

QUICK LAW

WHAT IS A WARRANTY?

CLASSIFICATION OF TERMS

The meaning of the word “warranty” is problematic, as it is used in a number of different ways. Indeed, the use of the word has been referred to as “one of the most ill-used expressions in the legal dictionary”.¹ From a strict, common law perspective the starting point in understanding the meaning of the word lies in the classification of contract terms.

Contract terms were traditionally classified as either “conditions” or “warranties”. In that context a warranty is a lesser term which, if breached, may give the innocent party the right to claim damages.

In contrast, a condition is a term which is an essential part of the contract, breach of which will entitle the innocent party to regard himself or itself as being discharged from further obligations under the contract (i.e. to treat the contract as at an end) as well as to claim damages.²

Because the condition/warranty classification was too inflexible, the courts invented the concept of an innominate (or “intermediate”) term which is one that may, or may not, be so important to the contract that its breach entitles the innocent party to regard himself or itself as being discharged from further obligations under the contract.³ In other words, breach of an innominate term can trigger termination, depending upon the nature and the consequences of the breach.

HOW WARRANTIES ARISE

A term can be given the status of a “warranty” in a number of ways:

- By statute - such as under the Sale of Goods Ordinance.
- By express agreement of the parties.
- By common law/implication - e.g. certain kinds of contracts have been construed by the courts and particular terms have come to be treated as warranties (or alternatively conditions or innominate terms), unless there is clear evidence of a contrary intention.

The reality is that in practice the word “warranty” tends to be used more loosely than when judges are construing contracts. For example, it is often used in the context of a guarantee (e.g. where a consumer is given a manufacturer’s “warranty” or where a licensor of software “guarantees” the functions of its software), or as a statement of fact (such as in a corporate sale and purchase agreement).

Calling a particular term a warranty is not necessarily conclusive of the term’s legal status. Accordingly, in the absence of express provisions for what would happen if the relevant “warranty” were breached (in the case of a manufacturer’s warranty this would normally be the manufacturer’s express obligations to repair or replace), in such circumstances the relevant term could in fact amount to an innominate or intermediate term, or perhaps even a condition.

WARRANTIES AND REPRESENTATIONS

It is common to see a warranty clause opening with the words “[the party]...warrants and represents

that...”. The addition of the word “represents” is important as it seeks to introduce the pre-contractual reliance concept that leads to remedies in the tort of misrepresentation.

Whilst breach of a warranty does not, if strictly construed, entitle the innocent party to terminate, breach of a representation can constitute a misrepresentation which introduces alternative remedies such as rescission (provided that the relevant rules on what amounts to an actionable misrepresentation are satisfied). Damages for misrepresentation are also normally calculated on a restitutionary basis (i.e. putting the innocent party in the position he or it would have been in had the misrepresentation not taken place) rather than being based on expectation loss (which is the case for normal breach of contract claims). While an effective entire agreement clause will allow a defendant grounds to challenge claims for pre-contractual representations, a representation expressly forming part of the written contract may well remain operative.

If an “intelligent bystander” would reasonably infer that the parties intended a statement to be contractual, then it is likely to be construed as a representation.⁴ Further, a statement is more likely to be regarded as a contractual term if one of the

parties stresses its importance and makes it clear to the other party that it is crucial to a decision whether or not to enter into a contract.⁵

COLLATERAL WARRANTIES

An entirely different category of term, which must be distinguished from the discussion in this Cab Crib, is the concept of a collateral warranty (sometimes referred to as a collateral contract). This is an agreement which is separate from the main agreement and may, in the circumstances, override the terms of the main agreement. Collateral warranties are sometimes used to create contractual relations between parties who would otherwise have no direct contractual link, for example in construction situations. They can arise inadvertently, such as where a statement is made prior to the main contract being concluded. One of the reasons for the use of “entire agreement” clauses is to seek to prevent this situation from arising.

CONTACT US

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DISCLAIMER:

This note is intended to jog memories and provide a simplified overview of the law in Hong Kong. It is not a substitute for taking legal advice. The law is summarised as at the date of publication.

- 1 *Finnegan v Allen* [1943] 1 KB 425. Also note that the term “warranty” has a special meaning in the context of insurance contracts.
- 2 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd.* [1962] 2 QB 26
- 3 *Hong Kong Fir Shipping Co Ltd v Kawasaki; Bunge Corporation v Tradax Export S.A.* [1981] 1 WLR 711
- 4 *Oscar Chess v Williams* [1957] 1 WLR 370
- 5 *Bannerman v White* [1861] 10 CB 844