NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

3.2 What are Terms of the Contract?

3.2.1 Terms or Representations

Once a court has decided as matter of evidence, what statements (oral or in writing) were made by the parties, the next step is to decide what is the legal effect of each statement. In deciding this question the courts ask whether the statement is part of the contract (and therefore binding) or are they outside the contract. To be contractually binding they need to be **promissory** in nature in which case they are called **terms** of the contract. Otherwise the statement while designed to induce or encourage the other party to enter the contract, does not form part of the contract and are not legally binding. These statements are called **representations** or 'mere' representations.

Say for example, A sells his business to B. The price, what stock, is included in the price, when B is to take over the business are all terms of the contract. Suppose though that in the course of the negotiations A said to B 'I've been in this business for 10 years' then it is highly likely that such a statement will only be regarded as a representation, if it was relevant at all. The difference between a term and a representation is reasonably clear in this case but frequently the business line is quite blurred. What if, in the example above A said to B that the turnover of the business next year 'will be X', assuming that X is higher then the current figure. Would that be a term of the contract? For a case example of the difference between a term and a mere representation see ***Oscar Chess Ltd v Williams.***

3.2.2 Test and Indicative Factors

To decide between a term and a representation, the courts apply an **objective test** of the intention of the parties. The **test** is whether a reasonable person in the position of the parties would have understood that the statement in question would be enforceable. The test is similar to that encountered in the area of intention to create legal relations. As mentioned above, the dividing line between the term and the mere representation is often quite unclear. To assist here there are a number of **indicative factors** developed by the courts which are useful, however it goes without saying that these factors are not elements. They are:

1. How closer in time to the formation of the contract was the statement made? The closer in time the more likely that the statement was a term.

2. If the statement was oral was it then included in the subsequent written contract if there was one? A failure to do so will be taken

as evidence that the intention was against an intention to regard the matter as a term. Of course if the contract was wholly written then the law of audience would exclude the oral term so this factor will only be relevant where the contract is partly written and partly oral.

3. Did one party have special knowledge or skill relevant to the contract and on which the other party was entitled to rely? This could apply to our example above of A selling his business to B. The seller is likely to have a much greater knowledge of the particular business than the buyer.

4. Does one party indicate that the statement was of importance to them. In one case a person buying a car made repeated requests of the seller to assure him that the car was roadworthy. These requests were interpreted by the court to indicate that the roadworthiness of the car was critical to the buyer and in the circumstances was regarded as a term of the contract.

[Adapted from] *An Introduction to the Law of Contract by S. Graw, 1993. p 148)*

3.2.3 Misrepresentation

If a statement made by a party is a representation not a term this does not mean that the other party has no legal recourse. If the representation is false and it induces the innocent person to enter the contract then that person has remedy in misrepresentation. This area is examined in detail in the next module. For the moment it should be realized that while a remedy might be available for misrepresentation, the right to sue does not arise out of breach of contract because the representation is not part of the contract. Contrast the situation where a person fails to fulfill a term of the contract, then the other party sues on the contract.

3.2.4 Puffs

At this point a further distinction needs to be made. You will recall in the previous module that a puff was distinguished from an offer. A puff was an exaggerated statement not regarded as having any legal consequences. So even if the statement is wrong the person making the statement will not be liable. In the sale of the business by A to B, a puff would be statement for A ‘You would have to go to Bourke to get better value for your money’ In the present context a puff is distinguished from a representation which, if false could give rise to a legal remedy.

3.2.5 Implied Terms

So far we have been discussing the legal effect of statements which have been made by the parties, some of which are classified as terms. Such terms are called express terms. However there are terms which are not spoken of by the parties at all but are still present in the contract. They are implied terms. An example of implied terms would be in a lease where the parties discuss the rental period of the lease and a few other basic details but that is all. Later on there may be a question of who is to pay for the repairs to the premises – a matter which was not spoken of at the outset. This issue is likely to be dealt with by a court implying a term which covers the problem. In this instance the court draws on what is the custom or accepted position within a trade, or, in this case the well known legal relationship of landlord and tenant.

Implied terms are likely to be read into a contract by the court in these circumstances:

(a) because of prior dealings between the parties, see *Hillas v Arsoc (1932) 147 LT 503:*

The appellant company had agreed to buy from Arcos Ltd, '22,000 standard of softwood goods of fair specification over the season 930'. This agreement was in writing and included a term giving the appellant an option to buy a further 100,000 standard during the season, 1931. The question for the court was whether this option agreement was enforceable. The Court of Appeal held that it was not, as it regarded the alleged option as nothing more than an agreement to make an agreement, which is not an enforceable agreement. This view was based on the number of things left undetermined: kinds, sizes and quantities of goods, times and ports and manner of shipment. On appeal however, the House of Lords, in a significant shift in attitude, rejected the view of the Court of Appeal. That view would have excluded the possibility of big forward contracts being made because of the impossibility of specifying in advance the complicated details associated with such commercial contracts. The House of Lords approached the interpretation of the option agreement by reference to the previous year's dealings between the parties. The house reaffirmed the view that the parties, being business men, ought to be left to decide with what degree of precision it is essential to express their contracts, if no legal principle is violated.

(Source: Vermeesch & Lindgren 1995. p 202)

(b) on the basis of custom or trade usage, so long as the custom is certain, well known and reasonable. An example of custom could

be the lease situation mentioned above. When we say well known, this does not mean that it must be known to the parties – it must be well known within the trade.

(c) To give the agreement some business efficacy, see *The Moorcock (1889)* 14 PD 64.

(d) Statute may also imply terms, to 'flesh out' the terms expressed by the parties. *The Sale of Goods Act of 1893* important such statute. (See the statutory interpretation problem in the introductory book for an example of implied terms.) Other statutes may also imply terms into specific types of contract, for example hire purchase agreements or residential tenancy agreements.

3.3 What Weight should be given to the Terms?

Assuming that we have separated out the terms from representations, the next step is to decide what weight to give the terms. Here the law breaks terms into two types: **conditions** and **warranties.** The reason for this is that different remedies are available for these two types of terms.

While the different legal results are clear enough, separating conditions from warranties at the outset is not always easy. In this course you are only expected to know the fundamental distinction between them and the different results that flow. However you should be aware of two cases that bring out the distinction. These are *Bettini v Gye* and *Associated Newspapers v Bancks.*

One may ask why do we have to go through this tortuous path of the common law analysis when construing a contract? These are two reasons:

1. Parties may have been guilty of misleading or deceptive conduct not being merely **a simple failure to abide by a term of a contract.** For example a party might undertake to carry out a certain task in a contract as the opera singe did in *Bettini v Gye.* Her failure to arrive in London 6 days before the engagement was not misleading or deceptive conduct, it was simply a breach of contract. So in that case it is still necessary to traverse the term/representation/condition/warranty steps to see what remedy was available to the other party.

However, let us assume that the singer while being interviewed for the position, had told the other party that she had sung in certain famous music halls in Europe which later turned out to be false. So long as the

other party relied on the misrepresentation then a remedy would be granted. That remedy could be rescission and damages which is equivalent to breach of condition at common law.

2. Contract has its origin in common law.

3.4 Summary of Process in Construing a Contract

Step 1

Decide whether the contract is oral, written or a combination of the two.

Step 2

If it is wholly written then apply the personal evidence rule. A good indication that the rule is relevant is a clause in the contract which state that the parties agree that no oral statements will make the written terms.

Step 3

Apply the exceptions to the PER. Would the parol evidence:

- Explain a custom or trade usage;
- Identify a party to the contract or the subjected matter of the contract;
- Reveal that entry into the written contract was subject to a condition yet to be fulfilled;
- Show a collateral; or
- Prove that the written part was not the full contract.

Step 4

Check whether there is collateral contract in existence. While this possibility is covered in the exceptions to the PER, it is necessary to consider the issue on its own. Remember that the courts will not readily find a collateral contract and there are three prerequisites:

- The statement which forms the collateral contract must be promise and otherwise fulfill the requirements of a contract.
- The party to whom the statement is made must rely upon the statement in entering the main contract. The best guide to a collateral is where one party hesitates before signing a written contract but eventually does so on the basis of a promise made by the other.
- The collateral contract must be consistent with the main contract.

Step 5

Categories the statements that are in dispute in three ways:

- Puffs, (which can be rejected as having no legal significance)
- Representations
- Terms

To decide between terms and representations apply the 4 indicative factors:

1. timing;
2. oral statement followed by writing;
3. special skill or knowledge of one party; and
   importance of the statement.

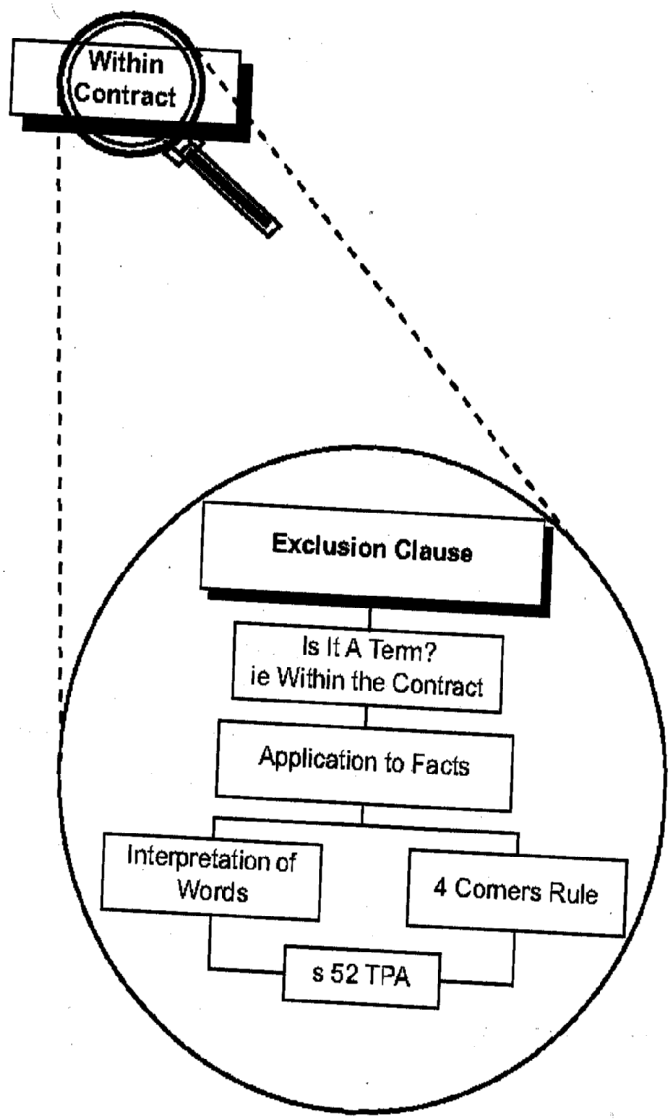
At this point in your answer you should mention that a representation will only give rise to liability if it induces the contract and is false.

Step 6

Assuming that the statement in question is a term, apply the condition/warranty distinction. Remember a condition, if breached, allows the innocent party to rescind the contract and sue for damages, however an unfulfilled warranty only means damages.

Step 7

Check to see if there are any implied terms. In this course you are only expected to recognize, in a problem situation, terms that might be implied through prior dealing between the parties. You need only to be aware that in theory, terms can be implied through custom, to give business efficacy and in some instances by statute.



3.5 Exclusion Clauses

While exclusion clauses are (potentially at least) terms of contracts, they have developed their own body of law and it is usual to treat them separately from the general principles of interpretation of contracts.

Exclusion clauses refer to the presence of a clause in a contract, which purports to exempt one party from certain liabilities. We enter into many contracts which contain exclusion clauses and often we are unaware of their presence.

The growth of exclusion clauses has paralleled the growth of 'standard form contracts'. Most large corporations, particularly when they are dealing with the public, tend to get into contract by means of their own standard contract drawn up by their legal advisors which naturally enough protects their interests. If people who wish to deal with the company object to the contract, they are generally given a 'take it or

leave it' reply. If they 'leave it' they will probably find a very similar contract with the next corporation that they wish to deal with.

This is a far cry from the 19th century situation when the law presented (and mostly it was the case) that the parties entered into the agreement from an equal footing and after proper negotiations. While exclusion clauses are still interpreted against the background of rules laid down before their existence, courts in general terms have shown their dislike of them and have mitigated their effect in favour of the consumer. If the exclusion clause is not upheld by the courts, the court may find that the statements contained in the clause are false or misleading representations.

You should note the following rules:

(a) If you sign a contract containing an exclusion clause you are bound by it, unless there has been misrepresentation; eg as to the nature of the document. *See L' Estrange v F Graucob [1934]* 1 KB 805.

(b) If it is not signed the question is – was the person aware of the existence of the exclusion clause? The test is, would a reasonable person have expected the document to contain contractual terms.

(c) Did the person seeking to reply on the exclusion clause bring it to the attention of the other party? *See parker v South-Eastern Railway Co* (1877) 2 CPD 416; *Thompson v LMS Railway Co* [1930] 1 KB 41. *Baltic Shipping Co v Dillon* (1991) 22 NSWLR1 and Thornton v Shoe Lane Parking Ltd (1971) 2 QB 163 (Turner).

(d) The notice must be given at the time the contract was made, *Olley v Marlborough Court Ltd* (1949) 1 KB 532.

(e) Knowledge from previous dealing will be relevant.

Balmain New Ferry Co v Robertson (1906) 4 CLR 379:

Facts: The appellants ran a harbour ferry from Sydney to Balmain. Fares were not taken on the ferry or on the Balmain side; they were collected at the turnstiles on the Sydney side. A notice was exhibited over the entrance to the Company's Sidney wharf stating that a fare of one penny had to be paid by all persons entering or leaving the wharf whether they had travelled on the Company's boats or not. The plaintiff, leaving from Sydney side, paid a penny, was admitted to the wharf through the turnstiles but, having missed the boat, attempted to leave

the wharf by another turnstile, refusing to pay a second penny. He was prevented from doing so and sued the company for assault and false imprisonment.

Held: *The appellants were not liable. Their actions had been justified by Robertson's breach of the contract of which the displayed condition had become a term. Griffith CJ(at 386) said:*

If the plaintiff were aware of the terms he must be held to have agreed to them when he obtained admission. If he had been a stranger who had never been on the premises it would have been sufficient for the defendants to proven that they had done what was reasonable sufficient to give the plaintiff notice of the conditions of admittance. In this case, however, it appeared that the plaintiff had been on the premises before, and was aware of the existence of the turnstiles and of the purpose for which they were used. It was therefore established that he was aware of the terms on which he had obtained admittance, and it follows that he had agreed to be bound by them.

(f) Exclusion clauses will be strictly construed (against the person relying on them) if they are ambiguous (*contra proferentem rule).* The exemption clause should specify the type of liability which is to be excluded.

White v John Warwvick & Co. Ltd (1953) 1 WLR 1285:

Whired a bicycle from the defendants. The contract contained an exclusion clause stating that 'nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired'. W was injured when the saddle of the bike tipped and threw him on the road. His action against the defendant was based on two alternate counts; one count alleged breach of contractual warranty to supply a bicycle reasonably fit for the purpose for which it was hired; the second count was in tort, alleging negligence, in that the defendant hired a defective bicycle to the plaintiff. The court field for the plaintiff on the grounds that 'the liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligence. In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability for negligence [1293].

(g) Clauses may be drafted to limit rather then exclude liability.

(h) Four Corners' or 'Deviation' Rule. The Nigeria courts adopt the fundamental term or breach concept in the final analysis on

question of construction of the case may turn the width of the particular clause.

(i) An important inroad into the effectiveness of exclusion clauses again s 52 *TPA*. If one party has misled another then an exclusion clause (as a rule) will not aid the party who has done the misleading.

Take for example, in *a* transaction concerned with the sale of a restaurant business. An argument arose over figures concerning the turnover of the business. The purchaser alleged that the provided figures by the seller were misleading and did not reflect the real situation. The seller denied this but argued that in any event he could rely upon an exclusion clause which said that the seller took no responsibility for figures or other information provided on the question of turnover. The exclusion clause would probably be ineffective to defeat the action.

Based on the foregoing explanation of the law, to determine whether on exclusion clause may be successful, a point form approach is shown as follows:

Step 1: You must first enquire whether the exclusion clause forms part of the contract at all. This will involve an application of the principles dealing with identification of terms ie what is included in the contract.

- The 'notion' given to the consumer of the exclusion clause
- Whether or not the exclusion clause was brought to the attention of the consumer when the contract was made or at some later time
- Have the parties had any previous dealings
- Did the party sign a contract containing acknowledgment of the exclusion clause.

Step 2: If the exclusion clause does form part of the contract then you look at matters of interpretation:

- The width of the exclusion clause
- Whether the type of liability is specified
- The appreciation of the contra preferentem rule
- Does the 'Four Corners' or 'Deviation' principle have any application?

SELFASSESSMENT EXERCISE 2

1a. What is an exemption clause?
b. Name two steps that are involved in the process of determining whether an exclusion clause applies to a given situation.

2a. What happen if the true effect of an exclusion clause is misrepresented?
b. What is the effect of an established prior course of dealing?
c. What is the Contra Proferentum rule?
d. What is the deviation rule?

4.0 CONCLUSION

We have ruled that a contract may be oral, written and partly oral and partly written. In every case, the basic elements are offer and acceptance, intended to create legal relations and consideration. Terms of a contract may be expressed or implied. They may also be written and outside the scope of a contract. We have tried to distinguish one type from the other. We also evaluated their significance and how the courts have interpreted the different terms of a contract.

5.0 SUMMARY

1. If the contract is oral or a mixture of oral and written terms then all representations by the parties' may form part of the contract. Whether they do, depends primarily on the next step in this process described below.

2. If the contract is wholly written, then the rule extrinsic evidence of document rule comes into play.

3. Check if any of the exceptions to the general rule apply.

4. Besides the fact that the form of the contract (between written, oral etc) may vary, there is also the prospect that there is more than one contract. In particular, a collateral contract might have come into existence. Note however that such a contract will not be readily inferred and that there are certain requirements that have to be met in this regard.

1. Distinguish three types of statements:

- A puff, an exaggeration (usually unprovable) which gives no right of legal recourse even if it induces the receiver to enter into the contract. In case of problems in this area, it is suggested that you eliminate puffs first because they are easy to deal with.