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## PAROL EVIDENCE RULE & EXTRINSIC EVIDENCE

### PRINCIPLE

- Where a contract is wholly in writing, **evidence is not admissible** to add to, vary or contradict the written document: Mercantile Bank of Sydney v Taylor (1891)
- 2 purposes
  - To identify the terms of the contract (see below)
  - To prevent the use of extrinsic evidence to interpret the meaning of the terms of the contract (see below)

### ESTABLISHING CONTRACT PARTLY WRITTEN & PARTLY ORAL

- Existence of an **entire agreement clause**: Hope v RCA Photophone of Australia Pty Ltd (1937)
  - However a blanket entire agreement clause may not be enough: Hart v MacDonald (1910)
- Masterson Homes
  - The parol evidence rule applies only to contracts that are wholly in writing
  - Where there is a document that appears to be a complete contract, it can be inferred that the document contains the whole of the express terms
  - However a party can argue that even though there is a document, the parties have also agreed orally on terms additional to those in writing (the converse is also true)
  - **Where a contract is partly written and partly oral, the terms of the contract are to be ascertained from the whole of the circumstances (question of fact)**
  - **ORAL TERMS**
    - If the words that the parties said to each other are known, the meaning of those words is determined by considering the **surrounding circumstances**
    - If the words are not known, use the surrounding circumstances to find what in substance the parties agreed
  - **\*NOTE:** Difference between partly written and partly oral contract and a contract that is wholly in writing and an oral collateral contract

### EXCEPTION TO PAROL EVIDENCE – PURPOSE 1 (IDENTIFY TERMS)

- **Rectify mistake:** Where parties fail to accurately record their common intention in writing, equity may allow a contract to be rectified so that it represents the true intention of the parties: Bacchus Marsh Concentrated Milk Co v Joseph Nathan and Co
- **Condition precedent:** The operation of the contract is dependent on a unique special event → this term is an exception and is called a condition precedent: Pym v Campbell
- **Oral termination of contract:** The rule prevents introduction of extrinsic evidence that the parties added to, subtracted from or varied the agreement *before* it was in writing, not evidence that the parties *LATER* agreed to its variation or discharge: Noarich v Commissioner of Payroll Tax (1983)
- **Sham (prove true consideration):** When the written document does not reflect the true consideration of the bargain: Esanda v Burgess
- **Not totally in writing:** Parol evidence rule only applies if the contract is totally in writing BUT existence of writing is persuasive: State Rail Authority of NSW v Health Outdoor
- **Implied term:** Even if it was not specifically referred to in the contract, **custom, trade usage or past dealings** may be relevant: Hutton v Warren
- **Prove Existence of Collateral Contract:** The parol evidence rule preventing extrinsic evidence being led to affect the main contract does not apply to the collateral contract: De Lassalle v Guilford

#### EXCEPTION TO PAROL EVIDENCE – PURPOSE TWO (CONSTRUE MEANING)

- **Evidence of Factual Matrices:** Circumstances of contract and following factors considered to help determine meaning of text (ambiguous or not) as a reasonable man would have understood them to mean: (*Electricity Generation Corporation*):
  - Language used by the parties
  - Circumstances known to the parties
  - Commercial purpose/objects to be secured by the contract
  - Contract to be construed to avoid it making commercial nonsense or working commercial inconvenience
  - **\*NOTE: Subjective intention is not admissible.** Surrounding circumstances applies to objective background facts: *Codelfa*
  - **\*NOTE:** Subsequent conduct cannot be used to interpret construction of contract but can be used to ascertain contract formation, subject matter or partly written/partly oral contracts: *Masterton*

#### COLLATERAL CONTRACTS

- **Collateral contract:** contract where one party makes a promise connected to, but independent of the main contract, in response to consideration of a promise by the other party to enter into the main contract: *Heilbut Symonds v Buckleton*; *De Lassalle v Guilford*
- If a collateral agreement exists, it will be enforceable even if the main agreement is not valid or enforceable.

#### ELEMENTS

1. The **statement must be intended as a promise** – i.e. a term rather than a ‘mere’ representation: *JJ Savage & Sons v Blakney*
2. Statement is **intended to induce entry into the main contract** AND **did** induce entry into the main contract: *JJ Save & Sons v Blakney*
3. **Separate consideration** from the main contract is required AND consideration must be **concluded at the same time or before the main contract**: *Hercules Motors v Schubert*
4. Statement must **not be inconsistent with the main contract**: *Hoyts v Spencer*