Sample Classroom Exercise: GCE Law (H524): Law of Contract: G145

Review activity for status of terms

Explanation – this would be a suitable review activity to follow up on formal teaching of the subject. Students are revising and explaining the basic concepts, they are also encouraged to develop their critical understanding to support AO2 skills.

Exercise 1: Some terms are seen as conditions because the courts have decided that those kinds of terms will always be seen as conditions.

Bunge Corp New York v Tradax Export SA Panama

The issue in this case was whether a breach of a time clause was serious enough to justify termination. This was a contract for the purchase, sale and shipment of Soya bean meal. The purchaser was obliged under the contract to give the seller 15 days' notice nominating a port and vessel for shipment. The purchasers were 4 days late in giving this notice. The sellers then said that they treated this as a **repudiatory breach** and terminated the contract and sued for damages.

The buyers (not surprisingly) argued that, although they were late, this was a trivial breach and should be tested by reference to the **Hong Kong Fir approach**, namely, to assess what effect being 4 days late had on the contract as a whole. On this argument, so the buyers said, the breach did not justify termination.

The House of Lords took a **very hard-nosed approach**. They held that the time clause was essential (a ‘condition’ in terms of the language of condition/warranty). Lord Wilberforce said that applying the Hong Kong Fir approach to a time clause **was fundamentally flawed** because the reason for the approach adopted in Hong Kong Fir was that the clause in that contract, like many contract clauses, could be broken in so many different ways. But, as Lord Wilberforce so wisely said, there is only one way to break a time clause, and that is to be late.

All the law Lords stressed that in mercantile contracts like this time clauses are very important because they provide certainty. In other words these sorts of contracts are not the place for rubbery time clauses. This case also reflects the very important role that the English courts play in sorting out shipping disputes. Shipping litigation is a major and successful export industry for the UK and so it must deliver what the shipping world wants in terms of the applicable law. There is, for understandable reasons, a premium on certainty and security in these types of contracts (they are not "rubbery").

Questions:

1. Explain what is meant by the term `repudiatory *breach'.*

2. Why would the Hong Kong Fir approach have benefited the buyers in this case?

3. Why was the approach of the HOL said to be hard *nosed?*

4. Why would it be `*fundamentally* flawed' to use the Hong Kong approach in this case?

Exercise 2 – Some terms are seen as conditions because the parties have labeled them as a condition in the contract.

***Schuler v Wickman Machine Tools [1974]* AC 235**

Wickman were the **exclusive selling agents** in the UK for Schuler's goods. The agency agreement provided that it was a condition that the distributor should visit six named customers once a week to solicit orders. This entailed approximately 1,500 visits during the length of the contract. Clause 11 of the contract provided that either party might determine if the other committed 'a material breach' of its obligations. Wickman committed some minor breaches of this term, and **Schuler terminated the agreement**, claiming that by reason of the term being a condition they were entitled to do so.

The House of Lords held that the parties **could not have intended** that Schuler should have the right to terminate the agreement if Wickman failed to make one of the obliged number of visits, which in total amounted to nearly 1,500. Clause 11 gave Schuler the right to determine the agreement if Wickman committed a material breach of the obligations, and failed to remedy it within 60 days of being required to do so in writing.

The House had regard to the fact that the relevant clause was the only one referred to as a condition. The use of such a word was a strong indication of intention but it was not conclusive. Lord Reid felt that it **would have been unreasonable** for Schuler to be entitled to terminate the agreement for Wickman's failure to make even one visit because of the later clause. The word 'condition' made any breach of the clause a 'material breach', entitling Schuler to give notice requiring the breach to be remedied. But not, as Schuler sought, to terminate the contract forthwith without notice.

Questions:

1. What does the expression exclusive selling agent mean?

2. What was Schuler's argument for being able to terminate the agreement?

3. What did the HOL think that the parties could not have intended?

4. Why would it have been unreasonable to allow Schuler to terminate the contract?

5. What was the actual outcome in the case (who would have been liable to pay damages)?