

INCORPORATION OF TERMS

Terms may be contained in a written and signed contractual document, but may also be found in unsigned documents, signs, notices, web pages, emails, or in statements made during negotiations.

However, where parties enter into a written agreement: Court generally holds them to it; **Equuscorp v Glengallan**

- A contract is, nonetheless, able to be partly oral and partly in writing

❖ **Equuscorp**: the alleged oral terms contradicted the terms of the written agreement. HELD that if there was an earlier, oral, consensus, it was discharged by the written agreement

EXPRESS TERMS

Statements made during negotiations

Parties negotiating a contract may make many statements about matters relating to the contract. Should one of these statements prove false, the party to whom it was made may seek a remedy

Questions to ask before commencing:

- Is there a written document involved?
- Is there a signature?
- What are the statements about which the plaintiff is relying?

1. NATURE OF STATEMENT: Is the statement promissory, or a mere representation?

For an oral statement to be binding as a term, the statement must have been made as a promise and intended by the parties to be part of their contractual agreement

- a) **State rule**: to rely upon a statement for breach of contract, **statement must be promissory**; **Hospital Products**
 - **Oscar Chess v Williams**: was it a binding promise or only an innocent misrepresentation?
- b) **Apply tests**:
 - i. **The main test: Hospital Products**
 - Depends on the **intention** of parties: ascertained **objectively**, from **totality of the evidence**
 - Intention depends on the conduct of the parties- on their words and behaviour- rather than on their thoughts: **Oscar Chess**:
 - 'If an intelligent bystander would reasonably infer that a warranty was intended'
 - ii. Supplemented by a **4-factor test** in **Ellul v Oakes**
 1. **Time** of the statement (relative to time of final manifestation of agreement);
 2. (Objective) **importance** of the statement;
 3. Whether statement was included when agreement was embodied as a **written memorandum**;
 4. **Knowledge and expertise** of the parties: whether the maker of the statement was, vis-à-vis the other party, in a better position to know and ascertain the accuracy of the statement
- c) **Conclusion**:
 - i) **Promise**: proceed to steps 2 & 3
 - ii) **Representation**: consider steps 4 & 5 (may still enforce through estoppel/collateral contract)

Further notes:

That the assumption is fundamental to the contract does not prove that the representation was a term (**Oscar Chess**) nor does establishing that without the statement, the contract would never have been made (**JJ Savage**)

Language used is important; **Oscar Chess**

- 'I believe the car is x. Here is the registration to prove it.' (statement of belief)
- 'I guarantee the car is x. This is borne out by the rego book. But you need not rely upon that; I give you my personal guarantee it is.' (promise)

- ❖ **Oscar Chess**: hard to imply warranty if seller, when stating fact, makes clear he has no knowledge but has got info elsewhere
→ HELD must have been obvious to both that seller had no personal knowledge
- ❖ **Dick Bentley**: Smith told Bentley he was 'in a position to find out the history of cars.'
- ❖ **Couchman v Hill**: HELD promissory where P asked D to confirm if the heifers were unserved, to which both answered 'yes'
- ❖ **JJ Savage & Sons**: actual words used, i.e. 'estimated speed' weren't promissory. Appellant could've required that the speed be inserted in the contract, or could've sought a promise that the boat would attain the speed as a prerequisite to his ordering. Instead, he was content to form his own judgment about the speed
→ That the statement made was intended to have some commercial significance upon a matter of importance to the respondent was conceded + that the respondent was intended to act upon it, and that he did act upon it, is clearly made out. However, these facts HELD not to warrant the conclusion that the statement was itself promissory.

2. INCORPORATION: if promissory, is the statement incorporated as a term of the contract?

A: first consider: will the parol evidence rule bar the plaintiff from adducing evidence of the statement?

- a) **State the rule**: where the contract is recorded **wholly in writing**, extrinsic evidence cannot be used to **add to, vary or contradict** the terms in the written document; **Goss v Nugent**
- b) **First, determine whether contract IS wholly written**: can use extrinsic evidence; **SRA v Heath Outdoor**
 - **SRA**: PER has no operation until it has first been ascertained that the contract is wholly in writing
 - When there is a doc. that on its face appears to be a complete contract: evidentiary basis for inferring that document contains the whole of the express contractual terms
 - However, open to party to prove that, despite this, the parties have agreed orally on terms additional to those contained in the writing

Entire agreement clauses

- **Definition**: term stating that the written documents contains the 'entire agreement' and that no other 'extrinsic' statements are to be treated as incorporated into that contract
- **Has it been incorporated?** → step 3
- **If yes, effect**: if you're bound by an EAC, courts will not work their way around their parol evidence rule

3. INCORPORATION

B: has the promissory statement been incorporated by one of the following methods:

- a) By signature?
- b) By notice (including 'by reference')?
- c) By course of dealings?

By signature

- a) **General rule**: a person who signs a document which is **known** by that person **to contain contractual terms**, and to affect legal relations, is bound by those terms, and it is **immaterial** that the person **has not read** the document; **Toll v Alphapharm**
 - Justification: signature is a representation that person signing either has read and approved the contents of the document or is willing to take the chance of being bound by those contents
 - Note that if signed, party **not required to show due notice** has been given of the terms
- b) **Exceptions: Toll v Alphapharm**
 - i. Where document could not reasonably be considered **contractual**; **Curtis v Chemical Cleaning**
 - Yes: order forms (**L'Estrange**); applications for credit (**Toll**)
 - No: time sheets (**Toll**), request for help for advertising (**Toll**), receipt/voucher (**Curtis**)
 - ii. Where: **fraud, misrepresentation**, mistake or other vitiating element; **Toll**
 - **Curtis**: any behaviour that conveys a **'false impression'** is enough

- ❖ **Toll v Alphapharm**: signed intending that it would affect his legal relationships
→ No misrepresentation: document invited him to read the terms on the reverse before signing, not rushed/tricked into signing, no concealment, no encouragement not to read. He chose to sign without reading: he could've read if he wished
- ❖ **Curtis**: by failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to beads and sequins.

EXCLUSION CLAUSES

Exclusion clauses seek to **limit or exclude** a party's **liability** for conduct that would otherwise be in breach of contract or constitute a tort

- An exclusion clause may be found in the statement 'use facilities at your own risk'
- An EC may limit a party's liability to a specified sum of money, exclude liability for certain kinds of loss, or impose a time limit for liability
- EC may be justified as consistent with the principle of freedom of contract
- The problem of ECs is that they are **one-sided**: favour those who draft them (the 'big' business) and harm consumers/small businesses, thus making them unfair
 - Lord Denning in **George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd**
- In response, courts started to construe ECs in a way that was narrower than the words may suggest
 - I.e. saying words weren't strong enough to exempt party from liability, or circumstances did not allow such exemption (e.g. where a warehouseman stored goods in wrong warehouse)
 - No longer necessary: now have unfair contract terms legislation, etc.

Where not regulated by legislation, three questions to determine whether an EC applies to affect liability:

1. Whether the EC was properly incorporated into the contract
2. Whether the person seeking to rely on the protection of the EC was a party to the contract
3. Whether, as a matter of construction, the clause applies to exclude or reduce the liability in dispute

MODERN CONSTRUCTION OF EXCLUSION CLAUSES

The meaning and effect of an EC is to be determined by ordinary processes of construction and contract.

- **General approach: Darlington Futures**
 - Interpretation of EC determined by 'construing the clause according to its **natural and ordinary meaning**, read in light of the **contract as a whole** and where appropriate, construing the clause **contra proferentem in case of ambiguity**'
 - Where on ordinary principles of construction the words of the clause are capable of more than one meaning, an EC may be construed strictly against the interests of the party seeking to rely in it (choose meaning least favourable to the proferens)
 - But, where the meaning of the words of an EC can be ascertained through ordinary processes of construction, there should be no scope for a restrictive interpretation
- The **four corners rule: Council of the City of Sydney**
 - EC does not exclude liability for acts that were not authorised by, or outside of, the main object or 'four corners' of the contract
 - I.e. if something falls outside 4 corners of contract, it is not covered by the EC
- **Deviation rule: May & Baker**
 - If you deviate from the contract, can't rely on EC
 - E.g. deliver goods to wrong suburb
- Special rules dealing with **exclusion of liability for negligence: Canada SS**
 - Clear words necessary to exclude liability for negligence (e.g. explicitly say 'negligence')
 - Exception: if negligence only basis on which one may be liable, general words often suffice
 - Unsure whether these rules apply to Australia (thus, say 'if the Canada SS rules apply...')
 - **Darlington Futures**: requires scope of EC to be determined by construing the clause according to its natural/ordinary meaning
 - Thus, a clause expressed in general but expansive language (e.g. excluding liability for losses 'however so caused' may be sufficient to exclude negligence

STATUTORY CONTROLS ON EXCLUSION CLAUSES

- Can't exclude liability for **misleading/deceptive conduct** under s 18 of ACL
- Some **consumer guarantees** you can't contract out of, either: s 64 of ACL
- Range of statutory frameworks that allow you to challenge a term on the basis that it's **unfair**
 - Part 2-3 of the ACL
 - Pt Div 2 Subdiv BA of ASIC

SOLVING AN EXCLUSION CLAUSE PROBLEM

1. First consider whether an EC it is **incorporated**
2. If the exclusion clause is (or may be) incorporated, it must be **construed**. Such a clause is construed contra proferentem where ambiguous – it may also be necessary or appropriate to consider the four corners or deviation rules
3. Offer a view as to whether the clause operates to shield the proferens from liability

PRIVITY

Privity rule: only parties to a contract can enforce (benefit from) it or incur obligations under it; **Selfridge**

- To sue on a promise, P must have given consideration in return for the promise, and be a promisee
- The Privity doctrine does not prevent a contract from conferring a benefit on a third party, but rather, simply prevents the third party from enforcing the contract
 - Example: A makes contract w/ B. A agrees to pay C money in return for B's services
 - If B performs agreed services, C can't sue A to recover money A has agreed to pay to C. B, a party, may enforce the contract but, the remedies available to B may not be adequate
- **Coulls v Bagots:** held that company owed no contractual obligation to Doris as she was not a party
 - Principle indication: contract expressly purported to be made btn Arthur and the company
 - Company made no express promise to pay royalties to Doris (+ impossible to imply this)
 - Fact that Doris had signed did not make her a party
 - Dissent: signature explicable only on the basis that she was intended to be a party
- However, because many contracts seek to benefit a third party expressly, an issue may arise as to whether this third party can enforce the contract directly

REASONS FOR PRIVACY

Trident General Insurance v McNiece Bros, per Mason CJ & Wilson J

1. **Precludes the risk of double recovery** from the promisor by 3rd party as well as the promisee
2. Imposes an effective **barrier** to liability on the part of a contracting party to a **vast range of potential plaintiffs** and
3. Recognition of 3rd party right to contractually sue would circumscribe parties' **freedom of action**

NON-APPLICATION OF THE PRIVACY RULE

Agency

The privity rule **does not apply** if a person promised a benefit under a contract can show that one of the parties involved in the contractual negotiations entered into the contract as her agent → you are a party!

- **Agent:** person who has power to enter into a contract on behalf of another person
- When you contract as an agent, you're not just contracting on your own behalf but perhaps also on another's behalf, or just on that other's behalf
- There are **various ways** in which agency can **arise** (implicitly and explicitly)
 - To establish the existence of agency, necessary to show that the principal expressly or impliedly consented to the agent acting on their behalf so as to effect the principal's relations with 3rd parties
 - Some people have powers of agency by virtue of their role (e.g. company director)

- Expressly authorising someone to do things for you 'i.e. go do this for me'
- Need to look for any express words or conduct that express a relationship of agency
- **Pola:** existence of agency often established from words of parties/circumstances of case
 - May be implied from prior habits or from a course of dealing between the parties where agent has repeatedly been permitted to perform similar acts in the past
- **Schmidt:** whilst terms indicate parties' intentions, all surrounding circumstances must be examined
 - A dictated in relatively precise terms the manner in which B was to deal with A's borrowers
 - B was contractually obliged to comply with any directions given to it by A
 - Thus, B was acting as A's agent
- Also need to show that agent was purporting to act on behalf of the principal and not solely on their own behalf (unless contract is subsequently ratified)
 - **Carminco:** agency not found → identity of 'principal' unknown to other party, etc.
 - **Ratification:** adoption of a contract by a person who wasn't originally bound by it

Stevedore cases

- These are for **contracts of carriage** involving an EC between the carrier (operator of a ship) and the person who is having the goods delivered
- Here, the exclusion clause intended to benefit the 3rd party stevedore (those who unload)
- **Application:** if goods damaged whilst they are being unloaded by the stevedores = no liability
- **Four stage-test** in **Scruttons** to determine whether SD entitled to benefit, on the basis of agency:
 - (a) The bill of lading makes it clear that the stevedore was intended to be protected
 - (b) BOL makes it clear that carrier was contracting as agent for SD as well as on its own behalf
 - (c) Either the carrier was authorised to make the contract on behalf of the stevedore, or the stevedore later ratified the carrier's action
 - (d) The stevedore provided consideration to the promisor (unloading is consideration)
 - If test satisfied, stevedore can rely on the EC, in a contract between two different people that does not include themselves, to protect themselves from liability
- **The New York Star:** SD allowed to rely on contract:
 - SD was 49% owned by carrier, commonly acted as its SD and was aware of BOL's terms
 - 3rd element satisfied bc carrier had acted w/ SD's authority as its agent in contracting for SD's protection

CIRCUMVENTING PRIVACY

Trust

Where A (the promisor), in a contract with B (the promisee) makes a promise to confer a benefit on C (the beneficiary), the court may discern an intention on B's part to hold on trust for C the contractual right to enforce that promise

- A trust is a **relationship**. A trustee holds **property** on trust (for the benefit) for another (beneficiary)
 - Trustee must deal with property in the beneficiary's interest, and not in their own
 - Look for an objective manifestation on the part of the trustee to hold the rights not merely for themselves, but for the benefit of others
 - Unnecessary to make trust at time of formation
 - Unnecessary to use the words 'trust' ('this money is as much mine as it is yours', etc.)
- A contractual right is a form of **property**, and is thus capable of being held on trust
 - Contractual right can be transferred by way of property (**Selfridge**)
- Approach to inferring an intention to create a trust of a contractual right (**McNiece**):
 - Inferred if it clearly appears that it was the intention of the promisee that the 3rd party should be entitled to insist on performance of the promise and receipt of the benefit and if trust is the appropriate legal mechanism for giving effect to that intention