for the sale of hops stipulated that the purchaser intended these to be used in the production of beer. As such, the purchaser asked if the hops had been treated with sulphur and if so, they would be unsuitable for the intended purpose. The seller gave those assurances when in fact the hops had been so treated.

Authority for:

The statement was held as a term of the contract, not a representation. The significance of this aspect of the negotiations was clearly made and the seller relied on the statement provided. The action for breach of contract was successful.

- *Strength of the statement:* The stronger and the more emphatic that the statement is made, the more likely that the statement will be considered a term. The strength of the statement may be identified through stopping a person investigating the validity of a statement, providing a guarantee about the truth of the statement, and so on.

Consider

Imagine that the statement regarding the turnover of the business is incorrect and actually the turnover has never been more than £150,000 per annum. Would this constitute a term of a contract and has the term been breached? Would this also be the case if the number of units held by Beta was incorrect? A term is a statement of fact whereas a representation is a statement of opinion (or cannot be verified). Is the number of items held and the income generated by a business an opinion?

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Schawel v Reade (1913)

Facts:

In the sale of a horse, the claimant required the animal for stud purposes and was informed by the seller that it was ‘perfectly sound’. Following the purchase it became clear the horse was not in such a condition.

Authority for:

The seller of the horse had specialist knowledge of the animal and thus the statement was a term rather than a warranty.

However, statements made with strength or presented emphatically will not be considered as terms where it is understood by the parties that statements cannot amount to a term.

Hopkins v Tanqueray (1854)

Facts:

A horse was to be sold at Tattersall's by auction and the potential buyer, when inspecting the horse, was told by the seller not to inspect the animal as it was 'perfectly sound'. On the basis of this statement the inspection was halted and the horse was subsequently purchased. When it was later discovered that the horse was not sound, the purchaser attempted to claim damages for breach.

Authority for:

It was held that this was not possible due to a rule at Tattersall's that all horses were sold without any warranty as to soundness.

- *The time at which the statement was made:* When the parties are negotiating, the courts will take into account the timing of any statements (in relation to when the contract was agreed). If a statement is made which causes the other party to agree to conclude a contract, this will be more likely to be considered a term. This is because the court may view the statement as being of such importance to the other party that it made them agree to the contract. The longer the delay between the statement and the conclusion of the agreement, the less likely the statement will be held as a term; this is particularly so where the written agreement does not include the statement made orally. Cases involving the timing of the statement are decided largely on the facts, rather than some application of the law, and attempts to second-guess how the court will determine the status of a statement are very difficult.
- *Was the statement reduced into writing:* If a statement is made during the course of negotiations, and the agreement is subsequently reduced into writing, statements made prior to the contract will be viewed as representations. The rationale is the **parol evidence** rule, where outside factors cannot be introduced into a contract or used to vary the written document. Generally, important terms will be included in the contract by the parties, and those other statements that were made, but not included, are by their nature of lesser importance.

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Routledge v McKay (1954)

Facts:

The claimant had acquired a motorcycle with the registration documents identifying the vehicle as a 1942 model. When selling it, he used that date although in reality the motorcycle had been registered in 1936. The purchaser inspected the vehicle and when returning some days later, a written agreement was produced without the date being included.

Authority for:

The statement was a representation. Neither party was an expert on the subject matter, there was a delay between the statement (of the year of the vehicle) and the conclusion of the deal, and the year of the vehicle was not included in the written agreement.

Note, however, that if the written agreement has been incorrectly drafted so as to exclude certain elements of the statement made in the negotiations, or where this may have been an intentional act to exclude statements that had been made, it may be held that these should still be part of the written contract terms. Further, oral statements made in the negotiations but not included in the written document may themselves establish a separate (known as collateral) contract that is enforceable.

Remember that these are merely guidelines to identify a term or representation and the courts can place importance on whatever factors are present in each case to determine the status of the statement. Indeed, Moulton LJ in *Helibut, Symons & Co. v Buckleton* stated that all of the factors that led to the contract have to be considered to identify terms from representations, and whilst the previous authorities are good guides, not one can be universally true in every case.

Terms of a contract are not simply those that are expressed. It would be unrealistic to attempt to include all of the terms applicable and hence some may be implied into the contract. It is vital you understand where terms derive, and how they may be implied, to appreciate the full implications of the contract being agreed.

8.3 Terms of the contract

Imagine you are drafting a contract, for example, for the employment of a member of staff. You are going to include the most important points—the hours to be worked, duties, to whom the individual must report and take directions from, what rate of pay is being provided, when and how payment is made, and so on. These terms are fundamental to the contract and hence are expressed. However, what about overtime duties? What if the business has to reorganize its production due to changes in delivery, new technology, or a change in legislation? If you hire a person in a management capacity for a multinational company will they be expected to move to new branches in different cities if their expertise is needed? These are aspects of the contract that

are included, often, through implied terms. They still form part of the contract, they are terms, and may be enforced, but by their very nature they will not have been expressed orally or in writing. Therefore, express and implied terms in all contracts have to be understood, as their effects are far-reaching.

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8.3.1 Express Terms

Express terms are, naturally, those that have been expressed in some form. Terms may be outlined in a written form (perhaps in the contractual document, in correspondence between the parties, or (in an employment law context) through a works handbook) or they may be identified from the oral negotiations between the parties. Being expressed in such an overt way, they are often the most important terms and contain key elements to the contract (the item to be sold, the price to be paid, and so on).

8.3.2 Implied Terms

Whilst terms are expressed in a contract, it would be impossible to include every element of the contract in a written document or an oral negotiation. Some terms may be necessary to make the contract work, some may be so obvious that they do not need to be expressed, and, importantly, Parliament has introduced implied terms in business, consumer, and employment contracts to regulate the behaviour of the parties. As such, terms are implied into contracts by the courts, through customs and statutes that must be appreciated to understand the obligations on parties, and their rights under the contract.

Wells v Devani (2016)

Facts:

Mr Wells had developed residential flats. Following a discussion with his neighbour, Wells was alerted to the fact that an investment company may be interested in purchasing the remaining seven flats. Being receptive to the proposal, the neighbour contacted the investment company and Devani, an estate agent. Later, Wells and Devani agreed, subject to contract, the purchase of the flats by a Housing Association. After the acceptance of the offer, Devani sent Wells an email seeking payment of his fees and attaching terms of business. A dispute arose over the content of the conversations between the pair prior to the email and the terms of business. Had the parties reached the stage of a legally binding contract given that the written terms were issued after the agreement with the Housing Association?

Authority for:

The Court of Appeal would not imply terms for the purposes of establishing a contract which would otherwise not exist. Per Lewison LJ: '… it is wrong in principle to turn an incomplete bargain into a legally binding contract by adding expressly agreed terms and implied terms together.' The parties should ensure that important contract terms have been agreed even if the complete contract has yet to be ascertained.

- *Terms implied by the courts:* Courts imply terms into a contract as a matter of fact or a matter of law. This is undertaken to help make sense of the agreement between the parties, or to make the contract work. Courts have also allowed terms not expressed in the contract to be implied because of the custom in a particular industry or market. Be aware, however, that whilst the courts may be willing to imply terms, they will not rewrite a poorly drafted contract and essentially perform the task that should have been undertaken by the parties. The two main reasons for the courts implying terms as a matter of fact have been due to **business efficacy**; and secondly, because the term was so obvious each party must have assumed it would be included.

The Moorcock (1889)

Facts:

The owners of a wharf on the River Thames entered into a contract to allow the owner of a steamship (named the *Moorcock*) to moor the vessel at the jetty for the purpose of discharging cargo. Whilst the *Moorcock* was discharging her cargo the tide ebbed and she hit the bottom of the riverbed and sustained damage. The owners of the *Moorcock* claimed damages, but in its defence the owner of the wharf stated the agreement had not provided assurances with regards the safety of the vessel or the suitability of the wharf. The Court of Appeal considered that the ship could not be used in the manner envisaged without it resting on the riverbed, and hence this must have been implied as the intentions of the parties. Esher LJ considered that an implied term existed (on the basis of business efficacy) and therefore the damages action would succeed.

Authority for:

The courts may imply a term where it is necessary to produce an intended or anticipated result in the contract.

- The second scenario where a court may be willing to imply a term is where it is so obvious that the parties clearly intended it to be included.

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Shirlaw v Southern Foundries (1939)

Facts:

Southern Foundries entered into an agreement with Mr Shirlaw employing him as managing director for a term of 10 years. Two years later a company called Federated Foundries Ltd acquired Southern Foundries and it was decided that Shirlaw should be removed from the board of Southern Foundries and this in effect resulted in Shirlaw's employment being terminated. Shirlaw, in response, brought an action for wrongful dismissal. The Court of Appeal held that Mr Shirlaw should not have been

dismissed. Mackinnon LJ used what has become known as the 'officious bystander' test when considering the parties' negotiations and held that they must have agreed, implicitly, to ensure that Mr Shirlaw was bound to complete the term of the contract for 10 years, and Southern Foundries were bound not to remove or replace him in the same period.

Authority for:

The courts may imply a term which is so obvious that it goes without saying. Hence, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'

When considering implied terms in a contract, the courts can adopt the 'business efficacy' route as established in the *Moorcock*. The alternative route was created in *Shirlaw* that established that if the term is so
p. 184 obvious that it 'goes without saying' then the term will be ↵ implied into the agreement. This officious bystander test is very important as it considers what a hypothetical officious bystander would have thought should be included in a contract. If the bystander was to make an observation of a clause to be inserted and the parties were to respond that 'of course the term was included in the agreement' (essentially that it was so obvious that it need not be stated) then this would amount to a term implied into the contract. Further, unlike the previous examples of terms being implied due to the facts of the case, in *Liverpool CC v Irwin* the House of Lords held that contracts such as those involving the lease of apartments in a tower block could have terms implied as a matter of law.

- *Terms implied through customs:* Customs can be used if they are very widely known and accepted by the general population (such as the term 'baker's dozen' which refers to 13 of a particular item rather than 12 which the term 'dozen' generally refers to—see *Smith v Wilson*, where the court implied the local custom that '1,000 rabbits' actually meant '1,200 rabbits'). Customs are mainly used in commercial or business transactions where the parties have not identified an express term to the contrary, and could be held to have intended to be bound by the business/industry practice (insofar as it is consistent with that type of contract). The custom may also be common to businesses in a particular geographical location. The courts will look towards the custom being notorious, certain, commonplace, reasonable, and legal to comprise an implied term. The term may also be implied on the basis of the previous dealings between the parties.

Spurling J Ltd v Bradshaw (1956)

Facts:

The defendant used a warehouse on a regular basis. When goods were delivered to the facility he signed an agreement containing an exclusion clause. The invoices came after these agreements were signed. On the occasion of the storage of orange juice, and the consequent spoiling of the

consignment, the defendant refused to pay for the storage. The claimant's action was for the recovery of the owed sum—relying on the exclusion clause as to any potential for damage to the goods. The defendant argued that the exclusion clause had not been incorporated into the contract.

Authority for:

The clause was incorporated into the contract due to the previous dealings between the parties and that the defendant had been aware of its existence.

- *Terms implied through statutes:* Protection of consumers and those entering contracts has been significantly enhanced through the actions of Parliament. The Sale of Goods Act 1979, for example, has been particularly prominent in this area. Such statutes will be considered in detail in **Chapter 9**.

Finally, it is important to remember that the courts may imply terms because the contract is silent on the particular issue. However, where an express clause is included, then a contradictory term will not be implied (unless as required by law).

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8.4 Classification of terms

Consider

Aspen includes a clause in the contract that the seaworthiness of the vessel is a condition. Are the parties permitted to conclusively designate clauses in the contract as terms and conditions?

8.4.1 Types of Terms

It is important to identify how the courts will determine what classification is to be given to each term of a contract. This is specifically relevant in the event of a breach of the contract. The breach will occur when a term(s) of the contract is not adhered to by a party, and the remedy available will depend upon whether it is a warranty or a condition. Also note a third classification of term was introduced in the *Hongkong Fir* (discussed later in this section) case called **innominate terms** (where the parties cannot identify a term as a warranty or condition in advance of a breach).

- *Warranty:* A warranty is a lesser term of a contract. As stated by Denning LJ in *Oscar Chess Ltd v Williams* (see **8.2**): 'During the last 50 years … some lawyers have come to use the word "warranty" … to denote a subsidiary term in a contract as distinct from a vital term which they call a "condition".' If breached the remedy of damages for any loss may be claimed but the injured party is not entitled to repudiate the contract (they must continue to fulfil their obligations in the contract).

Bettini v Gye (1876)

Facts:

Mr Bettini was a professional singer who had agreed with Mr Gye, the director of the Italian Opera in London, to perform as first tenor during his engagement. Bettini agreed that he would attend rehearsals in London at least six days prior to the commencement of the engagement. However, he became ill and could not travel to London for the rehearsals. He did arrive two days before the engagement, ready to perform, but Gye considered this a breach of contract and terminated the agreement. The High Court held that the stipulation for attendance at the rehearsals was not a condition of the contract. Also, as the contract was not for a small number of performances (the contract was for 15 weeks), which may have led to the requirement of attendance at rehearsals, Blackburn J held that this was a warranty. As a warranty, Gye was entitled to claim damages for Bettini's breach (not paying Bettini when he was not present) but Gye had to continue with the contract.

Authority for:

Lesser terms will generally be considered a warranty and will not enable the injured party to end the contract, although they may still claim damages in the event of a breach.

p. 186 ↵ *Bettini* has implications for the effective drafting of contracts, and as noted by Blackburn J in the case, if Gye had required attendance at the rehearsals as a condition and essential to the contract, this could have been drafted into the agreement enabling the contract to be ended. However, simply because the parties have used the word 'condition' will not oblige the court to interpret it as such.

L Schuler AG v Wickman Machine Tool Sales Ltd (1973)

Facts:

Schuler, manufacturers of tools, entered into a contract with Wickman, a sales company, for Wickman to have exclusive rights to sell certain tools produced by Schuler. A term in the contract required Wickman to send a sales person to named companies once a week (comprising of 1,400 visits). This term was identified as a condition. When Wickman failed to make some visits, Schuler both terminated the contract and claimed damages.

Authority for:

The House of Lords considered the term a warranty. It was not open to a court to take into account post-contractual conduct when determining the meaning and effect of the contract.

This does not prevent a party from identifying a term that they consider essential and insisting that it is a condition due to its significance.

Lombard North Central Plc v Butterworth (1987)

Facts:

The defendant had entered into a hire purchase agreement for the purchase of a computer which provided for prompt payment (time of the essence) of the instalments. When the defendant got into arrears, the lessor took possession of the computer, sold it to recover some of the owed money, and claimed the rest in damages.

Authority for:

The nature of the term requiring prompt payment was held as a condition of the contract. Per Mustill LJ: 'A stipulation that time is of the essence in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach.'

Also, where statute has implied 'conditions' into contracts, these will be interpreted as such (e.g. the Sale of Goods Act 1979—see **Chapter 9**).

- *Condition:* A condition is an important term of the contract. It is often described as a term that goes to the 'heart of the contract' or it is 'what the contract is all about'. Due to its fundamental status, a breach of a condition enables the injured party to claim damages *and* they have the option to bring the contract to an end. If the choice is made to end the contract this must be acted upon quickly and within a reasonable time (reasonableness is based on the facts of the particular case and will vary on the basis of the subject matter of the contract).

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Poussard v Spiers (1876)

Facts:

Madame Poussard was a professional singer engaged to appear in an operetta for a period of three months. The contract required Poussard to be present for the opening night. However, before the opening night, Poussard became ill and could not attend the performances and Spiers engaged a replacement to cover her role. One week later Poussard returned and wished to begin her performance in the show. Spiers refused and Poussard brought an action for breach of contract. The High Court held that the requirement to be present for the opening night was a condition, predominantly on the basis that Poussard's illness was serious and its duration was uncertain. Spiers could not be expected to stop the opening of the show until Poussard became available and so was entitled to appoint a replacement.

Authority for:

The failure of Poussard to be available at the commencement of the contract went to the root of the contract and consequently discharged the defendant (a breach of a condition).

The performer had to be available and present at the opening night as an essential feature of the contract. When compared with *Bettini*, Poussard was not available for the opening show while Bettini was. As the 'heart of the contract' for acting and operatic performances is to be available when the public are present at the opening night, and where the contract expresses this requirement as a condition, failure to satisfy this will result in the term being considered a condition.

- *Innominate/intermediate terms:* As conditions and warranties have such implications for the parties, and the courts do not like to have their time wasted with disputes identifying the status of terms, the courts consider that parties define the terms themselves. The rationale for this is that the money spent on the correct drafting of the contract will save the parties future expenses, and enable disputes to be settled without recourse to the courts. Whilst this 'term-based' approach, focusing on whether the term is a condition or a warranty, is commonly used, a court may be persuaded to use a 'breach-based' approach. The focus here is on the seriousness of the consequences of the breach. A better description of innominate terms is that they are intermediate terms and where the consequences of the breach are held to be serious, the effects of the breach will be treated as if a condition was broken, with less serious breaches being regarded as breach of a warranty. Therefore, innominate terms have not replaced conditions or warranties, but are simply a means of looking at the consequences of a breach, rather than the traditional method of looking at the parties' intentions in drafting the contract.

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Consider

Would Aspen's repudiation of the contract be justified or would it amount to a breach of contract? With reference to *Hongkong Fir v Kawasaki*, does Aspen have to complete the balance of the contract?

Hongkong Fir Shipping Co. v Kawasaki Kisen Kaisha (1962)

Facts:

The vessel the *Hongkong Fir* was chartered to Kawasaki for a period of 24 months. The ship was to be fitted for 'ordinary cargo service' and the owners were to maintain the ship during its service. The ship was delivered in a reasonable condition. However, due to its age, it required expert maintenance by engine room staff. The staff were incompetent and too few in number, and due to these facts there were serious breakdowns in the machinery. The ship was at sea eight-and-a-half weeks, off hire for five weeks, and when it reached its first destination it required an additional period of 15 weeks in repair. Due to the reliability problems, Kawasaki ended the contract. The owners of the *Hongkong Fir* brought an action for breach of contract, and Kawasaki claimed in response that the owners were obligated to provide a seaworthy vessel and had failed in this respect. Diplock LJ stated that the obligation of seaworthiness was neither a condition nor a warranty but in effect could constitute both dependent upon the consequences of the breach. The Court of Appeal held that Kawasaki had no legal entitlement to end the contract, although it was entitled to damages for any breach of the contract by Hongkong Fir Shipping Co as to delays when the vessel was being repaired and in port.

Authority for:

The courts may adopt a 'breach-based' assessment in the identification of terms of a contract. A breach of a term that has deprived the innocent party of substantially the whole benefit of the agreement will be held a breach of a condition.

The contract had been established but the condition that the ship be fitted for ordinary cargo service was so broad that it could not be used by Kawasaki in the manner attempted. A range of scenarios could have made the ship unseaworthy, some being a condition (such as a hole in the hull) and others a warranty (insufficient life-jackets). Therefore, as the businesses could have better drafted a contract to protect themselves if required, the breach had to be interpreted on the basis of the agreement and the benefit available in the contract. The 20 weeks being unavailable was a relatively small time in the balance of the two-year contract. The owners took responsibility for the repairs, and any losses incurred could have been reclaimed in damages.

This case has identified the importance of correct and technical drafting of contracts and the effect and importance applied to significant terms. Identifying 'conditions' and 'warranties' will save time in future disputes between the parties but there exist situations, as in *Hongkong Fir*, where it is the effect of the breach
p. 189 which will determine whether ↵ a breached term is a condition or warranty. Further, the courts have stated that if there is an established commercial practice regarding the status of terms used in commercial contracts, these should be interpreted as such to ensure certainty, which is good for public policy, between the parties.

The Mihalis Angelos (1970)

Facts:

Owners of a ship let it to charterers identifying that it would be ready for use on 1 July and if it was not ready to load by 20 July the charterer would have the option to cancel the contract. The charterer could not get their cargo ready by 17 July and thereby, on that date, cancelled the contract (arguing frustration). The ship was ready by 23 July and the owners sought to enforce the contract.

Authority for:

It was held the charterer had breached the contract on 17 July, however they were only entitled to nominal damages. The charterers would have cancelled the contract on 20 July as per the contract and losses should be restricted to this.

8.5 Contractual terms exempting/excluding liability

8.5.1 Exclusion/Exemption Clauses

An exclusion clause is a term of the contract whereby one party seeks to exclude or restrict a liability or legal duty that would otherwise arise. Rules have been developed through the common law and through statutes to regulate how exclusion clauses may be fairly used in contracts. Typically, the exclusion clause will be made known to the other party through a notice, written in the contract itself, or expressed in the negotiations between the parties. Further, an exclusion clause can be a non-contractual notice. The clause has to be incorporated into the contract at the offer and acceptance stage (i.e. when it is created), it must be reasonable, it must be specific as to what liability it purports to exclude, there must be a reasonable opportunity for the other party to be aware of the existence of the term (although it is not the responsibility of the party who is relying on the exclusion clause to ensure the other party has read the clause), and it cannot exclude liability where Parliament has provided specific rights.

There are numerous reasons why exclusion clauses have been allowed in contracts. These include that the courts have the ability to strike out unreasonable clauses; statutes have provided greater protection against unreasonable terms; exclusion clauses often result in cheaper services (such as the price paid for parking, which would be significantly higher if it included insurance for damage and/or theft); and unlimited exposure to any number of claims in numerous situations is of itself unfair and unrealistic to the contracting parties. However, the main rationale for the ability for one party to exclude its liability is because of the freedom of contract. Freedom of contract had developed through the market forces argument whereby the State would not seek to regulate contracts if the market could do so adequately. No one can be forced into a contract
p. 190 against their will, therefore if the terms of the contract are not acceptable by the other party, either the
↵ offeror will have to change the terms (which may be the exclusion clause), or the market will provide another party who will offer the terms required. This system works in a perfect market but the reality is that there is relatively little choice for consumers (see the price similarity for televisions, games consoles, and so on) and different high-street stores are often owned by the same multinational corporations. There is also an unequal power relationship between the parties. It was in response to these concerns that the State began to restrict the ability for certain terms to be excluded from contracts.

8.5.1.1 Incorporation (the common law approach)

The following cases demonstrate the courts' approach to how an exclusion clause may be incorporated into an agreement. It should also be noted that, whilst this section considers the common law approach, exclusion clauses have to be construed in light of the statutory requirements following the Unfair Contract Terms Act (UCTA) 1977 and the Consumer Rights Act 2015 (considered in more detail in **Chapter 9**).

- *Signing the contract binds the parties:* If a party had signed a document held to be a contract, provided they had been given an opportunity to read it, they are bound by the terms.

L'Estrange v Graucob Ltd (1934)

Facts:

Miss L'Estrange was the owner of a cafe in Llandudno who entered into an agreement to buy an automatic slot machine for cigarettes. The machine did not work correctly and engineers had to be called out several times, but each time the machine failed to work shortly after being repaired. Later L'Estrange wrote requesting that Graucob remove the machine, as it had not worked for one month. Graucob, however, refused to terminate the contract. The contract contained an exclusion clause that all express and implied terms and conditions were excluded. The High Court held that by signing the document, even though she did not read it, she was bound by it. There was no misrepresentation or fraud, and consequently L'Estrange could not reject the contract.

Authority for:

A general rule exists that a party who signs a contract is bound by it, even though they failed to read it. (But this rule is subject to many exceptions.)

This is the situation insofar as the other party has not lied or misrepresented the contents of the contract.

Curtis v Chemical Cleaning and Dyeing Co. (1951)

Facts:

The claimant used the cleaning services of the defendant to clean her wedding dress. The form she was asked to sign contained a number of exclusions. The claimant asked the assistant about the form
p. 191 and was told it referred to the exclusion of liability for damage to ↵ any beads on the dress. However, it went much further and excluded all damage, however so caused. The dress was returned to the claimant having been badly damaged.

Authority for:

The assistant had misrepresented the contents of the form to the claimant and could therefore not rely on it to exclude liability for the damage. This was despite the fact that the claimant had signed the form. Per Denning LJ: 'When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document.'

Standard form contracts frequently contain exclusion clauses, minimum periods for the life of the contract, and outline the remedies in the event of a breach. Parties should familiarize themselves with the terms and obligations before agreeing to be bound, as not having read the document will not exclude the party from its provisions.

- *The clause must be included at the creation of the contract:* For a valid exclusion clause, the term must have been included at the offer and acceptance stage. Once the parties have agreed the terms of the contract, future terms may not be inserted unless supported by fresh consideration.

Olley v Marlborough Court Ltd (1949)

Facts:

Mrs Olley stayed as a guest in the Marlborough Court hotel. She paid a deposit and proceeded to the bedroom where, behind a door, was a notice excluding the proprietors from responsibility for articles lost or stolen, unless these had been handed to the manageress for safe custody. Mrs Olley returned to her room where she discovered some of her possessions had been stolen. She brought a claim for damages but the hotel denied responsibility and referred to the exclusion clause displayed in the hotel room. The Court of Appeal held that as the notice was displayed in the hotel room this was seen after the contract had been established at the reception. Therefore, it was not included in the contract and could not prevent Mrs Olley's claim.

Authority for:

An exclusion clause must be incorporated into a contract at the offer/acceptance (agreement) stage to be effective. Attempts to include further terms after this stage in the formation of a contract must be supported by fresh consideration.

Similarly, in the following case, the terms binding the parties must be incorporated at the agreement stage. It
p. 192 is a requirement of the party attempting to rely on the term to ensure it is part of the contract. ↵

Thornton v Shoe Lane Parking Ltd (1971)

Facts:

Mr Thornton was attending an engagement at the BBC. He drove to the city and went to park his car in a multi-storey, automatic-entry, car park where he had never been before. At the entrance to the car park was a notice that read 'All Cars Parked at Owner's Risk'. Thornton approached the entrance, took the ticket dispensed by the machine, and parked the car. The ticket included, in small print, a term that it was issued subject to 'the conditions of issue as displayed on the premises'. This included a notice displayed within the car park excluding liability for any injuries sustained by persons using the car park (the case was heard before the enactment of UCTA 1977, where contracts purporting to exclude liability for death or personal injury due to negligence were held void). Thornton returned to the car park three hours later and was severely injured in an accident, the responsibility for which was shared between the parties. Thornton claimed for his injuries and Shoe Lane Parking considered the exclusion clause protected it from liability. It was held that the ticket was nothing more than a receipt and once issued, further terms could not be incorporated into the contract. Only those terms included at the entrance were effective (excluding liability from theft or damage to the vehicle) and not those displayed within Shoe Lane's premises.

Authority for:

A party subject to an exclusion clause is bound (insofar as it satisfies the test of reasonableness) by the terms identified to them at the agreement stage. Further, there must be a reasonable opportunity for that party to be aware of the existence and extent of the term(s).

An important element was that Mr Thornton had not been to the car park before. If he had, and thereby presented with the opportunity to have seen the exclusion clause, he would have been bound by it (as per the previous dealings between the parties).

- *Implying exclusion clauses through prior dealings:* An important feature of the court's decision in *Thornton* was that the exclusion clause did not apply, in part, because Mr Thornton had not visited the car park before. Reasonable opportunity to be made aware of the clause is all that is required, and therefore, previous dealings where an exclusion clause is present may imply this term into future agreements.

    Between businesses: If businesses have a history of trade where exclusion clauses have been included, these are likely be accepted by the courts as forming part of subsequent agreements. Further, if the clause is used and is commonplace in an industry or between businesses, it may be implied into the contract.

British Crane Hire v Ipswich Plant Hire (1974)

Facts:

The two businesses were involved in hiring plant and earth-moving equipment. Ipswich Plant Hire contacted British Crane for the hiring of a crane, but this was required immediately and the contract
p. 193 was concluded through an oral agreement conducted on the ↵ telephone. As such, the conversation did not include the conditions under which the contract would be based, and failed to identify the exclusion clause. This clause required the hirer to indemnify the owner for any expenses that would be incurred in connection with the crane's use. It was included in the written copy of the contract that was forwarded to Ipswich Plant Hire, but before this could be signed and returned the crane sank into marshland. British Crane argued that the exclusion clause was effective and sought to be compensated for its losses. It was held that the exclusion clause was implied into the contract because of a common understanding between the parties that standard terms as used in the industry would form part of any agreement between them.

Authority for:

Exclusion clauses commonplace in a particular industry or in particular business agreements will be implied into those contracts and are therefore effectively incorporated.

2. *Private consumers:* Private consumers are granted protections by the courts against exclusion clauses that, if implied into contracts, may produce unfairness. The first case noted here demonstrates the necessity for the party wishing to benefit from the exclusion clause to bring it to the other party's attention.

McCutcheon v David MacBrayne Ltd (1964)

Facts:

Mr McCutcheon requested that his brother-in-law transport his car using the services of David MacBrayne Ltd (McCutcheon had used the firm several times previously). MacBrayne occasionally required customers to sign a 'risk note' that included an exclusion clause for losses or damage to the vehicles shipped. On this occasion no note was provided or signed. The car was shipped but the vessel never reached its destination as it sank due to negligent navigation and the car was a total loss. Mr McCutcheon attempted to recover the value of the car but MacBrayne referred to the exclusion clause that had been previously included in its business dealings with McCutcheon. The House of Lords held that the exclusion clause was not present in this contract, and its previous use was so inconsistent so as not to be implied into further dealings.

Authority for:

Previous dealings between the parties are only relevant if they identify a knowledge of the terms of the contract (such as an exclusion clause) and these dealings can demonstrate assent (acceptance) of them.

Previous dealings with contracts involving exclusion clauses will bind a party if they have had an opportunity to be aware of the terms and there is a history of previous dealings. In this case, however, the contract with the exclusion clause present had not been agreed and McCutcheon was entitled to assume a different agreement was being concluded than those previously agreed. It may take many contractual dealings where an exclusion
p. 194 clause was present for the courts to later imply one. *Hardwick Game Farm v Suffolk Agricultural* ↵ *Poultry Producers Association* involved more than 100 situations of the exclusion notices forming part of the agreement; this was considered indicative of prior dealings enabling the clause to be implied.

- *The clause must be brought to the other party's attention:* For an exclusion clause to be effective, it must be provided in the contract through a notice, prior dealings between the parties, or expressed in the negotiations between them. If it is hidden in some document in which the party would not reasonably expect contractual terms to be included, it may be ineffective.

Chapelton v Barry UDC (1940)

Facts:

Mr Chapelton visited a beach which was under the control of Barry Council. Beside a café, on the beach were deck chairs owned by the Council available to rent through payment to an attendant. Chapelton took two chairs, one for himself and one for his friend, and received two tickets from the attendant, which he placed in his pocket. Importantly, the tickets contained conditions on the back disclaiming liability for injury when using the chairs. Chapelton used the chair, but when he sat down he went through the canvas and sustained injury to his back for which he had to seek medical attention. He claimed against the Council for the injury he sustained. The Court of Appeal held that the attempted exclusion clause was not effective as it had not been incorporated into the contract. It was not identified on the notice displaying the price for the hire of the chairs, and the ticket provided could be considered only as a voucher as a reasonable man would think of a ticket as proof of purchase (relying on a precedent established in *Parker v South Eastern Railway Co.*).

Authority for:

To be effectively incorporated into a contract, an exclusion clause must have been reasonably brought to the other person's attention and not hidden in some document where a term of a contract would not be expected.

Where a person would normally not expect a ticket to include terms and conditions that may restrict or bind them, such terms will not be considered as having been incorporated. However, where it was reasonable that a ticket contained terms and conditions, exclusion clauses included in such a document will be effective.

- *Unusual terms must be brought to the other party's attention:* Not only must the party wishing to gain protection from the exclusion clause give the other party a reasonable opportunity to be aware of the term, if such a clause would be unusual (such as to provide a significantly increased sum of damages) this must be identified to be effective.

Interfoto Picture Library v Stiletto Productions (1988)

Facts:

Stiletto had ordered 47 photographic transparencies from Interfoto. A note accompanying the delivery was included identifying terms and conditions, the most onerous of which provided that a 'holding fee' of £5 per day, per transparency, was to be paid if they ↵ were not returned within 14 days. Stiletto failed to return the transparencies as required and the resultant holding fee amounted to

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£3,783. The Court of Appeal held that such a clause had not been incorporated into the contract as it was unusual practice in the industry, it appeared to be unreasonable, and Interfoto had failed to adequately bring it to Stiletto's attention.

Authority for:

Where a condition of a contract is particularly onerous or unusual, it is for the party attempting to rely on this to demonstrate that they fairly brought it to the other party's attention.

8.5.2 Misrepresentation May Restrict the Operation of an Exclusion Clause

An exclusion clause which has satisfied the tests as noted at **8.5.1** will generally be held by the courts to be effective, even if the injured party has been ignorant of it. An exclusion clause which was otherwise lawful will fail if it was misrepresented to the other party. Such misrepresentation can be through words or conduct, but the key element is that it is sufficient to mislead the injured party about the existence or extent of the exclusion clause (see *Curtis v Chemical Cleaning and Dyeing Co. Ltd* in **8.5.1.1**).

8.5.3 Interpretation of the Clause

Having satisfied itself that the exclusion clause had been validly incorporated into the contract, the clause must be considered to ascertain whether its scope includes the nature of the event which has led to the loss/injury. The courts have traditionally interpreted such clauses ***contra proferentem***, and thereby against the party wishing to rely on it. Of course, this section must be read in light of the restrictions on contractual clauses through UCTA 1977, which has strengthened protections against the use of exclusion clauses.

- *The purpose of the contract:* The courts will look at the nature of the contract and ascertain if the exclusion clause attempts to contradict the purpose of the underlying agreement or the intentions of the parties.

Evans Ltd v Andrea Merzario Ltd (1976)

Facts:

The parties had contracted for the importation of machines from Italy by sea. The standard form contract contained an exclusion clause, upon which the defendants attempted to rely when the goods were lost in transit. The machines had been stored in a container on the deck of the ship, but the claimants had been given an oral assurance that the machines would in fact be stored below deck. The container in which the machines were housed was lost when it slid overboard during the voyage. The Court of Appeal held that the defendants were not able to rely on the exclusion clause in the standard form agreement as this was contrary to the assurance given, and this assurance was to override the exclusion clause.

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Authority for:

The oral assurance provided to the claimant was a term of the contract (a collateral contract was established) and overrode the inconsistent provisions of the written agreement. Hence, the written exclusion clause was ineffective against the collateral contract.

- *The* contra proferentem *rule:* Whilst an exclusion clause is permitted under the freedom of contract, as its effect is to restrict or limit a liability that would otherwise exist, the courts will interpret it *contra proferentem* (against the party who wishes to rely on the clause). Therefore, the party wishing to rely on the clause must ensure it is correctly and precisely drafted to cover the event that led to the claim.

Houghton v Trafalgar Insurance Co. Ltd (1953)

Facts:

The claimant had insured his five-seat car through the defendant insurers. The policy included an exclusion clause that the insurers would not accept liability for any damage caused whilst the car was 'conveying any load in excess of that for which it was constructed'. Mr Houghton was involved in an accident in which his car was a total loss, but at the time of the accident there were six passengers in the car. Under these circumstances, the defendants relied on the exclusion clause that six people in the car constituted an excess load. The Court of Appeal held that there was ambiguity in this clause, as the 'excess load' would have been more likely to cover situations of excessive weight rather than number of passengers. Due to this uncertainty, the exclusion clause could not be relied upon.

Authority for:

The courts will interpret exclusion clauses *contra proferentem* and any ambiguity will probably result in the clause, and its application, being limited in effect.

The requirement for precision in the drafting of the clause, and its effect thereafter was demonstrated in the following case:

Baldry v Marshall (1925)

Facts:

The case involved the purchase of a car. The claimant informed the defendant motor dealers that he wished to purchase a car suitable for touring. They recommended and supplied him with a Bugatti car, and a clause in the contract stated that the defendants would not be liable for any 'guarantee or

warranty, statutory or otherwise'. The car was unsuitable for its purpose and the claimant rejected it and sought to recover his payment.

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Authority for:

The Court of Appeal held that the claimant's stipulation of a car suitable for touring was a condition of the contract, and as, under an exact reading of the exclusion clause, it did not seek to exempt liability for a breach of condition, it could not be enforced in this case.

Similar reasoning as to interpreting exclusion clauses in light of the main purpose of the contract was seen by the House of Lords decision in *Glynn v Margetson*. However, note that in *Multiplex Construction Europe Ltd v Dunne* the court considered the *contra proferentem* rule 'has far less application in modern times than it did before', noting there 'are in any event better ways of resolving problems of construction, not least construing the actual words used'. Essentially, it is now a doctrine of last resort.

8.5.4 Limitation Clauses

Where exclusion clauses attempt to exclude a claim for loss or damage, and exempt liability for breach, **limitation clauses** seek to reduce exposure to claims by limiting liability to (e.g.) a monetary claim for damages, to a fixed sum, and for any consequential losses. Following UCTA 1977, the courts have been more willing to accept limitation clauses in contracts (since unreasonable clauses may be disregarded under the Act), and in *Photo Production v Securicor Transport Ltd* it was held that such clauses should be given their ordinary, natural meaning, and not construed differently from other clauses in the contract. Like exclusion clauses, the courts, in assessing the viability of the clause, will begin by assessing whether the limitation clause forms part of the agreement, whether it covers the breach in question, and finally whether it uses the *contra proferentem* rule of interpretation.

Goodlife Foods Ltd v Hall Fire Protection Ltd (2018)

Facts:

The defective installation of a fire suppression system led to losses by the claimant of over £6 million. A clause in the standard terms of the supplier's contract excluded liability for any losses (unless additional insurance protection was purchased—which was not). The Court of Appeal held the clause to be effective and had been incorporated correctly. This was despite the exclusion clause being wide and excluded liability for damages ' ... directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatsoever reason'.

Authority for:

The nature of the clause was not unusual nor was it onerous. It had not been 'buried' in small print within the contract. The parties were of equal bargaining positions and, very importantly, the claimants could have gone elsewhere and found an alternative supplier who did not include the exclusion clause in the contract if they wished.

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8.5.5 The Statutory Position

Particularly since the enactment of UCTA 1977, consideration of the validity of an exclusion and limitation clause has included statutory measures. UCTA 1977 was designed specifically to regulate the use of exclusion clauses, and the Consumer Rights Act 2015 has extended the powers to the entire contract. These statutes are of great significance in this area and are considered in **Chapter 9**.

Conclusion

The chapter has identified the factors that help to distinguish between terms and representations. Further, it has demonstrated the distinction between the terms in a contract and the significance of the status of warranty and condition. Exclusion clauses, their validity, and methods of incorporation, have been discussed, and the reader should be in a position to recognize the common law rules established for the effective incorporation of such clauses. The book continues by examining the effect of statutory involvement in the regulation of contracts.

Summary of main points

- The provisions of the contract may be viewed as a term or a representation.
- Terms are the most significant aspect of an agreement and failure to fulfil the agreement enables a claim under breach of contract.
- A representation is not a term under the contract and the injured party must seek a remedy under misrepresentation.

Representations

- A statement made by a party with greater knowledge, and relied on by the other, will generally be held a term.
- If the statement is made with strength it will be more likely to be regarded a term, unless it is implicitly/explicitly agreed that it cannot be held as such.
- A statement that induces the other party to enter the contract will be more likely to be held a term.

- Statements made in the negotiations, but that do not appear in the final written contract, will be held to be a representation (although a collateral contract may have been created).

Terms: expressed and implied

- Terms may be expressed orally or in writing and these will form part of the contract.
- Due to the problems in attempting to include every term into a written or oral contract, or deduced from conduct, terms are implied.
- Terms may be implied by the courts as a matter of fact or a matter of law.
- Customs established by the parties' previous trading relationship, the industry, or the conduct of business in that locality may form part of the contract.
- To form a custom the term must be notorious, certain, commonplace, reasonable, and legal.
- Many terms are implied into contracts by statutes—such as the Sale of Goods Act 1979 and UCTA 1977.

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Terms: warranties and conditions

- A warranty is a lesser term, breach of which enables the innocent party to seek damages although they must continue with the contract.
- A condition forms the most important aspect of the contract, breach of which enables the innocent party to seek damages, and they may end the contract or affirm it.
- Warranties and conditions are determined on a 'term-based' approach. However, the courts may also adopt a 'breach-based' approach. Here, it is the seriousness of the consequences of breach that will identify the term as a condition or warranty (referred to as 'innominate terms').

Exclusion/limitation clauses

- These clauses seek to limit or exclude a liability that would otherwise exist.
- To be effective the clause must be incorporated into the contract at the agreement. Incorporating an exclusion clause after this time requires fresh consideration.
- The clause must be reasonable (assessed using UCTA 1977) and not contrary to statute.
- The clause must be specific to the liability being excluded.
- It must have 'reasonably' been brought to the other party's attention.
- This obligation is even more strictly applied if the exclusion clause involves a particularly unusual term.
- Exclusion clauses may be implied through previous dealings between the parties.

- The *contra proferentem* rule applies so that any ambiguity in the exclusion clause will be interpreted against the party attempting to rely on it.

Summary questions

Essay questions

1. ‘Employment law is one jurisdiction of law that, whilst dominated by statutory intervention, continues to be underpinned by ordinary contractual principles. This is particularly true in relation to the doctrine of implied terms.’

Assess the role played by implied terms in employment relationships and how they have been developed by the judiciary.

2. How have the statutory developments regulating the use of exclusion clauses altered and restricted their use?

Compare how the cases pre-1977 would be decided in the courts today.

Problem questions

1. A Ltd and Z Ltd are negotiating for the charter of a ship on an 18-month contract. A Ltd is concerned that the goods to be shipped in the vessel reach the customers on time or it will face penalties and may also lose business. Therefore A Ltd has inserted the following clause in the contract:

‘It is a condition of this contract that the ship is seaworthy in all respects.’

Following the signing of the charter, when the ship is at sea there are continued problems with its maintenance as the
p. 200 crew supplied by Z Ltd are very inexperienced and the chief ↵ engineer has an alcohol problem. In part due to this, the ship is in the dock with engine problems for the first three months in the initial eight months of the charter.

A Ltd fears for the probable negative consequences of the ship and now wishes to end the contract and claim damages from Z Ltd.

Advise A Ltd accordingly.

2. Sarah works for a local school and travels to work each day by car. She usually parks on a nearby piece of waste ground, but was unable to do so last week because of flooding.

Instead, she parked her car in the multi-storey car park. A notice just inside the entrance to the car park states:

‘The company will not be responsible for death, personal injury, damage to vehicles or theft from them, due to any act or default of its employees or any other cause whatsoever.’

Reference to this notice is also contained on a ticket which Sarah received when entering the car park. On her return to collect the car, Sarah discovers that it has been stolen. She goes to report this to the attendant and is injured when he negligently allows the barrier to fall on her head.

Advise Sarah.

You can find guidance on how to answer these questions **here** *<https://oup-arc.com/access/content/marson6e-student-resources/marson6e-chapter-8-indicative-answers-to-end-of-chapter-questions?options=name>*.

Further reading

Books and articles

Lawson, R. (2017) 'Exclusion Clauses and Unfair Contract Terms' (12th Edition) Sweet and Maxwell: London.

Lewis, M. and Hinton, C. (2004) 'No Room for Ambiguity' *New Law Journal*, Vol. 154, 7138, p. 1128.

Online Resources

Visit the online resources *<https://oup-arc.com/access/marson6e-student-resources#tag_chapter-08>* for further resources relating to this chapter, including self-test questions, an interactive glossary, and key case flashcards.

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