THE LAW OF CONTRACT (HD NOTES)

UPDATED
28/07/2017

These notes were originally designed for class participation when I was a student but have been updated over time for use as a tutoring and lecturing resource. They provide a detailed analysis of the material and cases and will be a useful resource for learning the course content, participating in class discussions and completing assessment. They have been updated to be consistent with the latest edition (13th ed.) of the textbook for this class.

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Written terms

Whether you are bound by written terms depends on if appropriate notice was given (i.e. reasonable notice). If you have signed a written document this is strong, though not conclusive evidence that such notice was given (depends on the nature of the document i.e. likely to contain terms or not). For unsigned documents and displayed terms the party seeking to rely on the terms must show that they were available prior to formation and reasonable steps were taken to bring the terms to the attention of the individual to be bound by them. The standard of what is "reasonable" depends on the nature of the terms. If they are standard terms then simple display should suffice, however if they are unusual or onerous terms something more must be done to bring the terms to the attention of the person to be bound.

WRITTEN TERMS AND THE EFFECT OF A SIGNATURE

The most straightforward case in identifying terms in a written document is when the document is signed, but terms may also be found in unsigned documents, signs, notices, web pages, hyperlinks, emails, or in the statements made during negotiations.

Signed documents (summary):

L'Estrange – you are bound by terms contained in a written document that you have signed unless:

1. The document is of a type not likely to contain terms (e.g. a receipt);
2. There is fraud, misrepresentation or rectification (equitable relief); or
3. Non est factum ("this is not my deed").

12.15 ***L'Estrange v F Graucob Ltd*** **[1934]** – Cigarette vending machine – **effect of a signature/ nature of the document**

Facts:

- P signed an order form which contained printed terms of sale.
- It was retained by the sales person for 2 days and then an order confirmation was sent to P, signed on behalf of D.
- When it was delivered, it did not work.
- D asserts that the contract contained terms that excluded liability, even statutory. Plaintiff claims she didn't know about such terms.

Held:

Trial Judge:

- Held in favour of P stating P only had knowledge of Price, instalments and installation.
- Font was unreasonably small and the D did not do what was reasonably sufficient to give notice.

Appeal Judge

(Scrutton LJ):

- The main question was did the clause form part of the contract? If so liability excluded.
- Refers to *Parker v South Eastern Ry Co* which held that when a document is signed it does not matter if it was not read but also if it is not signed it is likewise true that it does not matter if there is other evidence it is assented to.
- No evidence of misleading behaviour despite assertions, additionally despite assertions that it was not a contractual document, an order form is a contractual document. May be an acceptance or a proposal but always contains contractual terms.
  A party will be bound by the terms contained in a contractual document which he or she has signed, whether he or she has read the document if not induced by any fraud or misrepresentation

(Maugham LJ)**:**

- Though not a formal document (brown paper) it can be found that a verbal acceptance of a written offer could not be altered by extraneous evidence.
- Contract in his opinion was formed when the order confirmation was signed by the defendants.

12.25 ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** - Flu vaccine – **effect of a signature – reasonable notice**

Facts:

- Alpha (sub-distributor) ask Richard Thomson to organise transportation of vaccine, he employs Finemores. Temperature was not correct during shipment. Damage to goods while in possession of Toll.
- Finemores (the carrier) provided a quotation to Richard Thomas under a cover letter that stated the cartage

was subject to conditions found on the back of a consignment note which was critically not attached.
- Asked for credit card details and for RT to sign recognising payment schedule
- Above signing line it said please read 'Conditions of Contract prior to singing'
- A rep for RT signed without reading.
- Clause 5 held customer entered into contract on own behalf as well as associates
- Clause 3(b) held associates to include persons having an interest in goods
- Clause 6 that in no circumstances would carrier be responsible for loss and damage

Causes of action: breach of duty as bailee and negligence.

Arguments:
- D conceded to binding agreement between RT and Finemore but disputes it was bound by clause 6. Arguing 1: that the terms on the reverse of the credit were not part of the contract and 2: RT had not contracted as agent of AP

Trial and Appeal:
- In favour of AP 'it was necessary for Finemores to establish that it had done what was reasonable sufficient to give Richard Thomson notice of them and this had not been done.

HC held: [Gleeson Cj, Gummon, Hayne Callinan and Heydon JJ)
- Signature = prima facie evidence of acceptance of terms.
- Subjective intention and evidence of it is not important and inadmissible.
- [179] Confirms reasonable person and objective approaches
- **"The general rule … is that … a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document."** p393 (this goes to the point about a reasonable person not thinking this will have contractual terms about delivery)
- **'The representation (by signing) is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents… whatever they may be.**
- Uses *Parker v South Eastern* to show that signature absent fraud or misrep' does not matter whether read or unread still bound.
- *Wilton v Farnworth* up to individual to abstain from signing if he did not understand. Otherwise everyday business would be chaos.
- **Signing a document that is known and intended to affect legal relations is an act that ordinarily conveys a representation to a reasonable reader of the document that he has either read, approves contents or is willing to take risk of being bound. Especially if signed near a request to read doc**
- **The Court disagreed with the view of the primary judge that there was a requirement to give reasonably sufficient notice of the terms before signing.** Noted three principles from L'Estrange in which a person would not be bound by signed document. Misrep, non est factum and memorandum.
- **Application for credit was intended to affect legal relation and no evidence the conditions were abnormal for the industry**.
- The Court found that Alphapharm was bound by cl 6 of the Conditions of Contract, appeal was allowed.
- Anything not found in consumer protection legislation is intended to be decided by parliament
- Protect third parties that think the signature binds the individual etc.
- Law of agency: made expressly or impliedly. Richard Thomson was agent of Alphapharm.

Criticisms of L'Estrange signature rule:
- The rule takes the objective fact of signing and disregards the reality of whether the party understood the terms or was even informed of them.
- Common sense may suggest consumers often do not read terms, appreciate allocated risks and may not be capable of understanding them.
- Individuals are poor (scientifically) at assessing the risks associated with future events.

EXCPETIONS to signed docs (Circumstances in which the effect of signature may be avoided)

12.35 The rule in *L'Estrange v Graucob* will not apply where the signature was **induced by misrepresentation or fraud**, or in some cases of **mistake**. The rule will also not apply where the document cannot reasonably be considered a contractual document for example, because it appears to have another function, such as being a receipt.

Misrepresentation and non est factum

Non est factum (Latin for "it is not [my] deed") is a doctrine in contract law that allows a signing party to escape performance of the agreement. A claim of non est factum means that the signature on the contract was signed by mistake, without knowledge of its meaning, but was not done so negligently. A successful plea would make the contract void ab initio (always void not voidable).

Non est factum is difficult to claim as it does not allow for negligence on the part of the signatory, i.e. *failure to read a contract before signing it will not allow for non est factum*. In a successful case, the fundamental basis of the signed contract must be completely different from what was intended. In *Lloyds Bank v Waterhouse* (1990) a father acted as a guarantor to his son's debt when purchasing a farm. The father was illiterate and signed the bank document under the belief that he was acting as the guarantor for the farm only, when the contract was actually for all the debt accumulated by the son. As he was illiterate, this was a mistake as to the document signed and the father was successful in claiming non est factum.

Another notable case on non est factum is *Foster v Mackinnon* (1869) LR 4 CP 704 where an elderly man signed a bill of exchange but was only shown the back of it. He was granted a new trial.[1]

12.40 ***Curtis v Chemical Cleaning & Dyeing Co*** [1951] – Cleaning of a wedding dress no liability - **misrepresentation**

Facts:

- P took white satin wedding dress to D for cleaning. P was handed by shop assistant a receipt which she was asked to sign.
- She asked why (b4 singing) and was told they don't accept liability for certain risks.
- She signed receipt which contained a different clause with complete indemnity.

Cause of action: negligence. D denied, relying on an exemption clause.

Trial judge:

- Burden on D to prove no negligence, innocent misrepresentation meant clause not possible to rely upon. Appeal was on what constitutes fraud or misrepresentation.

Appeal Judge: (Somervell LJ) (Singleton LJ agreed)

- Denning LJ held that "any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression that is enough."
- **Failure to draw attention to the width of the clause gave the false impression it only related to the beads and sequins.**
- **Obiter:** receipt perhaps **not a contractual document**.
- The County Court judge found there had been an **innocent misrepresentation** and this finding was upheld on appeal.
- Appeal dismissed.

Non-contractual documents:
The rule in L'Estrange will also not apply where the document in question could not reasonably be considered a contractual document. A person will, accordingly not be held to terms on a receipt, voucher or timesheet.

Note: When there are terms that purport to be part of a contract that is not signed, courts require reasonable notice of those terms to have been given to the party to be bound.

UNSIGNED WRITTEN DOCUMENT: (2 conditions need to be met if party is to be bound)

1. Terms available before or at time of contract formation
2. Reasonable steps taken to bring notice

Incorporation of Terms by Notice

12.45 A contracting party may incorporate its terms into the contract by giving the other party to the contract reasonable notice of those terms before the contracts is made.

This can be done by:

I. Delivering a document containing the terms; Or
II. Displaying a notice containing the terms E.g. Car park may display terms prior to entry

Whether they will be included in the contract depends on two factors:

1. Whether the displayed or delivered terms were available to party to be bound by those terms at a time **before the contract was made;** and
2. Whether **reasonable** steps were taken to bring the terms to the **notice** of party to be bound.

12.50 **Timing**: 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.

12.55 ***Oceanic Sun Line Special Shipping Company Inc v Fay*** (1988) – Greece exclusive jurisdiction clause

Facts:

- P (Queenslander) made booking in NSW for a cruise of the Greek islands on a vessel owned by a Greek company (the defendant)
- On payment he was given an "exchange order" which would be exchanged for a ticket on boarding the vessel. In Athens, he obtained the ticket with a condition that the courts of Greece should have exclusive jurisdictions in any action against the owner.
- P sued for negligence for injuries cause in a trap shoot activity.

Arguments:

- Defendant submits the contract was not formed in Sydney but in Greece at or after the time of ticket issue. This argument was based on their contractual to cancel any cruise which was said to make promise of carriage illusory until the P turned up in Greece for travel.

Issue:

- Whether the contract includes the exclusive foreign jurisdiction set out in cl 13.

High Court Judge held: (Brennan J) (Wilson, Toohey, Deane and Gaudron JJ agreed)

- **Reasonable notice of terms required before contract formation to get incorporation.**
- **Exemption on exchange order was not wide enough to exclude existence of any contractual obligation. In fact it allowed for a refund and prescribed that a ticket would be given on boarding if the cruise was to go ahead**. So far as appears the P is entitled to a ticket if he/she presents the exchange order.
- **No right to deny or cancel in the event it proceeds. Even though this is seen on the ticket if a contract is created at the purchase these statements cannot alter contractual rights**.
- **If no contract was formed there would have been no consideration moving from the defendant to support the defendant's right to not refund the passenger in the event of cancellation by the passenger**.
- **Conventional ticket rules don't apply when the defendant is obliged to give the ticket in exchange for the exchange order on boarding.** Not consistent with reasonable objective intention of the parties.
- If this were accepted the party would only be able to accept the conditions after travelling to Greece and exchanging for the ticket and to reject would require loss of the fully paid fare.
- ***Olley v Marlborough*** **a clause on a ticket is ineffective to alter a contract if issued after K is made**.
- **If it is not in the originally signed contract then the D needs to do all that is reasonable to bring the exemption clause to the attention of the P**. ***Hood v Anchor Line***
- Held that the contract was made in NSW and that the conditions on the ticket did not form part of the contract.
- Appeal dismissed.
- [Side note: the case went to high court for conflict of laws (because of the exclusion clause to Greece)]

Ebay International AG v Creative Festival Entertainment Pty Limited: Tickets to a music event (BDO) issued after conclusion of the contract contained a term that was not displayed on the Ticketmaster webpage. Rares J found the term to be misleading conveying the impression it bound consumers when it was not incorporated into the contract of sale.

12.60 **Knowledge or Notice**

If the timing requirement is satisfied, a party will be bound by delivered or displayed terms if he or she has either actual knowledge or reasonable notice of the terms. What will amount to reasonable notice will depend on the type of contract, the nature of the terms and the circumstances of the case.

Knowledge (objective)

Party who knows a delivered document or sign displayed, before or at the time the K was formed contains contractual terms, will be bound by them. ***Parker v South Eastern Railway Co.*** Read or un-read.

Reasonable notice
In the absence of this a party can be bound if the 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. Courts have suggested that if the document is one that a reasonable person in the circumstances would expect it to contain the terms of a contract, the mere presentation of the document will suffice notice.

E.g. the bill of lading is commonly known to contain contractual terms and the ship owner is thus entitled to assume the person shipping the goods has such knowledge. Person must bear the consequences of his own exceptional ignorance. (***Parker v South Eastern Rail Co***)

Reasonable notice of non-contractual documents (doc's not obviously containing K terms)
When terms are contained in what is not obviously a contractual document, the party seeking to incorporate them must take reasonable steps to bring them to the notice of the party to be bound.

Causer v Brown: Dry cleaning damage, defendants sought to rely on exemption clause contained in docket handed to Causer when he left wife's dress. Herring CJ found the voucher was one that might reasonably be understood to be only a voucher for the customer to produce when collecting the goods and not to contain clauses exempting liability.

What amounts to reasonable notice?
Essentially depend on the circumstances. Must be in the form that it is likely to come to the attention of the party to be bound…

Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd: Bingham LJ summarises the effect of English cases to be: Look at the:

(1) **nature of the transaction** and the
(2) **character of the parties,** to look at the
(3) **notice that was given** and
(4) to resolve whether in all the circumstances it is **fair to hold him bound** by the condition in question.

12.65 ***Thornton v Shoe Lane Parking Ltd*** [1971] 2 QB 163 – reasonable notice

Facts:
- P parks in D's garage. At the bottom of the sign out front showing costs read a statement "All cars parked at Owner's Risk.'
- On the ticket read in small print "This ticket is issued subject to the conditions of use as displayed on the premises"

Issue:
- Whether a ticket to the car park contained conditions which removed liability of ShoeLane when Thornton was severely injured in the car park. No argument over fault.

Appeal judge held: (Lord Denning)
- Even though he did not read the ticket he still would have had to search for the conditions
- **Traditional ticket cases rejected due to automatic nature of machine**. As he cannot refuse nor get money back and is committed at moment when he put his money in. Acceptance takes place at this point and the terms of the offer are contained in the noticed placed on or near the machine. **A person can only be bound by terms in which he/she is given notice beforehand**.
- Even terms printed on the ticket. Ticket is no more than a voucher to allow exit.
- Unless the exemption clause (individual not plural) is drawn to his attention.
- **He is bound if he is aware of it or if the company did what was reasonably necessary to give him notice of it.**
- **Clause so wide and so destructive of his rights that it need be explicitly drawn attention to in order to be bound.**
- There was not reasonable notice of the exempting conditions.

Megaw LJ:
- He only could see the terms when it would be practically impossible for him to withdraw his car.
- Impractical to also block entrance to search for terms prior to entering money.

Reference to terms that are not readily available
Trader may seek to incorporate terms by giving notice in another document that is not immediately available to the customer. Typically this has not been sufficient notice to allow incorporation. E.g. in ***Thornton*** where customers had not only small print but needed to find the conditions contained not at the entrance.

In ***Baltic Shipping Co*** it was found that even though the terms were available to the passengers at the offices of the provider of the cruise it was insufficient to comply with the responsibility to bring unusual terms at least to the notice of passengers.

In ***NSW Lotteries Corporation Pty Ltd v Kuzmanovski****:*
Scratch it game where a prize would be awarded if the picture (someone swimming) matched the word (Bathe defined as to swim) Lotteries refused to play and told them the required word was swim and that more over eligibility for the prize was contained in the verification code. The legislation provided that Lotteries could include verification code and did not have to pay out unless it corresponded. Rule 3 provided that if there was any discrepancy between the instructions on the ticket and the rules the rules would apply. Trial judge found in favour concluding they were synonymous and that the verification code was for security and did not change the nature of the contractual undertaking. The opposite of the second finding was handed down by the Full Federal Court as the ticket contained the words TICKET GOVERNED BY THE PUBLIC LOTTERIS ACT 1996. Unambiguously sought to include act by virtue of clear notification but still found them liable for engaging in misleading and deceptive conduct and awarded damages.

12.75 **UNUSUAL TERMS**

Denning LJ in *J **Psurling Ltd v Bradshaw*** "Clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd: one of terms contained in a document given after 47 transparencies were order outlined an unusually large charge if they were not returned before 14 days was found to be not payable as the judge referred to the civil law principle that in carrying out contracts parties act in good faith. They found that according the traditional doctrine the contract was not formed until Stiletto opened the bag. Once the delivery note was taken out it would have been recognised as something likely to contain terms and would have seen such terms printed. Whilst commonly encountered terms would have been incorporated they found Interfoto did not draw attention to the unreasonable and extortionate clause.

Concern for the sufficiency of the notice of unusual terms was also shown by the NSW Court of Appeal in *Baltic Shipping Co*

12.75 Baltic Shipping Co v Dillon ("The Mikhail Lermontov") (1991) 22 NSWLR 1 **MUST READ**

- Dillon bought a ticket for a cruise but when on board the ship sank and as a result the respondent suffered physical injury, nervous shock and the loss of all her belongings.

Judge held:

- Kirby P held that at the time of formation of contract of carriage, the respondent "had not had a reasonable opportunity to see and agree to the terms and conditions which the appellant sought subsequently to impose upon her". "She was entitled, in law, to take the view that she would be issued a ticket which would contain no unusual provisions …"
- Gleeson CJ also held that the limitation clauses did not form part of the contract of carriage.
- The mere availability of the conditions at the company's office was not adequate notice of unusual terms, such as those significantly limiting company's liability.
- Any terms that wish to be incorporated need to be given before or while contract is formed. Steps need to be reasonable and the burden is higher for unusual terms.

ESSENTIALLY FOR ONEROUS OR UNUSUAL TERMS – AVAILABLITY IS NOT ENOUGH YOU MUST DRAW SPECIFIC/ EXPLICIT ATTENTION TO THE CLAUSE!

Parker v South Eastern Railway Co (1877) 2 CPD 416 LJ Court of Appeal
J Nelish deals with this case as a ticket case. The ticket had an exemption clause on the back that the railway company would not be liable for the loss of any goods valued up to 10 pounds. This bag was worth 24 pounds. Mr Parker knew there was writing on the back of his ticket but did not read it. Court held there had to be reasonable notice. Sent back for retrial. Left his bag at the railway station.

Plaintiff has burden of proving contract was breached. If the person with the right to possess goods voluntarily allows somebody else to possess them, with the arrangement that that person will hand them back at some point, if the goods

are damaged or lost whilst in the possession of the second person, then the first person has the right to damages unless the 2nd person can show the damage or loss was not caused by their negligence.
"Bailment" of goods.
Cause of Action:

Olley v Marlborough Court Ltd [1949] 1 KB 532. p403
-You can't add in a term AFTER a contract is made.

Contrast with signed contracts:
Signature renders the terms in a signed document presumptively binding on the signing party.

In ***Toll Pty Ltd v Alphapharm*** the high court rejected the argument that a special notice requirement should apply for unusually onerous terms in signed contracts. In the absence of misrepresentation, a plea of non est factum or equitable considerations that vitiated consent, notice of terms was not relevant to the question of whether a party who has signed is bound.

Identifying the terms in electronic contracts
Clearly a person is unlikely to have signed a contract in a physical sense especially online. In some instances the act of clicking 'I accept' will have the same effect as a signature in incorporating terms. ETAs Electronic Transaction Acts provide that when a person is required to sign by law then that requirement is taken to have been met if an a appropriately reliable method has been used to indicate he person's approval and the person consents to the requirement being met by that method. E.g. 'I accept'

There may be cases where clicking such a button will not have the effect of signature in incorporating terms. This may be the case in circumstances where such an action would usually be associated with a different outcome e.g. accepting download of software or giving delivery details.

Class 2.1

REVISION:

Signed documents:

- L'Estrange Rule -> Signature = bound unless:
  1. Equitable relief (Fraud, misrepresentation or rectification)
  2. Non est factum

Unsigned documents: party seeking to rely must show

1. Terms available before K formation (Thornton and Sun line)
2. Reasonable steps -> [Exclusion clauses particularly relevant]

Incorporation by a Course of Dealings
12.85 Where parties have had a history of dealings, contractual terms introduced in earlier contracts may be incorporated into a subsequent contract.

12.90 Balmain New Ferry Co Ltd v Robertson (1904) 4 CLR 379 – Jump the turnstiles ferry style

Facts:

- Ferry from Sydney City to Balmain fees were collected on the Sydney Wharf
- Entrance sign stated that all those leaving or entering the wharf regardless of which boat they travelled on were required to pay 1 penny
- He missed his boat, attempted to leave through the turnstile but refused to pay another penny
- They tried to detain him and he brought an action for assault and false imprisonment

Issue: Was the condition he had to use a penny to leave a term?

High Court Judge Held:

- Whether he was entitled to demand he be specially released through depends on the conditions of entry. Wharf is not a public place it is private. They could impose any terms as they saw fit.
- No express terms, TF terms must be implied from the circumstances. Disregards notice board as it is immaterial whether the company did what was reasonable to direct public attention to it.
- He was aware there were turnstiles; paying the fare on numerous occasions prior, only on payment could he usually go in or out.

- The only contract that can be implied is that the company undertook to carry him as a passenger to Balmain. Plaintiff rescinded the contract and decided to leave.
- Rights no different than if in his own boat, still private property and he was not forced to be entrapped. If he wished to use turnstile as an exit he had to comply with usual protocol. Company was under no obligation to make an exception. Only had himself to blame for his detention.
- It was their right to maintain the turnstile as a mechanism to protect their interests and was entitled to prevent him from squeezing through the space.

12.95 The course of dealings must be **regular** and **uniform** [*Henry Kendall & Sons v William Lillico & Sons; Chattis Nominees v Norman Ross Homeworks; McCutcheon v David Macbrayne; Hardwick Game Farm v Suffolk Agricultural Poultry Association*]. In addition, the 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.

12.100 Rinaldi (manu) & Patroni Pty Ltd v Precision Mouldings Pty Ltd (carrier) (1986) WAR 181

Facts:

- Contract for transportation of a fishing vessel that was damaged during performance of the contract. The appellants relied on condition 5 of the cart notes to protect them from a claim for damage done to the boat by their own negligence.
- Similar contracts on 9 of 10 previous occasions: Agree on phone orally, cost worked out and entered by the appellant's driver in a book of "cart notes" which was then prepared in triplicate for signature by consignee. (New owner of boat)
- From of document "All goods are accepted subject to conditions on reverse."
- Con 5: protect appellants from a claim by the respondent for damage done by negligence of the appellants or their servants, agents or subcontractors.

Issues:

1. Is there a prima facie case? There was a contract of bailment so the onus of proof is reversed. You need to show that the damage was not caused by your negligence.

Arguments:

- But condition 5 says that if there is damage or loss, you can't sue us. Plaintiff says but you did not mention this term at the time of formation of contract. But you signed the document, so therefore you are bound. But you CAN'T add on the term AFTER the contract was formed. If it should appear that the parties had over a period of time been conducting business upon terms excluding liability then it should be held that on the occasion in question they contracted upon that basis.

Appeal judge held: (Burt CJ)

1. **If the document or documents containing terms and conditions are not considered "contractual documents" they cannot be implied into a current or later contract through a course of dealing. Never was the exclusion clause part of the contract.**
2. **Dealings must be regular and usual.**

- Rules out ***Spurling v Bradshaw*** (Orange juice storage with "landing account" as it is a ticket style case.) Cart notes not acceptance of the offer made by the respondent to the appellant whereby the appellant was requested to carry boat. As it was conceded that the "cart notes" were post contractual.
- ***McCutcheon v MacBrayne:*** Decided that an oral contract after previous written contracts could not impliedly contain the earlier terms as there was no established "constant course of dealings" Must find earlier contract or contracts containing that term.
- Document nothing more than acknowledgment of the delivery of goods not contractual. Request to accept delivery not to carry goods.
- ***Hill case:*** No evidence of any course of prior dealing in which the parties mutually regarded the terms and conditions endorsed on the back of the form as part of the contract between them.
- ***Hardwick Game:*** 100 previous dealings all regular = Yes.
- ***Hollier v Rambler Motors:*** "I do not know of any other case in which it has been decided or even argued that a term could be implied into an oral contract on the strength of a course of dealing which consisted of at most three or four transactions over 5 years.'
- ***British Crane Corp v Ipswich Plant Hite Ltd:*** Not from course of dealing rather is to be derived from common understanding which is to be derived from the conduct of the parties (usual conditions).

STATEMENTS MADE DURING NEGOTIATIONS/ Parole Evidence Rule

12.105 **Statements made during negotiations**

Can be **promissory** or mere **representation**… In assessing whether a statement forms part of a written contract, the first issue is to consider whether the evidence of the purported term is admissible to the court. Secondly, courts must decide whether the parties would have intended the statement to form part of the contract.

- Statements made during negotiations may form part the basis of the parties' oral contract.
- Alternatively they may decide (where a significant transaction is involved) to formalize their agreement in a written contractual document that contains some, but perhaps not all, of the statements made during negotiations.
- They may then have further discussions about how they will perform or additional obligations. E.g. that a clause may not be enforced except if XYZ happens.
- If a statement in negotiations proves false the legal status of it may be an issue of significance. (Party relying on it may have remedy in tort, contract or legislation.
- If it was a term of K (warranty) then it will be a BOC.
- If not (mere representation) contractual remedies will not be available (in some cases under misleading and deceptive conduct laws) estoppel in other cases.

Hardwick Game Farm

1. Groundnut meal was not reasonably fit for the purpose.
2. Excluding/limiting clause.
3. But HOW was the contract made? Orally, and term was not incorporated at that time. Rule: You can't add in the term (**Olley** case)).

12.110 **Entire agreement clauses (merger clause)**

- Will essentially take strict view, doesn't exclude extrinsic evidence for fraud.

See the following link for a discussion on Entire Agreement Clauses as they relate to the Parole Evidence Rule: https://www.claytonutz.com/knowledge/2009/july/entire-agreement-clauses-what-do-they-seek-to-do-do-they-work

12.115 **Parol Evidence Rule (relevance of evidence):** only applies to contracts wholly in writing

Parol Evidence Rule: 2 Limbs

1. If the parties have agreed that everything is in writing and normally in one document (or two) then you can't use something else extra or extrinsic to add to or vary the agreement. Reduced. *SRA (NSW) v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 [12.135].
    a. Whether the written contract was the entire agreement, determined **objectively**.
2. Can take in surrounding evidence if **AMBIGUOUS** OR **SUSCEPTIBLE TO MORE THAN ONE MEANING.** Construction/meaning. [Codelfa].

Two parts:

1. INCOPROATION ASPECT: Prevents extrinsic evidence being given to add to, vary or contradict the terms of the contract as they appear in wholly written contract
2. INTERPRETATION ASPECT: Limits the evidence that might be given to explain the meaning of those terms. (Only use when there is ambiguity on the face of the doc)

Two views:

1. Strict view -> written document indicates that K is wholly in writing. (exclude any EE)
2. Liberal view -> can use extrinsic evidence to prove contract not wholly in writing (State rail)

It excludes any extrinsic evidence to a contract in writing including: oral conversations, letters or early drafts of the contract. May reasonably be assumed that when parties formalize a contract in written terms the parties intended that the document contain or integrate all of the terms of their bargain.

12.135 ***State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*** (1986) 7 NSWLR 170

Facts:

- Agreement to advertise on the defendant's property
- Clause 6 held that defendant could terminate with one calendar months' notice in writing and it shall give no rise to compensation
- Dispute after policy decision to ban cigarette advertising on govt property. Def terminate contract in 1983.
- "The only time that the clause is ever invoked is for non-payment of rent or if somebody wants to advertise objectionable advertising content."

- Further that such a clause applied when renting the sign where as he was renting the ground space and building his own displays

Arguments

- That the letter and its terms should take precedence over the contract
- That the contract was part verbal and part written. Always open to a party to suggest written contract is not the binding record of their contract.

Judge held: (McHugh JA)

- Holds that even if the letter were submitted there was no inconsistency between it and the contract. As they both indicated a 5 year deal "until sooner determined"
- **Parole evidence rule has no operation until it is first determined that the terms of the agreement are wholly contained in writing. Need evidence to establish wholly written.**
- TF oral evidence to prove a contractual term cannot be excluded until such a determination. *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd.*
- **The mere existence of a written contract does not exclude evidence of oral terms if the other party asserts such terms were agreed it is merely an evidentiary foundation.**
- Comes down to whether the last assertion is proved.
- However, Mr Giles made it plain that he had no authority to change any condition of the contract. Standard form
- Not possible that they are collateral contract as they contradict the express terms.

12.140 (4) Where a contract is partly written and partly oral, the terms of the contract are to be ascertained from the whole of the circumstances as a matter of fact. (5) In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are.

Exceptions to the parole evidence rule in identifying terms.

1. Collateral contracts
2. Estoppel [not clear whether you can use this]

12.145 **Collateral contracts**

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. The parole evidence rule does not apply to exclude evidence of a collateral contract.

12.150 **Requirements for establishing a collateral contract**

For a statement to give rise to a collateral contract, the statement must be made as a promise and must be intended to induce entry into the contract: ***JJ Savage & Sons Pty Ltd v Blakney*** (1970) 119 CLR 435.

Heilbut Symons & Co v Buckleton "Must be strictly proved". [1913] AC 30 – selling shares to new company, company known for dealing in rubber from Malaysia. A prospective buyer, Buckleton, rings up before the sale of the new shares. Prospective buyer bought shares after having a phone conversation which assured the buyer that they were a rubber company, when in fact they were not. Buyer claimed a collateral contract. House of Lords said there was no such promise, but that the common law recognises this form of contract, which is an exception to the parole evidence rule. Collateral contract was consistent with main contract.

Shepperd v Municipality of Ryde: Received assurances that parks would be built where a pamphlet prescribed however the contract of sale made no reference to the park areas. Judges said the chief reason for the reluctance of courts to find a collateral contract is that the warranty is such that it could be usually expected to be found in the principal contract. Essentially the common intention was that the individual would rely on the promise and would proceed to buy the lot allocated to him.

The statement must also be **consistent** with the terms of the main contract.
Requirement of Consistency: Rule in *Hoyt's v Spencer*.

12.155 ***Hoyt's Pty Ltd v Spencer*** (1919) 27 CLR 133

Facts:

- Landlord agrees with tenant that tenant will have a lease. Landlord has right to bring the contract to an end early. Landlord exercises right to terminate, tenant says we were promised (orally) that you would not exercise that term unless requested and required to do so by head lessor.

Arguments:

- **Parol Evidence Rule**. But you can't have this minor collateral contract which is **inconsistent** with the main

contract.

- **Counter**: defendant is bound under a personal contractual obligation not to exercise his property right except in accordance with the collateral promise.

Appeal Judge held: (Isaccs J)

- Promise for consideration of plaintiff either promising to take lease or taking it (immaterial)
- Contract has the terms of the contract which defines their respective rights with reference to the property.
- In whatever from they determine to leave their bargain they may further agree to have one contract only or to have separate and distinct contracts.
- If the parties agree to commit their deal to writing then what is written is the conclusive record of the terms of their agreement, and unless it can be shown that the document was not intended as the complete record of their bargain, no oral evidence can be omitted to alter or qualify it.
- If recorded even in part written part verbal the written element is unimpeachable by oral testimony.
- If there be action on the whole agreement as one entire indivisible agreement, the whole documents read together and the words have to be modified by the words of another. However it cannot be contended that the promise sued upon was intended to be part of one contract
- It is clear that for the collateral contract to function the parties must be subject to all clauses of the main contract.
- **Essentially collateral contracts cannot contradict any element of the main contract nor the rights created by it.**
- This is because the plaintiff in one breath concedes the full extent of the proviso as a consideration yet cuts it down almost to the point of rendering it nugatory.

Dissent: (Ferguson J)

- Not about reasonableness but that parties have the right to make any agreement they choose within the law.
- Cannot see why they cannot modify an agreement whether earlier later or contemporaneous.
- Courts role is not to dictate what agreement they should make just whether they have and then to interpret it. All elements of a contract present.

12.165 **Estoppel:** Courts are divided as to whether the parol evidence rule precludes the admission of extrinsic evidence for the purpose of establishing an **estoppel**.

12.170 ***Saleh v Ramanous*** [2010] NSWCA 274.

Facts:

- The respondents entered into a contract to purchase land from the appellants, and paid them a deposit. They entered the contract on the assumption that Edmond, the appellant's neighbour, would participate in a joint venture with the purchasers to develop the two properties.
- The appellants promised the purchasers that they would take responsibility for Edmond and that if he didn't want to build, they did not have to buy and they would get their money back. Purchasers were unable to negotiate with Edmond so they purported to terminate the contract.
- Trial judge held a promissory estoppel arose against the vendors. Vendors appealed.
- Written document has Entire Agreement Clause: Excludes pre-contractual promissory estoppel?

Appeal judge held:

- Appeal dismissed, finding of estoppel upheld, rejection of application of parol evidence rule (only for contracts, not in cases of equitable doctrines).
- Handley AJA: If promissory estoppel is to negate a common law contractual right then it can work.
- Hoyt's did not decide that the sub-lessee had no equity but Isaccs J left the question open.
- *Bank Negara Indonesia v Hoalim:* held that a pre-contractual promise could support promissory estoppel.
- Bank Negara as followed in Walton Stores and State Rail v Heath shows that equity has trumped legal rights as protected by the parol evidence and entire contract rules.
- *Franklins Pty Ltd v Metcash Trading Ltd: "*if the estoppel ... is equitable ... the common law parol evidence rule will not impede its proper operation,"
- **A promissory estoppel** (as opposed to proprietary) is a restraint on the enforcement of rights and thus unlike a proprietary estoppel it must be negative in substance.
- However this is not an issue in this case as they can rely on statutory rights to recover deposit. S 55 (2A) provides if a court refrains from granting specific performance the purchaser is entitled to deposit back.

12.175 ***Australian Co-operative Foods Ltd v Norco Co-operative Ltd*** [1999] NSWSC 274

Bryson J held:

- Promissory estoppel or estoppel by convention cannot be enforced because the new agreement is as its terms show intended to be a comprehensive written expression of the parties' negotiations. Inconsistent with the express terms and the entire agreement clause.
- McLelland J in *Johnson Matthey Ltd v Rochester Overseas Corporation:* **Essentially that the formal, final and considered expressions of the party's contractual intention (writing it) shows the relative weight they attributed to earlier arrangements and understandings.**
- Does nor regard the decision in State Rail as having established the views of McHugh JA (obiter anyway as it did not matter in that case as the oral assurances were not breached.)
- Evidence is of less value than written contract.

12.180 ***Branir Pty Ltd v Owston Nominees****:* whilst expressly stating not to decide the issues Allsop J agrees with McHugh J's rejection of the exclusion of a role for estoppel.

WHEN IS A STATEMENT A TERM OF A CONTRACT?

12.185 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. **Intention judged objectively – reasonable person test**. Court will also consider relevant factors such as the significance of a written contract, language, relative expertise of the parties, importance of the statement, timing, and the form of the written contract.

12.190 ***Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*** [2004] HCA 55 – QLD Aquaculture farm

Facts:

- Investors limited liability partnerships develop aqua farm
- Written loan agreements with a lender related to the promoter to borrow subscription moneys to pay interest in advance.
- Venture failed, investors defaulted and lender wished to hold them to written agreements
- They assert that an oral agreement limited their liability to the prepaid interest and two capital repayments.

Arguments:

- Respondents argue that the agreement was "wholly oral" and was reached earlier.

Appeal judge held: (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ)

- **A party executing a written agreement is bound by it** (unless relying on a defence of non est factum or able to have it rectified). Respondents attempted neither.
- **You are bound by written terms (signed) which you have signed unless you can show fraud, misrepresentation, duress, mistake etc**
- Oral agreements will sometimes be disputable – difficult to resolve, time-consuming, expensive and problematic. They **also contradict the written agreement**. No real consensus reached or evidence of such via oral testimony that would be sufficiently certain.
- Still consistent with the liberal view. Not a time to ignore the rules of common law, exceptions must be proved according to set categories. Could be collateral or estoppel.
  1. **Oral term inadmissible for purposes of adding to the contract**
  2. **But not for one of the equitable doctrines**

Meanings of warranty

1. Warranty (promise that is meant to have contractual effect) vs. Mere representation
2. Warranty (minor) vs. a condition (essential):

12.195 ***JJ Savage & Sons Pty Ltd v Blakney*** (1970) 119 CLR 435

Facts:

- Contract for sale of boat, Blakney alleged that the representation of the estimated speed of the boat (15 miles per hour) was a condition or warranty of the contract, or a collateral warranty to the contract. The boat supplied could go not faster than 12 miles per hour.

Trial judge

- Trial judge held the representation was neither a term of the contract nor a collateral warranty.

Full Court of SC

- Held the representation was a collateral warranty by the appellant that the boat would attain an

approximate speed of 15 miles per hour.

Issue:

- Was there a promise that the boat would reach X speed that was matched with consideration of entering the contract to form a warranty?

HC:

- Full court substituted estimated speed with approximate (calculation based on probability). The HC did not agree with this substitution. "Stripped the words of the letter of their most significant meaning." Words lend themselves away from such a promise.
- Even if it were true to say that there would not be a contract without the statement as to the estimated speed it is not enough to say that a warranty was given.
- *De Lassalle v Guildford* [1901] 2 KB 215. – "only conclusion that will support a collateral warranty … that the statement so relied on was promissory and not merely representational."- Landlord/ tenant. Contract said nothing about drains. Before tenant signs the contract, the tenant asked the landlord about the drains and the landlord assures the tenant that the drains work a—okay. Tenant moves in, drains crook, tenant sues landlord about drains. But there is no such term in the lease. Court held that in some circumstances there can be a collateral contract – the promise that the drains were a—okay is a contractual promise, which is consideration for entering the main contract.
- **3 options for respondent: request insertion of condition into contract, request a promise (would give rise to a collateral warranty) or use his own judgment. He took option 3 "I prefer your advice on the GM 4/53" Appeal allowed**.

12.200 ***Oscar Chess Ltd v Williams*** [1957] 1 WLR 370 – Forged log book 1948/ 1939

Facts:

- The defendant's seller's mother purchased a car believing it to be a 1948 model when in fact it was a 1939 model. The defendant offered the car as payment for a new car which he wished to purchase from Oscar Chess Ltd, and described the car as a 1948. The plaintiffs discovered it was a 1939 model and claimed the difference in their payment. The plaintiffs alleged that it was an express term of the contract that the car is a 1948 model or that it was a warranty.
- Trial judge held the alleged term was a condition

Issues: Is there a warranty here that allows for damages? Is it a term of the contract at all?

Appeal judge held: (Denning J)

- They were both mistaken and their mistake was of fundamental importance. Contract not a nullity from the beginning rather set aside for inequity. May have done if he came sooner.
- Fundamental = condition. Of lesser importance is a warranty. If an intelligent bystander would reasonably infer a warranty was intended that will suffice.
- Relative experience of the two persons with the dealer should have known better.
- **"Difference between I believe it is a 48 and I guarantee it is a 48**." If asked to pledge to it he would likely have not as the car changed hands multiple times and he was only going by the log book.
- Appeal allowed. He only stated his belief and used the registration book to verify his belief. Innocent misrepresentation.

Dissenting:

- Oral statement, no written contract. Invoice expressly described the car as a 48. Statement therefore an integral part of the contract. TF condition.

12.210 ***Dick Bentley Productions v Harold Smith (Motors) Ltd*** [1965] 2 All ER 65

Facts:

- Contract for sale of a car, statement about mileage untrue. Bentley sought damages for breach of warranty and succeeded at first instance.
- Bentley looking for "well vetted Bentley car" and Smith said he was "in a position to find out the history of cars"

Appeal judge held: (Lord Denning)

- Existence of warranty depends on their words and behaviour not thoughts.
- **If the representation was intended to induce someone to act on it and enter into the contract it is a warranty. Prima facie grounds for inferring that it was intended as a warranty. (could be wrong as it should be objective intention)**
- Can rebut he one can show it is an innocent misrepresentation (innocent of fault).
- No reasonable foundation to make the statement and he had an easy way to check. Warranty exists. Appeal dismissed.

REVISION
Parol Evidence Rule: 2 Limbs

1. If the parties have agreed that everything is in writing and normally in one document (or two) then you can't use something else extra or extrinsic to add to vary the agreement. Reduced. *SRA (NSW) v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 [12.135]. Whether the written contract was the entire agreement, determined objectively.
2. Can take in surrounding evidence if **AMBIGUOUS** OR **SUSCEPTIBLE TO MORE THAN ONE MEANING.** Construction/meaning. [Codelfa].

13.05 **Construction** – the process by which a court determines the meaning and legal effect of the terms of the contract agreed by the parties.

EXTRINSIC EVIDENCE IN CONSTRUING A CONTRACT

13.10 **Evidence excluded**
Parol evidence rule restricts extrinsic evidence. Where a contract is wholly in writing, oral evidence is excluded. Subjective intentions generally not admitted.

Goss v Lord Nugent: Denman CJ:

Once in writing verbal evidence cannot be used as evidence of what passed between the parties either before the written document was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract.

Codelfa: Once written, evidence of the private intentions of parties is not generally omitted and it is the words themselves that are used to determine meaning.

13.15 **Evidence of the surrounding circumstances** – uncertainty

Codelfa Construction Pty Ltd v SRA (NSW) (1982) 149 CLR 337, 352 Mason J – *"The true rule is that 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.*

*But it is not admissible to contradict the language of the contract when it has a **plain meaning**. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were **known to both parties** although, as we have seen, if the facts are notorious, knowledge of them will be presumed."*

[15.35, p 520].
Can use facts if they are known to both parties or if they are notorious.

Evidence of surrounding circumstances are **generally admissible**: *Maggbury Pty LTd v Hafele Australia Pty Ltd* [2001] HCA 70; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3.

Maggbury – Lord Hoffman:

> "The ascertain-ment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of contract."

International Air Transport *– Gleeson CJ:* "An appreciation of the commercial purpose of a contract calls for an understanding of the genesis of the transaction, the background, and the market."

HC – correct approach – ***Western Export Services v Jireh International Pty Ltd*** [2011] HCA 45.

- Confirms Codelfa as the correct approach

13.18 ***Western Export Services v Jireh International – Gloria Jean's franchising***

Judges held:

- Codelfa to be the correct view that ambiguity or multiple meanings are required for admission of evidence of surrounding circumstances.
- Until the court embarks on changing this intermediate courts have to follow this.
- Don't read Royal Botanic to be inconsistent with Codelfa.
- May be saying that Australian courts need patent ambiguity.

13.20 English approach:

1. Ascertainment of meaning document would convey to a reasonable person with all info reasonably available to the parties at the time of formation
2. Anything that would have affected the understanding of the language by a reasonable man
3. **Exclusions:** Previous negotiations a (bias and too much information) and submissions of subjective intent (except in rectification) boundaries of this however are unclear.
4. Meaning which a document conveys to a reasonable man is not the same as the meaning of its words. (not dictionaries and grammar) What words meant given the parties and the background. May establish correct meaning or that a mistake was made.
5. Using natural and ordinary meaning reflects proposition that we do not easily accept that people have made linguistic mistakes, especially in formal documents. However if given the background something has gone wrong the law does not require judges to attribute the parties an intention they plainly did not have.

THE PROCESS OF CONSTRUCTION:

13.25 ***Royal Botanic Gardens and Domain Trust v South Sydney City Council*** [2002] HCA 5 – Parking lot – agreement for rent

Facts:

- Lessor/lessee – lease of 50 years.
- First three years = $2000; onwards it is to be determined by the lessor and he "may have regard to additional costs and expenses which they may occur..."
- Lessee sought **declaratory relief** in **SC** of the construction of cl 4(b) – constraint of need to have regard to additional costs and expenses. Tenant said you should construe language as though the word 'only' were in it. **Primary judge** held "the lessor must act **bona fide** for the purposes of determining a rent which is no more than a **fair** and **reasonable** rent."
- Lessee was successful in CA. Included a declaration that cl 4(b)(iv) **specified exhaustively** the considerations material to a determination by the lessor of the rent payable pursuant to the lease.
- Lessor granted leave to appeal to HC.

HC held: Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ: Appeal dismissed.

- Relied on Mason J in *Codelfa* – "appropriate to have regard to more than internal linguistic considerations and to consider the circumstances".
- **Ambiguous statement** "may have regard" does it mean they can't have regard to other than those additional costs? Why state it if not to set a limit and if they can have regard to other costs what are they?
- Mason J: Commercial purpose outweighs > knowledge of the genesis, the background, the context and the market in which the parties operate.
- Concern of the parties was to protect the lessor from financial disadvantage from potential increased costs.
- Lessee had substantial costs of maintenance and upkeep for the parking lot etc and either had to hand it over at the end of the lease or follow cl 4(c)
- Can remove all structures at own cost, or can be directed to do so by trustees at cost with no compensation. Other costs and conditions outlined.
- This is the context in which the operative clause must be construed.
- Read as a whole contained the totality of the matter to be taken into account when fixing rent. **This is also how it was calculated for the prior and no evidence to suggest a change to this (only when ambiguous maybe).** No avenue for dispute resolution outlined consistent with non-commercial nature of transaction. Condition is a serious term where any breach would allow other to break contract.
- Implied a term of only into it.
- Adopted a contextual approach.

Kirby dissent:

- **Implied term "only" contradicts express words of clause**.

13.35 ***Pacific Carriers Ltd v BNP Paribas*** [2004] HCA 35 – subjective intention irrelevant

Facts: (Pacific carriers = carriers, NEAT = seller, Royal = purchaser, BNP = Neat's Bank

- Shipment of legumes – Pacific delivered, NEAT seller. NEAT got a bank to sign a letter of indemnity for Pacific. This letter was rejected. 2nd letter of indemnity was signed by Ms Dhiri, a bank officer who was not authorized to bind the bank to any indemnity. Pacific was unaware of this. (Letter was to ensure NEAT had capacity to meet obligations)
- Pacific suffered loss as a consequence. Pacific sued BNP to enforce the letters on indemnity. CA held BNP was not liable b/c Dhiri had neither actual nor ostensible authority to bind BNP to an indemnity. Pacific appeal to HC:

HC Judges held: Appeal allowed.

- BNP gave evidence that they told NEAT they only offered signature verification.
- What she tried to communicate to NEAT and her (Ms Dhiri) subjective intention is irrelevant. **Nothing verbal communicated to pacific only the documents which need be determined objectively.**
- Commercial purpose was plain: Pacific was being asked to take a risk by delivering cargo to receivers who could not produce the appropriate bill of lading. **Pacific would not do so as it told NEAT without the Bank also signing the document.**
- Nothing in document to suggest they (PNG) were only authenticating it nor in the surrounding circumstances to suggest that Pacific would accept that.
- **Meaning of commercial documents to be determined objectively -> reasonable person.**
- Consider "not only … the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.
- "A reasonable reader in the position of Pacific would have understood that the bank was undertaking liability as an indemnifying party to support the liability undertaken by NEAT.
- **Seem to take the broad approach looking for ambiguity in the circumstances rather than in the document itself. Doesn't take a lot to move to broad view.**

13.40 **Exclusion Clauses**

- To modify the principal obligations
- To limit or exclude liability which would otherwise arise as a result of a breach by that party of his primary obligations to perform the contract in accordance with the terms.

Indemnity clause – excludes liability of one party by imposing on the other a duty to indemnify the former in respect of any loss incurred.

13.45 Can be **void** under **Statute** – **ACL** – Appendix, Parts 2-2 (Unfair contract terms) and 3-2 (Consumer Guarantees).

The common law approach to exclusion clauses:

13.50 In many cases an issue may arise as to whether a 3rd party can claim the benefit of an exemption clause in a contract made between two other parties. Before a party can rely on the protection of an exclusion clause it must be shown that the clause was incorporated into the contract. Q: Whether, as a matter of construction, the clause applies to exclude or restrict liability in relation to the issue in dispute. Whether a third party can claim the benefit of an exemption clause: *The "New York Star"* (1978) 139 CLR 231.

Proper approach for exclusion clauses:

13.60 ***Darlington Futures Ltd v Delco Aust Pty Ltd*** (1986) 161 CLR 500

Facts:

- Darlington and Delco had a written contract which instructed the appellant to engage on its behalf in a form of commodity futures dealings. Heavy losses were sustained when dealings were made by way of day trading without the authority of the respondent. The appellant relied on exclusion clauses 6 and 7(c).
- Trial judge found in favour of appellant, respondent appealed to Full Court, which allowed the appeal.

HC Judges held: (Mason, Wilson, Brennan, Deane and Dawson JJ)

- Q is whether the clauses **protect** the appellant from the consequences of what otherwise would be **breaches of contract**.
- *"…the interpretation of an exclusion clause is to be determined by construing the clause according to its*

natural *and* ***ordinary meaning****, read in the light of the* ***contract as a whole****, thereby giving due weight to the* ***context*** *in which the clause appears including the* ***nature*** *and* ***object*** *of the contract, and, where appropriate, construing the clause* ***contra proferentem*** *in case of ambiguity"* "the same principle applied to the construction of limitation clauses".

- *Photo Production Ltd v Securicor:* if ambiguous then construed contra proferentem, such a cause is to be given its natural construction. "However unreasonable the court itself may think it is, if the words are clear and fairly susceptible of only one meaning" Won't place strain on construction of contract between two businessmen if words are clear."
    - **Contra proferentem:** construing an exclusion clause strictly **against the interest** of the proferens, the party seeking to rely on the clause. Or who provided the wording.
    - Statements in previous cases do not deny the legitimacy of construing the language of the clause in the context of the entire document.
    - *Sydney Corporation v West*: essentially that the exemption clause will not operate if the contract is not performed in the manner specified e.g. if the bailee eats the stored goods. They reached this conclusion from a process of construction not fundamental breach.
    - **Same applied to limitation clauses**

- **"It can scarcely be supposed that the parties intended to exclude liability on the part of the appellant for losses arising from trading activity … when the appellant had no authority to do so."**
- Given Cl 7(c)and the present case is one in which the respondent's claim arises in connexion with the relationship of broker and client established by the contract regardless of the finding on unauthorized trade **Cl 7(c) operates to limit the appellant's liability to $100(Limiting clause).**
- Appeal allowed.
- Q: Doing the contract badly or outside the agreement altogether? Clause 7: "or in connection with the relationship" -> the relationship is wider than the contract. A distinction is drawn between performing the contract, but badly, and acting outside the contract.

Ordinary principles of construction and contra proferentem

13.65 Note: Darlington's principle of construction was confirmed in *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp, Berhad* (1989) 167 CLR 219 at 227.

Deviation:

13.70 ***Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd*** (1966) 115 CLR

Facts:

- May & Baker regularly used TNT to transport its goods. On the particular occasion, the subcontractor was unable to deliver the foods to the depot before it closed, or to obtain instructions. He took them home overnight where they were destroyed by a fire of unknown origin. TNT relied on the contract which "exempted it from liability for loss or damage or misdelivery of goods in transit or storage." (So what does "storage" mean)
- The plaintiff succeeded in the Supreme Court.

High court held:

- **Windeyer J (dissented):** clauses interpreted by a number of principles:
    1. Clauses construed strictly against proferens when ambiguous (party for whose benefit it was inserted)
    2. Does not cover negligence unless expressly or by implication is covered. **(implied if no other ground of liability is other than negligence could have been referred to**) General liability exclusion for carrier with a duty of care will exclude negligence.
    3. "Fundamental breach"/ "four corners" rule: Can only exclude liability for loss if the individual was dealing with the goods in a way that can be regarded as intended performance of his K obligations. *Lilly v Doubleday + Gibaud v Great Eastern Railway:* "in the way in which you were contracted to do it"
- ***Bontex Knitting Works Ltd v St Johns Garage:*** Goods stolen from truck left unattended when goods were meant to be delivered on express condition of "forthwith and immediately" Breach of contract was equivalent of deviation.
- Another key element of **deviation** is that whilst he cannot rely on the clause to prevent loss it will also prevent allowance for loss occurring afterwards unless it can be shown it would have occurred regardless. (TF if safely given to depot in morning the clause would not operate to protect them if lost or damaged after)

- No express provision to take the goods to depot but taken into contract from course of business. (As mentioned for deviation of ships if no route is expressly mentioned it should be taken in the usual or customary route) ***Myers v London and South Western Railway co***
- Only slight breach not equivalent to deviation. Negligence in performance of a contract is not a significant deviation from a contract that contains a clause limiting liability for negligence.

- **Barwick CJ, and McTiernan, Taylor and Owen JJ:**
    1. It was **implicit** in the contract that the goods would be taken to the depot at night and as the conduct of the subcontractor in taking the goods home was an **unauthorized way** of performing the company's obligations, the company could not rely on the exemption clause (4 corner's rule).
    2. Implied duty to take care.
- **Deviation rule** – comes from maritime contracts of carriage – carriage by land same as carriage by sea. Wrong way of performing contract so term does not apply -> Windeyer J.
    - ***Gibaud v Great Eastern Railways Co*** [1921] 2 KB 426 at 435: *'The principle is well known … that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it**, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it***'.