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## CONTRACTS NOTES

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### WRITTEN TERMS – SIGNED DOCUMENTS

**Signature rule:** Party will be bound by the terms contained in a contractual document which she or he has signed, whether or not she or he has read the document (*L'Estrange*, applied in *Toll (FGCT) v Alphapharm* (2004))

#### Exceptions:

- Non est factum<sup>1</sup>
  - If a person proves that he or she signed a document without carelessness and believing it to be **fundamentally** different from what it was, he or she is not bound by the signature
- Mislead
- Misrepresentation or fraud
  - Signature rule does not apply where document cannot reasonably be considered a contractual document
    - E.g. because it appears to have another function (e.g. receipt)
    - If a party makes a misrepresentation to another in regards to the content of a clause, it is possible if proven, that the clause is of no effect (*Curtis v Chemical Cleaning*)
  - Test: **any behaviour, by words or conduct, is sufficient to be a misrepresentation if it such as to mislead the other party about the existence or extent of the exception** (conveys false impression)
    - Failure to draw attention to a width of exception clause is sufficient – creates a false impression of the clause itself (*Curtis v Chemical Cleaning*)

### BY NOTICE

- Standard terms may be incorporated into the contract by giving the other party to the contract reasonable notice of those terms before the contract is made

#### Timing

- Test: for delivered or displayed terms to form part of a contract, they must be made available to the party to be bound by the terms at a time **before the contract is made**
  - Once a contract is made, it is not open for more terms to be imposed by the unilateral action of one contracting party
- Consider when the contract was made to determine if the terms were presented (*Oceanic Sun Line Special Shipping Company v Fay*)

#### Knowledge or Notice

- Party bound by delivered or displayed terms if he or she has either knowledge or reasonable notice of the terms
- Knowledge (objective):
  - Party who knows a delivered document or sign displayed before or at the time the contract was formed contains contractual terms will be bound by them, read or unread
- Reasonable notice:
  - Party can be bound if terms had been made available in such a form that the party to be bound can be taken to have been given reasonable notice of them (*Thornton v Shoe Lane Parking*)
  - What amounts to reasonable notice depends on:
    - Type of contract
    - Nature of terms
    - Circumstances of the case
  - Where reasonable person would expect it to contain terms of a contract:
    - Mere presentation of document suffices notice

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<sup>1</sup> See: Mistake

- Where terms contained in what is not obviously a contractual document:
  - Party seeking to incorporate must take reasonable steps to bring them to the notice of the party to be bound

### Unusual Terms

- For onerous or unusual terms (e.g. obscure language, significant effect on liability, etc.), party must draw specific/explicit attention to the clause (*Baltic Shipping Co v Dillon* (1991))
  - Anything destructive of rights must be brought to the attention of a contracting party in the most explicit way (*Thornton v Shoe Lane Parking*)

### INCORPORATION BY A COURSE OF DEALINGS

- Where parties have had a history of dealings, contractual terms introduced in earlier contracts may be incorporated into a subsequent contract (*Balmain New Ferry Co v Robertson* (1904))
- Elements:
  - Course of dealings must be **regular and uniform** (*Henry Kendall & Sons v William Lillico & Sons*)
  - Term must have **contractual force**
  - Document relied upon in previous transactions must also reasonably be considered a **contractual document**, rather than having the appearance of a mere receipt or docket (*Rinaldi & Patroni v Precision Mouldings* (1986))

### PRE-CONTRACTUAL STATEMENTS

#### Nature:

- Pre-contractual statement must be **promissory in nature** (otherwise merely a representation – not a term of the contract, remedy only through misrepresentation laws)

#### Determine if contract is wholly in writing or is partly oral: Parole Evidence Rule

- Parole evidence rule: applies to contracts wholly in writing
    - If parties have agreed that everything is in writing and normally in one document, then you cannot use extrinsic evidence to add or vary the agreement
1. Does the contract look complete?
    - Entirety clause? Is it a repository of what the parties wanted?
    - If yes → primary presumption that wholly in writing
      - Parole evidence rule: contract is all that the court can look to in determining rights and obligations of parties
  2. Do surrounding circumstances show that the party intended for the contract to be partly oral and partly written?<sup>2</sup>
    - Can look to circumstances *for* the purpose of displacing the presumption (*State Rail Authority v Heath Outdoor* (1986))
      - If ambiguous or susceptible to more than one meaning
    - Displaces the presumption of being wholly in writing
    - It is open to a party to prove that they have agreed orally on terms additional to those in writing
      - Use extrinsic evidence
    - If no → wholly in writing → parole evidence rule applies
    - If yes → partly oral, partly written
      - Terms of contract are to be ascertained from **whole circumstances as a matter of fact** (*Moore v Garwood*)

<sup>2</sup> Refer to 'Construing the Express Terms – Surrounding Circumstances'

- In determining the terms of such a contract, **surrounding circumstances** may be used as an aid

#### Exception to Parole Evidence Rule: Collateral contracts

- Contract made when one party makes a promise, connected to but independent of a main contract, and as consideration for that promise, the other party agrees to enter into the main contract
- Requirements:
  - Statement must be intended to induce entry into the contract (*JJ Savage & Sons Pty Ltd v Blackney* (1970))
  - Must be strictly proved (*Heilbut Symons & Co v Buckleton* (1913))
    - Easier when alleged contract deals with a subject matter than one would not naturally expect to find in the main contract
  - Statement must be consistent with the terms of the main contract (*Hoyts v Spencer* (1919))

#### When is a statement a term of a contract?

- For an oral statement to be binding as a term of the parties' contract, the statement must have been made as a **promise** and **intended** by the parties to be part of their contractual agreement
  - **Objective intention: reasonable person test**
- Consideration of relevant factors: (*Equuscorp v Glengallan Investments* (2004))
  - Significance of written contract
  - Language (*JJ Savage & Sons v Blakney* (1970), e.g. expression of opinion vs "I guarantee", "I promise")
  - Relevant expertise of the parties (*Oscar Chess v Williams* (1957))
  - Importance of the statement
  - Timing
  - Form of the written contract

#### CONSTRUING THE EXPRESS TERMS

- Evidence of **surrounding circumstances** is admissible to assist in the interpretation of the contract if the language is **ambiguous or susceptible** of more than one meaning (*Codelfa Construction Pty Ltd v SRA (NSW)* (1982))
  - Not admissible to contradict language of contract when it has plain meaning
  - Facts existing when contract was made will not be receivable as part of surrounding circumstances to aid construction, except if:
    - Known to both parties, or
    - Are notorious (whereby knowledge will be presumed)

#### Process of Construction

- Courts consider the meaning that a reasonable person would give to the contract
  - Can be contextual (*Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) or objective (*Pacific Carriers v BNP Paribas* (2004))

#### Exclusion/Indemnity Clauses

##### Legislative Restrictions

- Clause may be void under statute – ACL Pts 2-3 (unfair contract terms) and 3-2 (consumer guarantees)

##### Common Law Approach

- Party can rely on protection of an exclusion clause if:
  - Clause was incorporated into the contract, and
  - The clause, as a matter of construction, applies to exclude/restrict liability in relation to the issue in dispute

- Scope of exclusion clause to be determined by reference to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the contract in which the clause appears including the nature and object of the contract (*Darlington Futures Ltd v Delco Aust Pty Ltd* (1986))

## Negligence

- Clear words are necessary to exclude liability for negligence (*Davis v Pearce Parking Station* (1954))

## IMPLIED TERMS

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### IMPLIED IN FACT

- To be implied, certain conditions need to be fulfilled: *BP Refinery Pty Ltd v Hastings Shire Council*
  - Reasonable and equitable
  - It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it
  - It must be so obvious that it 'goes without saying'
  - It must be capable of clear expression
  - It must not contradict any express term of the contract
- Cumulative satisfaction of all five elements

### IMPLIED IN LAW

- Terms implied as a legal incident of all contracts of a particular class
  - Examples:
    - Reasonable fitness and merchantable quality
    - Warranty of seaworthiness
    - Implied duty of care
    - Implied promises of non-disclosure
- **Test of necessity** (*Byrne v Australian Airlines Ltd; Frew v Australian Airlines Ltd* (1995))
  - **A term can only be implied if its omission would entail that the rights of the parties under the contract were significantly diminished**
  - For a term to be implied in law, it must be:
    - Applicable to a defined category of contracts
    - Suitable in a way which allows it to be implied in all contracts in that category

### IMPLIED BY CUSTOM

- **A term may be implied on the basis of custom where the custom is "well known and acquiesced in"; then "everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract"** (*Con-Stan Industries of Aust v Norwich Winterthur Ins (Aust)* (1986))
  - Term cannot be contrary to express terms of agreement
  - Person may be bound by a custom notwithstanding the fact that he had no knowledge of it
  - Existence of a custom is a question of fact

## AUSTRALIAN CONSUMER LAW

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### Schedule 2 of *Competition and Consumer Act 2010* (Cth)

#### UNFAIR CONTRACT TERMS

- Part 2-3
- Ability to declare certain contractual terms unfair and therefore void

1. Must be a **standard form contract**

- Rebuttable presumption in s 27(1) definition
- Onus is on Respondent to prove that it is not a standard form contract – according to considerations in s 27(2)

## 2. Consumer contract

- s 23(3): definition excludes commercial contracts
- Applies to small business contract (2016 Amendments have extended scope to certain small businesses)

## 3. Unfair

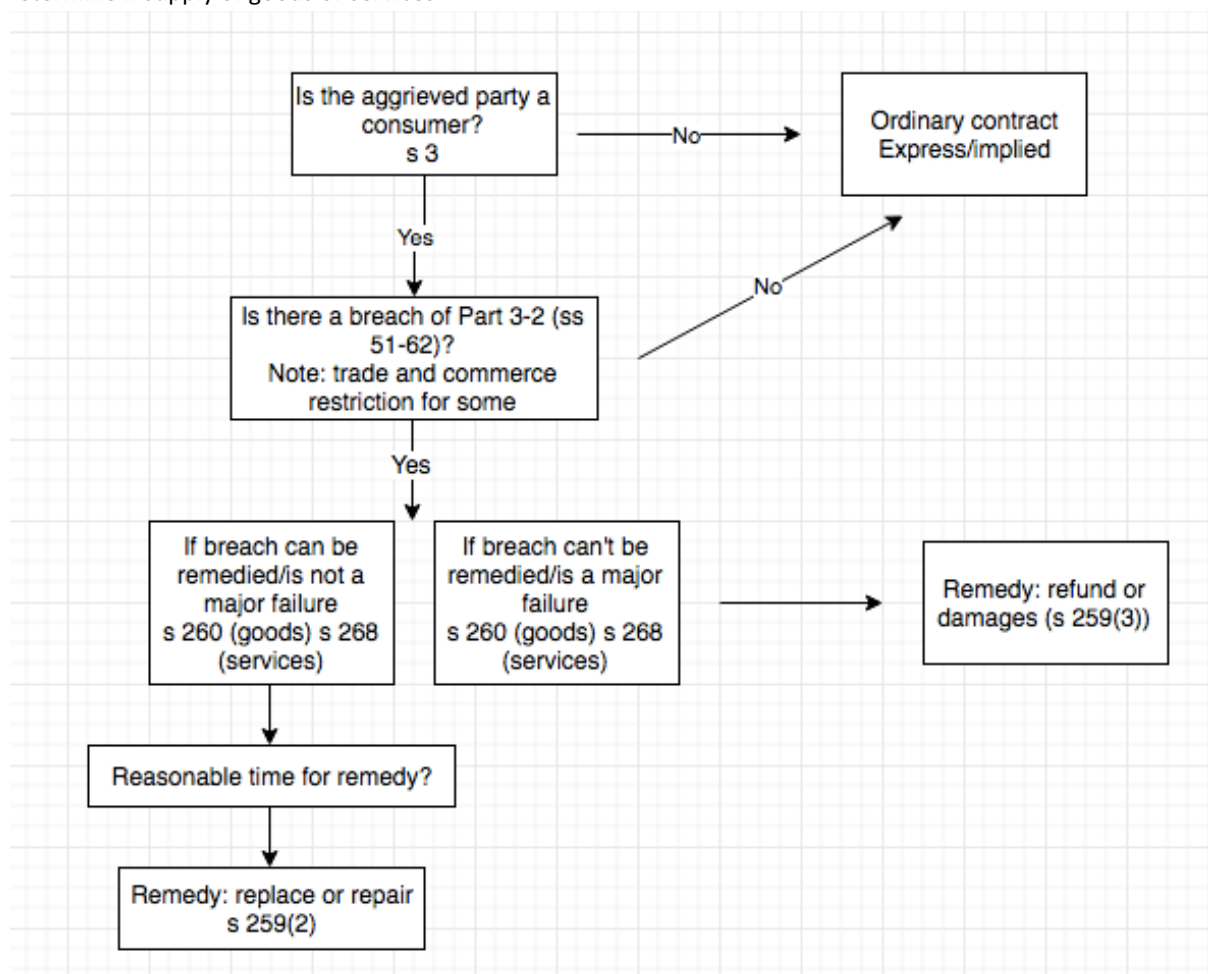
- Meaning in s 24
- Examples in s 25 – designed to put contractual parties on equal footings
  - If contract can be changed, terminated, etc. by just one party, it is likely that the term is unfair

### Remedy:

- s 250
- Once declared unfair, it is severed from the contract
  - Test of severance: if contract is capable of operating without the unfair term, contract continues to bind (s 23(2))

## CONSUMER GUARANTEES

- Ability to imply certain guarantees into a contract
- Guarantees cannot be contracted out of (s 64)
- Determine if supply of goods or services



## RESCISSION (REMEDY)