

# WHAT ARE THE TERMS OF THE CONTRACT?

## EXPRESS TERMS

Is your pre-contractual oral statement a term of the contract, a mere representation, puff or give rise to a collateral contract?

### 1 – INCORPORATION OF ORAL STATEMENTS

#### 1.1) PAROLE EVIDENCE RULE

- Is the contract wholly in writing?
  - Flexible approach – PER has no scope to exclude extrinsic evidence until it is first determined that the contract is wholly contained in writing: *SRA v Heath Outdoor*
  - Strict Approach – *Williston*
- Is the contract not an exception?
  - Collateral contract, estoppel (*Saleh v Romanous*), rectification, contract subject to condition precedent

#### 1.2) Is there an entire agreement clause?

- **Def:** a term statement that the written document is to represent the entirety of the parties' agreement and no extrinsic statements are to be treated as incorporated into that contract
- Construe clause to determine its breadth; such a clause will generally be taken as conclusive evidence that the writing represents the entire agreement between the parties: *Hope v RCA Photophone of Australia Pty Ltd*
- However, this does not preclude potential liability arising from other remedies such as estoppel

#### 1.3) On the totality of evidence, must the person making the statement be taken to have warranted its accuracy? *Hospital Products*

- To be determined by looking at the conduct, words and behaviour of the other party: *Oscar Chess*
- Secondary matters: time and importance of statement (in inducing party to enter contract), relative knowledge and expertise of parties, existence of written memorandum: per Zelling J per *Ellul v Oakes*
  - Promissory language: *JJ Savage*
  - Relative expertise: *Oscar Chess Ltd v Williams* cf *Dick Bentley Productions v Harold Smith (Motors)*
  - Importance of statement *Couchman v Hill*
  - Existence of written memorandum gives rise to presumption that oral statement was not intended to be a term of the contract, especially if the oral statement is inconsistent: *Equuscorp Pty Ltd*.
  - Standard form: *State Rail Authority NSW v Heath Outdoor*
- **MERE PUFF**
  - No contractual effect: *Carlill v Carbolic Smoke Ball*; *Leonard v Pepsico*
- **MERE REPRESENTATION**
  - a statement made to induce entry into the contract but not a term of the contract; possible estoppel

- **COLLATERAL CONTRACTS**

- An oral contract made when one party makes a, connected but independent promise whereby the consideration is the agreement to enter into the main contract: *Heilbut Symons & Co v Buckleton*
- No PER
- **ELEMENTS:** To prove a collateral contract exists, it is necessary to prove that
  - 1. The statement must be intended to be relied upon and;
  - 2. The other party relies upon it and;
  - 3. The maker of the statement intends to guarantee the statement's truth ("promissory not merely representational"): *JJ Savage*
  - 4. Not inconsistent: *Hoyts v Spencer*
- Must ask why it is not a term is so important yet not included (different subject matter): *Sheppard v Ryde*
- Statement alleged to be the collateral promise must be an offer capable of acceptance so consider if it is too uncertain (lack of meaning) and/or incomplete (missing an essential term): *Crown Melbourne v Cosmopolitan Hotel*

## 2 – INCORPORATION OF WRITTEN TERMS

### BY SIGNATURE

- **RULE:** where a person who signs a document, contractual in nature, will be bound by the terms in that document regardless of whether he or she has read or understood those terms, in the absence of misrepresentation or non est factum: *L'estrage v Graucob* upheld in *Toll (FCGT)*
- Absent fraud or misrepresentation: *Curtis*
- Contractual in nature? Examples:
  - Y - Application for credit, terms on back: *Toll v Alphapharm*
  - N - "To assist with our advertising" *Le Mans Grand Prix v Iliadis*
  - N – voucher: *L'Estrange v Graucob*

### BY REASONABLE NOTICE

- **TEST:**
  - If the document is one which a reasonable person would expect to include terms, then mere presentation of the document is enough: *Parker v South Eastern Railway* (eg. Coat check ticket)
  - If the document is not immediately obvious to contain terms, then the person delivering the document must convey to the other party that it contains special conditions: *Causer v Brown*
  - If brought to attention after, not bound: *Olley v Marlborough Hotel*

### THE ACCEPTANCE OF AN OFFER MADE ON A 'TICKET'

- 'Ticket' cases apply when offer=giving of ticket and acceptance=not objecting; ticket=contractual in nature (if not, notice)
- **TEST:** A person will be bound by terms written on a ticket if – they knew there was writing on the ticket, that the ticket referred to terms and the party relying on the terms took reasonable steps to bring notice of the existence of terms to the other party: *Parker v SE Railway*

- The customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or if the company did what was reasonably sufficient to give him notice of it (Denning MR, **Thornton v Shoe Lane Parking**)
- Automatic ticket machine not subject to these requirements
- Unusual terms (harsh/onerous)
  - Denning J: Did D do what was reasonable to bring to P's notice this particular condition/condition of this nature? **Thornton v Shoe Lane Parking**
  - More stringent for clauses "so wide and destructive of rights"

### **COURSE OF DEALINGS**

- For a term to be incorporated through course of dealings (Q of fact):
  - Dealings must be regular and uniform: **Henry Kendall** (100/3years)
  - Other: number of prior dealings, how recent, and the consistency of terms in the prior dealings and the dealing in question: **La Rosa v Nudrill**
  - Documents relied on from earlier transactions must reasonably be considered to be a contractual document: **Rinaldi & Patroni v Precision Mouldings** ('cart notes'); **La Rosa v Nudrill Pty Ltd** (invoice)
- No need for reasonable notice where previous dealings imply knowledge and acceptance of terms: **Balmain**

### **BY REFERENCE**

- Where parties make reference to another document for other terms to be included eg. Employment contracts,

### IMPLIED TERMS

This section is concerned with how courts imply terms into a contract. Terms will not be implied if they have been expressly excluded by the parties or are otherwise inconsistent. An entire contract clause does not exclude terms from being implied: **Hart v McDonald**. If a term is implied, it will be implied from the moment of contract formation.

#### **1 - IMPLIED IN LAW**

- **TEST:** In deciding whether a new term should be recognised as implied in law it must be shown that the term is a necessary incident (**Bryne**) of a definable category of contractual relationship, and not too extensive

##### 1.1) Is the term necessary?

- Unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered negatory, worthless or be seriously undermined: **Bryne v Australian Airlines Ltd**
- Look at rights conferred by the matter and the rights necessary to avoid impairment of such rights: **Liverpool City Council v Irwin**
- Not business efficacy. More general considerations: **Gray** (research)
- Not reasonableness. **Commonwealth Bank of Australia v Barker** (termination)

##### 1.2) Is it a term which the courts can imply?

- Not overstep into legislature: **Reid v Rush Tompkins** (overseas insurance)
- Confine to particular kind of relationship: **Sally v Southern Health Board**
- Not a significant impact on employment relationships or law: **CBA v Barker**

##### 1.3) Implied for the first time?

- Must be a "necessary incident of a definable category of contractual relationships"

#### 1.4) Examples

- Duty of Good Faith: *CBA v Barker, Royal Botanic*
- High court yet to express view on whether law recognises an independent implied duty of good faith, leaving issue open in *Royal Botanic Gardens*
- Duty of reasonableness in exercising a discretionary power (but can act in self-interest): *Renard Constructions (ME) Pty Ltd v Minister for Public Works*
- Not to exercise powers in a capricious or arbitrary manner or for an extraneous purpose: *Burger King Corporation v Hungry Jack's Pty Ltd*
- Duty to co-operate with dependent obligations: *Servcorp Ltd*

## 2 – IMPLIED IN FACT

### 2.1) For **FORMAL CONTRACTS**:

- **TEST:** Per *BP Refinery* affirmed by *Secured Income Real Estate*:
  - Be reasonable and equitable
    - No significant burden or detriment
  - Be necessary to give business efficacy
    - The term must be necessary so as to enable the contract to operate in a business-like manner
  - Be obvious “it goes without saying”
    - *Gwam Investments v Outback Health Screening*
    - eg. *Codelfa* – not so obvious
  - Be capable of clear expression
  - Be consistent with the express terms of the contract
- Reasonably intended to mean that given context? Not independent tests *Belize*

### 2.2) For **INFORMAL CONTRACTS** (terms not spelt out in full)

- **TEST:** Terms should be implied if it fulfils the grounds of reasonableness or efficacy: *Hawkins v Clayton* approved in *Bryne*
- Obviousness: *Bryne*

## 3 – STATUTE

- *Sale of Goods Act 1923 (NSW)* – s57 implied terms may be negated by express agreement or by course of dealings
  - s13: reasonable price to be implied in absence of specification
  - s18: goods must correspond to description
  - s19: goods must be reasonably fit for required purpose, no defects
- *Australian Consumer Law*
  - s64 – guarantees not to be excluded by contract

## 4 - CUSTOM

- Applies to all contracts of this type where there is evidence of the existence of custom and usage
- **TEST:** per *Con-Stan Industries*
  - Exists (Q of fact)
  - The custom must be so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to import the term
  - Not inconsistent
  - Knowledge of custom is not necessary for that person to be bound
- Very difficult test to meet