

Admissibility of Evidence:

- If the agreement has been recorded in writing, evidence of unrecorded terms may be inadmissible (application: parole evidence rule & signature rule)
- Issues of whether the evidence, other than the relevant written contract, can be admitted into evidence.
- **Admissible evidence:** Evidence received, or capable of being received by a court or tribunal of fact or purpose of proving a fact in issue and not subject to exclusion. The rules governing admissibility of evidence are found in statute: *The Evidence Act 1995 (NSW) ch 3*,
- It is common for one party to the contract to allege, although a written contract has been entered into and that they have signed it, pre-contractual statements should also be incorporated or become part of the said contract, or alternatively should be used to explain or interpret the words used in the contract.
- Even if pre-contractual statements can be admitted as evidence, they will not be binding on the parties and constitute terms of the contract unless they are promissory in nature.

Actual Terms:

- What exactly are the terms, which the parties actually agreed to incorporate in the contract. (Expressly by reference or other methods.)
- To constitute a term of contract, a particular statement must have been incorporated into the contract at the time of its formation.
- The ultimate questions as to whether a term has been effectively incorporated into the contract depends on the intention of the parties. This intention must be determined on an objective basis and by reference to the three principal methods of incorporating terms, namely incorporation by signature, by reference and reasonable notice, and by a course of dealing.

Express Terms:

- Express terms of a contract are those terms, which the parties have objectively intended to include in it.
- **Oral Statement:** A statement of fact which induces entry into the contract may be:
 - a) A term of the contract – if there was an intention to guarantee its truth;
 - b) A representation; or,
 - c) Mere sales talk or puffery.
- Whether such statement is a term of the contract depends on the intention of the parties.
- In relation to any statement, intention is determined objectively having regard to:
 - a) The time it was made;
 - b) Its content;
 - c) Whether there is a written contract; and,
 - d) The relative knowledge and expertise of the parties
- *Couchman v Hill [1947]; Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965]*

Collateral Contracts:

- An undertaking given prior to the execution of a contract document as a consideration to the other party's entry to the contract:
- 'A contract the consideration for which is the making of some other contract' *Saleh v Romanous [2010]*.
- A collateral contract is a contract the consideration for which is the making of another contract ("main contract").
- A statement will take effect as a collateral contract if the maker of the statement intended to guarantee the truth.
- A statement, which contradicts an express term of the main contract, cannot take effect as a collateral contract between the same parties.
- *Hoyt's Pty Ltd v Spencer (1919)*; *JJ Savage & Sons Pty Ltd v Blakney (1970)*
- **(Elements) proving existence of a collateral contract:**
 1. The statements, written and oral, which are relied on as constituting a collateral contract, must clearly be promissory in nature.
 2. The statements, written or oral, which must be consistent with the written contract. Estoppel provides a possible means of circumventing this – no requirement necessary.

Incorporated Terms:

- A term may be incorporated into a contract:
 - a) By signature on a contractual document;
 - b) By reasonable notice;
 - c) Under the principles of the 'ticket cases'; or,
 - d) By a course of dealing.
- In the absence of misrepresentation, a signed contractual document is binding even if it was not read.
- *L'Estrange v F Graucob Ltd [1943]*; *Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd (2004)*.
- **Notice tickets and course of dealing:** A term may be incorporated if reasonable notice was given prior to or contemporaneously with entry into the contract.
- Under the ticket cases a term stated or referred to in a document is incorporated if it was tendered and accepted prior to or contemporaneously with entry into the contract, and:
 - a) A reasonable person in the recipient's position would have regarded it as contractual;
 - b) The recipient knew that there was writing on the document; and,
 - c) The recipient knew that the document referred to contractual terms, or the other person took reasonable steps to bring notice of the term to the recipient's attention.
- A term may be incorporated by a course of dealing if:
 - a) There is sufficient course of dealing; and,
 - b) Each party left the other reasonably to believe their rights were governed by the.
- *Causar v Browne [1952]*; *Thornton v Shoe Lane Parking Ltd [1971]*; *D Hill & Co Pty Ltd v Walter H Wright Pty Ltd*.

Parole Evidence Rule:

- Parol Evidence Rule is estoppel.

- Excludes evidence of extrinsic terms which ‘subtract from, add to, vary or contradict the language of a written instrument.’ *Codelfa Constuction Pty Ltd v State Authority of NSW (1982)*,
- **Extrinsic evidence:** Evidential material that lies outside a contract or instrument. Under the parol evidence rule, extrinsic evidence, except as to surrounding circumstances is generally excluded if it subtracts from, adds to, varies or contradicts the language of a written instrument. However extrinsic evidence is admissible to aid interpretation of a document, where the document, or any of its terms is vague or ambiguous: *Codelfa Construction Pty Ltd v State Authority of NSW (1982)*. The types of extrinsic evidence that are admissible to aid interpretation are:
 - The object and purpose of the instrument evidenced in the instrument, and purpose surrounding circumstances that were reasonably known to all parties at the time of the entry.
- Similar to signature rule, but independent from the parol evidence rule. On the basis that it is desirable to preserve finality in written instruments and now allow ‘written words to be altered or qualified by the uncertain testimony of slippery memory.’

Exceptions of the Parol Evidence Rule:

- Documents which obviously do not record the whole contract:
 - Receipts, tickets, invoice and other documents which manifestly demonstrate only a partial record of the contract.

Promissory Nature:

- Even if pre-contractual statements can be admitted as evidence, they will not be binding on the parties and constitute terms of the contract unless they are promissory in nature. They must be distinguished from mere representations.
- **Promissory estoppel:** A species of equitable estoppel, arising from representations about present or future rights between the parties: *Legione v Hateley (1983)*. The party protected must have altered its position in reliance on an assumption induced by the representations or promises so that it would suffer detriment if there were a departure from the assumption: *Waltons stores (Interstate) Ltd v Maher (1988)*. The other party may be able to resile from the position upon giving reasonable notice: *Commonwealth v Verwayen (1990)*. Relief under the doctrine of promissory estoppel is in the nature of discretionary equitable relief against the operation of the common law and is based on unconscionability.
- **Elements of promissory estoppel:** There are three essential elements of promissory estoppel:
 1. A promise;
 2. Reliance on the promise; and,
 3. Unconscionable conduct.
- **Unconscionable conduct:** conduct not done in good conscience; sometimes conduct that is morally tainted: *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd [2013]*. Unconscionable conduct is prohibited by the Australian Consumer Law (ACL) in connection with the supply of goods or services to consumers.
- Where, during the course of negotiations for a contract, the person sought to be estopped promised to complete those negotiations in accordance with agreed terms, that party may be estopped from contradicting the promise: *Legione v Hateley (1983)*; *Waltons Stores (Interstate) Ltd v Maher (1988)*.

- The promise may be express or implied but must be unequivocal.
- Reliance must be definite and substantial to the knowledge of the person sought to be estopped and which:
 - Is detrimental; or,
 - Will occasion detriment if the promise is contradicted.

Remedies of Estoppel:

- Where a person is estopped from contradicting a promise, the other person may raise the estoppel:
 - By way of defence in relation to a right to which the party estopped would otherwise be entitled; or,
 - In the assertion of a positive right against the party estopped.
- The remedy of an estoppel must be proportionate to the detriment suffered by reliance by the person who invokes the estoppel.

Pre-contractual terms/statements:

- Evidence of such statements is not admissible (under contract law) unless one of the exceptions to the parol evidence rule applied but there are other considerations in play:
 - The importance of the concluded written contract;
 - The nature of the pre-contractual terms – whether promissory;
 - Consistency with the written contract;
 - Estoppel – the need to prove unconscionability.

