



**ANU** LAW  
STUDENTS'  
SOCIETY

**LAWS1204**  
**Contracts**  
**2<sup>nd</sup> Semester 2009**

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## Question 1

65/100

### Can Edward & Bella (E) recover damages to loss in transit?

#### Does the exclusion clause apply?

The issue is whether the exclusion clause is a valid term. The meaning and effect of an exclusion clause must be interpreted according to the ordinary process of construction of a contract (Darlington Futures). Given the losses/damage to goods occurred while being transported, and the exclusion clause explicitly names this situation in clear language, the exclusion clause likely applies to the lost goods in transport due to inadequate cooling.

#### Did E agree to the clause?

The issue is whether E agreed to the exclusion clause. Signatures denote intention, regardless of whether the party signing reads the document. (L'Estrange). Thus, although Alice did not read the terms, she objectively is likely to be taken to agree.

#### Privity

The issue is whether Alice's signing denoted acceptance of the offer (including the exclusion clause). A person who is not a party to a contract cannot enforce a contract or incur any obligations under it. Thus, E could argue that as they were Ruby Reds' agents in organising the contract, they did not agree to the terms, and therefore Ruby Red cannot be bound by the fifth clause. However, acceptance can also occur through conduct (Carlill) and thus Hunttons could argue they agreed through continuing to use their services. Alternatively, they could argue that as they were contracting with Ruby Red, Ruby Red's CEO is acting as its agent, and agreeing to the terms. Thus, it is likely Ruby Red agreed.

#### Misrepresentation?

The issue is whether the document asked to be signed was of such a nature. If the document presented is not one of the same nature as is implied, it will not be valid (Drycleaners). E could argue that because it was titled: "Application for credit", while being a transport contract, it should not be valid. However, given the rest of the document is clearly terms for transport, and Ruby Red objectively read such terms (indicated in signing), such a construction is unlikely. Thus, the exclusion clause appears valid, and Ruby Red will be unable to obtain damages.

The issue is whether the TPA implied a legal obligation on Hunters to provide a service of 'merchantable quality'. Ordinarily, the TPA will imply such a condition into all contracts of trade/commerce (s 51AA). However, 2 businesses may contract out of such a condition if they choose to do so, using clear language. As both Ruby Red and Hunttons were companies, they were able to do this. Because the exclusion clauses are so clear and precise, they appear to have objectively agreed to this.

## Can E recover for losses in storage?

### Aware of terms?

The issue is whether Red Ruby was made aware of the terms contained in the 'Storage Liability Document'. A contract may consist of several separate documents, provided they refer to each other (Harvey). All terms must be reasonably brought to the attention of a party (Parker). Red Ruby may argue that because the terms were not brought to her attention, Red Ruby is not bound by them. However, such terms need only be brought to the attention of a reasonable person. Given Alice signed, and was therefore taken to have read the terms in the read document, such efforts are likely reasonable, and so will be incorporated into the agreement. Assuming the 6<sup>th</sup> clause is not valid, however, Ruby Red may sue for damages/termination.

### Implied reasonable standard of care?

The issue is whether a standard of care may be implied into the contract. Most service contracts imply a term that a reasonable standard of care be taken. As this contract concerned the transportation of goods, it is likely a service contract, and as such likely implies a reasonable service will be given.

### Breach of the term?

As the storage facilities had faulty cooling equipment, such a breach (that the products transported/stored be treated appropriately) was clearly breached.

Any breach gives rise to a right of damages, however if Ruby Red wishes to terminate, the implied term must be either a condition or intermediate term.

### Condition?

The issue is whether the implied term to take reasonable care was a condition. The test for this is essentiality - was the term of such importance that without it, the party would not enter the contract? (Tramways). As manufacturers have a duty to consumers, that the goods be merchantable, and such a duty would be broken if the goods were not transported correctly, it seems likely it is a condition, giving rise to a right to termination or to obtain damages. Thus, discussion of whether it is an intermediate term/warranty is not required (range of breaches would be test - HK Fir)

### Repudiation?

Alternatively, if E wishes to rescission, they may claim repudiation

### Conduct suggesting repudiation?

The issue is whether H's conduct suggests they are unable/unwilling to act according to the contract, depriving E of substantially the whole benefit of the contract (Maple Floch). Given they do not have reliable cooling facilities, R may argue they cannot complete the contract (are literally unable to do so), and have repudiated. However, Hunttons could argue they will invest and make it work, as it is their business.

### Remoteness if going for damages

- shipping

Unconsonability

- special disadvantage? - angry
- known - appears not
- taken advantage of - not really
- > unlikely to succeed