

## Construction and Classification of Terms

### 1) Rules of Construction

- Basic Rule - terms given the meaning intended by parties, usually determined objectively
- Parol Evidence Rules – extrinsic evidence cannot vary a written document – exclusions apply
- Aids to Construction – how to interpret the words

### 2) Classification of terms

- Nature of the term – promissory versus descriptive
- Operation of the term – conditions precedent or subsequent
- Importance – conditions, warranties, intermediate terms

### The Basic Rule

- Intention is usually determined objectively – what would the reasonable person consider to be the intention of the parties having regard to the document
- Determining the intention involves consideration of the words in the document, surrounding circumstances, and the purpose of the transaction

### The Parol Evidence Rule

- Parol evidence rule operates where the parties have recorded their contract in writing
- Excludes extrinsic evidence – except as to surrounding circumstances – to vary or contradict the language of a written instrument

### Operation of the Rule: *Gordon v Macgregor* (1909) 8 CLR 316

General rule concerning the admissibility of extrinsic evidence:

- where the agreement is in a written contract, the court can only look at the written contract to determine meaning.
- the written contract may be different to the discussions prior to the agreement being written. However, the purpose of the written contract is to put an end to the disputes that would arise if the agreement were not put in writing.
- Extrinsic evidence may be necessary if it is established that the written contract was not intended to be the record of the contract (ie. there was fraud, mistake, or, the contract was not properly recorded).

### Exceptions to the Parol Evidence Rule

The parol evidence rule will not apply where:

1. the evidence goes to the validity of the contract (if there was fraud, mistake, or, the contract was not properly recorded)
2. Evidence shows the true nature of the agreement – e.g. a named party may have contracted as an agent for another person
3. Where the evidence establishes a collateral contract (the written contract is not altered, rather, the collateral contract adds to the contractual relationship between the parties)
4. Where there is evidence of surrounding circumstances (see next slide).

### Surrounding circumstances

- Position on considering the “surrounding facts” (“matrix of facts”):
  - Conservative position in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* – 1982 HCA – court said evidence of surrounding circumstances should only be given when there is ambiguity in the document.

### Aids to Construction

Some aids courts use in interpreting a contract:

1. Ordinary meaning
2. Internal context
3. Promote validity
4. Intention of parties
5. Contra proferentum

### Nature of the Term

- May be promissory or merely adjectival
- The way that terms are classified may affect the rights and obligations of the parties
- Only a term that is promissory can be breached

### Nature of the Operation of Terms

- Terms may be classified according to the nature of their operation: conditions precedent v conditions subsequent. May be waived
  - Condition precedent – e.g. subject to contract: unless and until certain events occur, the contract is not binding, or certain obligations are to be suspended
  - Condition subsequent – e.g. subject to finance: the contract, or parts of the contract, are brought to an end in specified

circumstances, but unless and until these circumstances operate, the parties are bound

### Importance of Terms

- **Conditions:** Form an essential part of a contract. Goes to the root of the contract. Innocent party has the option of terminating the contract and claiming damages, or, affirming the contract and claiming damages.
- **Warranties:** Do not form an essential part of the contract. Do not go to the root of the contract. Innocent party cannot rescind the contract – it can only claim damages
- **Intermediate Terms:** innocent party may be able to rescind – depending on the seriousness of the consequences of the breach

**Test of essentiality (How to determine if it was a condition or warranty):** Whether the term is of such importance to the innocent party that the innocent party would not have entered into the contract unless the term was fulfilled

### Conditions

How to identify a condition:

- Whether judicial decision has described the term as a condition
- Whether the parties have made it a condition
- Whether it is a fundamental term

### Warranties

- Whether a term is a warranty will be determined by reference to the intention of the parties to be determined from the language used in the contract and surrounding circumstances

### Intermediate Terms

- Intermediate AKA innominate: not able to be classified as either conditions or warranties. Depends on the gravity of the breach

### Exclusion Clause

- Protects a party to a contract from what otherwise would be their liability. Transfer the risk from a seller or suppliers of goods and services to the buyer

### Types of Exclusion Clauses:

1. Clauses that seek to reduce or eliminate the duty that would otherwise be owed to another person “substantive”
2. Clauses that provide a guilty party with a defense “procedural”

3. Clauses that protect the guilty party by imposing restrictions on a claimants' ability to bring an action against them
4. Clauses that require a successful claimant to indemnify the guilty party

### Use of Exclusion Clauses

- Consumer contracts: courts have interpreted exclusion clause to prevent them being used unconscionably. This is reinforced by statutory provisions
- Commercial contracts: exclusion clauses are recognized as a deliberate attempt by parties to allocate risks and costs between themselves

### Contra Proferentem

- In cases of ambiguity exclusion clauses are construed against the party that drafted them; usually, the party they are designed to protect

### Wallis Sons & Well v Pratt & Haynes [1911] AC 394

- Buyers alleged breach of the condition implied under the *Sale of Goods Act 1893* (UK) which provided that goods should correspond with their description.
- Sellers relied on an exclusion clause that it gave "no warranty expressed or implied as to growth, description or any other matters".
- "Warranty" may mean any term in a contract OR it may be read strictly to mean terms that are not conditions.
- House of Lords construed the clause strictly to refer to a warranty in the legal sense – so the exclusion clause did not exclude liability for breaches of terms that were classified as conditions (which this was).

### Negligence Only Rule

- Clear words are necessary to exclude liability for negligence
- A clause expressed in general language may be insufficient, e.g. excluding liability for losses "howsoever caused" or stating that "under no circumstances" will the party be liable
- In *White v John Warrick & Co Ltd* [1953] 2 All ER 1021 - clause in a contract hiring a tricycle said "Nothing in this agreement shall render the owners liable for any personal injuries to riders of the machines hired". The clause did not protect the defendant from liability for negligence. In the absence of clear words covering negligence, the clause was construed as only exempting the owners from liability in contract.

## Four Corners Rule

- Where the contract requires a person to do a particular thing, then the exclusion clause might not be effective if the promisor steps outside the four corners of the contract by failing to do what was required
- This may apply to contracts of bailment – where a party may be specifically required to keep goods in a particular location – in such a case, an exclusion clause will normally not be effective to exclude them from liability

## Deviation

- In cases of carriage of goods, courts have generally found that an exclusion clause won't operate if the carrier deviates from the agreed course of carriage
- The rule of deviation is based on the assumption that the deviation alters the risks of the voyage
- The rule about deviations in contracts of carriage by sea has been imported into contracts of carriage by land.

## Legislative Control of Exclusion Clauses

### Pre 2011

- *Trade Practices Act 1974* (Cth) (and state equivalents) implied certain terms in consumer contract, and prevented these being excluded by exclusion clauses

### From 1 January 2011:

- TPA renamed the *Competition and Consumer Act 2010*
- It includes a new national 'Australian Consumer Law'
- Implied terms are replaced with 'consumer guarantees' – These do not give rise to contractual remedies – Various statutory remedies are available
- Schedule 2, sections 64 and 64A, void (s64) or limit (s64A) exclusion clauses in contracts with respect to consumer guarantees