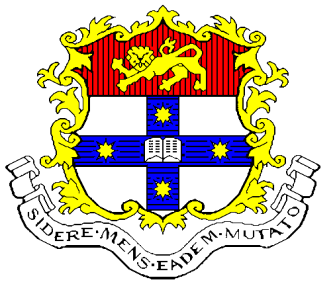

Legal Environment of Business

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Title of assignment	Case study

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Question

10.1 Sandra Smith owns and operates a courier company in Sydney. Over the last five years she has been delivering parcels of goods for Louise Jones, a wholesale importer, to various locations in the city. On each occasion a delivery was to be made, Jones would telephone phone Smith and obtain a quotation for the cost of delivery; if this was satisfactory she would arrange for Smith to collect and deliver the goods. After they were delivered, Smith would post her account to Jones together with a document headed "Terms of Carriage Contract" on which was printed a number of clauses.

Clause 4 of this document read:

> " All goods are carried at the owner's risk. The carrier gives no undertaking and accepts no responsibility whatsoever for their safety or as to the time of delivery."

On 12 May Jones telephoned Smith and asked if she could deliver a parcel of documents for her. Jones explained that this delivery was urgent and must reach its destination by 12 noon on 14 May. Smith promised that it would, and quoted a charge for delivery. Jones agreed to this charge and Smith uplifted the parcel later that day. However due to Smith's carelessness, the parcel was not delivered until 20 May and this caused Jones loss of profit of $500.00 from two clients who cancelled when the documents were not received. A third client, who required the documents for a special government contract sustained $10,000.00 loss and is threatening to sue Jones.

Advise whether Jones can recover damages from Smith for any losses suffered due to late delivery of the documents.

Answer Plan

- Identify and classify any relevant oral statements:
    - General test – term or presentation?
    - Four subsidiary tests.
- If a term, discuss parol evidence rule.
- If a term, test for classification:
    - Condition, warranty or intermediate term?
- Collateral contracts.
- Identify whether any implied terms breached?
- Identify whether the courier company exempted from liability for breach of contract.
    - Did the exclusion clause form part of the contract?
    - Did the exclusion clause cover the breach that has occurred?

Answer

- **What is the effect of Sandra Smith's oral statement/promise?**

These statements are pre-contractual oral statements. Pre-contractual oral statement may be classified in one of four ways:

- Mere puff or sales talk – no legal remedy;
- Mere presentation – a statement which induces the representation to enter into the contract but which is not guaranteed by the representor;
- Term;
- Collateral contract.

It is unlikely that the statement could be view as a puff as it appears that a reasonable person would not have dismissed the statement as mere sale talk.

Is it a presentation or a term? The way in which the court distinguish between a term and a mere presentation is to objectively (what would a reasonable third person have understood the statement to be?) look at the intention of the parties as to whether the statement was promissory or merely an inducement to contract: *Oscar Chess Ltd v Williams* (1957) 1 WLR 370; *United States Surgical Corp v Hospital Products International Pty* (1984) 156 CLR 41.

To assist in determining this question, four subsidiary tests have been developed.

- Time.

  If there is along interval between the making of a statement and the conclusion of the contract, it is probably not a term of the contract: *Routledge v Mckay* (1954) 1 WLR 615. Here, based on the fact that the contract was decided over the phone, it seems that the contract was concluded immediately after the statements were made.

- Reduction of the statement into writing.

  If the statement is made orally and it is not included when the contract is reduced into writing, it is probably not a term: *United States Surgical Corp v Hospital Products*. Here, this test may not indicate one way or the other since there is no evidence of the contract being reduced into writing.

- Importance in the mind of the parties.

  If the statement was important in the both minds of the parties, it is probably a term: *Couchman v Hill* (1947) KB 554. Certainly the statements were very important to Louise Jones. On 12 may she ask Smith to deliver a parcel of document, she explained that the delivery was urgent and must reach its destination by a specific time in future. Aware of the urgency nature of the parcel and for Smith's company getting the contract, it might be seen being important in Smith's mind too.

- Special skill and knowledge.

  If the party who made the statement is in a better position than the other party to ascertain the accuracy of the statement, it is probably a term: *Dick Betley Production Ltd v Harold Smith* (Motors) Ltd (1965) 1 WLR 623. Smith acted of promise and quote charge for delivery after she was aware to the statements made by Jones means that she adopted them (statements) as her own. Sandra Smith as an owner and operator of a courier company would be in better position than Jones to know whether the parcel can be delivered to its destination by a specific time in future.

In light to the surrounding circumstances, a general objective test might suggest that the statement was promissory rather than mere inducements. This is supported by a qualitative assessment of the four subsidiary tests, which would indicate a term.

There is no difficulty with the parol evidence rule since at no time was the contract reduced into writing: *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252.

What type of terms are they?

This is a test of the parties' intentions, determined objectively: *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322.

A condition is a term where the promisee would not have entered into the contract without being assured of its strict or substantial performance: *Tramways advertising Pty v Luna Park* (NSW) Ltd (1938) 38 SR (NSW) 632. Breach of condition gives rise to a right to terminate and /or claim damages no matter how small the breach.

A warranty is a term subsidiary to the main purpose of the contract: *Bettini v Gye* (1876) 1 QBD 183. Breach only gives rise to a claim for damages no matter how serious the breach.

Finally, an intermediate term is a term capable of a variety of possible breaches, some serious, some trifling: *Bunge Corp New York v Tradax Export SA Panama* (1981) 1 WLR 711. The relevant remedy for breach of intermediate term depends on the seriousness of the breach.

It might be possible to argue, that giving the urgent nature of the parcel to be delivered, Jones would not have entered into the contract unless assured of strict or substantial performance. If this were the case, the statements would be **conditions**. As before, breach would enable Jones to terminate and/or claim damages.

The statements are better viewed as terms of the delivery rather than collateral contracts. As collateral contract is one which the consideration for a promise is usually the making of another contract: *Heilbut Symons & Co v Buckleton* (1913) AC 30. Here the statements relate directly to, and are part and parcel of, the objects of the delivery contract. There would seem to be a single transaction between Sandra Smith's courier company and Louise Jones rather than promises the consideration for which was the entry into the delivery contract.

This is a useful result for Jones since if the statements were collateral contracts she would only have been able to claim damages for their breach, and would not have been able to terminate the main delivery contract.

- **Implied terms**

The presence of the express terms makes it unnecessary to attempt to imply terms at common law to the same effect. Also, It is unclear whether price of service was worth of less than $40,000. If it doesn't, Jones cannot use the consumer protection legislation but she still can claim for damage based on the express terms discussed previously. Furthermore if the price of service was worth less than $40,000, -, Terms may be implied by statute, however, in the form of TPA s 74, because Jones's contract is:

- With a corporation (that is, Sandra smith's courier company);
- For the supply of service;
- In the course of a business;
- To a consumer – since the price of the service was less than $40,000: TPA s 4B (1) (b).

Thus, in this content Jones is regarded as consumer and therefore can take advantage to consumer protection legislation.

Jones can argue that Courier Company has breach the warranty implied into the contract by s 74 (1) of the TPA. Under s 74 (1) of the TPA there is an implied warranty that service by corporation to consumer must be carried with due care and skill and that any material supply with the services will be reasonably fit for the purpose of they are supplied. The purpose may have been to deliver a parcel of documents, which was urgent and must reach its destination by 12 noon on 14 May, was pointed out to Smith during negotiation. Also, Smith's courier company must carry the service with due care and skill. The company failed to do these implied warranty and carelessly delivered the parcel until May 20.

Also under s 74 (2), a warranty that, where the purpose for the service are required is made known, that the service and material supplied in connection with those service, are fit for their purpose. Jones has made known the urgent nature of the parcel and expects that Smith carried out service based on it.

The Sale of Good Acts in each state and territory also imply into a sale of goods a condition that the goods are fit for the purpose for which they are supplied: Sale of Good Act (NSW) s 19 (1).

If either or both of these terms have been breached, there will be a right to terminate the contract and/or claim damages for breach of contract.

Nevertheless, as already noted, there has been a breach of the implied term that the service be reasonably fit for the purpose for which they are purposed, the service by corporation to consumer must be carried out with due care and skill and when the purpose for service are required is made know, that the service and material supplied in connection with those service are fit for the purpose. Thus, Louise Jones has a right to terminate and or claim for damages for breach of contract.

- ***Was Sandra Smith's courier company exempted from liability for its breach of contract?***

Section 68 of the TPA declares void any disclaimer, which excludes, restricts or modified the conditions or warranties implied by the Act. The implied that the service provided should corresponded with its description, be fit for its stated purpose and be merchantable quality apply despite any disclaimer. Furthermore, the Sale of Goods Act (NSW) s 64 (1) states that 'Any provision in, or applying to, a contract for a consumer sale and purporting to exclude or restrict the operation of any of the provisions of section 18, 19 and 20 or any liability of the seller for a breach of condition or warranty implied by any provision pf the section is void.'

Unlike terms implied by the TPA (see TPA s 68), any terms implied by the Sale of goods Act, or the common law, may be excluded by agreement between the parties: see Sale of Goods Act (NSW) s 57.

- **Did clause 4 form part of the contract?**

Based on previous dealing, after the parcel delivered, Sandra Smith would put her account to Jones together with a document headed 'Term of Carriage Contract'. This document arrived after the oral contract for the service was agreed. Therefore, the terms in the 'Term of Carriage Contract' could not be incorporated into the agreement: *Thorton v Shoe lane Parking Ltd* (1971) 2 QB 163. Similarly, the 'Term of Carriage Contract' document was not signed and was not incorporated into the contract by that method: *L'Estrange v F Graucob Ltd* (1934) 2 KB 394.

Sandra Smith's courier company may instead argue that the terms in the Term of Carriage Contract should be incorporated on the basis of a previous dealings, namely that the parties contracted on the basis of the terms and conditions appearing in the sold note which had been delivered to Jones one each of the previous occasions. Before a term will be implied on this basis, the following will have to be satisfied.

- There must be a 'course of dealing' – the previous occasions must be sufficiently numerous and frequent. This element is unknown here. Even though the parties have been dealing for over the last five years, it was unknown that the previous occasion were on sufficient numerous and frequent. (*Compare Henry Kendall v William Lilico*, where three to four transactions each month over three to four years were sufficient, *and Hollier v Rambler Motor (AMC) Ltd* (1972) 2 QB 1, where three to four transactions spread over five years were insufficient.)
- The course of dealing must be consistent. Here, the same process was used each time. The parties agreed over the phone on the range of service to be provided as well as the price and the agreed services. If these were satisfactory, then Jones would arrange for Smith to collect and deliver the parcel. After delivery Smith will send her account together with a document headed 'Term of carriage Contract'.
- There must be a reasonable expectation that the same terms should be included in the subsequent contract. Here, the delivery contracts were always entered into on the same basis – on the basis of the 'Term of Carriage Contract'. Although Jones might did not know the terms of the Carriage contract, she knew and expected that the parties were contracting on the basis of the terms on 'Term of Carriage Contract'.

There have been different views on whether Jones needs to have actual knowledge of the exclusion clause before it can be incorporated by a previous course of dealing. The better view seems to be that actual knowledge is not required and that constructive knowledge is sufficient: *Henry Kendal v William Lilico*; compare *Eggleston v Marley Engineers Pty* (1976) 21 SASR 51.

On balance, the better view is that the terms in the Term of Carriage Contract (including the exemption in clause 4) were incorporated into the 12 May delivery contract between the parties.

- **Did the exclusion clause cover the breach that occurred?**

This is a question of the construction of clause 4. The general rule is that an exemption clause is interpreted by giving the clause its natural and ordinary meaning, read in light of the contract as a whole. Due weight should be given to the context in which the clause appears, including the nature and the object of the contract: *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500.

However, there are a number of rules of interpretation, which the courts turn to for assistance in interpreting exclusion clauses. Here, the most relevant are:

- An exclusion clause will be interpreted strictly and, in the case of ambiguity, construed against the 'proferens' (the party inserting the clause and seeking to rely on it): *Wallis v Pratt* (1911) AC 394.
- An express exclusion is effective.
- Where a cause of action may be based on the same ground other than negligence (that is breach of contract), a wide clause must be confined to the head other than negligence (that is breach of contract): *White v Warwick Ltd*.

Here, the exclusion clause exclude any liability to consumer, in this case, it was represented to consumer on take-it-or-leave-it basis and they are also very broad so that courier company is essentially saying that they are not liable to consumer, however poorly the service they provide. Under s 68 (2) of TPA, consumer is protected against such an unfair and unreasonable terms. Thus, Sandra Smith's courier company cannot rely on this exclusion clause and in the other hand, Jones can terminate contract /or claim for damages.

- **Conclusion**

Accordingly, Jones has an action to terminate/or claim for damages for breach of a condition under common law and breach of implied terms that the service be reasonably fit for the purpose, the service by corporation to consumer must be carried out with due care and skill and also when the purpose for the service are required is made known, that service and material supplied in connection with those service, are fit for their purpose which it were required as implied by Trade Practise Act 1974. Although it is possible to exclude such a term by agreement, and even though the exemption contained in cl 4 of the Term of carriage Contract was probably incorporated into the contract by a previous consistent course of dealing, in this case the breach was not excluded the clause was too broad and thus is unfair and unreasonable. Accordingly, Jones should be entitled to recover her loss the 12 May delivery contract from Sandra Smith's courier company.

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