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Part 3 – Scope and Content

Deals with who acquires rights and obligations under a contract and the content and nature of those rights and obligations.

Terms of a Contract

1. Introduction

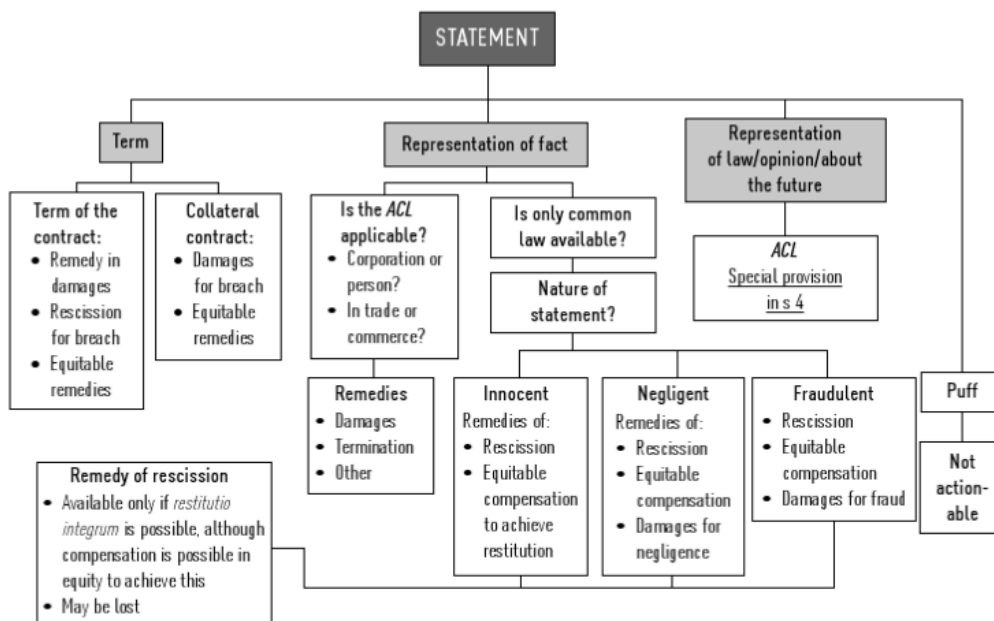
- Determination of C
 - What are the contractual rights and obligs the Ps agreed to OR imposed on them by statute
- Express terms
 - Articulated by Ps during formation
- Implied
 - Not referred to by Ps but form part of C anyway through operation of law
- 1 Jan 2011
 - ACL replaced non-excludable statutory implied terms with statutory guarantees
- Note: terms in C aren't the ONLY determinants of rights and obligs for Ps
 - General law
 - Statute
 - Prohibition of misleading or deceptive conduct (s 18 ACL = powerful remedies)
- Determining rights and obligs of Ps:
 - What are the express terms of C?
 - Are any terms implied in C?
 - What do these terms mean / how important are they?
 - Are there any exclusion clauses that curtail what would otherwise be a Ps oblig?
 - Has the conduct of the Ps given rise to non-contractual rights / obligs?

2. Express terms

- Can be done orally, written, reference to a sign, ticket
- Issue arises when determining what those express terms in the C are
 - Ps don't make it clear

Pre-contractual statements

- During pre-C negotiations, statements relating to subject matter of C will often be made that influence decision making of one / both Ps
- These statements may come from a TP
- Classifying statements



- Classifying statements important because it determines the remedies available

Sales puff

- Hyperbolic statement that speaker doesn't intend to be literal and reasonable person would recognise it as exaggerated sales talk
- No remedy available

Terms of C

- Term = Contractual expression of a promise that one P made to another (ie. Articulates Ps oblig to other P)
- If statement = term = proven false = party who made it will be guilty of breach = other P remedy on that ground

Term of a collateral C

- CC = secondary C that exists collaterally to main C b/ Ps
- Typically exist with only one term
- Statement = CC = proven false = party who made it guilty of breach
 - Won't be guilty of breaching main C

Representation

- Rep = statement made by one P to another that was not intended / understood by Ps to be a promise
 - Could be factual: e.g. car travelled only 50,000 km
 - Could be about future: e.g. car will outperform other cars
 - Statement of opinion: e.g. car is best model ever
 - Could be law
- Not promissory --> not form part of any C
- Common law
 - Only remedy for representee = rescind C on ground of misrep (damages not avail unless representor was guilty of negligence or deceit)
 - Remedy only avail if it was a factual matter
 - Remedy lost if restitution isn't possible
- ACL

- Statement comes within scope of s 18 (misleading and deceptive conduct), representee has remedies
- Include damages

The test

- Remedies for breach is far better than those for misrep
- Courts use this test to resolve this issue^

Case: Ellul and Ellul v Oakes (1972)

Facts

- E purchased house from O
- Relied on statement that property was sewerage
 - Representation was made in real estate agent's listing form
 - Form was signed by O
- Prop not sewerage
- Ellul's claimed for breach of C

Issue

- Was this feature a term of the C?

Held

- 1st: claim failed - sewerage not part of C of sale
- Justice Zelling:
 - Questions
 - Whether statement was made in course of contractual dealing? YES
 - Whether statement made for purpose of inducing other P to act upon it? YES
 - Whether purchaser induced as a result by entering into C? YES
 - Prima facie evidence it was intended as a term
 - Relevant factors:
 - Time b/ statement and contract: longer the time, less likely the term
 - Importance of statement: more important, more likely a term
 - Subsequent written doc: less likely a term
 - Is representor in better position than representee to assess accuracy of statement?: helps in proving intended as term
 - Main test
 - Intention of PS - did the P making the statement intend to 'warrant' its accuracy (promise to make good on statement)

Collateral contracts

Pre-Cual statement not part of C can still have Cual effect

- CC = two Cs = main C has principles terms relating to bargain and CC containing the statement
- Most common sitch for a CC is where Ps recorded agreement in writing but have omitted a promissory statement made by a P which induced the other P into entering the C
 - To avoid strictures of **parole evidence rule** (prevents statement being added to doc) the courts regard it as a CC rather than mere representation
- Statement must be
 - Promissory in nature
 - Central issue when one P claims that a pre-cual statement = CC
 - **Case:** JJ Savage & Sons Pty Ltd v Blakney (1970)

- Not contradict main C
 - Can't say a term in main C is to be ignored
 - Established in AUS by HC decision in *Hoyt's Pty Ltd v Spencer*, which argued that as the consid for the promise contained in the CC was the promisee agreeing to enter into the main contract, the two must be consistent
- Made in exchange for consid
- Consideration
 - Usually entering into the main contract = consid for CC
 - Done by the person to whom the statement is made

Tripartite collateral contracts

- Most CCs are b/ the same parties of the main C
- BUT law recognises that a CC can be made b/ Ps of main C and a TP
- Typically when a TP makes a statement about a product that has induced the representee to enter into a C to acquire it from a supplier
 - Main C = shop and consumer
 - T CC = consumer and manufacturer

Signed documents

- Most effective way for Ps to ensure term becomes part of C = record in doc and sign
- Gen rule = signature is bound by its terms whether or not they've read / understood the doc
 - Rule of *L'Estrange v Graucob*
- Exceptions

Case: Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd

- Qualifications to rule in *L'Estrange v Graucob*
 - Applies only when doc in q was understood by signatory to be a C (as opposed to a doc with no legal effect e.g. receipt)
 - Doesn't apply where P putting forward doc misrepresents the terms
 - Doesn't apply where signatory was mistaken about nature of doc (invoke plea of *non est factum*)
 - Statutory exceptions created dealing with unconscionable conduct, duress or unfair terms

Terms displayed or delivered

- Terms can be incorporated into C w/out being mentioned during pre-contract negotiations nor included in a signed doc
 - Could occur if terms are set out in a sign at Ps place of business
 - Terms displayed at entrance to reduce liability of owner
 - Or contained in a ticket or receipt
 - Tickets issued to passengers travelling on commercial / public transport and receipts issued to acknowledge delivery / collections of goods and services
- 'ticket cases'
 - Terms only part of C if the party seeking to enforce did all that was reasonable in the circumstances to bring other P to attn of such terms
 - ^ occurred before C concluded

Case: Oceanic Sun Line Special Shipping Company Inc v Fay

Facts

- F booked cruise of Greek Islands
- Brochure said transport governed by terms and cond printed on ticket
- Fay didn't read this and didn't obtain ticket prior to making booking
 - Ticket contained clause excluding Aus jurisdiction
- Fay injured on voyage

Issue

- Did clause apply?

Held

- Ticket provided after C made
- Ticket couldn't alter existing terms
- Clause on sep doc to C and F wasn't aware it existed
- Carrier could only rely on it if they did: 'all that was reasonably necessary to bring the exemption clause to the passenger;s notice'
- That didn't occur here

Case: *Interfoto Pictures v Stiletto Visual Programs (1989)*

Facts

- S ordered 47 photos from I (to borrow)
- With them came delivery note with certain conditions
 - Clause 2: payment of 5 pound per day per photo late
- Photo's returned nearly 2 weeks late
- I claimed 3,783 pound (reasonable amount would've been 3.5 pounds per week)

Held

- To incorporate such a term into C a firm must
 - Take reasonable steps to draw condition to attention of other P
 - If condition particularly onerous the condition must be FAIRLY brought to other Ps attn

Result

- Unusual / onerous term
- Unless brought to Ps attn it can be assumed it's of little signif
- Not fairly brought to attention
- Can't be relied upon

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Case: Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd

Facts

- M submitted quote to PD for installing machinery
- Quote expressed to be on 'attached terms' (NOTHING was attached)
 - Subsequent fax stated quote to be on M's standard terms (NONE sent)
- PD orally accepted faxed quote
- Subsequent discussion:
 - M sent docs setting out standard terms to PD
 - PD prepared amended purchase order (contained only one of M's standard terms and paid 25% of price)
- Machinery manufactured + installed but EXPLODED causing damage to PD

Issue

- standard terms part of the contract? (if so, M avoided liability to damage suffered as terms included an exclusion clause)

Decision

- **Consider communications as whole**
 - No concluded agreement with first quote
 - PD's acceptance of M's request for deposit supports this conclusion
- Offer = original quote and confirming fax with spec's and standard terms
- Reasonable reader of quotation would conclude M intended to contract on certain terms and these could be identified
 - May be clear from original quote
 - If not, clear from confirming fax which again referred to M's standard terms
- Acceptance: hard to pinpoint but there was acceptance by PD

Course of dealing

- Terms may be incorporated into C without being discussed, referred to or displayed at time C concluded WHERE previous dealings of Ps give reasonable notice that a P intended to contract on those terms
- Case: Henry Kendall & Sons v William Lillico & Sons Ltd

3. Implied terms

Common law

- Common law implies terms in variety of sitches --> we categorise them for ease
- Categories overlap
- Common law implied terms can be excluded by EXPRESS terms of C or statute
- Two grounds terms can be implied
 1. Give effect to intention of Ps
 - Term is implied as Ps would've expressly made it a term had they thought of it when negotiating C
 - 'ad hoc' --> these terms must give C 'efficacy'
 2. Implied standard implied terms regarded as 'a legal incident of a partic class of C'
 - Courts don't care about intention of Ps but what's appropriate to apply to the partic nature of C
 - Case: Cwlth Bank of Australia v Baker [2014]

Standard implied terms (terms implied in law)

- Certain standard terms implied in categories unless Ps make clear otherwise

- Examples
 - Contract for materials = implied term that materials are good qual
 - Ps make contract work as intended
 - E.g. Contract subject to finance has implied term that purchaser take reasonable steps to obtain finance
 - Ps required to act in good faith and fair dealing
 - Case: Paciocco v Australia and NZ Banking Group Limited

Terms implied by custom

- Customary in partic trade, profession or locality
- Case: Con-Stan Industries of Aus Pty Ltd v Norwich Winterthur Insurance (Aus) Ltd (1985)

Statute

- 1) Terms implied into consumer contracts to protect Ps
 - a) E.g. Insurance Cs
- 2) ACL avoids these though as It creates statutory consumer guarantees and remedies for consumer against supplier

Construction and Classification of Terms

4. Introduction

- Once terms have been ascertained, you must determine the contractual rights and obligs of Ps to discover their meaning and importance

5. Rules of construction

The basic rule

- Basic rule = contract must be given meaning INTENDED by Ps
- Role of courts is to ascertain their intention and give effect to it
 - Determine objectively
 - Evidence can't be given of what Ps ACTUALLY intended... the focus is on their PRESUMED intention

Case: Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd

Held

- Law places great importance on signatures
- Absent fraud it doesn't matter if Ps read doc they sign
 - Otherwise the usefulness of signatures for business would be undermined
- By signing you represent either
 - You've read / understood terms
 - You're willing to accept whatever terms are contained in doc
- It's reasonable for other P to rely on sig as evidencing intent to be bound
- Toll didn't need to establish that it has done what was 'reasonably sufficient' to give A notice
 - That'd be a serious qualification to general rule
 - Such notice is required when NO sig
- Exceptions to gen rule
 - Where doc signed isn't the C
 - Where 'non est factum' is claimed

- plea that a written agreement is invalid because the defendant was mistaken about its character when signing it.
- Where there's misrep
- Case: Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982)
- Case: Investors Compensation Scheme Ltd v West Bromwich Building Society [1998]
- Case: Royal Botanic Gardens and Domain Trust v South Sydney City Council (2002)

The parole evidence rule

- Where contract is in writing, this rule deals with admissibility of extrinsic evidence to determine terms of C and their meaning

Case: Codelfa Construction Pty Ltd v State Rail Authority of NSW

- Mason J: broad purpose of this rule is to exclude extrinsic evidence, including direct statements of intention and preceding negotiations, that **change the language** of a written doc in any way

Case: Gordon v Macgregor (1909)

Facts

- Written agreement for G to supply M with logs
 - Logs to have average girth not less than 10 ft 6
 - Minimum quantity to be delivered every 3 months
- G failed to deliver
- M claimed breach
- G argued contract did not comply with formalities
 - Claimed two essential terms were not recorded
- G succeeded at trial
- M succeeded in Qld Full Court

Held

- Chief Justice Griffith quoted the general rule that:
 - 'Where a contract, though completely entered into by parol (verbally), is afterwards reduced into writing, we must look at that, and at that alone ... It is by the written contract alone ... that the parties are bound.'
 - there was no admissible evidence to demonstrate these terms regarding delivery or width of the timber
 - Isaacs J referred to a number of cases that also held that where oral negotiations are reduced to writing, the writing constitutes the contract
 - When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence.
 - To escape the effect of a document in those circumstances it would be necessary to demonstrate some sort of fraud or mistake – but neither were present here. The written document applied.

Exceptions to the parole evidence rule

- Rule operates ONLY when Ps intended the doc to embody the entire agreement
 - Case: State Rail Authority of NSW v Health Outdoor Pty Ltd McHugh JA said: "it has no operation until it's first determined that the terms of the agreements are wholly contained in writing"
 - Case: Mainieri and Comande v Cirillo [2014]
- Won't operate where the evidence goes to the validity of the C
 - Extrinsic evidence can be given to establish there's no binding C
 - E.g. Ps had no intention, C conditional upon an event that hasn't happened, etc

- Won't operate where the evidence shows the true nature of the agreement
 - Extrinsic E may be given to:
 - Show a P was really contracting as an agent for someone else;
 - Show what the real consid was;
 - Justify the rectification of doc so it accords with what Ps actually agreed to
- Won't operate where E establishes a collateral C
 - CC adds to the totality of the contractual reln b/ Ps
- Won't operate where the E is admitted of surrounding circumstances
 - Conservative approach = grammar
 - Modern approach = facts
 - AUS is pretty conservative
 - Case: Codelfa
 - Case: Royal Botanic Gardens and Domain Trust
 - England is pretty modern
 - Case: Investors Compensation Scheme Ltd v West Bromwich Building Society

Some aids to construction

- Words are given their ordinary meaning
 - Ps assumed to have meant the words as their ordinary meaning unless circumstances show their intention was otherwise
 - Dictionaries are great!
- Words are interpreted to promote validity
 - Word is ambiguous, one meaning would invalidate C, other meaning makes sense then the latter is preferred
- Words aren't read in isolation
 - Words read in context
 - May show the ordinary meaning is not to be adopted
- Words are construed *contra proferentem*
 - In cases of ambiguity, a doc should be interpreted against the person responsible for drafting
 - Relevant to exclusion clauses

6. Classification of terms

- Classifications include:
 - Conditions
 - Warranties
 - Intermediate terms

Nature of the term

- Term promissory or adjectival?
 - Only promissory can lead to a breach --> damages
- Adjectival terms
 - Regulate aspects of contract
 - Aren't promises
 - E.g. choice of law clause: indicating the law of which jurisdiction is to govern the C

Nature of the operation

- Classified according to nature of operation
 - Conditions precedent (term that regulates commencement of C / obligs)

- OR conditions subsequent (term providing for C to be brought to an end in specified circumstances)
- Important to classify as it:
 - Determines whether Ps contractually bound to each other
 - If so, what terms and at what times

Importance

- Terms may be classified according to importance: *conditions, warranties, intermediate terms*
- Important as it determines the remedies available
- Condition = innocent party has option of rescinding (revoke)/ affirm C and claiming damages
- Warranty = innocent party NOT able to rescind but CAN claim damages
- Intermediate = depends on seriousness of breach

Conditions

- Refers only to terms fundamentally important to C
- Whether a term is a condition depends
 - Whether the term is made a condition by statute
 - E.g. Sale of Goods Act
 - Whether the courts have characterised the term as a condition
 - Courts decided certain terms by nature are so important they're considered conditions unless Ps prove otherwise
 - Whether the Ps have made the term a condition
 - Ps use word 'condition' for a term
 - Isn't conclusive if other areas of C indicate it's not Ps intention
 - Whether it is fundamental to the C
 - Term = condition if it's apparent the term is fundamental to C

Case: Associated Newspaper v Bancks (1951)

Facts

- Contract required Bancks to provide weekly drawings of 'Ginger Meggs' and Associated Newspapers to print them on front page of Comic Section
- On three occasions the paper printed the drawing on the third page of the comic section
- Bancks sought to terminate the contract

Issue

- What test did the court use to determine whether the undertaking to place the drawing on the front page was an essential term?
- What are concurrent and correlative promises?
- What did the court conclude – who won and on what grounds?
- What is the ratio of the case?

Warranties

- Term of secondary importance
- Adopted in UK Sale of Goods Act 1893
- Adopted in AUS in similar legislation

Intermediate terms

- Term that couldn't be classified as a condition or warranty when C was made
- Remedies? Depend on severity
- Case: Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd

Case: Cehave NV v Bremer Handelgesellschaft mbH [1976]

Facts

- Bremer sold goods to Cehave
- Term stated goods to be shipped 'in good condition'
- Small portion of goods were damaged
- Cehave purported to terminate as a result
 - Could they?
- They could if it was a condition

Cehave on intermediate terms

- What is the nature of an intermediate term?
- What is the effect of a breach of an intermediate term?
- What was the position here and why?
- What is the ratio of the case?

Held

- Ratio:
 - If a condition is breached the buyer is entitled to reject the goods (treat contract at an end), but if it was not a condition, but rather an innominate term that was breached the buyer cannot reject the unless breach goes to the root of the contract.
- → TEST to determine if allowed to treat contract as brought to an end: does the effect of the breach (consequences) deprive you substantially of the benefit expected to receive out of the contract?
- If the breach (not just the term itself) does go to the root of the contract then the other party is discharged from performing the contract

Case: Koopahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007]

Facts

- Koopahtoo entered a joint venture with Sanpine for the development of Koopahtoo's land.
- The parties incurred some debt in preparing proposals for development of the land, but in the end weren't granted development consent
- An administrator was appointed to Koopahtoo and terminated the agreement.
- Koopahtoo terminated an agreement it had with Sanpine on the grounds that the latter was in breach of contract.
- Sanpine sought a declaration to this termination was invalid.
- Sanpine lost at first instance but successfully appealed to the NSWCA.
- Koopahtoo then appealed to the High Court

Issue

- could it validly terminate the contract it had with Sanpine?
- "Whether, on the proper construction of the agreement, the Agreement was validly terminated by Koopahtoo by its letter to Sanpine in 2003."

Held

- According to the High Court in what circumstances can a party terminate a contract for breach?
- What did the Hong Kong Fir Shipping case decide?
- What was the effect of this case (Hong Kong) on contractual certainty and on achieving just outcomes? Do you agree?
- In the case of an intermediate term – when can it be determined whether breach of contract will allow termination?
- How did the Court characterise breaches of contract that allow termination?
- What factors did the Court say can be considered when deciding whether breach of an intermediate term allows termination?
- What was decided?

Summary

- The Court held that “a party may terminate a contract where there has been either a breach of an essential term or a sufficiently serious breach of a non-essential term by the other party.”
- Consequently the termination of the joint venture agreement by the Land Council had been justified by sufficiently serious breaches of intermediate terms.” The breaches had deprived the Council of a substantial part of the benefit for which it had contracted.
- At [53] “We rest our decision in the appeal not upon the ground of breach of an essential obligation, but upon application of the doctrine respecting intermediate terms.”

Exclusion Clauses

7. Introduction

- Used to protect a person from liability

8. Nature and operation of exclusion clauses

Types of exclusion clauses

- Clauses that seek to reduce, or eliminate altogether, the duty that would otherwise be owed to another person
 - E.g. clause seeking to exclude from a contract of sale, the implied term relating to quality of goods sold
 - Coote refers to these as 'substantive' exclusion clauses because by reducing a Ps obligs they prevent a breach of C arising
- Clauses that provide a guilty party with a defence
 - Seek to shield a P from liability of a wrong they've committed
 - Coote refers to these as 'procedural' exclusion clauses
- Clauses that seek to protect the guilty P by imposing restrictions on a claimant's ability to bring an action against them
 - May take form of time limit which claim must be brought
 - Or limit on amount of damages to be recovered
- Clauses that require a successful claimant to indemnify the guilty P
 - Requires successful claimant to repay any damages they recover
 - Clauses designed to discourage claimant from taking proceedings in first place

Importance of exclusion clauses

- Exclusion clauses are common and used widely, partic in Cs involving consumers
- When assessing rights and obligs of Ps: [Look at substantive terms of C and exclusion clauses together to assess the position of Ps](#)

Use of exclusion clauses

- Consumer Cs, exclusion clauses typically used to reduce supplier's liability to consumer (imbalanced bargaining power)
 - 'take it or leave it'
 - Thus courts construed clauses against supplier
 - Application of the ordinary rules of construction enabled courts to prevent effectiveness of exclusion clauses
 - Reinforced by statutory provisions
- Commercial contracts (similar bargaining power)
 - Exclusion clauses should be given full effect

Case: NZ Shipping Co Ltd v AM Satterthwaite & Co Ltd

Held

- Pre-requisites (from Mildand Shipping)
- Bill of lading makes clear the stevedore is intended to be protected
- Bill of lading makes clear the carrier is contracting both for himself and as agent for the stevedore
- Carrier has authority from stevedore to do that (latter ratification may suffice)
- Any difficulties about consid could be overcome
 - NZ Shipping says they're overcome by performance of the stevedoring obligs under a 'unilateral' C

Other judge held

- Promisee must give consid for promise to exclude liability
- Purpose of exemption was to carry all carriage, regardless of who performed it
- This was effectively unilateral contract with stevedor!
 - Performance of oblig of stevedores was completion of C between stevedore and owner
 - Whoever performed the 'uni' contract was free from liability

Preconditions to effectiveness

- General rule, exclusion clause protects P if:
 - Clause incorporated into C b/ P and claimant
 - Exclusion clause is wide enough to cover breach of C relied upon by complainant

9. The construction of exclusion clauses

- Once an exclusion clause forms part of C, you must decipher whether the clause is wide enough to cover the event complained of: breach / other wrong
- Protection can always occur by EC if it's drafted skilfully covers ALL possible forms of liability
 - If EC is imprecise then courts will treat it unsympathetically
 - Case: Belna Pty Limited v Irwin [2009]

General approach to construction

- Courts approach it by interpreting them as the Ps intended
 - Give words their ordinary meaning
- Case: Darlington Futures Ltd v Delco Australia Pty Ltd (1986)

Aids to construction

- Contra proferentem
 - In cases of ambiguity this rule requires the ambiguity to be resolved against author of doc / party seeking to rely upon it
 - Case: insight Vacations Pty Ltd v Young
- Main purpose rule
 - In cases of ambiguity, an EC won't be construed if it's in conflict with main purpose of C
 - Derives from assumption that Ps wouldn't have intended clause to be construed if events defeat the purpose they sought to achieve by making the C
 - Case: Glynn v Margetson & Co
- Negligence only rule
 - EC can exclude liability for negligence but MUST use words that make clear it was the intention of Ps
- Four corners rule
 - EC will confer protection only in respect of conduct that occurred in performance of C
 - Ie. It won't protect defendant while acting in manner outside its 'four corners'

- Case: Council of the City of Sydney v West (1965)
- Case: Thomas National Transport (Melbourne) Pty Ltd v May & Baker (AUS) Pty Ltd

Legislative control

- Attempts by judges have been made(Lord Denning MR) to limit effectiveness of EC to exclude liability of a P BUT they've been unsuccessful
- Thus at common law Ps can get away with it
- Commercial Cs is partic the case as Ps have comparable bargaining power
- Consumer contracts
 - Not the case
 - ACL
 - Prevents suppliers from protecting themselves from liability for breach (Part 3-2)