

1. IDENTIFYING THE EXPRESS TERMS I

Starting point: Is the document contractual?

- An order form is a contractual document: *L'Estrange v Graucob* [1934] (brown paper not formally contractual but made such when it was signed)
- A receipt or memorandum of a pre-existing contract is not a contractual document: *Curtis v Chemical Cleaning & Dyeing* [1951]

Step 1: Signed Documents

- **In the absence of fraud or misrepresentation, a party will be bound by the terms contained in a contractual document which he or she has signed, whether or not she or he has read the document** (*L'Estrange*; *Toll*) (vending machine) (consignment letter)
- Doesn't apply if vitiating factors
- **Objective test:** 'the intention which reasonable persons would have had if placed in the situation of the parties' (*Pacific Carriers*), including:
 - o the text;
 - o the surrounding circumstances; and
 - o purpose and object of the transaction.

Step 2.2 Incorporation from 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*)
- Course of dealings must have been regular and uniform (*Henry Kendall*)
- The document relied upon in previous transactions must also be a contractual document, rather than having the appearance of a mere receipt or docket (*Rinaldi*)

Step 2: Unsigned documents

Step 2.1 Incorporation from notice:

1. **(timing)** Terms available before the k is made (*Oceanic Sun*) (condition printed on ticket after contract of sale); **AND**
2. **(knowledge or reasonable notice)** Actual knowledge of the terms or have been given reasonable notice of those terms: (*Thornton*) (sign only inside the carpark)
 - a. **Actual Knowledge** (*Parker*)
 - b. **Reasonable notice**
 - i. *Contractual documents:* If document is one that a reasonable person would expect to contain the terms of a contract, the mere presentation of the document will be sufficient notice of the terms, e.g. bill of lading in *Parker*
 - ii. *Non-contractual documents:* If terms are contained in a document that is not an obvious or well-understood contractual document, party must take reasonable steps to bring those terms to the notice of the party to be bound, e.g. *Causser v Brown* [1952] (dress receipt voucher)
 1. Reasonable notice depends on the circumstances of the particular case, e.g. *Thornton* (car park case): the exclusion clause was displayed inside the carpark, not visible from the entrance or outside.
 - c. **Red hand rule** (onerous or unusual terms) if term is unusual or unexpected in the context of the transaction, party must make extra effort to give notice of those terms, e.g. 'red ink': (*J Spurling*)

2. IDENTIFYING THE EXPRESS TERMS II

Step 1: Is the contract wholly in writing?

- **TEST: Objective test of intention** as to whether the parties intended that the written document should contain all the terms of their contract.
- A written document that looks complete is only an evidentiary basis for the conclusion that the a/ment is wholly in writing (SRA)
- Extrinsic evidence can be admitted to establish whether the parties intended the contract to be wholly in writing or supplemented or varied by promissory statements made during negotiations (or other material), 306 TB.
- **Entire agreement clauses:** Not conclusive proof the contract is wholly in writing.

Step 2: Wholly in writing: Parole Evidence Rule

- The PER excludes any evidence extrinsic to a contract wholly in writing: *Hoyts Pty Ltd v Spencer* (1919)
- 2 exceptions to the PER:
 - o Collateral Contracts: *Hoyts Pty Ltd v Spencer* (1919) (illustration)
 - o Estoppel: *Saleh v Romanous* [2010] cf *Australian Co-operative Foods v Norco Co-operative*

Exception to PER: Collateral contract

- = contract made when one party makes a promise, connected to but independent of a main k, and as *consideration for that promise*, the other party agrees to enter into the main k, 418.
- **TEST:** For a statement to give rise to a collateral k, the statement must:
 1. be made as a promise (Savage)
 2. be intended to induce the recipient to enter into the k (Savage)
 3. be consistent with the terms of the main k: (Hoyts)
- Easier to prove when alleged contract deals with subject matter one would not naturally expect to find in the main contract, e.g. *Shepperd* (pamphlet for house)
- The main contract can only be the consideration for a collateral contract when the terms of the collateral contract do not reduce or alter the rights created by the main contract (SRA)

Exception to PER: Estoppel*

- Courts remain divided as to whether to parole evidence rule precludes the admission of extrinsic evidence for the purpose of establishing an estoppel.

Step 3: Contract is not wholly in writing: When a Statement is a Term of a Contract

- **Promissory** in nature (cf misrepresentation); and
- **Objectively intended to be binding:** s/ment would reasonably be considered a binding k'ual promise by a person placed in the situation of the parties.
- If a statement is found to be a mere representation rather than a term, then the plaintiff can sue under misrepresentation law s 18 ACL.
- These aren't exactly two separate tests, the cases below consider both.

1. **Existence of a formal written contract** (Equuscorp) (investor default)

- o Where parties have recorded their agreement in a formal written k'ual document that does not include the oral s/ments, this suggests they were not *intended* (objective test) to be part of the final k (309, TB).
- o If they had been intended to form part of the k, they would have been included in the written contractual document.
- o If the purported oral terms contradict the *subsequent* written terms, the written terms will be held to be the true agreement:

2. **Importance of the statement (Chappell)**

- o Highly significant statement to a party's decision to enter into the transaction is more likely to be considered promissory.

3. **Language used:** (Savage) (promissory)

- o Promissory language e.g. 'promise', 'agree', 'guarantee', 'warrant'
- o Cf words expressing an opinion or hypothesis: 'estimate', 'guess'

4. **Relevant expertise of parties:** (Oscar Chess) (Dick Bentley) (promissory)

- o A statement w expertise to a party who is inexperienced is more likely to be promissory than a statement made by an inexperienced party.

3. CONSTRUING THE TERMS

Step 1: Objective approach

- Determine the objective intentions of the parties by what a reasonable person with all the background knowledge would have understood the language to mean (Pacific Carriers)
- The PER excludes evidence extrinsic to a **k in wholly in writing** from being used to explain the meaning of that contract: Codelfa

Step 2: Relevant factors to consider (Arnold)

1. The natural and ordinary meaning of the [term or clause in question];
2. Any other relevant provisions of the [contract];
3. The overall purpose of the clause and the [contract];
4. The facts and circumstances known or assumed by the parties at the time the document was executed [to the extent that these surrounding circumstances are admissible];
5. Commercial common sense; but
6. Disregarding any subjective evidence of any parties' intentions.

Step 2: Ambiguity - use surrounding circumstances

- Evidence of the surrounding circumstances is admissible...if the language is **ambiguous or susceptible to more than one meaning**: (Codelfa)
- Negotiations: Can't be used to show subjective intentions, only objective background facts which were known to both parties: Codelfa
- Subsequent conduct not an aid to construction (James Miller)
- Exceptions
 - o **Trade usage**: Trade meaning must be **'well-known, uniform and certain'**. Where parties use language in the written k that has a special meaning in the parties particularly industry or trade, extrinsic evidence of that meaning can be admitted.
 - o **Ambiguity**: present when:
 - 'Patent ambiguity': Words used in k do not have a readily ascertainable meaning or are used in an inconsistent manner
 - 'latent ambiguity': words used have clear meaning but potentially refer to 2 or more subjects w/o providing a way of distinguishing b/w them
 - o Ambiguity can be found where there are plausible, as opposed to fanciful, competing interpretation of the term: *Royal Botanic* (as a suggestion, not ratio)

Step 4: What is the effect of any Exclusion Clause?

- For a 'consumer', ss 64 and 64A ACL
- If not covered by the legislation, common law approach: must establish:
 - o (1) Whether or not the exclusion clause was properly incorporated into the contract;
 - o (2) Whether the person seeking to rely on the k was a party to the contract; and
 - o (3) As a matter of construction, whether the clause applies to exclude or reduce the liability in dispute.

Step 3.1 Does the clause apply, exclude or reduce liability?

- **Rule**: An exclusion clause is to be construed 'according to its'
 - o natural and ordinary meaning,
 - o in light of the contract as a whole, thereby giving due weight to
 - o **the context** in which the clause appears including the **nature and object of the contract**: *Darlington Futures Ltd v Delco Aust Pty Ltd* (1986)
- Where the meaning of words of an exclusion clause can be ascertained through the ordinary processes of construction, there should be no scope for a restrictive interpretation.
- Exclusion clauses in standard form contracts may not be 'fair' when there is a substantial degree of inequality of bargaining power b/w parties to the transaction, like consumers and large businesses.

Other principles: If there is ambiguity

- **Contra proferentum**: the exclusion clause should be construed strictly against the interest of the proferens, i.e. the party seeking to rely on that clause (*Darlington Futures*)
- **Four corners rule**: A clearly worded exclusion clause can apply to exclude liability, even for events occurring in circumstances that would defeat the main object of the contract: (*Nissho*)
- **Negligence**
 - o Clear words are necessary to exclude liability for negligence:
 - o But, since an exclusion clause must be construed according to its natural and ordinary meaning, a clause expressed in general but expansive language, e.g. excluding liability 'however so used' may be sufficient to exclude negligence.

4. IMPLIED TERMS

Step 1: In Fact

- Based on the presumed intentions of parties and are therefore **unique to the k in question**.

TEST (BP Refinery): Terms must be

- **(1) Reasonable and equitable;**
 - o A term that is beneficial to 1 party but that imposes a significant burden or detriment on the other is unlikely to satisfy this point
- **(2) Necessary to give business efficacy** to the k so that no term will be implied if the k is effective without it (Moorcock)
 - o Is the term necessary for the contract to operate in a businesslike manner?
- **(3) So obvious** that 'it goes without saying' from the perspective of an 'officious bystander' (Shirlaw)
- **(4) Capable of clear expression;**
 - o It must not **contradict** any express term
- Formal contract: You need all 5 requirements.
- Partly oral/written: Some of the 5 might not be necessary: *Byrne v Australian Airlines*; *Frew v Australian Airlines* (1995).

Step 2: In Law

TEST of Necessity (Byrne)

- Unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless or undermined
- Apply to all contracts of a particular class and based on policy (not the presumed intentions of the parties)
- 'necessity' differs from business efficacy because it is based on considerations of a more general nature.
- Higher threshold because it will apply to an entire class.

Step 3: By Custom

TEST (Con-Stan)

A term can be implied by custom where the custom is:

1. Existence of custom or usage is a question of fact: *Nelson v Dahl* (1879).
2. Must be evidence that the custom **so well-known and acquiesced in** that everyone making the k can reasonably be presumed to have imported that term into the k i.e. **'must be so notorious'** *Nelson v Dahl* Jessel MR.
 - a. Not necessary to prove that the custom be universally accepted
3. A term will not be implied into a k on the basis of custom where it is contrary to the express terms of the agreement.
4. A person may be bound by a custom notwithstanding the fact that he had no knowledge of it.

Step 4: Consumer Guarantees

Step 5.1 Define a consumer

- s 3(1) Acquiring **goods** as a consumer
 - o (a)(i) amount paid/payable for goods did not exceed \$40,000; **OR**
 - o (b) goods were for personal, domestic or household use or consumption; **OR**

- o (c) goods were vehicle or trailer acquired for transport of goods on public roads.
- s 3(2) subsection 1 doesn't apply if the person acquiring the goods does so for:
 - o (a) purposes of re-supply; **OR**
 - o (b) purpose of using them up or transforming them in trade or commerce in the course of:
 - (i) production or manufacture; or
 - (ii) repairing or treating other goods or fixtures on land.
- s 3(2) Acquiring **services** as a consumer
 - o (a)(i) amount paid/payable for services did not exceed \$40,000; **OR**
 - o (b) services were for personal, domestic or household use or consumption.

Step 5.2 Consumer Guarantees

- s 51-63

Step 6: Any exclusion clauses?

- s 64(1) a term of the contract is **void** if tries to do or does in fact exclude, restrict or modify:
 - o (a) any of the consumer guarantees; or
 - o (b) exercise of a right conferred by a consumer guarantee; or
 - o (c) any liability of a person who fails to comply with the consumer guarantees.
- s 64(2) a term of the contract isn't taken to do (a)-(c) unless it does not **expressly** or is inconsistent with the provision.
- s 64A(1)-(2) a term of a contract for the supply of goods under \$40,000 is not void under s 64 merely because the term limits the person's liability for failure to comply with guarantee to:
 - o Goods
 - (1)(a) replacement of goods or supply or equivalent goods; or
 - (1)(b) repair of the goods; or
 - (1)(c) payment of cost of replacing the goods or of acquiring equivalent goods; or
 - (1)(d) payment of cost of having the goods repaired.
 - o Services
 - (2)(a) supplying of the services again; or
 - (2)(b) payment of cost of having services supplied again.
- S 64A(3) This section doesn't apply if the person to whom the goods and services were supplied establishes that it is **not fair or reasonable** for the person who supplied the goods to rely on term of the contract.
- S 64A(4) In determining fair or reasonable, things to have regard to.

Step 7: Remedies

- s 224(1)(a): pecuniary penalties
 - o (i) contravention of unconscionable conduct
- s 232: injunctions
- s 236: actions for damages
- s 237: compensation orders

Step 5: Unfair Contract Terms

Step 4.1 Is it a consumer contract?

- s 23(3) a consumer contract is a contract for:
 - o (a) supply of goods or services; or
 - o (b) a sale or grant of an interest in land
 - o to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

Step 4.2 Is the term unfair?

- s 24(1) a term is unfair if:
 - o (a) would cause **significant imbalance** in parties' rights and obligations under the contract; AND
 - o (b) not reasonably necessary in order to protect the legitimate interests of the party advantaged by the term; AND
 - s 24(4) party advantaged by term must prove it is reasonably necessary.
 - o (c) would cause detriment (financial or otherwise) to a party if it were to be applied.
- s 24(2) court must take into account:
 - o (a) the extent to which the term is transparent;
 - s 24(3) transparent means:
 - (a) expressed in reasonably plain language; and
 - legible; and
 - presented clearly; and
 - readily available to any party affected by the term.
 - o (b) the contract as a whole.

Step 4.3 State the result

- s 23(1) A consumer contract is void if:
 - o (a) the term is unfair; and
 - o (b) the contract is a standard form contract.
- s 23(2) the contract continues to bind parties if it is capable of operating without the unfair term.