Express and Implied Terms

1 Pre-reading activity

1 What terms would you like to have in your contract for sale?
2 If a person included a false fact in a contract, what would he commit in the eyes of the law?

2 Reading for gist

Skim the following Heilbut, Symons & Co. V Buckleton and Museprime Properties v Adhill Properties (1990) cases and decide whether these statements are true or false:

1 Heilbut, Symons & Co v Buckleton (1913) AC 30 is a leading Court of Appeal decision on misrepresentation in contract law.
2 Heilbut, Symons & Co issued shares of a rubber company.
3 The manager of Buckleton stated and said to Heilbut that they were “bringing out a rubber company“.
4 Relying on this information, Buckleton purchased a large amount of shares.
5 Because of the fact that the shares did very poorly, Buckleton sued for breach of contract.
6 Although the misrepresentation was made, it was not done fraudulently.
7 Despite the fact that a statement regarding the rubber company established a warranty, Buckleton, being a plaintiff, lost the case.
8 In the cause Museprime Properties v Adhill Properties (1990) the plaintiff company discovered misrepresentation and commenced an action for rescission.
9 On the other hand, the defendant company filed the defence that no misrepresentation was made.
10 Upon the decision of the court the plaintiff company was awarded only damages related to conveyancing expenses and interest.
11 Some jurisdictions, mainly Austria, Israel and India imply a term of good faith into contracts.

3 Close reading

Read the article closely and answer the following questions:

1 Who were the defendants? What was their profession?
2 How can the deal be characterized?
3 Was there intention to misrepresent Buckleton on the part of Heilbut & Symons?
4 What did Lord Moulton hold in conclusion of a case?
5 Who commenced an action in Museprime Properties v Adhill Properties?
6 Did the defendant company answer? If so, what was its defence?
7 What were the grounds on which the plaintiff established his claim?
8 Were the rulings of the trial court and the House of Lords in compliance?
Heilbut, Symons & Co v Buckleton [1913] AC 30 is a leading House of Lords decision on misrepresentation in contract law. The Court held that an innocent misrepresentation gave no right to damages.

Background

Heilbut, Symons & Co. were rubber merchants who were underwriting shares of what they claimed was a rubber company. Buckleton called up a manager at Heilbut to inquire about the shares. In response to the questions, the manager stated that they were "bringing out a rubber company". Based on this statement, Buckleton purchased a large amount of shares. The shares turned out not to be for a rubber company at all, the shares did very poorly. Buckleton sued for breach of warranty.

At trial the Court found that Heilbut made misrepresentation but was not done fraudulently. Nevertheless, at trial is was found that there was a warranty in the statement regarding the rubber company. The Plaintiff Buckleton succeeded at trial.

Opinion of the Court

For the Court, Lord Moulton identified two ways that the action could be successful. First, if the plaintiff could show fraudulent misrepresentation "or what is equivalent thereto, must be made recklessly, not caring whether it be true or not." Second, if there was intent (animus contrahendi) to be held to a promise then there may be a collateral contract, that would bind Heilbut to their representation. However, they are difficult to find, and, on the fact, none was found.

In conclusion, Moulton held:

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more.

Museprime Properties v Adhill Properties [1990] 36 EG 114

In a sale by auction of three properties the particulars wrongly represented the rents from the properties as being open to negotiation. The statements in the auction particulars and made later by the auctioneer misrepresented the position with regard to rent reviews. In fact, on two of the three properties rent reviews had been triggered and new rents agreed. The plaintiff company successfully bid for the three properties and discovered the true situation. They commenced an action for rescission. The defendant company countered with the defence that the misrepresentations were not such as to induce any reasonable person to enter into the contract.

It was held that the plaintiff's had established, and indeed that the defendants conceded, that misrepresentation had occurred and any misrepresentation is a ground for rescission. The judge referred, with approval, to the view of Goff and Jones: Law of Restitution (see Lecture p2-3), that the question whether representations would have induced a reasonable person to enter into a contract was relevant only to the onus of proof. Here the plaintiffs had established
their claim to rescission of the contract on the ground of material misrepresentation because
the inaccurate statements had induced them to buy the properties. They would therefore be
awarded the return of their deposit, damages in respect of lost conveyancing expenses and
interest.

5 Legal brief

Express Terms
Where the contract is written down and signed, both parties are bound to do what it says
(subject to some exceptions). Where some terms are in writing but are not signed by the
parties, they are only binding if the party concerned knew about them, or the other one at least
took reasonable steps to bring them to their attention before the contract was made. For
instance, if you buy a car-parking ticket, there may be printed conditions on the back of the
ticket. If nothing is done to bring these to your attention and you do not see them before the
contract is made, they may not form part of your contract. On the other hand, if the carpark
staff tell you about the conditions first, you can be bound by them, even if you chose not to
read them or ask about their meaning.

It is also possible for oral statements to form part of the contract. If an intelligent bystander,
listening to your discussions, would have thought that a party was giving their word that the
statement was true, it can be a term of the contract. If it turns out to be false, they may be in
breach and liable to pay damages.

Implied terms
Sometimes, terms which are never mentioned at all are, just the same, part of the contract.
They may be implied by the circumstances. For instance, when you visit your doctor, you
probably do not discuss whether the doctor will agree to keep your medical details
confidential, or whether you will have to pay the doctor's bill. There is no need to, because
these things are understood. Your doctor is still legally bound to keep your confidence, and
you are still legally bound to pay the bill.

Terms can also be automatically implied into a contract by law, even if the parties do not
know this. For instance, the Sale of Goods Act 1895, requires that when goods are sold, they
must be of merchantable quality and reasonably fit for their purpose. If they are not, the buyer
is entitled to a refund or substitute goods, even though nothing was said about this at the time
of the sale, or even if the seller said that they do not give refunds. Most terms that are implied
by the common law are now stated in legislation such as the Sale of Goods Act 1895, the
Consumer Transaction Act 1972, the Trade Practices Act 1974 (Cth) and the Manufacturer
Warranties Act 1974 which provide for certain basic terms to be part of the contract. These
terms are known as statute implied terms.

When a term is implied by an Act of Parliament, the Act will also say whether the parties
have a choice to exclude that term. If it says that they cannot do that, then the term will still
be part of the contract, even if both parties agree that it will not apply. For example, the
parties cannot agree that the Trade Practices Act will not apply to them. Such an agreement
would have no effect.

Misrepresentation
Misrepresentation means a false statement of fact made by one party to another party and has
the effect of inducing that party into the contract. For example, under certain circumstances,
false statements or promises made by a seller of goods regarding the quality or nature of the
product that the seller has may constitute misrepresentation. A finding of misrepresentation
allows for a remedy of rescission and sometimes damages depending on the type of
misrepresentation
6 Exercises

When doing the exercises always consider the CONTEXT of this unit!

1 Match the following columns:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>innocent</td>
</tr>
<tr>
<td>2</td>
<td>successful</td>
</tr>
<tr>
<td>3</td>
<td>collateral</td>
</tr>
<tr>
<td>4</td>
<td>false</td>
</tr>
<tr>
<td>5</td>
<td>reasonable</td>
</tr>
<tr>
<td>6</td>
<td>contractual</td>
</tr>
<tr>
<td>7</td>
<td>commenced</td>
</tr>
</tbody>
</table>

2 Find synonyms to the words used in the preceding text and RS:

- **nouns**
  - bid
  - finding of a court
  - rescission
  - deposit
  - accuracy
  - damages
  - delivery
  - discretion
  - loss
  - representation
  - misrepresentation

- **verbs**
  - to induce
  - to constitute
  - to repair
  - to bring out
  - to succeed
  - to award (damage)
  - to repudiate
  - to sue
  - to treat (contract)
  - to permit
  - to repair

- **adjectives**
  - innocent
  - fraudulent
  - specific
  - collateral
  - conveyancing
  - defective
  - implied
  - previous
  - satisfactory

3 Use the following words to fill in the gaps; be careful, one expression is redundant:

- shares, reasonable, false, innocent, fraudulent, property, rescission, warranty, intent, inducing, to succeed, bid

1 Misrepresentation means a ....... statement of fact made by one of the parties to a contract.
2 Sometimes it has the effect of ............the party to enter into a contract.
3 The Court`s decision in Heilbut, Symons & Co, v Buckleton case was that ............
    misrepresentation did not entitle the plaintiff to damages.
4 Based on the information by Buckleton, Heilbut bought the .......... that brought no profit.
5 As a result, Buckleton brought the action for breach of .......... .
6 At the end Buckleton ............. at trial.
7 According to Lord Moulton one of two ways to be successful in action is to show ............
    misrepresentation by the plaintiff.
8 Another way is to show that there was an ........... to be held to a promise.
9 In a sale by auction case the plaintiff successfully ........... for the three properties.
10 Later, when he discovered the situation, he commenced an action for ............ .
11 In their defence the defendant company declared that the misrepresentations were not such as to induce a ............. person to enter into a contract.

misrepresentation, common, breach, implied, defective, warranty, to suffer, condition, to replace, damages, custom, obligation, representation, performance, statute

1 When the goods delivered by the seller are ..........., he has the obligation to repair or ............... them.
2 A ..........., as an essential term of the agreement may constitute a ........... of contract if it is not ........... .
3 Unlike the condition, breach of .........., as the secondary term of a contract, is not the reason for discharge of a contract.
4 Nevertheless, if the loss is ............. , innocent party may sue for ............ .
5 The facts concerning a contract that are not intended to be legally binding are called ........ .
6 If they later turn out to be false, it does not cause breach of contract but may result in action for ........... .
7 .......... terms of a contract are not expressed by words but are included into it in several ways.
8 If such terms are used in market, or have been in the previous dealings, they are implied by ............... .
9 If they are specified in legislation, they are then implied by ............... .
10 Traditionally, the implication is carried out by ............. law, resulting from the intention of the parties to make the contract work.

4 Create word families:

verb noun adjective
delivery defective

to sue loss implied satisfactory
to induce identification rent

termination
5 Fill in the proper prepositions:

- to deliver goods ... a certain period, term ... the contrary, to turn ... to be false, to do sth ...
- sb’s sole discretion, to replace the goods subject ... the following conditions, to be fit ...
- habitation, to be ... satisfactory quality, to be done ... certain circumstances, a finding ...
- misrepresentation allows ... a remedy, to call ... sb to inquire ... sth, to succeed ... trial, to be ...
- a great importance, sale ... auction, to be liable ... damages ... misrepresentation, to bid ... the property ...

7 Practice your translation skills

1 Každá zmluva obsahuje hlavné podmienky, ktorých nesplnenie zakladá porušenie zmluvy.

2 Porušenie zmluvy jednou zo zmluvných strán umožňuje druhej strane prerušiť plnenie a následne dochádza k ukončeníu zmluvného vzťahu.

3 V dôsledku porušenia zmluvnej podmienky má poškodená strana právo na podanie žaloby o odškodnú.

4 Zmluva obsahuje okrem výslovných aj konkludentné podmienky, často vo forme obchodných zvyklostí.

5 Konkludentné podmienky vychádzajú aj zo zákona alebo zvykového práva.

6 Úmysel zmluvných strán môže súdom uľahčiť rozhodovanie o oprávnenosti prerušenia plnenia zmluvných záväzkov.

7 Uvedenie zmluvnej strany do omylu, často vedie druhú stranu k uzatvorení zmluvy v dôsledku čoho utrpí újmu.

8 V prípade, že nález súdu uzná uvedenie do omýlu, má poškodená strana právo na odškodnenie alebo aj na anulovanie zmluvy.

9 Ak nie je podľa nálezu súdu uvedenie do omýlu úmyselné, nie je možné získať odškodnenie.

10 Skutkovou podstatou prípadu Heilbut, Symons & Co v Buckleton bolo uvedenie do omýlu pri upísaní emisie cenných papierov údajnej spoločnosti obchodujúcej s gumou.

11 Uvedenie osoby do omýlu je možné slovom alebo správaním, hoci nie všetko čo sa povie alebo vykoná môže uvedenie do omýlu zakladať.

12 Keďže sa ukázalo, že zakúpené akcie sú fakticky bezcenné, kupujúci podal žalobu za porušenie zmluvnej podmienky.

15 Napriek uvedeniu do omýlu, úmysel podvodu nebol preukázaný.

16 Poškodenej strane bola vrátená záloha a bolo jej priznané odškodné za stratu pri prevode nehnuteľností.
Subject-matter comprehension check
Use as much new vocabulary and information from the seminar and RS as possible to discuss:

1. Types of contractual terms
2. Grounds for repudiation of contract
3. Breach of warranty and available consequences
4. Concepts of representation and misrepresentation
5. Ways of implying terms into contracts
6. Reasons for termination of contract

9. Write four different situations in which implied terms are operating.