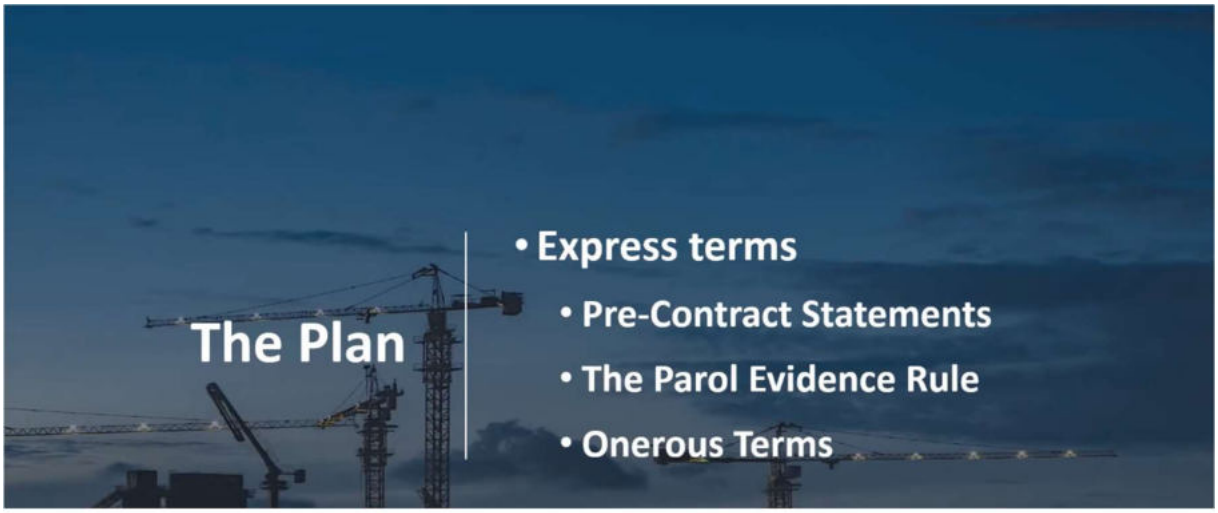
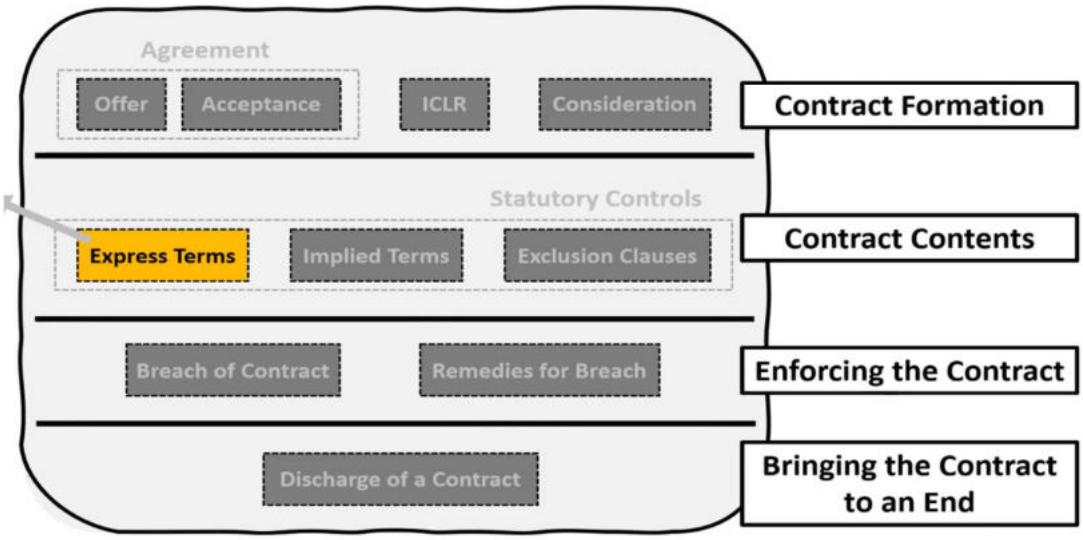
Week 7: The Contents of the Contracts





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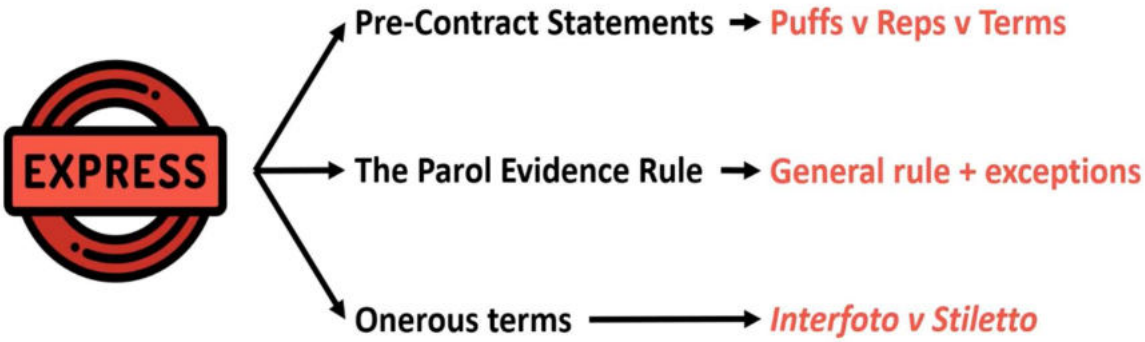
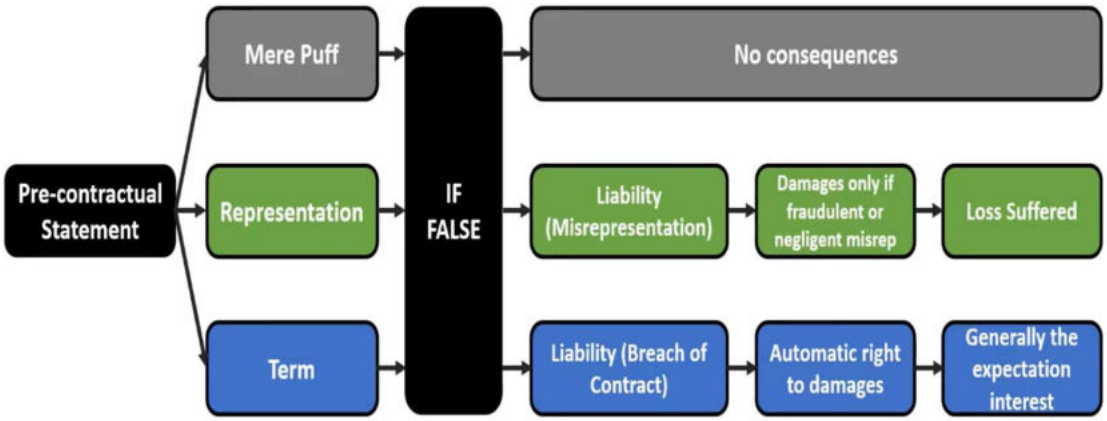
Week 7: The Contents of the Contracts

Express Terms – Perspective



Pre-contractual Statements

- Pre-contractual statements by the parties can be divided into three groups:
  - **Mere puffs** – no legal significance
  - **Representations** – statements of fact/law that help induce contract
  - **Terms** – statements of fact intended to be binding



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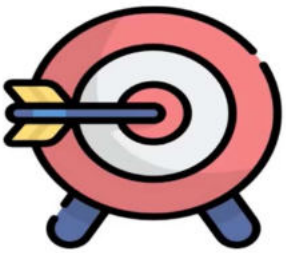
Week 7: The Contents of the Contracts

Representations v Terms

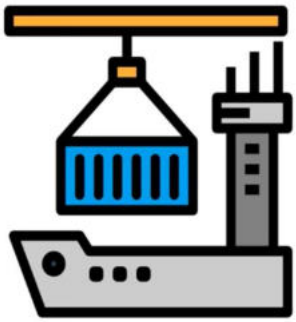
- The objective approach to contract – *"What would a reasonable man under to be the intention of the parties, having regard to all the circumstances?"*
- A number of factors are considered
  - Reduction of contract to writing
  - Importance of the statement
  - Special knowledge or skill
  - Timing of the statement
  - Accepting responsibility for the statement



Representations v Terms

- **[1/5] Reducing contract to writing**
  - GENERAL RULE = statements within a written contract are terms, not representations – **Inntrepreneur Pub v East Crown (2000)**

    "[it is a] prima facie assumption… that the written contract includes all the terms the parties wanted to be binding between them"
  - EXCEPTION = if the parties intended the contract to be partly written partly oral – **J Evans and Son**



- **[2/5] Importance of the statement**
  - GENERAL RULE = the more important the statement, the more likely it is to be a term of the contract – **Bannerman v White (1861)**
  - Would the parties have entered the contract *"but for"* the statement?
  - Do these hops contain sulphur? If so, I do not want them.

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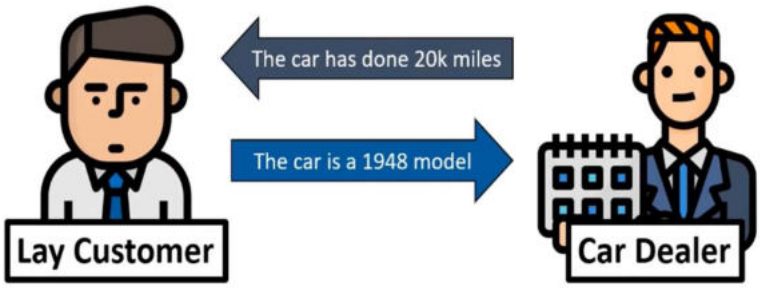
Week 7: The Contents of the Contracts

- **[3/5] Specialist knowledge or skill**
  - GENERAL RULE = If the party making the statement has specialist knowle skill, it is more likely to be considered as a term – **Dick Bentley v Harold S Motors (1965)** cf. **Oscar Chess v Williams (1956)**



Representations v Terms

- **[4/5] Timing of the statement**
  - GENERAL RULE = If the statement is made at the time of contracting, it is more likely to be a term. If there is a delay, the statement is more likely to be a representation – **Routledge v McKay (1954)**

Representations v Terms

- **[5/5] Accepting responsibility for the statement**
  - GENERAL RULE = If a vendor expressly accepts responsibility for the statement, it is more likely to be a term – **Schawel v Reade (1913)**

Please find the video from the following link: https://youtu.be/B4O6K7gZXsY

Week 7: The Contents of the Contracts

The Parol Evidence Rule

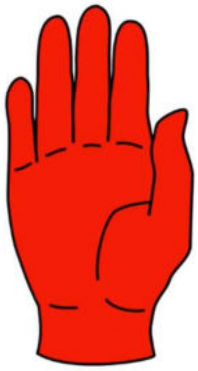
- Where a contract has been reduced to writing, extrinsic evidence (written or oral) cannot add to, or vary, or contradict its terms
- A written contract is **presumed** to contain all the terms agreed
- Parol evidence = extrinsic evidence that is not included in the relevant written document

The Parol Evidence Rule

- The rule can be dispatched (or rather, the presumption rebutted) if the parties intended their contract to be qualified by other written/oral terms
- E.g. ***J Evans and Son v Andrea Mezario (1976)***

Onerous terms

- Where a clause is particularly onerous or unusual, the party seeking to rely on it must show they have taken reasonable steps to bring it to the other party's attention – ***Interfoto v Stiletto Visual Programmes (1989)***
  - Was the term surprising?
  - Was the term a penalty?



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Chapter 6

THE CONTENTS OF THE CONTRACT

6.1 INTRODUCTION

The previous chapters considered the mechanics of contract formation and the process of analysing a transaction or negotiations, in order to determine the existence of an agreement, supported by consideration. However, even where those components have been established, in order to create a binding contract, the terms of the agreement must be certain; otherwise there will be no contract.

6.2 CERTAINTY OF TERMS

The courts are reluctant to imply terms on the parties' behalf. An irreparable lack of certainty, therefore, will lead the court to conclude that the contract is invalid. In *Scammell & Nephew Ltd v Ouston* [1941] AC 251, Ouston sent Scammell an official order for a truck which specified the following: "This order is given on the understanding that the balance of the purchase price can be had on hire purchase terms over a period of two years". Scammell completed the truck and arrangements were made with a finance company to facilitate a hire purchase arrangement, although the actual terms had not been agreed. Scammell had also agreed to take Ouston's old truck in part exchange but reneged once it became aware of the truck's poor condition. A dispute arose and Ouston brought an action against Scammell for non-delivery of the truck. The court agreed with Scammell that, until any terms of the hire purchase agreement were established, there was no contract. It held that the agreement was not enforceable, since the terms were not certain and required further agreement between the parties.

While it is not the role of the court to construct the terms of the contract for the parties, the courts will not defeat the parties' intention to contract merely because the agreement has been loosely worded. Gaps in the contract may be filled in by reference to such measures as: trade custom or usage; statute; or by a previous course of dealings between the parties. Where the parties have relied upon previous agreements the courts are more willing to imply terms that make commercial sense of the agreement. This was illustrated by the decision in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494. Although the terms of the contract were vague in *Hillas*, there had been a course of dealing between the parties. This allowed the court to infer the intention of the parties based upon the terms contained in the agreement and the custom in the trade. In addition to considering the previous course of dealings between the parties, the courts may employ the following methods to iron out uncertainties and facilitate agreements:

(i) Allowing an arbitration clause in the contract to be used; *Foley v Classique Coaches Ltd* [1934] 2 KB 1.

(ii) Application of the 'officious bystander' test to imply terms (see 'Implied Terms' *infra*); *Bear Sterns Bank PLC v Forum Global Equity Ltd* [2007] EWCH 1576.

(iii) Enforcing a contract where there has been performance; *Bell Scaffolding v Rekon Ltd* [2006] EWCH 2656.

6.3 PRE-CONTRACTUAL STATEMENTS

Pre-contractual statements take the form of:

- 'puffs';
- representations;
- terms.

6.3.1 PUFFS

A mere puff is a sales promotion in the form of a statement, whether oral or in writing, which precedes the formation of a contract, or is made at the time the contract is concluded. Puffs are without legal effect and subject to consumer protection legislation. There is no intention on the part of the maker to be legally bound. Evidence to the contrary, however, will undermine the maker's claim that the statement was not meant to be taken literally; *Carlill v Carbolic Smoke Ball Co* (*supra*).

6.3.2 REPRESENTATIONS

A representation is a statement that is generally made outside the contract which may induce a party to enter into it. A representation is not guaranteed by the maker of the statement and does not, therefore, constitute a contractual term. Where a statement of fact made by one party *induces* the other party to enter into a contract, rather than constituting a mere advertising puff, it may be construed as a ***representation***. A mere representation, if false, does not give rise to an action for breach of contract, although it may give rise to a cause of action founded on misrepresentation.

6.3.3 TERMS

A term is a statement that forms part of the contract. A promise amounting to a ***term*** of the contract will allow a remedy for breach of contract if either an express or an implied term was breached by the defendant. Breach of a term of the contract automatically entitles the injured party to claim damages. Breach of an essential term equates to a repudiation of contract. It allows the innocent party to accept the repudiation – in other words, to terminate the contract. Discharge is not automatic upon breach; the injured party must elect to accept the repudiation that led to the discharge of the contract. Terms are considered in greater detail below.

6.4 DIFFERENTIATING TERMS AND REPRESENTATIONS

Whether a statement is construed as either a term or a representation depends on the objective intention of the parties (*Heilbut, Symons & Co v Buckleton* [1913] AC 30). Factors the court will consider include the following:

6.4.1 INTERVAL BETWEEN STATEMENT AND EXECUTION OF CONTRACT

The shorter the interval between the making of a statement and the contract's conclusion, the more likely it is to be considered as a term by the court. In *Routledge v McKay* [1954] 1 WLR 615, the defendant, taking the information from the registration book, stated to a potential buyer that a motorbike was a 1942 model. The following week the parties concluded a written contract of sale. It was subsequently discovered that the motorbike was a 1930 model. The

Court of Appeal held that the defendant's statement was not a term of the contract since the interval between the making of the statement and the conclusion of the contract was quite distinct.

6.4.2 THE IMPORTANCE OF THE STATEMENT

If a statement made is so important that, if it had not been made, the claimant would not have entered into the contract, the court will likely construe the statement as a term. In *Bannerman v White* (1861) 10 CBNS 844, a clear declaration by a buyer that, if certain hops had been treated with sulphur, he would not even bother to ask the price – meaning that he would not consider buying the hops – was sufficient to render assurances by the seller that they were untreated a term of the contract. The assurance was of such importance that, without it, the buyer would not have contracted.

6.4.3 REDUCTION OF TERMS TO WRITING FOLLOWING THE STATEMENT

If a statement is not included in the written contract, the courts generally take the view that the parties did not intend the statement to be a term. An oral statement of particular significance, however, may be treated as a contractual term even though it was not subsequently contained in the written contract. For that reason, a verbal assurance that cargo would be carried below deck, which was contradicted by printed standard conditions allowing for cargo to be carried on deck, was deemed to be a contractual term after the cargo was lost overboard (*Evans & Son Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930).

6.4.4 SPECIAL KNOWLEDGE/SKILLS

A statement made by one party with specialist knowledge or skill to a non-expert is generally regarded as a term. For that reason, where a motor dealer wrongly stated to a private purchaser that a car had done only 20,000 miles, when in fact, it was closer to 100,000 miles, the Court of Appeal held that the statement was a term of the contract even though made honestly. Lord Denning said that the seller "was in a position to know or at least to find out, the history of the car" (*Dick Bentley Productions v Harold Smith Motors* [1965] 1 WLR 623). Lord Denning MR distinguished the case of *Oscar Chess v Williams* [1957] 1 WLR 370, where a private seller honestly relied on his car's registration book when describing its year of manufacture to a professional car dealer. The car's registration book, however, had been fraudulently altered by a previous owner. The car was worth considerably less as the stated 1939 model than the actual 1948 model. The Court of Appeal held that the statement was not a term of the contract since the statement was made by a non-car dealer who had no special knowledge, who had relied on the registration book for his belief. Further, a professional car dealer should have discovered the true year of production.

6.5 CLASSIFICATION OF TERMS

If a statement is integrated into the contract, the importance of the statement must then be determined. This step is crucial to assess the remedies that may be available for breach of the relevant term (remedies are discussed in Chapter 13). Terms of a contract may be placed into three discrete categories: (1) express and implied terms; (2) conditions, warranties and intermediate terms; and (3) exclusion clauses (these are discussed in Chapter 7).

6.5.1 EXPRESS TERMS

Express terms are distinctly or explicitly stated rather than implied. There is no doubt that they have been reduced into the written terms of a contract. Disputes may arise, however, regarding whether the clause has been incorporated into the contract, its actual meaning, and with reference to the consequences of breaking it. The approach of the courts in addressing these questions is to objectively determine the parties' intention.

6.5.1.1 Incorporation of Terms

The issue of incorporation of terms generally stems from unsigned written standard form contracts. A party to the contract may protest that a particular clause should not be considered as being included in the contract, because they were unaware of it for some reason, and otherwise would have objected to it. In these cases, the court may be asked to consider, essentially, whether the clause was in fact part of the contract. The rules that operate in this area have mainly developed in relation to the incorporation of exemption or exclusion clauses.

6.5.1.2 Construction

Disputes may arise between the parties, even though they agree that a clause is incorporated into the contract, if they disagree about what a particular clause is intended to mean. In such cases, the clause's meaning will have to be interpreted so as to give effect to it and the courts must objectively evaluate what the intentions of the parties were. While a written form contract will normally indicate the intentions of the parties, if a dispute arises in an entirely written contract, such cases engage the parol evidence rule.

6.5.1.2.1 Parol Evidence Rule

The parol evidence rule states that where a contract is reduced into writing, it is presumed that the writing contains all the terms of the contract. The parol evidence rule has the effect of making it difficult for one party to challenge the clear words that are written in the document by presenting parol evidence to the contrary. Consequently, extrinsic evidence and, particularly, oral evidence, is not admissible to vary or interpret the document or as a substitute for it. However, the following exceptions fall outside the scope of the parol evidence rule:

- **Operating status of the contract**

Extrinsic evidence may be allowed to show that the contract has not started to operate or has ceased to operate. In *Pym v Campbell* (1856) 2 E & B 370, the court allowed the defendant to give oral evidence regarding the claimant's verbal acknowledgement that the contract should not begin to operate before the approval of the defendant's engineer. The court held that the verbal acknowledgement was a condition precedent to the operation of the contract.

- **Trade usage or custom**

Evidence relating to trade usage or custom is admissible to "...annex incidents to written contracts in matters with respect to which they are silent..." (*Hutton v Warren* (1836) 1 M & W 466; 150 ER 517). A particular word or phrase may be used in a way that does not accord with its obvious meaning. In such a case, oral evidence relating to custom is often used as an aid to construction, even though it is not referred to in the written contract. In *Smith v Wilson* (1832) 3 B & Ad 728, evidence was admitted of a local custom to show that "1,000 rabbits" actually meant "1,200 rabbits".

- **Ambiguity**

If a word or phrase contained in the contract is ambiguous, then ancillary evidence may be considered regarding what the parties actually intended. In *Robertson v Jackson* (1845) 2 CB 412, a question arose regarding the meaning of the phrase "turn to deliver" concerning the unloading of goods from a ship. The contract was unclear and the court allowed oral evidence regarding the custom applying in that port.

- **Incomplete written agreements**

If at least one of the parties can demonstrate that a written agreement was not intended to contain all the terms of the contract, then oral or other extrinsic evidence may be employed to complete the contract. Where a contract for the sale of a horse amounted to a mere receipt, devoid of any tangible terms, the court was prepared to hear evidence of a verbal promise regarding the horse's reliability (*Allen v Pink* (1838) 4 M & W 140).

- **Collateral contracts**

A collateral contract is an additional and separate contract made between the original parties. The consideration provided is the entry into the main contract. Since the collateral contract runs independently parallel to the main contract, the parol evidence rule does not apply to it. For example, even though parol evidence cannot be used to vary or add to the terms of a written contract, it may be possible to show that the parties made two related contracts, one written and the other oral, or where the contract is one that *has* to be in writing (e.g. a lease), that the missing statement forms the basis of a collateral contract. The courts may do so, even where the statement *contradicts* the terms of the main contract. In *City and Westminster Properties (1934) Ltd v Mudd* [1958] 2 All ER 733, a tenant who lived in retail premises renewed a lease containing a non-residential clause after receiving an assurance from the landlord that he would be able to continuing living there. When the landlord tried to enforce the strict terms, it was held that there was a collateral contract which allowed the tenant to remain.

6.5.1.3 Conditions

A condition is an essential term of the contract, the breach of which entitles the injured party to elect either to repudiate the contract or claim damages and continue with the contract. Accordingly, the defendants were entitled to terminate the contract where an opera singer failed to attend the opening night performance. The court treated the claimant's non-attendance as a breach of condition since it was a term going to the root of the contract; *Poussard v Spiers & Pond* (1876) 1 QBD 410.

6.5.1.4 Warranties

A warranty is a non-essential term of a contract, the breach of which allows the injured party to claim damages only. There is no right to repudiate for breach of warranty. The common law rule relating to warranties is defined in statute as being "...collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated..." (s. 61 Sale of Goods Act 1979). Accordingly, where an opera singer was engaged to sing for a whole season in theatres and at concerts, but arrived only three days in advance for rehearsals, rather than the six days to which he had committed, the court held that the defendant had no right to terminate the contract. The six-day rehearsal clause was subsidiary to the main part of the agreement and its breach constituted a mere warranty (*Bettini v Gye* (1876) QBD 183).

6.5.1.5 Intermediate Terms

Terms which are not identified in advance as either a condition or a warranty, and which cannot be assigned into either category, are referred to as intermediate or innominate terms. In such cases, the court will look at the consequences of the breach of the term and, based on the effect of the breach, ascertain whether the term is a condition or a warranty. Depending on the particular facts of the case, if the breach is serious or continuing, the court will treat it as a breach of condition and the contract may be terminated. If the breach is not serious, the breach will be treated as a warranty and the injured party may claim damages but must affirm the contract.

In cases of wrongful repudiation, the question the court must address is whether the breached term was a condition or a warranty. The case of *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26 established that the right to repudiate for breach of an intermediate term was contingent on the seriousness of the breach. In the *Hong Kong Fir* case, the charterers repudiated the charterparty because they were supplied an unseaworthy ship. The charterparty contained a seaworthiness term. It was held that the owners were clearly in breach of the seaworthiness term. Seaworthiness, however, was not a condition. Neither did the term give rise to a warranty. The obligation to provide a seaworthy ship therefore gave rise to an intermediate term. This was because the term could have been broken "by the presence of trivial defects easily and rapidly remediable" as well as by defects that undermined the intentions of the parties to the contract. Lord Diplock said that in regard to such complex arrangements, the deciding factor is whether the breach will "...deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract...".

6.5.1.6 Interpretation of Express Terms

The focus of the discussion thus far has been on express terms of the contract. Sometimes, however, the strict meaning does not reflect the intention of the parties. Thus, in the event of a dispute, the courts must construe what the contract means. In the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffman set out the modern principle for the construction of contracts as follows:

> *"It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed."*

To this end, certain rules of evidence enable the parties to establish what the words in the contract in fact mean. These include the following:

- the "matrix of fact", or background, includes, subject to the requirement that it should have been reasonably available to the parties, absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man;
- previous negotiations of the parties and their declarations of subjective intent are excluded; admissible only in an action for rectification. This is because "legal interpretation differs from the way we would interpret utterances in ordinary life";
- "the meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words" (i.e. not literal). The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

The rule that words should be given their "natural and ordinary meaning" does not require

judges to attribute to the parties an intention which they plainly could not have had.

6.6 IMPLIED TERMS

An implied term is one that is not expressed orally or in writing by the parties to the contract, but which is implied by the court through fact, law, custom or statute, to deal with a specific situation before it.

6.6.1 IMPLIED TERMS IN FACT

The courts will imply a term if they consider that it represents the true intention of the parties on a particular issue. The term is implied on the basis that, as a matter of fact, this was the intention of the parties, even though the parties had not thought about the issue at the time the contract was agreed. It is not sufficient that the term makes the contract more fair or more reasonable; it must be necessary to imply such a term. Nor will a term be implied to deal with an eventuality which the parties had not anticipated; if they failed to anticipate it they cannot be said to have intended that a particular term would apply to the situation (see *Crest Homes (South West) Ltd v Gloucestershire County Council* [1999] EWCA Civ 1642).

Traditionally, the courts would apply the following key tests when implying a term into a contract as a matter of fact:

- The officious bystander test: "if, while the parties were making the 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!" (*Shirlaw v Southern Foundries* [1939] 2 KB 206, MacKinnon LJ).

- The business efficacy test: the terms had to be implied to make the contract work; *The Moorcock* (1889) 14 PD 64. Subsequent case law made clear that that term could only be implied if the contract could not work without it; *Trollope & Colls Limited v North West Metropolitan Hospital Board* [1973] 1 WLR 601.

The officious bystander and business efficacy tests were later refined by Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 when describing the overlapping conditions which were thought to be necessary to imply a term in fact: "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying' (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract" (282-283).

However, according to Lord Hoffman, giving the lead judgment of the Judicial Committee of the Privy Council in the case of *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC 10 (*Belize*), going forward the correct approach to the question when to imply a term into a contract involves arriving at a proper construction or interpretation of the contract by applying an *objective 'construction' approach only*. According to this approach: "[i]n every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean" (at paragraph 21 of the judgment). Lord Hoffman said that the previous tests are but pointers which might or might not help to explain the parties' contractual intention.