



# ANU LAW STUDENTS' SOCIETY

## LAWS1204 Contracts 2<sup>nd</sup> Semester 2007

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# Question 1

32/40

## Introduction

Pierre (P) wants to

Refuse delivery of the second trolley

Return the 1<sup>st</sup> trolley

Be awarded damages for the losses he has suffered

To get 1), he has to prove that he has the right to termination of the k.

To get 2), he needs to prove the right to rescission.

To get 3), he needs to prove that the damages he has suffered are as a result of the breach of the k between P and Jenny(J) [causation], and that the damages were not too remote.

Right to refuse delivery to second trolley: Had P the right to terminate the k?

To terminate, there necessarily has to be a breach of condition or serious breach of innominate term

## Pre-contractual statement

Jenny “guaranteed” that the second trolley will be delivered on 1<sup>st</sup> December. Is that a statement which will lead to a collateral k? (why not main contract PER?) For a collateral k to arise, it must be established that the statement was promissory (Oscar Chess v Williams), made with the intention of inducing entry into the k (JJ Savage v Blakney), does not contradict with the main k (Hoyt’s v Spencer) and must be a subject matter not mentioned in the main k (Sheppard v Municipality of Ryde). Since J used the word “guarantee”, we can conclude that the statement was promissory. The statement was made directly before the entry into the k. J as a sales agent at the kitchen may have been eager to conclude the sale and guaranteed delivery to induce P to agree to the contract. The alleged collateral k regarding the date of delivery however, goes the c11 of the main k, where it says that trolley 2 is to be delivered no earlier than 1<sup>st</sup> dec whereas, the agreement between P and J was that the delivery was to be made exactly on 1<sup>st</sup> dec, the fourth element is also not satisfied because trolleys are in fact mentioned in the k itself. Thus, prima facie, there seems to be no collateral k between J and P regarding the fact that the trolley 2 is to be delivered on dec 1. (not inconsistent(?))

⌚ In fact, from c11 of the k, from kitchen’s point of view, they were in compliance with the k because the promise was to deliver no earlier than 1 dec 2007.

Examining c11 of the k however, it gave kitchens an unfettered discretion as to when to perform the delivery of trolley 2. With unfettered discretion, the promise will be considered illusory and if the term is essential to the k, the k is void (Biotechnology Australia v Pace). To determine whether the term is essential, the pre-contractual negotiations should be looked to and it would be found that the term was important to P, given how he “pressed” for the delivery date to be on 1<sup>st</sup> dec and made J guarantee. Thus, the term may be essential, and the contract may be void(?) on that grounds, allowing P the right to refuse delivery of the trolley.

Would P be able to insist on returning the 1<sup>st</sup> trolley?

Was there misleading and deceptive conduct by J under s52 of the TPA?

Element of corporation is settled- kitchen supplies was a “pty ltd” and therefore a corporation.

Element of “in trade and commerce” is settled – sale of the trolley by J for P’s buffet business, dealing was in the course of trade and commerce ( Concrete Constructions v Nelson).

To satisfy misleading and deceptive conduct, J must have made a representation that creates a false impression without clarification (Henjo Investments v Collins Marrickville))

⌚ Here J had made a representation to P regarding the steel containers and their highest temperature being 60 degrees. When in false, the highest temperature was up to 30 degrees. Thus the representation was false and there was no clarification by Jenny later at all. Thus, it should be found that there is misleading and deceptive conduct under s52 of TPA. (the silence)  
(point form from now)

⌚ Remedies available for breach under s52 of TPA found in s87 of TPA since P wants to rescind the k-return the trolley and get back \$1000 paid- although s87 are discretionary remedies

⌚ Although it seems as if parties can be put back to their original positions substantially and thus, rescission is a possible remedy subject to court’s decision. (delivery statements as misleading?s 51A)

In the alternative, the statement being made by J regarding the temperature becomes a collateral k, which a breach would still entitle P to damages and /or termination of k

• Test of essentiality in Tramways v Luna Park that w/o strict assurance of compliance with requirement, k would not have been entered into.

• P had made it clear that the term was “vital” and the level of detail he went into to describe the temperature he needed showed the intention of P to require strict compliance of the term.

⌚ Thus, if the term had been a part of a k, it would have been a condition which would entitle P to terminate and seek damages.

Above statement part of k?(why did you not also apply this to delivery statement?)

No integration clause, does not seem to insist on operation of parole evidence rule.

⌚ Is the k partly written, partly oral? The modern approach is that the parole evidence rule should not be in operation until prove to be in operation ( SRA of NSW v Heath Outdoor. Therefore evidence can be entered regarding pre-contractual negotiations.

Above statement was not really promissory as J was not certain about it. (She said that the trolley was) “probably” most suitable – no warranty about it.

However, she made warranty re(garding) the temperature i.e. temperature “never gets” above 60 degrees.

Given her relative expertise in the business of steel containers and P being new to the business P could have relied on her.

Statement as a term.

P could have terminated and sought damages

### Damages for breach of k

To prove damages, loss must be proven (Alfred McAlpine v Panatown). The loss must have been caused by breach of k (Alexander v Cambridge Credit Corp) and the loss must not have been too remote (Hadley v Baxendale [H v B])

#### 1. Customer burnt

Loss - \$10 000

Causation – the loss of \$10 000 was caused by the breach of the term that J had ensure that the steel container would never go above 60 degrees c

⌚ Remoteness – P mentioned the possibility of people getting burnt to J. J possessed the special knowledge required by the 2<sup>nd</sup> limb of H v B that required the loss to have been in the contemplation of the parties at the point of entry into k.  
Damages can be claimed.

#### 2. Cancellation of half the cooking

Loss- the profits from the cancelled bookings

⌚ Causation – as a result of being unable to have the 2<sup>nd</sup> trolley in time, P has to cancel the bookings  
Remoteness- J knew that the steel containers were meant for P's restaurant business and that the steel containers were primarily for serving of food, (that) P relied on for profits (similar to Victoria Laundry) –satisfying the 1<sup>st</sup> limb of H v B  
Damages can be claimed

#### 3. Special function for Princess

⌚ Remoteness – not within the knowledge of J, therefore damages cannot be claimed

### Damages under s82 of TPA

Only reliance loss can be claimed, the only expenditure was \$1000 on the trolley.

⌚ Thus, if P wants to rescind then he will only be able to get back \$1000.  
If P claims under breach of k, then he may get more damages.  
But it is more uncertain that he can prove breach of k.