

Chapter 6 Notes **BLAW**

Concept of 'terms' of a contract

'contents' of contract = 'terms' of contract = promises of legal binding
create enforceable obligations to give/do something

how do 'terms' become part of a contract? AGREEMENT

terms in a contract → agreement (expressed / implied) or law (general law or legislation)

the law can insert terms into contract to fill gaps in the agreed terms / regulate aspects of the contract
some terms implied by law becomes part of *all* contracts, others only *particular kinds* of contract

how are terms of contract proved?

Written (whole/part) → but not an essential requirement

Wholly written – '**parol evidence rule**': wholly written terms are proven by written contracts only -> no additional oral terms allowed (oral evidence is forbidden), unless evidence of rectification; resolution of uncertainty; or only partly written

Orally → evidence from parties to the contract or witnesses

Van den Esschert v Chappell [1960] WAR 114 (eg: partly written, partly oral)

C confirmed orally before buying V's house if it's white-ant-free.

BUT not in written contract

V sued C for breach of promise

But was the promise part of the contract? N

parol rule not in effect bc partly oral/written

Are all 'terms' of contract treated as equally important?

Fundamental importance vs **lesser** importance

Conditions: **fundamental** importance (promisee wouldn't have contracted without it & apparent to promisor)

Warranties: **lesser** importance

Whether it is conditions/warranty depends on the intention of the parties (can it be inferred from the circumstances that the promise was so important that the promisee would not have entered the contract without it?)

Factors assessing whether term is a condition:

- Previous decisions
- Language in which the obligation is described
- Other terms of the contract
- Likely character of the breach

Associated Newspapers Ltd v Bancks (1951) 83 CLR 322

B = cartoonist

B agreed to draw if drawing published on front page but did not (instead page 3)

Was promise made by AS to B an **essential** term? **Y** → **B wins**

Term (in this case) = fundamental importance (promise is of such importance to **B that he would not** have entered the contract)

Bettini v Gye (1876) 1 QBD 183

B = singer

G & B's term of contract: B to arrive 6 days before 1st engagement + attend rehearsals

B got sick, missed 4 rehearsals

Was the term requiring attendance at rehearsals a fundamental importance? **N** → **B wins**

Term (in this case) = **warranty NOT condition** | attendance at **rehearsals would not vitally** affect the whole contract.

Innominate terms

Sometimes terms are **not classified as conditions/warranty** → unnamed = Innominate terms = **'intermediate' terms**

Hence, the breaching of terms is determined by **how seriously** the breach affected the intended benefit of the **contract**.

Breach of condition (in this case) – if breach denies the non-defaulting party (party that managed to actually fulfil the contract)

Doctrine of freedom of contract

'freedom of contract' = freedom to negotiate and agree to the terms of their contract that serve their own interests.

Statements that becomes terms of a contract and other kinds of statement

Categories of statements made during negotiations:

- No legal effect (puffery)
- representation of fact → if untrue promise may cancel contract
- constitute a contractual promise

Statement that **do not** become terms of contract

- puffs: **exaggerated/insincere** statements to **engage/excite** others into contract
- opinions: **personal views / beliefs**
- representation: **statement of fact** (untrue = misrepresentation: error – innocent, deliberate – fraudulent, careless – negligent) → representations do not become terms **unless can be inferred as intended to be binding promise** | **misrepresentations** are also **not terms** hence do not give rise to breach of contract actions

Comment [HA1]: False advertising

Handbury v Nolan (1977) 13 ALR 339 (?? Why terms? Isn't it a puff?) 113

Auctioneer offered cow for sale & stated cow is pregnant | cow is in fact infertile not pregnant

A's statement = terms? Is breach of contract payable then?

Results: **Auctioneer lost** → statement was legally binding

Result of test (infertile) is not mere **opinion** = it's a **STATEMENT OF FACT**

Hence, statement was a contractual promise

Statement of fact + not opinion + circumstances (statement is made just before the sale & want to see higher price be paid for the cow)

Oscar Chess Ltd v Williams [1957] 1 All ER 325

W sold car to dealer.

Car claimed as **1948** car – according to book that was fraudulently altered by prev owner **not known by W** → car is in fact a 1939 → different ages

O sued, **O lost** | o= buyer

W's statement = term of contract? **N** | **description of car was misrepresentation NOT contractual promise.**

W had no special knowledge in cars → not possible to infer that promise was intended.

Terms can become part of a contract either:

- by agreement (which can be express or implied)
- because they are put into the contract by operation of law (either the general law or legislation).

Terms that arise by **express** agreement

'expressly agreed' = when they have actually been **declared/definitely stated** (writing/orally)

Ways terms may be expressly agreed:

- discussed
- included in signed doc
- referred to on a ticket/notice

L'Estrange v F Graucob Ltd [1934] 2 KB 394

G sold L machine. L **signed without reading**

Document stated that any implied warranties and conditions to be excluded.

L received machine, unsatisfactory, **L sues G**

Was L **bound** by the terms expressly agreed although **did not read the document?** **Y** → **L lost**

Signed = cannot later say that they did not agree (even if not read)

Causer v Browne [1952] VLR 1

C took a dress to B for **dry cleaning**

B passed C a '**docket**' with statement "no responsibility for loss or damage"

C did not read

C got back dress and found stain on it

C sues B

Is the statement in the docket a term of contract? **N** | **C wins**

Document was only an **identifying docket** → **need to be produced** to collect C's dress

Document = contractual document

HENCE can't be inferred that C was agreeing

Comment [HA2]: What's the diff between expressly agreed terms and terms agreed by implication?

terms agreed by implication: obvious | assumed
expressly agreed: written or verbally expressed to be part of the terms

Comment [HA3]: So does it mean that binding terms can't be contained in a ticket or other document that is given by one contracting party but is not signed?

Must be obvious and **apparent to the promise** / must be **brought into attention** to the other party

Doesn't have to be signed → cos can be verbally

Terms arising by **implication** [ad hoc] terms that limit or exclude liability

Ad hoc = unplanned (or intended to be part of contract w/o being expressly stated/referred to)

Requirements for terms to be implied ad hoc:

- **officious bystander test** (for intention): what would the parties have replied if an officious bystander had asked them at the time of agreement **whether the suggested term was part of their contract?** → if can be inferred that parties answers **'of course'** then intention is established
- Requirements of ad hoc:
 - Must give **business efficacy** to the contract (if contract would be effective without the proposed term → term won't be implied to contract)
 - Obvious to 'go without saying'
 - Reasonable & equitable
 - Clear, unambiguous expression
 - Did not contradict express terms

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337.

C builds tunnels for S → both **believed** that nothing could prevent construction from continuing 24hrs a day.

High level of noise = neighbourhood complained

Hence, need to place time limits

Hence work is done at slower rate, C has to pay more for labour

C claimed extra payment from S → **C lost**

Qn: was it an implied term that S would pay extra costs associated with the limited working hours? **N**

Just because both **believed** that there would not be prevention DOES NOT MEAN **contract includes S agreeing to pay extra** for any future preventions.

Also, implied terms NEED to be inferred from expressed terms not just any external **evidences**

Comment [HA4]: Implied terms
Terms obvious
DURING THE CONTRACT FORMATION

Comment [HA5]: **'Of course'** = implied adhoc

Comment [HA6]: Obvious (the implied term is obviously stated) as& necessary (you can't proceed to perform/ do anything without it) to desirable and reasonable

Comment [HA7]: beliefs

Moorhead v Brennan (t/as Primavera Press) [1991] 20 IPR 161.

M author

B publisher

B agrees to publish M's book, wrote introduction for book. M approves

T is an overseas publisher, wanna publish book but don't want introduction

B refused, hence T didn't end up publishing

M fails to make profit

M sues B

B lost → B breached

The only way M can sell books outside Australia is to license overseas publishers to publish books, hence M relied on B to produce, publish and license book → **IMPLIED** that B should be supportive and can't just reject anything that hinders M's opportunity to make \$\$

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266

Test: reasonability n equitability & business efficacy

HSC entered into agreement with BP → allows BP to pay lower municipal rates

BP underwent restructure and the refinery site was transferred to another company (smaller but related) **BP AUSTRALIA**

HSC charged BP AUSTRALIA full municipal rates

HSC argues it is **IMPLIED** that only BP is allowed for Municipal rates

BP sues HSC → **HSC lost**

There is not implied terms: terms was not needed to give business efficacy to the contract, it's not fair and equitable, it's not obvious (can go without saying)

Court applied **officious bystander test** → no **'of course'** → **not satisfied** → term **not implied** in the contract

Terms put into a contract by operation of law

Universal terms: implied to all contracts

2 important terms put into all common law:

- To cooperate and do what is reasonable so both parties benefit from contract

Perri & Another v Coolangatta Investments Pty Ltd (1982) 149 CLR 537

P agrees to buy property from C

Condition: P has to sell his property at lilli pilli within a certain time

P struggled to find buyer for the lilli pilli property

P failed to sell his lilli pilli property within the time

C terminated contract → P argues termination is **breach** of **implied duty of cooperation**

P sues C → **P lost**

IMPLIED condition that P would do all that it takes to sell his lilli pilli property before the due time for the contract with C to be completed.

Hence, **P fails to sell**, contract **not completed** with C → **C can terminate** (no contract to begin with)

Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

SM bought land from SI but only a part (not whole)

SI then realizes that during the period, very few people buy property

SI offered to lease the whole land to SM

SM rejected

SI sued SM claiming that SM should **cooperate** (**IMPLIED** to cooperate)

There's implied terms to cooperate but **no BREACH**

SI lost

- To act in accordance with good faith ie use contractual powers honestly and reasonably

Generic terms: terms implied into specific kinds of contracts eg sale of goods

Establishing the relative importance of particular terms in a contract

Proving the terms of a contract