



CONTRACT LAW

NOTES

Term 1 2019

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Week 1A: Express Terms

WRITTEN TERMS AND SIGNATURE

- You need to establish what and where the express and implied terms are (IDENTIFICATION)
- Then you need to work out the meaning and legal effect of the document (CONSTRUCTION)
- The terms of a contract determine what the parties have agreed to do by way of performance of their contract
- The terms of a contract may be contained in a written and signed contractual document
 - o Contract terms may also be found in unsigned documents, signs, notices, web pages, hypertext links, emails, or in the statements made during negotiations.
- The modern law of contract generally favours an objective approach in assessing the parties' intentions.
 - o Courts consider "the intention which reasonable persons would have had if placed in the situation of the parties" (Reardon Smith Line v Hansen-Tangen [1976] 1WLR 989)
- Terms may be incorporated:
 - o By Signature;
 - o By adequate notice given prior to contract formation;
 - o By reference (being directed to another document);
 - o By a course of dealing;
 - o By custom
- If there is a signature, you look for exclusions
 - o If there is no signature, you move to notice

***L'Estrange v Graucob* [1934] 2 KB 394 – The Signature General Rule:**

- A party will be bound by the terms contained in a contractual document which he or she has signed, whether or not he or she has read the document.
- Facts:
 - o L'Estrange bought a vending machine from Graucob which turned out to be faulty
 - o However she had signed a brown paper titled Sales Agreement which said: "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded."
 - o Relied on the implied term of warranty to sue for damages
 - o They said we excluded them by agreement hence we aren't liable for implied terms
 - o L'Estrange said that she didn't read the contract fully and so it can't be binding, and also that the term "otherwise not stated herein" shouldn't be valid as it wasn't an express term

- Held:
 - Found that the express provisions of the contract were binding and effectively excluded the relevance of statutory sales provisions
 - The fact that the claimant had not properly read the contract did not impact its validity, as in signing the contract she consented to be bound by its contents.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

- Facts:
 - Respondent (*Alphapharm*) was a sub-distributor (to a company called EB) of a flu vaccine, who had a contract with a carrier, (*Toll*) the Appellant.
 - Toll was to collect, deliver and store (storing the vaccine had special instructions) from various places.
 - Toll gave a cover letter with a quote, which also stated that its services are subject to the conditions on the other side of the consignment note. However, there was no consignment note.
 - A representative of EB, signed a credit application form which also included 'Conditions of Contract' (on the other side of it). The conditions were not read.
 - Conditions:
 - Clause 5: Customer entered contract on its own behalf and as an agent for its associates.
 - Clause 6: the Respondent would not be held responsible for loss or damage to the goods. (EXCLUSION OF LIABILITY)
 - In the process of transportation, the vaccine was frozen and therefore rendered valueless.
 - Respondent sued and won
 - Appellant (*Toll*) appealed
- Arguments:
 - Conditions attached to the application of credit were not a part of the contract:
 - Weren't read, and "a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms." - no such effort here.
 - Representative of EB was not an agent of the Respondent.
- Held:
 - Acceptance:
 - It doesn't matter that the representative didn't read the contract, signing it is his way of indicating that he read it and accepted it (intention and acceptance is measured objectively).
 - "It is not the subjective belief or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe"

- "References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement
 - Privity (Agency):
 - There was enough evidence to suggest that Richard Thomson was authorised to act on their behalf
 - Effect of a Signature:
 - Signature has a legal effect of reading and accepting the contract, regardless of whether the party actually did so.
 - "Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution"
 - "It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief."
 - Reasonably Sufficient Notice:
 - Court of Appeal said that "a person who signs a **contractual document** without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms."
 - This should be given a narrow focus - only applies for exclusion clauses or unusual clauses.
 - Whilst this was an exclusion case, the effect of a signature cancels the need to give reasonable notice:
 - "where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms."

Exceptions to the signature rule - *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805

- Facts:
 - After cleaning a dress, the Defendant asked the Plaintiff to sign a receipt.
 - When the Plaintiff inquired why she needs to sign, the Defendant informed her that it wanted to exclude liability for damages for beads and sequins.
 - Actually, the document included a wider exclusion that the company was not "liable for any damage whatsoever."
 - The dress returned with unexplainable stains.
- Held:
 - Signature
 - The general rule to the effect of a signature is that "if the party affected signs a written document known to be a contract which governs the relations between them, then his signature is irrefragable

evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

- This means that a signature **cannot apply** where the signature was obtained by a **misrepresentation**, or where the **document was not known to be a contract** by the party signing it.
- Misrepresentation
 - A misrepresentation is any behaviour "if it is such as to mislead the other party about the existence of extent of the exemption. If it conveys a false impression, that is enough"
 - "If the false impression is created knowingly, it is a **fraudulent misrepresentation**; if it is created unwittingly, it is an **innocent representation**; but either is sufficient to dis-entitle the creator of it to the benefit of the exemption. "

INCORPORATION OF TERMS BY NOTICE

- It is not uncommon for one party to allege that the contract contains terms which have been displayed or delivered before or at the time of the transaction. Whether or not the other party will be bound depends upon whether:
 - the terms were available to the party to be bound by those terms before the contract was made; and
 - reasonable steps were taken to bring the terms to the notice of the party to be bound.

Timing

- For delivered or displayed terms to form part of a contract they must be available to the party to be bound before the contract is made.

Oceanic Sun Line Special Shipping Company Inc v Fay (1988) 165 CLR 197 HCA

- Facts:
 - Plaintiff (Fay) booked a cruise in Greece from the Defendant (Oceanic Sun Line).
 - Upon paying the fare, Plaintiff was given an 'exchange order' which stated that it would be exchanged for a ticket upon boarding the cruise ship.
 - When the Plaintiff arrived at Athens for the cruise, he was handed a ticket containing a condition that Greek courts would have exclusive jurisdiction in any action against the owner.
 - Defendant was injured, and sued in NSW.
- Issues:
 - When was the contract made?
 - If made in Australia, was it already a contract of carriage or contract to later provide an offer for a contract of carriage in Greece?
 - Was the exclusive jurisdiction clause incorporated into the contract of carriage?
 - Did the Defendant do all that was reasonably necessary to notify the Plaintiff of the exemption clause?

- Held:
 - When was it made?
 - The exchange order made in Australia contained contractual obligations on the part of the defendant therefore making it a valid contract
 - The exchange order also specified contractual rights of the Defendant (such as refusing refunds in case of a passenger cancellation)... if no contract was made through the exchange order, the Defendant could not rely on this right.
 - Therefore it was made in Australia
 - Was it already a contract of carriage?
 - The Plaintiff purchased an option to initiate an **already made** contract of carriage, based on the terms he agreed to when buying the exchange order.
 - Therefore, the defendant could not add new clauses after the contract had already been formed
 - Was the exclusive jurisdiction clause incorporated into the contract of carriage?
 - No, the attempt to incorporate the exclusive jurisdiction clause came **after** the contract of carriage was made.
 - "A condition printed on a ticket is ineffective to alter a contract of carriage if the ticket is issued after the contract is made." (*Daly v General Steam Navigation Co Ltd (The 'Dragon')* [1979] 1 Lloyd's Rep 257, 262)
 - Reasonably necessary steps to notify
 - In the case of a ticket (rather than a **signed** document), an exemption clause (from liability of loss) will only be deemed incorporated if the Offeror took all reasonable steps to notify the Offeree of the clause.
 - "...where an exemption clause is contained in a **ticket** or other document intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier **cannot rely on that clause** unless, at the time of the contract, the carrier had done **all that was reasonably necessary to bring the exemption clause to the passenger's notice.**"

Knowledge or Notice

- If a party knows that the relevant document contains contractual terms, he or she will be bound by those terms regardless of whether he or she has read them.
- In the absence of knowledge, a party will be bound by delivered or displayed terms if he or she had reasonable notice of the terms.

Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163

- Facts:
 - Plaintiff parked his car in a car-park owned by the Plaintiff

- The Plaintiff has never been to that car-park before.
- A notice on the outside listed the charges and other terms.
 - On term was 'All cars parked at own risk'.
- Once inside, he was issued a ticket on which it was written, in fine print, 'This ticket is issued subject to the conditions of issue as displayed on the premises'.
 - Those conditions were displayed **inside** the parking garage, namely, the Plaintiff could have only seen them after he had purchased the ticket.
 - One of the conditions exempted the Defendant from liability from 'injury to the customer however caused'.
- Held:
 - Timing:
 - The offer was accepted when Mr Thornton [Plaintiff] drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it **could not be altered by any words printed on the ticket itself**. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence."
 - He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made.
 - Thus, only the terms on display outside the parking garage are incorporated.
 - Knowledge or Notice:
 - If the terms written on the notice inside are to be incorporated, the Defendant would have had to intend that customers would park their car in the entrance, leave it (blocking traffic) and go read the terms and conditions deep inside the parking lot.
 - Since it is clearly not the expectation of the Defendant, the Plaintiff was not given reasonable notice of the terms or a fair opportunity to discover the conditions of the contract.

Unusual Terms

Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1991) 22 NSWLR NSWSC

- Facts:
 - Respondent (Dillon) made a booking for a cruise with the Appellant (Baltic Shipping Co), through a travel agent and received a booking acknowledgement.
 - The Respondent later received a booking form, which stated that a contract of carriage was made only when the tickets are issued, and which contained details of penalties for cancellation of the booking.
 - One month later the Respondent paid the balance of the fare and 2 weeks before the cruise she received the ticket.
 - Ticket contained unusual terms, one of them being an exemption from liability clause.

- The ship sank with the Respondent in it, and the Respondent suffered great physical and mental injury.
- Held:
 - The Appellant tried to rely on the fact that the contract was only entered into when the tickets were issued to incorporate further terms through the ticket.
 - However, whilst the court accepted that the contract was only entered to when the tickets were issued, that does not entail that unusual terms (of which the Respondent was not aware of before) can just be incorporated without further notice to the respondent.
 - The **Appellant still needed to notify the Respondent** as to the *unusual conditions* which were not previously mentioned in the booking form. It had not done so:
 - Since the Respondent was not notified of the new terms, the Respondent's acceptance of the ticket that was issued still only signified the acceptance to the terms set by the booking form.

Flowcharts
Incorporation of Express Terms

