

Chapter 6: Express Terms of the Contract

Terms of the contract

- Express terms: Terms expressly agreed by the parties and can be wholly in writing , partly in writing and partly in oral and totally oral
- Exemption clauses: These are a special type of express term designed to restrict liability
- Implied terms by the courts: These are terms which the parties have NOT discussed but which the courts regard as an integral part of the deal
- Implied terms- by statute

Express terms

Ascertaining the evidence.

- The parol evidence presumption.
- Rule: - Assume the written contract is the completed record, and courts will not permit one of the parties to add or vary that written contract.
 - This presumption is rebuttable, if courts are convinced that the written document is incomplete or incorrect.
- Statements made after contract formed are not terms- contractual statements are **not** terms. A party cannot be bound by statements, promises or representations after the contract been formed unless fresh consideration is provided (Roscorla v Thomas)

Thornton v Shoe Lane Parking Ltd P246 (Thornton park at a carpark, which he had never visited before, outside the carpark has an exemption clause, which exempt any responsibilities by the carpark owners. Thornton purchased a parking ticket to park his car and suffered injury. Court held that the exemption clause is not effective as the contract was formed prior to the ticket was issued through vending machine.)

Olley v Marlborough Court Ltd P246 (The Olleys booked a room at M hotel and paid a week's board, exclusion clause put on the door after contract made at reception desk, furs were stolen. The court held that the clause is not a term.)

- Past dealings may be important in determining the terms because it may be different if Olley's visited the hotel for a few times. Past dealings can be important in commercial contracts where the parties deal with one another on a regular and consistent basis.

The importance of a signature.

- A person is bounded by his/her own signature. A person who signs a document that has a contractual appearance about it is bound by the contents of the document.

L' Estrange v F Graucob Ltd P247 (Mrs L'Estrange bought cigarette machine, signed a document called a "Sales Agreement" without reading, machine jammed. The court held that L legally bound by the contract)

Toll Pty Ltd v Alphapharm Pty Ltd P248 (A did not read the terms and conditions which was written overleaf the document and signed the document. At the same time, on the document, it was written "please read conditions of contract before signing". The High Court held that A is not entitled to sue T)

Exceptions: when is a person not bounded by his/her signature?

- The document didn't appear to be contractual. ("Reasonable person test", if no reasonable person would have realised the document they signed was a contract, a person is not bound by his or her signature)

D J Hill and Co Pty Ltd v Walter H Wright Pty Ltd P250 (Have past dealings, contract made on phone, machine was damaged, employee signed a form containing exemption clause. The court held that contract was made before the clause was presented, although they had past dealings, no one would have treated the form as contract because it is thought to be just a delivery docket.)

- Promissory estoppel applies: If a party is not relying on a term, there should be no reason why the term is not being taken out from the document prior to signing the document.
- Misrepresentation. If a person has misrepresented the contents of the signed document, that person will not be able to rely on the contents that have been misrepresented.

Curtis v Chemical Cleaning and Dyeing Co P252 – Mrs C went to CCD drycleaner. She was asked to sign a document, which was called 'receipt'. She asked the worker why must she sign the document and the worker mentioned that Mrs C would have to be liable for any damage beads and sequins. Mrs C argued that the worker responded led her to believe that it was only beads and sequins that she has to be responsible for but not other materials. The Court held that the worker has misled Mrs C into signing the contract.

- Condition precedent was not satisfied. (Not binding if the parties made it subject to a condition precedent.)
- The document does not accurately record the agreement. (Not binding if there is a mistake made in recording the terms and one party is unfairly trying to take advantage of that mistake.)
- Equitable doctrines (Courts will not enforce a contract because it would be inequitable to do so in certain situations. These situations include: Unconscionable conduct, duress, undue influence & unilateral mistake.

Incorporating unsigned terms into the contract by notice.

Unsigned written statements may be terms of the contract, if

- (1). Rules of offer and acceptance.
- (2). Is there reasonable notice?

The reasonable notice test:

Parker v South Eastern Railway Co p 254 (Parker left a bag at the railway and bought ticket, unsigned document, lost bag, clause said that company will not be responsible for package over \$10.) (Held that reasonable notice must be given to the other party, If reasonable notice has been given, it doesn't matter if Parker has read it or not.)

Determine whether reasonable notice has been given:

Step 1, Is the document contractual in nature?

D J Hill v Walter Wright

Oceanic Sun Line Special Shipping Co Inc v Fay P255 (Read brochure which containing reference about terms and conditions, paid fare for cruise, injured.) (Held that brochure not a document that could reasonably be regarded as contractual in nature, so reasonable notice not given, not term of contract.)

Step 2, Is the term unusual?- If term is particularly unusual, extra notice needed.)

Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd P256 (Stiletto hired some transparencies, late return, charged \$5 per day but others libraries charges \$3.5 per week, extra notice will have to be given.) (Contract was not formed until the transparencies and the delivery note had been delivered. Held that follow normal industry practice \$3.5 per week, implied term of contract.)

Step 3, Were there any conflicting statement or promises? Even sufficient notice has been given, the incorporation may be subject to any oral statement to the contrary.

Couchman v Hill P246 (Cattle auction, disclaimer on catalogue stated that the seller did not guarantee the accuracy of the information contained in the catalogue, sought assurance before bidding.) (Held that oral representation as warranty so prevailed over written terms, Couchman won.)

Example of Incorporation: Ticket cases *p258* - *The relationship between the passenger and the railway company is one of contract. Are the terms and conditions given to the passengers by the railway? Purchase of train ticket will usually hold that sufficient notice has been given.*

Figure 6.3 Page 259!! Determining whether a written statement is a term

When are oral representations binding?

Only statements which are **promissory** become terms.

Must identify what legal status does the representation have:

- Mere puff - Not binding, **No** remedy.
- Mere representation - **Possibly** binding. If not, No remedy in contract, must rely on law of misrepresentation. (S52, show reasonable reliance.)
- Term of contract- Binding, remedy for breach of contract.

Was the oral statement promissory? - “Reasonable bystander test”.

Applying the reasonable bystander test: There are number of factual matters which the courts look to as a guide in determining whether a representation was intended to be promissory. It should conclude:

- Was the representation included in a written document?
- When in the negotiations was the representation made?
- Did the representation sound promissory?
- How objectively important is the representation to the overall deal?
- Did either of the parties have special knowledge about the subject matter of the representation?

Step 1, Was there a written document?

- Statement needs to be included in any written document for good evidence that the parties were treating the statement as sufficiently important to be a term. However, if the statement is left out of the document, the parties did not intend it to be contractually binding
- The written document should accurately reflects the deal between parties
- Amendments can be made to the document before signing
- Prevention is much cheaper and more certain than litigation cure

State Rail Authority of NSW v Heath Outdoor Pty Ltd (Prior signing the contract H asked about

the term, S assured H, held that parol evidence rule applies, oral agreement to the contrary not applied.) An **oral representation can be added** to the written terms *if* the **evidence suggests that this is what the parties intended**.

Rebutting the parol rule presumption:

Van Den Esschert v Chappell P261 (C bought V's house, asked if there were any white ants prior signing contract, V said no, then signed, contract no mention of ants.) (Held that oral statement was made immediately prior signing document, it is reasonable that C would not have signed without V's assurance, regarded as term.)

Step 2, How much time lapsed between statement and contract?

- The longer the lapse of time, the more likely it is to be treated as an inducement and not intended to form part of the agreement, the more likely it is to be treated as an inducement and not intended to form part of the agreement
- If the statement was made **as the final inducement**, it might very well be a term. **Van Den Esschert Chappell**

Step 3, How important was the statement to the deal as a whole?

- If a **reasonable person** would regard it as important

Step 4, What words were used?

- The **more precise** the language, the more likely it is to be **promissory**.

Step 5, Did either party have special knowledge?

Oscar Chess Ltd v Williams P263 (W sell car to O who is a car dealer, wrong car model year, as O had no knowledge of the age so he relied on registration book.) (Held that W had no personal knowledge of the year of manufacture, so the statement was a mere representation.)

Cases of reasonable bystander test:

Ross v Allis-Chalmers Australia Pty Ltd P264 (Negotiating purchase of new harvester, A made representation that the machine would harvest about 90 acres per day based on his own experience, R then bought, harvested less than 90.) (Held that A's statement not contractual, merely an opinion, not intended to be promissory. It is important that sales staff and agents to be realistic in their appraisals of a product's performance.)

Esso Petroleum Co Ltd v Mardon P254 (M lease petrol station from E, E estimated that sell 200,000 gallons but in fact less) (Held that E warranted the estimate as he had relevant information and necessary experience whilst M does not.)

Hospital Produces Ltd v United States Surgical Corporation (P260) (U made surgical instruments for hospitals, B made oral statement that he would like to take over the distributorship in AUS, then cancelled contract and competed with USSC by copied USSC's goods and grabbed their customers.) (Held that oral statement amounted to contract, as it intended to be promissory, USSC won due to breach of contract.)

Collateral warranties

Useful for some cases with difficulties/inconsistencies related to parol evidence presumption.

De Lassalle v Guildford (G signed a lease of premises, D orally assured drains were working, written document did not mention of the drains, P would not have enter the contract if drains did not work.) (Held that there was collateral contract, two contracts stand side by side. (1) main contract, the lease. (2) D promised drains were in order, P promised to enter the lease as consideration.)

J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd, Van Den Esschert v Chappell

L G Thorne & Co Pty Ltd v Thomas Borthwick & Sons (A'asia) Ltd (Sale of oil, seller provide a sample of oil, written document did not mention of the sample, oil did not conform to the sample.)

(Held that parol evidence rule applied to exclude the sample of oil from the contract, however sample of oil may be part of collateral contract.)

When does a collateral contract apply?

Step 1, A collateral warranty must be promissory. (**Reasonable bystander test.**)

J J Savage and Sons Pty Ltd v Blakney P259 (B purchase cabin cruiser, S estimated speed to be 15 mph, however below 15.) (Held that representation is not promissory, B based on S's opinion, not collateral warranty, representation given not a term of contract. S won.)

Step 2, A collateral warranty must not be inconsistent with the main contract. Collateral contract **cannot exist if it conflicts with the main contract.** **Hoyt's Pty Ltd v Spencer**

Gates v City Mutual Life Assurance Society Ltd P260 (Gates took out an insurance policy, injured, unable to work as carpenter, claimed for insurance.) (Held that it is promissory, but no collateral contract b/c inconsistent with the written policy.)

Maybury v Atlantic Union Oil Co P261 (Broadcast for advertising, M written stated A had total control, oral stated no competition.) (Held that inconsistent with main contract, no collateral warranty, A won.)

Meaning of terms

Once statements are found to be terms, their meaning must be ascertained.

- Reasonable person test. - To determine what the parties mean.
- Parol evidence rule.

Hope v RCA Photophone of Australia Pty Ltd p268 (RCA hired sound equipment to H, H refused to pay b/c not new product, hire agreement did not mention about new.) (Held that **parol evidence rule did not apply** to vary its ordinary meaning, no implied term as it would conflict with express term in the document. RCA won.)

Exception:

- Clarify ambiguities (patent and latent) in the document.

Bacchus Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co Ltd P263 (Patent, document not specified about which patent is included.) (Held that **parol evidence rule applies to clarify ambiguities**. Glaxo patent is not included)

- Correct errors made in recording the contract.

Importance of terms

Determined by "reasonable bystander test".

- Conditions (most important terms) – termination & damages.
- Warranties (less important terms) – damages **only**.
- Intermediate terms – damages, termination **only if breach is very serious**.

Unenforceable terms

Illegal contracts such as:

- Contracts for an immoral purpose
- Contracts to oust the jurisdiction of the courts
- Contracts tending to promote corruption in public life
- Contracts prejudicial to the safety of the state

Terms in restraint of trade: (All restraints of trade are unlawful unless they are reasonable as between the parties and in the public interest. A restraint of trade will be reasonable if it is no wider than is reasonably necessary to protect the legitimate interests of the party relying on it.)

ICT Pty Ltd v Sea Containers Ltd P265 (ICT build ferries for S, contract not allow ICT to sell similar ferry to its competitors within 100 miles, ICT did.) (Restraint was invalid, restraint was too wide, general and long, ICT won.)

Peters (WA) Ltd v Petersville Ltd P266 (Sale icecream, 15 years is too long, restraint is unlawful, unreasonable.)

Exemption clauses

What are the rules for interpreting exemption clauses?

The general rule – exemption clauses are to be understood according to their natural and ordinary meaning.

Insight Vacations Pty Ltd v Young pg 270 (Y bought a holiday tour, she fell down when she stood up to get things from her bag, there is an exemption clause which says that “Where the passenger occupies a motorcoach seat fitted with a safety belt ...” The court held that, the exemption clause covers only when a passenger is sitting down without safety belt but Y was standing up when she fell. Hence, exemption clause is not effective.)

Rules, which act as guidelines in applying the general rule:

Ambiguity rule. - Must use clear words.

An exclusion clause that “excluded liability for breach of **express** condition or warranty” would not cover breach of an **implied** term.

Andrews Bros (Bournemouth) Ltd v Singer Car Co Ltd (A purchased unused car from S, but it was not new as the term stated, contract had exemption clause as excluding all conditions, warranties implied... Court held that S breached of express warranty and implied condition. However the exemption clause **did not cover the breach of express** warranty.)

Alex Kay Pty Ltd v General Motors Acceptance Corp and Hartford Fire Insurance Co (Hiring motor cars, A took out insurance with G, has exemption clause that not liable for breach of contract..., TP hired cars, did not return and disappeared with car, A claim insurance, G refused.) (Held that the clause was ambiguous, there were 3 possible meanings, the case possible meant that the breach of A and G's contract, not A and TP's, given that A did not breach of contract with G, exemption clause invalid.)

Negligence rule. - If words could reasonably against others **other than negligence**, negligence would **not be covered**. If a person wishes to exclude liability for his or her own negligence, the exclusion clause must do so clearly.

The rule applies when: liability for negligence may be expressly or implicitly excluded but if the words of the exclusion clause could reasonably be applied to protect against some ground of liability other than negligence, then negligence will not be covered.

White v John Warwick & Co Ltd P272 (P hired tricycle from D, injured b/c of the seat slipping forward, exemption clause excluded liability of negligence.)

(Held that P had **2 possible claims** for damage, breach of contract and negligence, the exemption clause will **not cover negligence**.)

Presumption against fundamental breach – In constructing the exemption clause, the courts will presume that the parties did not intend to exempt liability for breach of the fundamental terms or obligations of the contract. This is only presumption and it may be rebutted.

A proper drafted exemption clause may exempt a party from liability for breach of the most fundamental obligations, provided it is not prohibited by statute.

Photo Production Ltd v Securicor Transport Ltd pg 274 – PP engaged S to provide a night patrol at its factory and the contract consist of an exemption clause that says S will not be responsible for anything unless the action of its employee is foreseeable and it could have been avoided by the company. PP caught on fire and the court held that the exemption clause protected S from having the responsibility.

The Four corners presumption - (Where clause was intended to cover only the matters contained within the four corners of the contract.)

Sydney Corporation v West P277 (W parked his car to S's car park, ticket must be presented to attendant before leaving, ticket contained exemption clause that excluded liability for loss or damage to any vehicle, or any injury to any person....W's car was stolen while parking in car park.) (Held that the exemption clause was a term of contract, but did not cover the **deliberately acts** of S, W won.)

Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd P278 (TNT's employee driver collected M&B's goods, was unable to return to TNT's depot before it closed, then stored them at home, backyard, fire destroyed the goods, contract had exemption clause.) (Held that the parties must have contemplated the goods would be stored at depot, the event was beyond the contemplation of the contract- beyond the four corners of the contract, exemption clause was invalid.)

Darlington Futures Ltd v Delco Australia Pty Ltd P275 (Darlington and Delco had contracts for future exchange, had exemption clause 6 that Darlington would not responsible for any loss arising in any way out of any trading activity, Darlington engaged in unauthorised trading which costed Delco.) (Held that the unauthorised trading was beyond the contemplation of parties, exemption clause 6 was invalid.)