



# ANU LAW STUDENTS' SOCIETY

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

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# Question 1

34/40

***Can Pierre (P) terminate his contract with Kitchens (K) and therefore return the first trolley and refuse delivery of the 2nd?***

*Is there a contract?*

The two parties agreed on the terms and both signed a written contract – the fact that P did not read this does not give him right to argue no contract exists (*L'Estrange*).

As it is a commercial contract, consideration is easily satisfied, as is intent to create legal relations.

*Rectification*

P could seek an order of rectification for the term “no earlier than” – as from prior negotiations he could argue that the mutual intention was to have a term “no later than” and the written term is mistaken. However, this would not allow him to terminate the contract; so would not be worth pursuing. [Why not?]

*Is the “guarantee” to deliver on 1 December promissory?*

Due to the timing (close to finalisation); the knowledge advantage of Jenny; the language of “guarantee” and the fact that the statement induced P into the contract, it could be argued that this statement was promissory (*Dick Bentley*). This is strengthened by the importance P obviously placed on this information (*Couchman*).

*PER*

However, K would likely argue that the contract is intended to be wholly in writing due to the lengthy contract signed by both parties; if she was successful in this, P could claim that the delivery time guarantee was part of a collateral contract. [✓ note construction however and “standard” form]

*Collateral Contract*

As P’s consideration for the ‘guarantee’ was entrance into the main contract (*Shepherd*), it could be argued that this was a collateral contract. The guarantee was more than an opinion (*Savage*) as K ought to have known/had the ability to fulfill the ‘guarantee’.

However, K would argue that a collateral contract must not be inconsistent with the main contract (*Hoyts*) and the fact that the written term of “no earlier than” contradicts this means the collateral contract is not enforceable. [but that’s not inconsistent]. This is where P would seek rectification – likely to succeed if court could see “no earlier than” is unlikely to be what’s intended in a commercial context. Therefore it’s a genuine mistake (*Maralinga*).

*Termination*

The time guarantee is enforceable, and is so important to P that he would not have entered the collateral or the main contract without it. Time was not made “of the essence”; however the term was so important to P (*Tramways*) that breach of it robbed him of the main benefit of the contract: having an operation trolley (*Hong Kong*) to his requested specifications. [✓]

K would argue that P must deliver notice making time of the essence and giving reasonable notice (*Louinder*) [√] and did not do so. However, conduct as a whole can amount to repudiation of the contract (*Laurinda*) and K's obvious contempt and failure to take the contract seriously in saying "it's not my problem" would be analogous to *Laurinda* and be sufficient to claim termination for repudiation. Therefore P is entitled to terminate the contract for repudiation; refuse delivery of the 2<sup>nd</sup> trolley and seek damages [√].

#### *The first trolley*

K would argue that in using the trolley for 2 months (without complaining) amounts to P's affirmation of the contract – he waived his right to terminate (*McDonalds*) on this first breach (NB this does not waive his right to terminate on breach relating to the 2<sup>nd</sup> trolley *Tropical Traders*). This argument is likely to succeed therefore in order to claim damages for the losses caused by the first trolley; P must look to the TPA and rely on s52.

#### *S52: Was K's conduct misleading?*

The transaction was in trade of a business and K is a corporation so this section applies.

Whilst K would argue that their words were not misleading as "can never get above 60degrees" is not a falsity in itself – in context; their failure to acknowledge P's wish to have a machine that will reach 50 degrees is misleading: silence can be misleading in context (*Henjo; Demagogue*). IN this context P clearly placed vital importance on having a trolley to those specifications and the statement "probably the most suitable", while not a guarantee, misleads P into thinking he will get a trolley suitable to the needs he has expressed. He relies on the statement (*Futuretronics*) – especially as he cannot independently verify the voracity of it as K is the one with the knowledge. Therefore K's statement is misleading as per s 52 TPA. [Could delivery guarantee also be misleading?]

#### *Exclusion Clause*

K would then argue that they are excluded from liability arising from the provision due to the 2<sup>nd</sup> term "no guarantee or warranties are given". (Note they could not rely on this to exclude the time clause as "in relation to" is too ambiguous and likely only to relate to quality matters; not procedure such as delivery. Given this ambiguity the court would likely employ the *contra proferentum* rule and construct it in P's favour, therefore it would not relate to the time clause).

However, K cannot exclude liability under the Act (*Henjo*) or else the Act would be rendered superfluous (i.e. policy reasons); given K is in breach of s 52 they cannot rely on this exclusion clause to exempt liability arising from this breach.

#### *Conclusion*

- 1: P can return the first trolley and seek damages by proving that K breached s 52 of the TPA [√]
- 2: P can refuse delivery of the 2<sup>nd</sup> trolley by
  - (a) rectifying the contract
  - (b) asserting a collateral contract and
  - (c) showing that K repudiated the contract in their conduct (i.e. repudiation)

#### *Damages*

P would then seek damages (expectation) under the common law and under s 87 to put him in the position he would have been in had he had two trolleys, operation to promised specifications and delivered on time.

*Was there a loss caused by K's breaches?*

P could show financial loss (*Alfred Alpine*) in the profits he would have expected to make. Although, as a new business with no comparison figures, this would be difficult to do, so long as he does bring some evidence of his loss (*Luna Park*), the court will endeavour to calculate his reasonable profit expectations and the difference between this and what he actually made (*Howe v Teefy*)

*Remoteness*

In a commercial transaction; loss of profit will be reasonable foreseeable (*Victoria Laundry*) as it would be in the reasonable contemplation [✓] of K that if they did not supply the required machines on time, profit loss would follow (*Alexander*).

However, when there is a special or extraordinary loss such as the profit loss from the dinner – P would have to prove that K had knowledge of this [✓] (*Victoria Laundry*) and this is not arguable on the facts. Therefore only loss of profits calculated on an average night's takings can be compensated for

*Mitigation*

I would advise P to seek immediate termination then look to finding a new company to purchase his trolleys from so that his losses do not accumulate (*Burns v MAN*)

*Damages under statute*

Although the above are common law calculations; the court has the discretion to award them for breach of s52 also (s87 TPA) [✓]. I would advise P to seek expectation damages as an s87 discretionary remedy and, failing this, to seek rescission of the contract

*Can P claim damages for the compensation pay out to a customer?*

There was financial loss (*Alfred*). Caused? (*Alexander*) – in reasonable contemplation that hot trolley (above promised temperature) could burn customer, however there is an issue in remoteness: P's conduct of turning off the safety switch amounts to a *novus actus*, therefore the damage is too remote. [✓]. The statements in the collateral contract only referred to when the safety switch was on.