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Introduction

A contract under law is known to be made of several terms – however, the terms in a contract do not denote everything that has been discussed during the negotiations of the contract. A principal distinction to be drawn here is that between the term of a contract and what is also known as a mere representation. The distinction here is considered to be important because if a statement is considered to be a term, failure to adhere to it is a breach of contract, thereby giving the aggrieved party a remedy in law.

On the other hand, if the statement is considered to be a mere representation, then there can be no claims of breach of contract as the statement is not considered to be constitutive of the contract. Therefore, it is clear that it is crucial to be aware of when a statement is considered to be a term of a contract. Hence, this paper seeks to study what a term of a contract is, and also seeks to establish the various sources of contractual terms under English contract law. The first part of the paper shall study the various principles deciding when a statement is a term of a contract, while the second part shall study the various sources of contractual terms.

Principles Governing Terms

It must be noted firstly that while there are indeed a few principles deciding when a statement is a term, no principle is decisive. Rather, their applicability depends on the particular case itself.

Firstly, there is the point of verification – if the maker of a particular statement has not asked for the statement to be verified by the other party, then such a statement is likely to be held as a term. Indeed, in the case of Ecay v Godfrey, a person selling the boat had told the buyer that the boat was in a very sound condition. However, the seller had also expressly stated that th4e buyer should have the boat surveyed before purchasing it. Hence, it was held in this case that the statement was only a mere representation – if the condition of having it inspected had not been added by the seller, then it would certainly have been held to be a term of the contract.

Secondly, there is the idea of importance of the statement being made. A statement would most likely be considered to be a term where the statement is of such central importance to the person to whom the statement has been made. The important point here is that if that statement had not been made, the person would not have agreed to enter into the contract. In the case of Couchman v Hill, a heifer had been put up for sale, and the buyer had asked the seller if the heifer was in calf, to which he had been answered in the negative. However, after buying it, the heifer suffered a miscarriage and had died. When proceedings were instituted, the statement that the heifer was not in calf was considered to be a term by the court, given the high level of importance the claimant had attached to it prior to the conclusion of the contract.

Thirdly, the level of specialist knowledge of the person making the statement is also relevant here. Where the person making the statement is deemed to have specialist knowledge or a skill, as compared to the person to whom the statement is being made, then there is a strong chance that this is considered to be a term of a contract rather than a mere representation. On the other hand, where the knowledge of the parties is considered to be somewhat equal, or if the person receiving the statement is actually of superior knowledge than the person making it, then the statement will be considered to be a mere representation rather than a term. This can be made evident when one considers the case of Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd. In this case, the claimant had requested a car dealer company (the defendant) to help him find a well vetted Bentley car. The defendants had thereby found a car which they had told the client to have only travelled 20,000 miles since the engine had been replaced. However, in reality the car had done over 100,000 miles at that stage. The court had held that the statement made by the defendants regarding the miles travelled by the car as being a contractual term. The court cited that the fact that the defendants were car dealers must mean they ought to have superior knowledge as to the actual mileage of the car. Therefore, owing to specialist knowledge, statements can actually be treated as terms of a contract.

Sources of Contractual Terms in English Law

Given that this paper has studied what constitutes a contract, it is now time to consider some of the sources of contractual terms. There are essentially two main sources of contractual terms – express terms and implied terms. While express terms refer to those terms which parties have openly agreed to, implied terms refer to terms which implied into the contract by Parliament or by the courts, for various reasons. This section shall first consider express terms, and then deal with insider terms.

Express Terms: Parol Evidence Rule

The first source of express contractual terms can be described as the contract itself, as illustrated by the parol evidence rule. By this rule, once a contract has been enshrined into a written document, the parties cannot seek to vary the contract, thereby leading to the outcome that the contract is the sole written repository of contractual terms. The reason behind this rule is because once parties have put in the effort to physically conceptualise their contract, they should not be allowed to vary this, as when framing the contract, they would have already rejected other terms. This leads to conceptual uncertainty if they are allowed to vary the terms of the contract.

However, there are indeed various exceptions to this parol evidence rule, most of which fall outside the scope of this paper. It can be stated with conviction that the parol evidence rule today does not apply in a very strict manner, for doing so could lead to considerable injustice. One should consider the case where the contractual document has been procured through fraud or deceit or where the contract is not supposed to contain the whole list of terms agreed to by the parties.

Express Terms: Signature Rule

Another source of contractual terms is a document which a person has signed, regardless of whether or not he is aware of the content of the document. This denotes that not only can a contract itself, but any other document which has the formal signature of a party could be considered to be a source of contractual terms under English law. Once again, this rule comes with certain exceptions, in order to ensure that there are no administrative injustices done. Indeed, in the case of Grogan v Robin Meredith Plant Hire, it has been argued that the court must actually consider whether the signed document can be used for contractual purposes, or whether the document was merely an administrative document which had been designed in order to help the parties facilitate their actual agreement.

Express Terms: Incorporation of Written Terms

Another source of express terms is the process of parties to a contract agreeing to incorporate a set of written terms into their contract. Three main points must be fulfilled in order for this source of contractual terms to be active. Firstly, notice of the terms to be incorporated must be given prior to the conclusion of the contract, or at the point of the conclusion of the contract. Secondly, the terms must have been contained within a document that was intended to have contractual effect in practice. In determining this, reference must be made to current commercial practices as to whether or not it can be considered to be so. Thirdly, reasonable steps must have been undertaken in order to bring the written terms to the attention of the other party.

Express Terms: Incorporation by Course of Dealing

Finally, another source of express terms is the course of dealing of the parties itself, whereby terms could be incorporated into contracts through a course of dealing. Such course of dealing between the parties must have been regular and consistent, in order for this to serve as a source of express contractual terms. Where the contract has however been concluded between commercial entities with reasonably equal bargaining power, the courts have been known to accept that even two prior contracts between them could establish a regular course of dealing, for the purposes of incorporation of terms.

Implied Terms: Statutory Terms

The first source of implied terms is statutory provisions, whereby Parliament has sought to imply terms into contracts for various reasons. For example, when one considers the Sale of Goods Act 1979, Section 12(1) states that it is an implied term of a contract for the sale of goods that the seller has the right to sell the goods. Similarly, Section 14(2) of the Act states that where a seller is selling goods in the course of his business, then there is an implied condition that the goods that are being supplied as per the contract must be acceptable quality.

Implied Terms: Customary Practices

The second source of implied terms is customary practice, whereby any relevant custom of the market could be implied into a contract. Once it can be shown that the custom is generally accepted by those involved in that business in a particular place, whereby if an outsider made normal inquiries, he would automatically become aware of the customary practice.

Implied Terms: Common Law

The final and most important source of implied terms is the common law, whereby there are two categories of sources of common law. The first is known as terms which are implied in fact – this means that the court will imply a term into the contract where the court is convinced that the term was an unexpressed intention of the parties. Such a form of implication occurs where it is deemed to be necessary in order to give the contract the business efficacy which the parties intended.

The second category is known as terms that are implied in law, which means that such terms could be implied into all contracts of a particular type. Sone examples include employment contracts and in general contracts concluded between landlords and tenants. With regards to employment contracts then, one can note that there is the general implied term that the employee will serve the employer in a faithful manner, and that where he has engaged in wrongful acts, he will indemnify his employer. Traditionally, the court gives due regard to whether it is equitable to imply such terms into the contract, and whether it is fair to the parties.

Conclusion

In summary, it has become clear that there are a few guiding principles on when a statement is considered to be a term, and when it is a mere representation. It must be remembered that no principle is conclusive, and the question of what is a term is one that almost always leads to a subjective answer. The relevant principles must be given due regard in the context of each and every case, rather than in a general manner. At the same time, the paper has also shown that there are two main sources of contractual terms – implied terms and express terms. Within express terms however, sources of such terms could be the parol evidence rule, the signature rule, incorporation of written terms and incorporation of terms based on a course of dealing. Sources of implied terms include terms implied by statute, terms implied by customary practices, and terms implied by principles of common law.

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