

THE UNIVERSITY OF HONG KONG
ACADEMIC YEAR 2024/25
LAW OF CONTRACT

TERMS

MASSIMO LANDO

7 OCTOBER 2024

OUTLINE

- **What are terms**
- **Terms v representations**
- **Classification of terms**
 - express v implied
 - conditions v warranties
- **Good faith**

UNDERLYING ASSUMPTION

- Parties of equal bargaining power
- Standard form contracts (e.g., *Butler v Ex-Cell-O* [1979] 1 WLR 401)
- Problems:
 - Lack of comprehension
 - Non-negotiability
 - Unfairness

WHAT ARE TERMS?

- **Essential element of the contract?**
 - civil law jurisdictions—“objet du contrat”/ “oggetto del contratto”
 - common law jurisdictions—*Butler v Ex-Cell-O* [1979] 1 WLR 401 / LP(MP)A 1989, s2(1)
- **Terms defined as:**
 - what is not a term (representations, puffs)
 - propositions of law made true by parties' acts
 - content of a contract (?)

TERMS AND REPRESENTATIONS

- **Why it matters—remedies:**
 - terms—damages for breach, rescission if serious (and statutory controls)
 - representations—damages for misrepresentation and rescission in any case
- **How to distinguish—parties' common intention:**
 - objective test (*Oscar Chess Ltd v Williams* [1957] 1 WLR 370)
 - Indices:
 - importance of statement (*Bannerman v White* (1861) 10 CB NS 844)
 - special knowledge (*Dick Bentley v Harold Smith* [1965] 1 WLR 623)
 - verify truth of statement (*Ecay v Godfrey* (1947) 80 Lloyd's Rep 286)

EXPRESS TERMS: PAROL EVIDENCE RULE

- **How to express terms?**
- **Role of extrinsic evidence (*Jacobs v Batavia & General Plantations* [1924] 1 Ch 287)**
- **“Four corners” doctrine**
- **Exceptions:**
 - contract is vitiated—e.g., misrepresentation
 - additional terms—e.g., collateral terms/contracts

EXPRESS TERMS: COLLATERAL TERMS/CONTRACTS

- **Whether collateral term/contract (*Mendelssohn v Normand Ltd* [1970] 1 QB 177):**
 - objective test + assurance so strong that claimant would not have contracted
 - distinct from test for representation—different remedies + overriding other express terms
- **Collateral terms ≠ collateral contracts?**
 - question of overriding written document
 - today same thing—sidestep parol evidence rule and add terms to contract (e.g., *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805)

IMPLIED TERMS

- ‘[T]he implication of terms is so potentially intrusive’ (*Philips Electronique v British Sky Broadcasting* [1995] EMLR 472)
- Function of courts in implying terms
- Ways to imply terms:
 - implication in fact—based on circumstances
 - implication in law—by statute, common law or custom

See Mindy Chen-Wishart, *Contract Law* (7th ed, OUP) 433

TERMS IMPLIED IN FACT: TESTS FOR IMPLICATION

- Aim—give effect to parties' unexpressed intention
- How to determine what parties intended—test of “necessity”:
 - business efficacy test (*The Moorcock* (1889) 14 PD 64)
 - officious bystander test (*Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701)

TERMS IMPLIED IN FACT: TERMS NOT IMPLIED

- **When are terms not implied?**
 - a party is ignorant of it (*Spring v NASDS* [1956] 1 WLR 585)
 - parties carefully negotiated written contract (*Shell UK v Lostock Garages* [1976] 1 WLR 1187)
 - term too vague (*Walford v Miles* [1992] 2 AC 128)

TERMS IMPLIED IN FACT: IMPLICATION v INTERPRETATION

- **Implication v interpretation (*Attorney-General of Belize v Belize Telecom* [2009] UKPC 10):**
 - tests not cumulative/alternative but have one aim
 - “reasonableness” as test for implication
- ***Marks & Spencer v BNP Paribas Securities* [2015] UKSC 72:**
 - re-asserted business efficacy test
 - kept implication distinct from interpretation
 - clarified relationship between business efficacy and officious bystander tests

TERMS IMPLIED IN FACT: GOOD FAITH IN PERFORMANCE?

- **No implied duty of good faith in negotiations**
(*Walford v Miles* [1992] 2 AC 128)
- **Implied duty of good faith in performance—*Yam Seng v International Trade Corp* [2013] EWHC 111 (QB):**
 - traditional hostility—case-by-case solutions, no overarching principles + ethos of individualism
 - implying good faith term in fact—consonant with business efficacy test?
 - limited to where there is a fiduciary relationship?—“relational” or “symbiotic” contracts

TERMS IMPLIED IN LAW: HOW TO IMPLY?

- **Implication of terms based on type of contract—wider impact**
- **Ways to imply terms in law:**
 - by statute
 - by custom
 - by common law

TERMS IMPLIED IN LAW: IMPLICATION BY STATUTE

- **Sale of Goods Ordinance (Cap. 26):**
 - s2A—dealing as a consumer
 - s15—sale by description
 - s16—quality and fitness
- **Supply of Services (Implied Terms) Ordinance (Cap. 457):**
 - s3—contracts for supply of services
 - s4—dealing as a consumer
 - s5—care and skill
 - s6—time of performance

TERMS IMPLIED IN LAW: IMPLICATION BY CUSTOM

- Depends on usages of where contract is made
- Term must be notorious, recognised as binding, reasonable, consistent with express terms (*Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421)
- Example—*Hutton v Warren* (1836) 1 M & W 466

TERMS IMPLIED IN LAW: IMPLICATION BY COMMON LAW

- **Test is one of “necessity”—*Liverpool City Council v Irwin* [1977] AC 239**
- **Disagreement as to whether test really one of “necessity” or “reasonableness” (House of Lords v Lord Denning)**
- **Policy considerations—*Crossley v Faithful & Gould Holdings* [2004] EWCA Civ 293:**
 - whether term consistent with law
 - how term would affect parties
 - wider issues of fairness within society

CONDITIONS AND WARRANTIES: IN GENERAL

- **Why it matters—remedies:**
 - breach of condition—repudiation and damages
 - breach of warranty—damages
- **Basic distinction:**
 - condition—essential term
 - warranty—non-essential term

CONDITIONS AND WARRANTIES: CLASSIFICATION

- **By the parties—courts can override parties if unreasonable (*Schuler v Wickman* [1974] AC 235)**
- **By statute:**
 - SOGO s12—“stipulations as to time of payment are not deemed to be of the essence of a contract of sale”
 - SOGO s16—“there is an implied condition that the goods supplied under the contract are of merchantable quality [...]”
- **By precedent—e.g., time when vessel ready to load in voyage charterparties (*The Mihalis Angelos* [1971] 1 QB 164)**

CONDITIONS AND WARRANTIES: INNOMINATE TERM APPROACH

- Approach where parties' intention unclear
- Test (*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26):
 - innocent party deprived of substantially the whole benefit under the contract
 - high threshold (breach goes to root of contract—*The Hansa Nord* [1976] QB 44)
- Guidelines under *Grand China Logistics v Spar Shipping* [2016] EWCA Civ 982:
 - classification is question of interpretation
 - term innominate if various degrees of gravity of breach
 - need to apply commercial approach
 - innominate term, not condition, is default