LAW OF CONTRACT. LAW 103.

THE CONTENT OF THE CONTRACT.

1. CONTRACTUAL TERMS.

The terms of a contract identify the rights and obligations of each party under that contract. A contract is merely a collection of terms – duties and rights and penalties, some of which may be in writing and some of which may be oral. Terms create contractual obligations for breach of which an action lies.

Terms may be either express or implied.

Express terms.
Express terms are those which are specifically agreed by the parties.

Implied terms.
Implied terms are those which form part of the contract but they have not been specifically agreed between the parties during the negotiations for that contract. Terms may be implied into the contract in a number of ways;-

Terms implied through custom and practice**.**
Perhaps a most obvious example here would be the fact that contracts in the baking industry that make reference to the term 'dozen' may actually mean thirteen rather than twelve as that is a custom within that industry.

"It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contract, in matters with respect to which they are silent… and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages." (Baron Parke – *Hutton v Warren (1836) 1 M&W 466)*

British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd (1975) 1 ALL ER 1059 .
Both parties were engaged in the business of hiring out heavy earth moving equipment. A contract was agreed by telephone for the hire of a crane. A written document was sent afterwards the terms of which were similar to those used by all firms in the plant-hiring business including the hirer themselves. One clause stated that the hirer was liable to indemnify the owner against all expenses in connection with the use of the crane. The crane sank in marshy ground with neither party to blame. The hirers claimed that the clause was inapplicable because it had been communicated after the contract had been made and thus was not incorporated into the contract.

(b) Terms implied by statute**.**

Perhaps the most common example of terms being implied by statute is provided by the Sale of Goods Act 1979. The provisions contained within s.12-15 relating to title, sale by description, satisfactory quality, fitness for purpose and sale by sample are implied into every contract for the sale of goods where the seller sells in the course of business.

(c) Terms implied in fact.

Terms may be implied because the very nature of the contract requires it or because the application of an objective test makes it apparent that the parties must have intended it. It may be that its omission was a simple mistake or that both parties thought it so obvious that it did not need to be stated. What is important is to ascertain the intention of the parties and the courts have developed two overlapping tests – the **officious bystander** test and the **business efficacy** test.

Shirlaw v Southern Foundries [1939] 2 KB 206.

"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying so that if while the parties were making their bargain an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh of course!'" (per Mackinnon LJ)

The Moorcock (1889) 14 PD 64.

The defendants contracted to allow the plaintiff to discharge his ship at their jetty. Both parties knew that the vessel would ground at low water. When the tide ebbed the ship settled on a ridge and was damaged. "In business transactions such as this what the law desires is to give such business efficacy to the transaction as must have been intended by both parties. What did each party know? Both knew that the jetty could only be used by the ship lying on the ground. The business of the jetty could not be carried on unless the ground was supposed to be safe. The master of the ship cold know nothing whereas the defendant might, by exercising reasonable care, know everything. The defendant was on the spot at high and low tide. The question is how much of the safety of the berth is it necessary to assume in order to get the minimum of efficacy to the transaction" Bowen LJ.

One must be careful, however, not to diminish the principle of the freedom of contract. Terms will be implied where it is necessary – not merely where it is reasonable.

"An unexpressed term can be implied if, and only if, the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying; a term necessary to give business efficacy to the contract, a term which although tacit, formed part of the contract which the parties made for themselves." *(per Lord Pearson Trollope and Colls Ltd v North West Regional Hospital Board [1973] 1 WLR 601)*

(d) Terms implied in law.
These are terms which the law dictates are present in certain types of contract.

"In deciding whether to imply a term in law, the courts are guided by general policy considerations affecting the type of contract in question; and to this extent considerations of reasonableness and fairness may enter into the implication of such terms." (Treitel)

Liverpool City Council v Irwin [1977] AC 239.
The defendant was the tenant of a ninth floor flat in a block owned by the claimant. His contract contained no statement of obligations of the landlord (the Council). Because of vandalism, the lifts rarely worked, stairwells were unlit and refuse shoots were frequently blocked. The defendant withheld rent claiming he was entitled to so do because of the landlord's breach of contract

2. DISTINGUISHING TERMS FROM REPRESENTATIONS.

"A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract." (Cheshire)

It is necessary to make a distinction between a term and other statements which may be made in the course of negotiations – representations. These are designed primarily to induce the other party into the contract but do not generally form part of that contract. Perhaps the main reason for making the distinction is that where a term is broken by one party, the other party will have a right to sue for breach of contract. If the statement is merely a representation which proves to be false – thereby making it a misrepresentation – the other party's means of redress is in an action for misrepresentation.

Whether a statement is a term or a representation will depend upon the intention of the parties, and in determining this intention, a number of factors may be taken into account.

(a) At what time was the statement made?
If the statement is made immediately before the contract was made, it is more likely to be a term. If it is made some time before the contract is made, it is more likely to be representation.

Routledge v McKay [1954] 1 WLR 615.
The defendant, when selling his motor bike on October 23rd, told the claimant that it was a 1942 model. A written contract was produced and signed on October 30th, and this made no reference to the date. Subsequently, it was discovered to be a 1939 model. The claimant claimed damages for breach of contract

(b) What was the relative importance of the statement? Where the statement is so important that without it the contract would not have been made, it is more likely to be a term.

Bannerman v White (1861) 10 CBNS 844.
A buyer negotiating for the sale of some hops asked if they had been treated with sulphur, saying that if they had he would not even bother asking the price. The seller stated that sulphur had not been used. A contract was drawn up for the sale of 3,000 acres. The buyer subsequently discovered that 5 acres had been grown using sulphur thus he no longer wished to purchase the 3,000 acres. He was sued for breach.

(c) Did the party making the statement have specialist knowledge in comparison with the party to whom the statement was made?
Where the person making the statement has specialist knowledge over and above that of the other, the statement is more likely to be a term. Where the other party has a greater knowledge than the person making the statement, it is more likely to be regarded as a representation.

Oscar Chess v Williams [1957] 1 WLR 370.
Williams was selling his car to the claimant (a car dealer) in part exchange. The registration book said it was a 1948 model. Williams gave the claimant that date in good faith. The claimant allowed £290 part exchange. It was later discovered to be a 1939 model and was worth only £175. The claimant sued for the balance, claiming that the year was a term of the contract.

(d) Has the maker of the statement advised the other party to verify the accuracy of the statement?

A statement is unlikely to be regarded as a term if the maker of the statement suggests that the other party verify it.

Ecay v Godefroy [1947] 80 Lloyd's Rep 286.

The seller of a boat said that it was sound but suggested that the purchaser have a survey done. The purchaser ignored this advice and bought the boat. When it proved to be unseaworthy, he sued.

3. THE RELATIVE IMPORTANCE OF CONTRACTUAL TERMS.

This material in this section is designed for self-study. When you have answered a question yourself turn to the suggested answer. When you have completed this material read the section in your chosen textbook.
This material replaces the lecture and seminar on this topic.

The Relative Importance of Contractual Terms.

Not all terms of a contract are of equal importance. The law has sought to classify them according to their importance. The modern classification is: **conditions, warranties, innominate terms.**

The remedies available to the innocent party depend upon the type of term broken.

Traditionally the courts classified terms into only two types: conditions and warranties. The third type, the innominate term, has been recognised only relatively recently.

A condition is an important term, which goes to the root of the contract. A breach of condition entitles the innocent party to repudiate the contract and/or claim damages.

A warranty is a less important term. A breach of warranty entitles the innocent party to claim damages only.

Two cases decided in 1876 involved performers.
In *Poussard v Spiers and Pond [1876] 1QB 410* an actress agreed to take the leading role in an operetta the first night of which was 28 November 1874. She fell ill and could appear only some days later. The producers had engaged a substitute and when she appeared they refused her services.
In *Bettini v Gye [1876] 1 QB 183* a singer agreed to perform from March 30 to 13 July 1875 and to attend six days beforehand for rehearsals. The singer fell ill and so did not arrive until 28 March when he was told his services were not required.

Question 1.
Were the producers in these cases entitled to do this?
(Attempt your own answer before turning over the page.)

Answer 1.
The producers have repudiated the contracts. They could only do so lawfully if the actress/singer had broken a condition of the contract i.e. committed a breach that went to the root of the contract. The actress in *Poussard* missed the first night and the initial performances. This was found to be a breach that did go to the root of the contract. The producers were therefore able to repudiate the contract. However the singer in *Bettini* had missed only a few days of rehearsals. This was not a breach that went to the root of the contract and so the producers were not entitled to repudiate the contract.

Traditionally the courts classified a term by attempting to find the intention of the parties from the language of the contract itself and the circumstances under which it was entered into.

For example, in *Behn v Burness (1863) 3 B&S 751* the contract was for the hire of a ship. (Such a contract is known as a charterparty.) It stated that the ship was "now in the port of Amsterdam." In fact the ship arrived in Amsterdam four days after the date of the contract. Williams J stated: "The court must be influenced not only by the language of the contract but also by the circumstances and for the purposes for which it was entered into. ... For most charters the time of the ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters it would be so: the evidence of the defendant shows it to be actually so in this case. If the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition."

Can the parties stipulate that a term is a condition or a warranty?
In *Schuler v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39, HL* the contract appointed Wickman sole distributor of Schuler's panel presses in the UK for four-and-a half years.
Clause 7 stated "It shall be a condition of this agreement that Wickman shall send [one of two named] representatives to visit [six named large motor manufacturers] at least once every week for the purpose of soliciting orders."
Clause 11 stated that either party might determine the contract if "the other shall have committed a material breach of its obligations and shall have failed to remedy the same within 60 days of being required to do so."

Question 2.
How do you think this contract was construed? Do you think the parties intend that a breach of clause 7 would enable Schuler to repudiate the contract?

Answer 2.
The HL held that clause 7 must be read subject to clause 11. "It appears to me that clause 11 is intended to apply to all material breaches of the contract which are capable of being remedied. .....The question is whether a breach of clause 7 is capable of being remedied. Failure to make one particular visit might have irremediable consequences e.g. a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I am inclined to the view that breaches of clause 7 should be held to be capable of remedy within the meaning of clause 11. Each firm had to be visited more than 200 times. If one visit is missed I think one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach. Thus clause 7 does not give Schuler a right to rescind but only to require the breach to be remedied within 60 days." Reid LJ.

Schuler did not contend that Wickman's failure to make visits amounted in themselves to fundamental breaches but contended that the use of the word condition in clause 7 sufficiently expressed an intention to make any breach, however small, of the obligation to make visits a breach entitling Schuler to repudiate the contract. They maintained that the use of the word "condition" was in itself enough to establish this intention. Lord Reid stated, "We must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word condition is a strong indication of such an intention but it is by no means conclusive. The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

What could be the unreasonable result if any breach of clause 7 gave Schuler the right to terminate? Think about what might happen in practice. Turn over for the answer.

Clause 7 required that 6 firms be visited every week by one or other of two named representatives. What would happen if one or both died or retired? What if both were to be ill during a particular week? What if one of the manufacturers said they could not receive the representative during a particular week?
In practice if Schuler were right then any failure by Wickman to make even one visit a year as stipulated would entitle Schuler to terminate the contract.
Lord Reid: "This is so unreasonable that it must make me search for some other possible meaning of the contract."
and so justifying the repudiation."

If the parties do intend that any breach of a term will give the innocent party the right to repudiate then this should be clearly stated. It may not be enough simply to use the words: “this is a condition of the contract.”

Question 3.
Would you classify this term as a condition or a warra nty? "The ship, a wooden sailing vessel, must be seaworthy."
(Think of the ways in which the ship may not be seaworthy.)

Answer 3.
There are a number of reasons why the ship may not be seaworthy. It may be missing life jackets, it may have only one anchor, it may not have sufficient medical supplies, the sails may be threadbare, the boards may be so rotten that they are likely to be holed as soon as the ship encounters rough water etc. Some of these defects may be easily remedied - others clearly cannot be. Thus some potential breaches may be described as minor whereas others would be fundamental. This is the type of term that it is not sensible to classify either as a warranty or as a condition.

Since 1962 the courts have recognised that the classification of terms into conditions and warranties cannot be exhaustive. The third class of term is the **innominate term.** A breach of an innominate term may or may not entitle the innocent party to put an end to the contract. This depends upon the nature and effect of the breach. The term itself is of such a kind that some breaches of it may have only a slight effect whereas other breaches might render the contract incapable of performance.

The leading case recognising the existence of the innominate term is *Hong Kong Fir Shipping Co Ltd. v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26.* The contract was for the charter of a ship for a period of 24 months. A term in the contract required the ship to be "in every way fitted for ordinary cargo service." On a voyage to Osaka the ship was delayed for five weeks because of the defective state of the engines. Fifteen weeks were lost in Osaka itself when repairs were carried out. This meant that the ship was available to the charterers for a period of only 17 months. The charterers repudiated the charterparty.

Question 4.
Were the charterers entitled to do this?
Apply the tests put forward by Lords Upjohn and Diplock set out overleaf.

Upjohn LJ "It is open to the parties to make it clear that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it entitles the other party to treat the contract as at an end. Where the parties have not made a particular stipulation a condition it would be unsound and misleading to conclude that, being a warranty, damages is a sufficient remedy.
The remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend on the nature of the breach and its foreseeable consequences. Does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only."

Diplock LJ. "In what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract itself may expressly define some of these events. If it does not it is for the court to determine whether it has this effect or not. The test is: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

Answer 4.
The charterers were not entitled to do so.
Diplock LJ "The question to be asked was did the delay deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charterparty."
The answer to this question was "no".

The test has been described by J. C. Smith in his text "The Law of Contract" thus: "If the defaulter is still able to do substantially what he has promised to do, then the injured party has no right to put an end to the contract; but if the breach would deprive him of substantially the whole benefit he expected to receive from the contract then he may refuse to proceed."

Hong Kong Fir Shipping thus sees the task of the court as not to evaluate the term as it stands in the contract but to wait and see what happens as a result of the breach. The more serious the consequences the more likely it is that the breach will entitle the innocent party to repudiate; the less serious the consequences, the less likely it is that the breach will entitle the innocent party to repudiate.

The more flexible approach, of not classifying a term as a condition or a warranty but as an innominate term was applied in *Cehave NV v Bremer Handelsgesellschft mbH, The Hansa Nord [1975] 3 All ER 739.* Two contracts were made each for 6,000 tons citrus pulp pellets, "shipment to be made in good condition." The buyers paid the contract price of £100,000 but when the goods were discharged from the ship it was found that part had been damaged by overheating. The buyers rejected the whole shipment. The sellers refused to refund the price. The goods were sold to a third party. The original buyer eventually acquired them for £30,000 and used them for exactly the same purpose as originally intended, manufacturing animal feed.

Question 5.
Apply the reasoning of the Court in *Hong Kong Fir Shipping to* the facts of *The Hansa Nord*. Were the buyers entitled to the refund?

Answer 5.
The buyers were not entitled to the refund. The buyer's right to reject depended upon the seriousness of the consequences of the breach, and on the facts rejection was not justified.
Ormerod LJ "In the present case I would unhesitatingly hold that the stipulation that the goods were to be shipped in good condition was not a condition, and that on the facts of this case the breach did not go to the root of the contract, and that consequently the buyers were not entitled to reject the goods. The buyers are not entitled to reject the goods but are entitled to such damages as may be appropriate."

In *Hong Kong Fir Shipping* and *The Hansa Nord* the innocent parties received the substance of what they had contracted for. They were not entitled to absolute compliance with the seaworthiness or "shipped in good condition" clauses. If the breaches had been so serious in effect that the innocent parties had not received the substance of what they had bargained for then they would have been entitled to refuse to perform their parts of the bargains.

"Waiting to see" the effect of the breach may provide a better solution but it removes certainty. In *The Mihailis Angelos [1970] 3 All ER 125* a clause in a charterparty for a voyage from Vietnam to Hamburg stated that the vessel was "expected ready to load under this charter party about 1 July 1965. In fact on July 1 the vessel was in the Pacific on her way to Hong Kong where she had to discharge a cargo; she did not complete discharge until 23 July.
" The term was held to be a condition and so the charterers could terminate the contract without having to prove that the breach had serious consequences. Megaw LJ: "I reach that conclusion for four reasons. First it tends towards certainty in the law. At any rate in commercial law there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship. It is surely much better for shipowners and charterers to be able to say categorically "If a breach is proved then a charterer can put an end to the contract" rather than that they should be left to ponder whether or not the courts would be likely, in the particular case, when the evidence had been heard, to decide that in the particular circumstances the breach was or was not such as to go to the root of the contract. Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle."

Question 6.
Can you summarise the law?

Answer 6.

In *The Hansa Nord* Ormrod LJ offered this summery:

"When a breach of contract has taken place the question arises: is the party who is not in breach entitled to treat the contract as repudiated? The answer depends upon the answers to a series of questions. The first question is: does the contract expressly provide that in the event of the breach of the term in question the other party is entitled to terminate the contract. If the answer is no the next question is: does the contract when correctly construed so provide? The relevant term for example may be described as a condition. The question then arises whether this word is used as a code word for the phrase "shall be entitled to repudiate the contract" or in some other sense as in *Wickman v Schuler.* The next question is whether the breach of the relevant term creates a right to repudiate. This may arise either from statute or as the result of judicial decision on particular contractual terms e.g. the "expected ready to load stipulation" in *The Mihailis Angelos* where the courts have decided that breach will ipso facto give rise to a right on the other party to repudiate. In these two classes of cases the consequences of the breach are irrelevant or, more accurately, are assumed to go to the root of the contract. There remains the non-specific class where the events produced by the breach are such that it is reasonable to describe the breach as going to the root of the contract and so justifying the repudiation."