MAS4052

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Ans. 1

Issue:

The main issue in the present case is whether the oral statement made by Tower flours about almond flour being gluten free forms 'term' of the contract with Mikaela.

Rules:

Various statements are exchanged before making a contract by way of encouragement of inducement. These statements may be in the nature of information, specific details, inquiries etc. and may be written or oral. Terms of the contract bind the parties to perform their obligations. Dispute may however arise as to what statements should be considered as 'terms' of contract and which are merely general pre contract dialogue. For this, the courts may look at the intention of the parties i.e. whether the parties themselves intended to make the statement a term in the contract. It has been established that for a valid contract, valid consent of parties is required. A false statement on the basis of which consent is obtained may vitiate the consent and invalidate the contract. A false statement is made where the parties were induced by something written or said and which is not true. These statements are not actually included in contract but since they encouraged the party to enter into contract, they are treated as term of contract. *Heilbut, Symons & Co v Buckleton* (1912)[1] laid down the relevant Contract Cartography Test wherein guidelines were given to determine whether a statement was a term or not. If a lot of importance is given to the statement, then it is likely to be a term. If the party is relying upon the knowledge of the maker of the statement then it is likely to be term. If the maker of the statement takes the undertaking with respect to

[1] (1912) UKHL 2

its elements then it is also a term. Apart from this, the time of making the statement would also determine whether it is term or not. In *Bannerman v White* (1861)[2] a statement was made about using sulphur in cultivation. It was held to be a term of contract as upon reliance on this statement, the contract was made.

Application:

In the present case, the contract was entered into by Mikaela with Tower Flours specifically for the reason that the latter told that almond flour was gluten free. Had this not been told, Mikaela would not have contracted with Tower Flours. This statement though made orally forms the basis of the contract. There would not have been an agreement if there was no *consensus as idem* with respect to flour being gluten free. Tower Flours also had the knowledge whether the flour was gluten free or not and thus Mikaela relied upon their knowledge. Additionally, Tower Flours had given an undertaking saying that the flour was in fact gluten free. The time of making the statement and the subsequent contract was also not delayed.

Conclusion:

Since the statement was the reason for entering into contract, it will be considered as 'term' of contract.

[2] (1861) CBNS 844 (CP)

Ans. 2

Issue:

The main issue in the present question is whether there is a term can be implied from the contractual terms between Dan and Jacob and Mikaela about cake being gluten free.

Rules:

A contract is a combination of express or implied terms. A term in a contract is implied by law if it is given in a statute or decision of court. However, it is implied by fact if it was such that the parties would have agreed to it if it was brought to their attention in the course of negotiation. To determine whether a term is implied in the contract, two tests are generally used. In the business efficacy test laid down in *The Moorcock* (1889)[3], a term is implied in the contract if it is necessary for smooth running of the business. Term should be obvious and necessary as distinct from desirable and reasonable. The "officious bystander" test laid down in *Shirlaw v Southern Foundries* (1940)[4] stated that if a term is such that if a bystander suggested that it should form part of the contract, the parties could reply by " oh of course". That is, the suggested term should be so obvious that it goes without saying.

Application:

In the present case, Mikaela's business requires that her cakes should be gluten free as her customers are demanding gluten free cakes. Thus, the term could be said to be implied in the contract as it is necessary for smooth functioning and business efficacy of the bakery. Additionally, almond flour is commonly known for its gluten free characteristics. It was clearly

[3] (1889) 14 PD 64
[4] (1940) AC 701

mentioned by Dan and Jacob that they wanted the cake to be made of almond flour. A preference or almond flour would automatically suggest a preference for gluten free flour. Thus, if a bystander suggested Dan and Jacob and Mikaela that the contract should also include the term 'gluten free' then it would have been an obvious addition therein.

Conclusion:

On the basis of the above discussion, it can be said that the term requiring the cake to be made gluten free was implied in the contract.

Ans. 3

Issue:

The main issue in the present question is whether the requirement of icing was essential or collateral to the formation of contract.

Rules:

Every contract has certain conditions and warranties attached with it. A condition is a set of terms which are the essential part of the contract and are necessary for the purpose of achieving the objective of the contract. These are those terms which hit at the root of the contract and must be satisfied at all times. A breach of this can lead to termination of the contract. These may be express or implied. Express conditions are clearly expressed and defined in the contract. In Bettini v Gye (1861)[5] it was held that a condition which does not got to the root of the contract and its non fulfillment does not result in contract being terminated. A condition which affects the contract partially is only a breach of warranty and thus entails

[5] (1876) 1 QBD 183

only damages. A warranty on the other hand is that term which is related to quality, fitness and performance of goods. They do not go to the root of the contract and a breach of these would not terminate the contract.

Application:

In the present case, the objective of the contract was to bake a chocolate cake. The root of the contract was thus the cake. The icing part of the contract was a term which was not essential to the contract. Though, it was a term of the contract as it was discussed between Mikaela and Kimiko nevertheless it was not so important that a breach would render the objective of contract useless.

Conclusion:

On the basis of the discussion above, it is concluded that the term about icing color was a warranty in the contract between Mikaela and Kimiko.

Ans. 4

Issue:

The main issue in the present question is whether the ‘no liability for breach of warranty’ sign renders Mikaela not liable for the breach that she committed.

Application:

When there has been a breach of a warranty in a given contract, it will result in damages by the defaulting party. In no case, it can result in termination of contract. A party however can exude himself from any liability by resorting to exclusion clauses at the time of entering into

contract. These clauses are such that it aims to limit or exclude the liability of the party in case of breach of contract. Such clauses are common in standard form contracts. The courts do not readily enforce them and require evidence which shows that they clearly formed part of contract either through writing or notice, prior to formation of contract. Notice may be actual or constructive. Actual notice happens when the attention of the party is brought to the clause by reading it or through other means. In *Olley v Marlborough Court Ltd* (1949)[6] it was held that for exclusion clause to be effective, it must be given prior to or at the time of entering into contract.

Application:

In the present case, the sign acted as exclusion clause as it was displayed and brought to notice at the time of entering into contract. Kimiko can be said to have actual notice of the clause. The contract made between Mikaela and Kimiko can be said to be subject to the exclusion clause as it was displayed at the time of making of contract. It is also given in facts that Kimiko had actually seen the sign. Thus, the breach of warranty by Mikaela is protected by the exclusion clause. Kimiko cannot claim damages from Mikaela by virtue of this clause.

Conclusion:

From the above discussion, it can be concluded that Mikaela is not responsible for the wrong color of the icing as the breach was protected by exclusion clause given in the sign.

[6] (1949) 1 KB 532