TERMS AND EXEMPTIONS

TERMS

Not all terms of a contract are of equal importance, part of the construction of a contract is to examine the terms as:

i) **Conditions**- those terms which entitle the party not in breach to **terminate the contract** and/or claim damages.

ii) **Warranties** - those terms, the breach of which entitles the party not in breach to damages only.

iii) **an "innominate term"** whose consequences depend upon the outcome of the breach

If a clause states that on a breach one party will be entitled to end the contract that will normally be conclusive but the word "condition" or "warranty" will not.

Bettini v Gye [1876] 1 QB 183

A singer (Plaintiff) agreed to perform for Defendant for a whole season, and the contract stipulated that he should arrive six days before the first performance for rehearsals. Due to illness Plaintiff missed the first three rehearsals, and Defendant refused to proceed, as a breach of conditions, giving the right to terminate the contract
Held - This was not a fundamental condition and Defendant could not terminate the contract, although he was entitled to damages. Rehearsals were not the main part of the contract; they were ancillary to the main part of the contract and was merely a warranty.

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Poussard v Spiers and Pond (1876) 1 QBD 410

Madame Poussard agreed in writing to sing and play the lead role at Spiers and Pond's French opera at the Criterion Theatre. She was taken ill and did not attend the final rehearsals in the last week. Spiers and Pond engaged another performer, Miss Lewis to be ready to take over if Poussard could not. Poussard continued to be ill for the first three days of the performances. When she was well again Spiers and Pond refused to have her back.
An action was brought for wrongful dismissal.
Blackburn J (delivering the court's judgment) held that failing to turn up for the first performances entitled Spiers and Pond to rescind the contract, for this went to the root of the matter.

Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha [1962] 2 WLR 474

This was not a sale of goods but involved a "charterparty" under which a ship was hired which was "…in every way fit for ordinary cargo service."
It transpired that the engine room crew were incompetent & the ship was in a poor state of repair.
It was a 2 year charter & the defendants lost 20 weeks use of the ship. They claimed breach of contract because of breach of condition.
Plaintiffs claimed it was only breach of warranty hence defendants only entitled to damages.
Held by C.A. that: It could not be classified at the outset as either a condition or warranty. It was an **"innominate term"** whose consequences depended upon the outcome of the breach.
Damages were appropriate in this case.

This approach is now of general application so that in each case the breach must be looked at as well as the term.

Cehave N.V. v Bremer Handelsgesellschaft mbH [1976] QB 44

The sellers had sold a cargo of Citrus Pellets to the buyers (c.&f. Rotterdam). One of the terms of the contract was that “Shipment to be made in good condition”. Part of the cargo was damaged, so the whole cargo was rejected by the buyers, even though there was nothing wrong with the majority of the pellets. The defects were not serious and the goods were sold by order of Rotterdam Court, where it was bought by the original buyers at a greatly reduced price, they used it for its original purpose (cattle feed).

Held – The Court applied the (Hong Kong Fir) test, stating that “the consequences of the breach were not so serious as to allow the buyer to reject the whole cargo” It was an innominate term whose outcome depended upon the nature of the breach.

EXEMPTION CLAUSE
One particular problem caused by the interpretation of terms is that of the exemption clause. An exemption clause is a clause which aims, by its terms, to exclude or limit liability for a breach of contract by one of the parties to that contract.

The first question is, **has a term been validly incorporated into a contract**.

L'Estrange v Graucob [1934] 2 KB 394

The Plaintiff ordered a vending machine from the defendant, and signed a standard printed order (sales agreement) form including (in very small print) a clause excluding any kind of warranty. The machine did not work, and P claimed not to be bound by the exclusion clause which she had not read.
Held - The court found against her: in the absence of misrepresentation, a person who signs a document is normally bound by its contents whether or not he has read them.

But this may not be so if, even though a document has been signed, the party seeking to rely on it misrepresents its contents.

Curtis v Chemical Dry Cleaning Co [1951] 1 KB 805

The plaintiff took a satin wedding dress to the defendants to be cleaned. She was asked to sign a document containing a clause excluding the defendant's liability for "any damage howsoever arising", before signing, she asked what the document was and was told that it excluded certain types of damage, "in particular, damage to beads or sequins". The plaintiff signed without reading the document. The dress was stained during cleaning, and the defendants claimed protection of the clause, so the plaintiff sued.
Held - The Court of Appeal found in her favour: the assistant's innocent misrepresentation of the exemption clause in the document had the effect of excluding the clause from the contract.

In the absence of writing the question is, has the party pleading the term brought it sufficiently to the attention of the other party.

Thompson v L.M.S. [1930] 1 KB 41

The plaintiff (who was illiterate) went on a railway excursion, and was given a ticket with the words "Excursion: for conditions see back". On the back was a notice referring customers to the conditions printed in the company's timetables (which cost 6d each); these conditions excluded liability for any injury. The plaintiff was injured on the journey and claimed for damages. She lost her claim.
Held - The Court of Appeal said the ticket was a contractual document, and the fact that the plaintiff could not read did not alter the legal position. She should have realised that the special excursion price might imply special conditions.

Olley v Marlborough Court Ltd [1949] 1 KB 532

The plaintiff and his wife were guests at the defendant's hotel; they paid for a week in advance. In their room on the back of a door, was a notice stating "the proprietors will not hold themselves responsible for articles lost or stolen unless

handed to the manageress for safe custody". The defendant left her fur coat in the room the room key was left with reception. The fur coat was stolen from her bedroom. The defendants relied on the notice in the hotel room.
Held - The Court of Appeal said this notice could not have been part of the contract, as the contract was made at the reception desk before the plaintiff entered the bedroom and saw the notice.

Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686

The plaintiff parked his car in the defendant's car park, paying his money and taking a ticket from the automatic machine at the entrance. On the ticket, in small print, was a notice referring to conditions displayed in the car park; these were not visible from outside, and were quite lengthy, they included one excluding liability for any injury to a customer. When the plaintiff returned later to collect his car, there was an accident in which he was seriously injured, and he sued.
Held - The Court of Appeal struck out this exclusion clause, holding (i) that so wide-ranging and unusual an exclusion called for exceptionally clear and explicit notice, and (ii) that in any case, the contract was complete when the money was put into the machine at the entrance, before there could be any possibility of reading the conditions.

Chapelton v Barry U D C [1940] 1 KB 532

The plaintiff hired a deckchair belonging to Barry UDC, He paid the hire fee, and took a ticket without reading it, on the back of the ticket was an exclusion clause stating ***"The Council would not be liable for any damage or injuries suffered to the hirer while using the chair"*** The chair collapsed and he was injured; The defendants relied on the clause printed on the back of the ticket excluding liability for any injury.
Held - The Court of Appeal said the ticket was not a contractual document - no reasonable person in the circumstances would have thought it anything more than a receipt - so the clause had not been part of the contract.

It is possible where there has been a course of dealing between the parties to impute notice.

Spurling v Bradshaw [1956] 2 All ER 121
The plaintiffs were warehousemen, and the defendant had dealt with them on many occasions. He delivered eight barrels of orange juice, and was sent a receipt, which he did not read. When he came to collect the barrels he found them empty, but the plaintiffs pointed to an exemption clause on the receipt. The defendant argued that this clause could not be part of the contract because he

had not been sent it until after the contract had been concluded, but admitted that he had often received similar documents from the plaintiff in the past.
Held - The Court of Appeal said there had been a consistent course of dealing, and terms from the previous contracts could be implied in the present case as long as they were not inconsistent with express provisions

Exemptions

Photo Production Ltd v Securicor Transport Ltd [1980]
1 All ER 556

The defendants were engaged to provide security guards at the plaintiff's factory, with an exemption clause that the defendant***s "under no circumstances" were they "to be responsible for any injuries, act or default by an employee, unless such act or default could have been forseen".*** A security guard on night duty started a small fire, which got out of control and destroyed the factory, worth about £615.000. There was no evidence that the Defendants had been negligent in employing the guard, and they relied on the exclusion clause.
Held - The House of Lords (Lord Wilberforce) said they were entitled to do so, and were protected by the exclusion clause; where the parties are of equal bargaining power, and when risks are normally covered by insurance, there is everything to be said for leaving the parties free to apportion the risks as they think fit and respecting their decisions.

It is normally reasonable to assume that a contract drafted with a legal input, particularly as an industry standard, uses words intentionally and so, prima facie, a condition will be treated as such.

This is so, in particular, in terms incorporated by statute as conditions:
such as sections 12-15 of The Sale of Goods Act 1979
However, to label each term of a contract from the outset as a condition or warranty ignores the commercial realities in that a term, whatever its label, may be breached in such a way that the contract should be determinable or, alternatively, in such a minor way as to make damages a perfectly reasonable recompense.