

Exam Notes Business Law

Topic 5: Exclusion Clauses and Implied Terms

Learning Outcomes:

- Explain how agreed terms may be used to **exclude liability**;
- Know how and when terms are put into a contract **by fact**;
- Know how and when terms are put into a contract **by law**; and
- Understand the effect of implied terms regarding the quality of goods and services

Terms that exclude liability

- It is common for contracts to contain terms, variously called exclusion, exemption or limitation clauses, that operate exclusively to the benefit of one party. The effect of these clauses are to:
 - Exclude all liability for breach;
 - Limit liability for breach of contract or other wrongful conduct
 - Exempt a party from the obligation to perform as promised; or
 - Limit the redress available to the other part where there is a failure to perform
- These terms are commonly utilised in the following contexts:
 - A bus company restricts liability for injury to passengers;
 - A dry-cleaner excludes liability for damage to clothing:
 - *Causer v Browne* [1952] VLR 1;
 - An insurance company excludes liability for death arising from dangerous sports; and
 - A manufacturer excluding liability for defective products.
- For a term excluding liability to be given legal effect, it must be:
 - clear and precise in its wording and the aspects of liability that are being excluded or limited; and
 - properly brought to the attention of the other party prior to them entering the agreement (so as to be incorporated into it)

Olley v Marlborough Court Ltd [1949] 1 All ER 304

Note: A course of prior dealing would be relevant in determining whether a term excluding liability has been brought to the attention of the other party.

Olley v Marlborough Court Ltd [1949] 1 All ER 304

Facts:

- Couple booked into hotel room.
- Furs and jewellery were stolen from the room during their stay.
- Couple wanted compensation from the hotel.
- Hotel denied liability, directing the couple's attention to an exclusion clause detailed on a sign on the back of the couple's room door – 'The hotel would not be responsible for articles lost or stolen'.

Issue:

- Had the exclusion clause behind the door been incorporated into the contract between the couple and the hotel?

Decision:

- No. It was only brought to the attention of the couple after they had checked in. For the clause to be effective, it needed to be brought to their attention at that time when the contract was formed.

- An exclusion clause that has been properly incorporated into the contract will be construed according to the contract as whole and the language used
- But where the meaning of an exclusion clause is ambiguous, the court will interpret the exclusion clause against the interests of the party who is seeking to rely on it (contra proferentem).
- An exclusion clause can be interpreted against the interests of the preferred party by:
 - Interpreting ambiguous words narrowly; and
 - Not giving the clause scope to apply to events which fall outside the 'four corners' of the contract

Sydney City Council v West (1965) 114 CLR 481

Sydney City Council v West (1965) 114 CLR 481

Facts:

- West parked car in Sydney council car park, obtaining a ticket from machine at entrance.
- Car was gone when he returned.
- Third party had approached parking attendant claiming to have lost ticket.
- Attendant provided duplicate ticket to third party without doing any checks. Third party then proceeded to take car.
- West sued Council for damages.
- Council denied liability on the basis of express statement on ticket – 'The Council does not accept any responsibility for the loss or damage to any vehicle...however such loss damage or injury may arise or be caused'.

Issue:

- Did the statement on the ticket effectively exclude liability in these circumstances?

Decision:

- No. The exclusion clause had become a term of the contract, but properly interpreted it did not apply to this situation where the parking attendant had allowed for an unauthorised delivery of the car.

Agreed Terms and Terms Implied by law

- Terms can become part of a contract either:
 - By parties **expressly agreeing** that they be included; or
 - Being **implied by fact**; or
 - By the **operation of the law**

Implied Terms

- Not expressed but intended to be part of the contract
- Terms implied by fact and terms implied by law
- The courts do not easily recognise such terms as they don't want to be seen to interfere with the contract between the parties

Terms Implied by Fact

- For a term to be implied by fact it must be **obvious** from the circumstances that the parties must have intended to include such a term as part of their agreement
- The court applies the officious bystander test to determine if the requisite intention is present
- The officious bystander test:
 - "What would the parties have replied if an officious bystander had asked them at the time of their agreement whether the suggested term was part of their contract?"
- If the court can infer that the parties would have answered 'of course', the necessary intention is established.