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## SCOPE & CONTENT

### TERMS OF A CONTRACT

**TEST** to consider when determining the rights and obligations of the parties

- What are the express terms of the contract?
- Are there any implied terms?
- What do these terms mean and how relatively important are they?
- Are there any exclusion clauses that curtail what would otherwise be a party's obligation?
- Has the conduct of the parties given rise to non-contractual rights and obligations?

### EXPRESSED TERMS

Are mentioned by the parties during the formation stage of the contract either orally, written or implied.

#### Pre-contractual Statements

Statements relating to the subject matter will often be made that influence the decision making of 1 or both parties.

##### 1) Term of the Contract

A term is a promise made by one to the other and as a result, if a statement is classified as a term, should it prove to be false then that party will be guilty of breach and the other party will be entitled to a remedy.

A statement made by a third cannot form part of the contract because they are not privy to it.

##### 2) Sales Puff

A sales puff is not intended to be taken literally and a reasonable person would recognize it as merely exaggerated sales talk – therefore there is no remedy if proven false.

##### 3) Term of a Collateral Contract

A collateral contract is a secondary contract that exists between parties collaterally to the main contract. Generally there is only one term and if a term of a collateral is proved false then there will be a remedy for breach but there will be no breach of the main contract because this term wasn't apart of the main contract. A promissory statement by a third party would constitute as a tripartite contract between the third party and the person this promissory statement was made to.

- Must be promissory in nature –  
*Sheppard v The Council & JJ Savage v Blakney p. 242*
- Must not contradict main contract
- Must have consideration

##### 4) Representation

a representation is a statement made by one person to another that was not intended or understood by the parties to be a promise. It may be about a factual matter or about the future or an opinion or law. As it is not promissory it will not form part of the contract.

At common law - the only remedy available is to rescind the contract on the ground of misrepresentation; damages cannot be recovered.

If the statement comes within the scope of s 18 of the ACL misleading or deceptive conduct, there will be remedies that include damages. The ACL also has a provision for representations about the future.

**TEST** court will consider determining whether pre-contractual statement is a breach or misrepresentation

(Important because remedies for breach are far better)

**Ellul & Ellul v Oakes** p. 240

- The time that has elapsed
- The importance of the statement in the minds of the parties > if important = usually term
- If the statement was followed by the execution of a formal contract in writing > if statement not incorporated in K = probably representation
- Where the maker of the statement is in a better position (*vis-à-vis* other party) to ascertain the accuracy of the statement = usually term

### **Tripartite Collateral Contract –**

When a third party has made a statement that induced the representee to enter into a contract with the other party.

### **Signed Documents –**

General rule at common law *L'Estrange v Graucob* – the signatory of a contractual document is bound by its terms whether or not they have read or understood it.

Exceptions to the general rule – *Toll v Alphapharm* p. 246

- The rule only applies when the document was understood to be a contract as opposed to a receipt or a document not having contractual effects
- It doesn't apply if the party proffering it, misrepresents its terms
- It does not apply where the signatory was mistaken about the nature, they can plea *non est factum*
- Doesn't apply if there was unconscionable conduct, duress or unfair terms

### **Ticket Cases –**

Where a term is not incorporated into the contract itself and the parties do not mention it when making contract yet it is still a term because it comes in the form of a ticket, receipt, etc.

These will only be valid if –

- 1) All reasonable steps were taken to bring it to the parties attention
- 2) This occurred before the contract was concluded

See *Oceanic Sun Line Special Shipping Company v Fay & Interfoto Picture v Stiletto* p. 251 –

### **Course of Dealing –**

Terms maybe incorporated into contract without being discussed because of previous dealing between them. See *Henry Kendall v William* p. 254

### **Implied Terms –**

Terms that form part of the contract even though parties didn't mention or refer to it when making contract – they may be implied by common law and statute.

### **Common Law –**

- 1) "Ad Hoc" – give effect to the intentions of the parties, determined objectively (reasonable person) *Codelfa Construction v State Rail* p. 260
- 2) Standard implied terms – court not concerned with the intentions but what would be appropriate
  - Implied terms to make the contract work as intended
  - Implied terms requiring good faith and fair dealing
  - Terms implied by custom

### **CONSTRUCTION & CLASSIFICATION**

Once terms established, the next step is to determine their meaning & importance.

### **The Basic Rule –**

A contract is given the meaning intended by the parties. The courts role is to ascertain the intentions and give effect to them – this is determined objectively with few exceptions. As a result, evidence cannot be given for what was actually intended; the focus is on the presumed intention.

See, ***Codelfa Construction v State Rail Authority of NSW***

— Evidence is acceptable to interpret contract if the language is ambiguous or there is more than one interpretation of the meaning but it will not be acceptable if this evidence contradicts the contract.

Facts that were true when the contract was made are acceptable only if both parties knew them.

Evidence of prior negotiations can be used if both parties knew about the facts in question but this evidence cannot be used if it provides evidence of their intentions.

See, ***Investors Compensation Scheme v West Bromwich Building***

— The Matrix of Facts; what is available to the parties when the contract is made, excluding: previous negotiations the parties engaged in that show intentions

The meaning a document conveys to a reasonable person is not the same as the meaning of its words, that is a matter of dictionaries and the meaning of a document is what parties using those words against the relevant background would have been understood to mean. The meaning is going to be read in the specifics of the case.

### **The Parole Evidence Rule –**

Where the contract is in writing – this rule deals with the admissibility of extrinsic evidence to determine what the terms of a contract are and the meaning of those terms.

See, ***Gordon v Macgregor*** — to look at extrinsic evidence the parties would have to show that the document itself was not the complete contract, that there is more to the contract e.g. collateral contract, you cannot use extrinsic evidence to show that you meant something else in the contract (intention)

### **Exceptions to the Parole Evidence Rule –**

- Where the evidence goes to the validity of the contract
- Where the evidence shows the true nature of the agreement
- Where the evidence establishes a collateral contract
- Where the evidence is admitted of the surrounding circumstances

### **Aids to construction (interpretation)**

- Words are given their ordinary meaning
- Words are interpreted to promote validity
- Words are not read in isolation
- Words are construed contra proferentem (against the drafter)

### **Classification of Terms**

#### **1) Nature of the Term —**

- Promissory terms; express the promises made, they are the main terms and reflect the reason it was made
- Adjectival terms; merely regulate the terms

#### **2) Nature of the Operation —**