

Performance

Pre Contractual Oral Statements

Statements during negotiations are either promissory or a representation. If they are promissory, then they are a term of the contract and there be a remedy for breach of contract. If they are representation, relief must be sought under the law relating to misrepresentation.

In determining whether an oral statement forms part of a written contract, the court must consider

1. whether the parol evidence rule limits the extent to which this statement is admissible.
2. Whether the parties would have intended the statement to form part of the contract.

If the contract is oral, the court may consider all relevant evidence to identify the terms of the contract. Where the parties have recorded their agreement in writing, the evidence that is admissible for the purpose of identifying and interpreting the terms of the contract are limited by the *Parole Evidence Rule*.

PAROLE EVIDENCE RULE

1. The rule prevents extrinsic Evidence being given to add to, vary, or contradict the terms of a contract as they appear in a written document. This rule therefore limits the extrinsic evidence that may be given in identifying the terms of the contract.
2. The rule limits the evidence that can be given to explain the meaning of the terms of a written contract

THIS RULE ONLY APPLIES TO CONTRACTS WHICH ARE WHOLLY IN WRITING.

Therefore, extrinsic material can be used to determine whether a contract is wholly in writing. The parol evidence rule will not apply to exclude evidence of the oral terms of a contract that are only partly in writing.

The parol evidence rule does not apply to a collateral contract!!

ENTIRE AGREEMENT CLAUSES

Parties may expressly clarify their intention for a contract to be wholly in writing through a merger or entire contract clause, which states that the written contract contains the entire agreement of the parties.

GENERAL APPROACH

Hospital v US surgical

MF: contract for sale of land, vendor completed a form in which he indicated that the property was served, yet served by septic tank. purchasers claimed that it was seaward was a term of contract.

A representation made in the course of negotiations which result in a binding agreement may be a warranty, ie. it may have binding contractual force in one of two ways: it may become a term of the agreement itself, or it may be a **collateral contract, the consideration for which is the promise to enter into the main agreement.** In either case the question is :

whether the representation creates a binding contractual obligation depends on the intention of the parties ... the intention of the parties is to be ascertained objectively; it can only be deduced from the totality of the evidence ...

objective intention can be difficult to determine- so there are secondary guides provided by the court:

ELLUL V OAKES :secondary guides to the main test:

1. they may have regard to the time which elapsed between the time of making the statement and the final manifestation of agreement; if the interval is a long one, this points to a representation.
2. they may consider the importance of the statement in the minds of the parties; a statement which is important is likely to be classed as a term of the contract.
3. if the statement was followed by the execution of a formal contract in writing, it will probably be regarded as a representation should it not be incorporated in the written document.
4. where the maker of the statement is, *vis-a-vis* the other party, in a better position to ascertain the accuracy of the statement, the Courts will tend to regard it as a contractual term.

But all of these factors are at best only secondary guides, and they are subsidiary to the main test of *contractual intention*, that is, whether there is evidence of an intention by one or both parties that there should be contractual liability in respect of the accuracy of the statement. **The question therefore is: On the totality of evidence, must the person making the statement be taken to have warranted its accuracy, i.e. promised to make it good?**