LEGAL EXAM

1 CONTRACT

Mainly case law (contract law is under common law and is fundamental of commercial law)

A. Is there a contract? Exam: There will be a contract

B. What are the terms of the contract

Terms may be Implied may be By courts In writing Verhal

Partly verbal/writte

Terms in the contract have contractual consequences

Express terms

- 1. Formality
- a. Entirely oral b. Entirely in writing
- c. Partly oral and partly writter

- 1. What is the difference (if any) between a term that excludes liability for breach of ontract and one that limits liability for breach? Limitation clause only limit defendant's liability to a certain amount, but cannot totally exclude liability for breach of a term. (Darlington Futures; Suisse Atlantique)
- F. Validity & Effectiveness of terms that purport to limit or exclude liability for breach of

Sten 1: Analysis under common law

- 1. Timing rule of exclusion/limitation clause
- a. Has the contract in question already been made (ie has the relevant offer already been accepted) at the time that the exclusion/limitation clause is presented? (Olley. Thornton; Baltic Shipping; 'I Spurling'; compare Bradshaw)
- → 'Olley': The exclusion/limitation clause is shown on the back of the door in the hotel
- One; I the exclusion, imitation clause is snown on the acks of the acor in menoter room, which is after the contract has been made. It is only effective when given at reception desk, especially for the guests who stop in this hotel for the first time. I Spurling: the exclusion clause was effective because it was part of the contract and made before the contract was formed.
 The exclusion/limitation clauses can only be part of the contract if it is made before the formation of the contract.
- 2. Timing rule of the interpretation of the exclusion/limitation clause (only if there is an
- The oral interpretation of the limitation clause can only be considered whether or not to be incorporated into the contract if it is given before the contract is formed. In addition, the formality of the contract that contains the limitation clause is also important to determine the effectiveness of the limitation clause. If the limitation clause is in an determine the eljectiveness of the limitation clause. If the limitation clause is in an entirely oral contract, the interpretation of the limitation clause can be treated as an amendment to the limitation clause, which suggests that the previous limitation clause is not effective. It becomes a contractual promise and can be incorporated into the contract as an express term. If the limitation clause is in an entirely written contract, other common low rules should be applied and are discussed below.
- 3 Parol evidence rule
- i. A written document is presumed to be complete (i.e. contain all terms in the
- ii. Evidence or material outside that document may not be used to contradict or change (eg add to or subtract from) the words of the document. (Gleeson, McHugh, Kirby, Hayne, Callinan, <u>Equuscorp</u>)
 Purpose: To respect what is in the document, otherwise there is no use to
- have the document. 1. IF you want to change the terms in the contract, you can make a new contract, BUT problems are: the other party may not agree, then you can only follow what's already in the contract (a drawback of this rule).
- iv. Rationale
 - Associates Pty Ltd v Brian A Cheeseman & Associates Pty Ltd (1994) 35 NSWLR 227, 234 (Kirby P)* It is to add to certainty by adherence to the effect of the clearly expressed written word.' See also Prenn v Simmonds [1971] 3 All ER 237, 240-1 (Lord Wilberforce)

5.2.2When the contract is verbal: In the absence of writing, there are two problems

(1) Firstly, determining what was actually said:

There are obvious problems in proving oral terms that are not admitted by an opponent. But it is possible to do so by giving credible evidence of them, having witnesses present and so on.

<><It is always better to have a written contract>>> Buckenara v Hawthorn Football Club Ltd (1988) (2)Secondly, when it is determined what was said, it is necessary to determine which verbal statement was

- 1) Time between making of the statement and finalization of the contract. Close to finalization, more likely
- 2) Did one party have special knowledge or skill on which the other was entitled to rely [Dick Bentley

Productions v Harold Smith (Motors); Oscar Chess v Williams]?

- 3) How important was the statement in the minds of the parties?
 - 2. Requirements of terms (cumulative)
 - A. For a statement to be a term of a contract, the statement must amount to a promised b. It is inferred that statements in a contract are promissory in nature unless the words that are used tend against the making of such an inference. ([1] Savage] 'estimated speed', namely, if the speed is not reached, there is no breach of contract. -> this is not a contractual term.

 - c. Example of promissory words: 'will'; compare 'may'. → Contract must have promise in it. BUT promise does not necessarily in the contract to be a promise.
 - → IF there is no promise, like || case, the plaintiff cannot sue under contract law, but can sue misleading or deceptive conduct.

 d. Timing: the promise must also be given before the contract has been made. (i.e.
 - before acceptance of the relevant offer) (Roscorla) 'The seller's promise was not binding. It was make after the sale had been completed.'
 - e. If the promise is given after the contract has been made, it will become a non-→ Once the contract is made, it cannot be changed. (General rule

iii. Implied terms

- 1. Definition: terms that are part of the contract even though they may not have been mentioned by any party. (Wallis; Arturi)

b. Exceptions: (at least o

- In any contract that involves the provision of services, it is implied that the services will be performed with reasonable care and skill. (Red Glass; Hawkins; Hungerfords)
- → 'Red Glass': The golden door was installed within a wood frame, which was easily broken. This indicated that the service was not performed professionally, and without reasonable care and skill.

2. Compare with Justice Michael Kirby: 'strict rules of interpretation ... make the law

for example, to establish the existence of a condition that has to be satisfied before the contract comes into existence: (Pym)

→ Entire agreement clauses are commonly found in commercial agreements, especially those that are drafted by lawyers.

→ With this clause contained in the contract, this exception is rejected. BUT other three can still be proved.

ao you refer to? "Hope': 'Audio and visual equipment' are clear words, and in the circumstances you understand their meanings. IT DOESN'T MATTER whether they are used or new. (classification/state is not important.)

Identify the true identity of a party to the contract, irrespective of the pame used in the document. (Edwards: G.R. Securities: contra Shogun Finance) 'You should look at the subjective intention of the person.'

c. One another way to overcome the strictness of the parol evidence rule: IF the contract

is partly oral and partly written, it can be inferred that the written contract was not intended to contain all the terms of the contract. Then, all of the circumstances should be looked at to work out what was agreed. These may allow a written document to be

signed contract rule

I is the term contained inside a written contract that has been signed by the party
against whom the term is being used? (Tall; L'Estrange; compare Illadis; Causet)
'Illadis': driver registration form, 'to help with our advertising'; 'Causer': dry cleaning

">- "Iliadis." This rule may not apply if signatory is not aware of the contractual nature of the document. The court held that the exclusion clause was not a part of the contract because he was not aware that what he was signing was not a contractual document. The person signing has to know he/she was signing a contract, under which condition,

Clarify instances of natent ambiguity (things that are clearly unclear) 'You Clarify instances of patent ambiguity (trings that are clearly unclear) rou look at this word, but you don't know what it means/you don't understand.'
(White: Bacchus Marsh Concentrated)

 Clarify instances of latent ambiguity 'The word looks clear on surface, but in

some circumstances, it becomes unclear.' (Raffles; compare Hope) → 'Raffles': 'Ship' or 'harbor' are easy words, everyone knows their meanings. BUT in this case, they are latent ambiguous. Which ship/harbor

e.g. 'This document represents the entire agreement between the parties in

be added in, including an oral interpretation of exclusion/limitation clause) Evidence That Is Found Outside a Written Document May Be Used to

Show that the document is incomplete

do you refer to?

4. Signed contract rule

the rule can be applied.

relation to the subject matter of this document

compare with justice includes in the law earlies of index predation ... make the law less ambiguous and more predictable, but at the price of individual justice.' -> not reflect the actual agreements.

- → If the service is not performed with reasonable care and skill, the plaintiff can argue the breach of contract, as well as **negligence**
- b. In any contract for the sale of goods (under Goods Act, i.e. common law), it is implied
 - 'Time is of the essence' (Tradax)
 - If the goods come late, you have the choice to reject the goods and not pay.
- The goods are of merchantable quality and are fit for their purpose (GA s
- → 'Merchantable quality': lunch with poisoned peanuts
- → 'Fit for purpose': lunch without peanuts (but buyer requires peanuts)
- → Difference: Goods without merchantable quality cannot be sold to anyone but goods that does not fit for purpose can be sold to anyone else who don't have that requirement.
- 3. Can implied terms be expressly excluded by the parties to the contract?
- a. Under general rule, implied terms can be excluded, because of the freedom with
- b. Exception: Cons r contracts cannot remove implied terms. C. What do the terms (i.e. the obligations parties need to perform) mean?

Approach to interpretation

- 1. Focus on the text used (Beconwood; cf Integrated Computer Services)
- 2. HOWEVER, 'no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements'. (Barwick, <u>Upper Hunter</u>)

D. Have the terms been followed? (i.e. Is there a breach of contract?)

- An actual breach of contract involves: (alternative)
 - not doing what has been promised (<u>Moore</u>); or
- 2. doing what has been promised will not be done (Lumley: Curro; cf Network Ten) 'An 2. Going World into Seen jointeed win into the other Learnings, Lutzlis, C., Learnings, L. Elly An European opera singer has made a contract with the company that she would only stip for that company, but she saing for other company. Thus, there is a breach of contract and she breaches the express term. If I relevantly challenged by the party (D) that is in breach, the party (P) that is seeking a remedy needs to prove on the balance of probabilities that it is actually willing and able to perform its.
- contractual obligations, (Papadopoulos)

i.e. the plaintiff is able to perform his/her own obligations totally

E. Is there an exclusion or limitation clause?

- Exclusion Clauses
- 1. A clause that effectively excludes liability for breach of a term brings about the same outcome as the exclusion of the term itself from the contract
- Terms that purport to exclude liability for breach of contract are ineffective in the case of
- imers. (CCA sch 2 ss 64, 276; Australian Consumer Law and Fair Trading Act s 9)
- 3. Two tests to help work out whether an exclusion clause will work: (cumulative
- Is the exclusion clause a term of the contract?
- b. Does the exclusion clause cover the loss or damage that has happened?
- Limitation Clauses

- -> 'Causer': Unsigned docket-> The docket was not a document containing contractual
- -> 'L'Estrange': P was bound by the document he signed, whether or not she had read
- them (in small print).
 b. If Not signed, Has Reasonable Notice (not actual notice) Been Given of the Term? Has the party that is seeking to rely on the term attempted to bring the term to the attention of the other party? (Balmain: Parker: Thompson: compare Interfoto)
- attention of the other party: (Bullmain: Causer; Thompson: Compute macecular)

 -> Unsigned documents are non-contractual. The responsibility is on the person who
 wants to rely on an exclusion clause (D) to show that the terms of the contract have
 been brought to the notice of the plaintiff that the term was contractual in nature.
 p. 449
- -> 'Parker': see back (ticket). There is a reasonable notice. P. 450
 -> 'Balmain': rule of reasonable notice does not apply, because the plaintiff had
- previous dealings with the defendant and this shows that he has known and accepted the terms of paying an extra fee for the wharf. P. 454
- the terms of paying an extra fee for the what f. F. 454*

 Thompson': P was illiterate and could not see the exclusion clause. P was injured when she fell from the train, but she failed against the railway company. The court held that P could not rely on being illiterate, which was a burden not a privilege. Moreover, she had received constructive notice of the exclusion clause. P. 451
- -> 'Interfoto': In the delivery note, there was a condition which said that the hirer would have to pay a holding fee of 5 pounds per day plus tax if the transparencies were not returned on time. This condition was not effective as it was not discussed, it was not brought to the attention of the customer and it was not part of the contract, p. 452 -> e.g. the font size is too small or the light is dim, the notice is not reasonable.
- -> IF the reasonable notice has been given of the exclusion/limitation clause, regardless whether you read it or not, they are still part of the contract.
- regarness whether you rean to mot, they are still part of the contract.

 c. Exceptions: where there was fraud or misrepresentation about the clause; the document was presented in a way that suggested it had another purpose; or non est factum applies (a plea that a written agreement is invalid because the defendant was mistaken about its character when signing it).

5. Misrepresentation rule a. Misrepresentation is an exemption to

- a. Misrepresentation is an exemption to b. Has the party that is seeking to rely on a term of the contract misrepresented the term to the party against whom the term is being used without the latter being aware of the misrepresentation? (Curtis; compare Mendelssohn; Evans; Couchman)
- -> 'Curtis': one party told the wrong thing about the clause to the other, and the other party was not aware because he/she did not read this clause. Thus, under this situation, the other party should rely on what is being told rather than the actual clause in the
- IF the other party was aware of the misrepresentation, then he/she should follow the reclusion/limitation clause.

 ->'Mendelssohn': there was no discussion between the plaintiff and defendant about
- whether the exclusion clause formed part of the contract and no interpretation of the exclusion clause
- 6. Contra Proferentem Rule (based on the clause is part of the contract)