

# Exam notes

Friday, 21 August 2020 1:35 PM

- What is the meaning of the contract

- What are the terms incorporated into the contract

- **Incorporated by signature?**

- *L'estrage v F Graucob*

- ◆ If a document is signed, parties are bound by it regardless if they've read it
        - ◇ Subject to exceptions: misrepresentation or fraud

- *Toll* (refinement of *L'estrage*)

- ◆ Where signature, person is bound where they aware (or objectively should have known) to the person to contain contractual terms, and to affect legal relations
      - ◇ And where there is no question of misrepresentation, duress, mistake or any other vitiating element

- Misrepresentation?

- ◆ *Curtis*

- ◇ Denning: Any behaviour, by words or conduct, is sufficient to be a misrepresentation if it such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough.
        - ◇ Reconcilable with toll?
          - ▶ Application perhaps not: Curtis made aware of contractual nature, made aware of general exclusionary terms, appears as if accepting the risk

- ◆ *Toll*

- ◇ Claim of misrepresentation is untenable; signed with the invitation to read-subjective beliefs/understands of party obligations do not matter
          - ▶ 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.

- **Incorporated by notice?**

- Timing - reasonable steps made before contract formed (*Oceanic, Thornton*)

- ◆ *Oceanic- Brennan*

- ◇ Contract formed in issuing of exchange notice because it created obligation for cruise to issue ticket; defendant reserved no right to cancel booking
            - ▶ Contrasted to MacRobertson Miller: ticket with seat/contract of carriage created upon arrival at kiosk.
          - ◇ "If terms are not available before the contract is formed, those terms will not be incorporated"
            - ▶ No access to terms (on ticket)

- ◆ *Thornton*

- ◇ Contract formed when ticket issued; conditions on ticket comes too late
          - ▶ Machine issued- cannot reject ticket/offer

- Proper notice - whether reasonable steps were made to bring terms to notice of party to be bound (*Oceanic, Thornton*)

- ◆ *Oceanic- Brennan*

- ◇ "To differing circumstances, different steps may be needed to bring an exemption clause to a passenger's notice, especially if it is an unusual one"
          - ▶ Only step taken (beyond ticket) was a note in the brochure

- ◆ *Thornton*

- ◇ Customer is bound by the exemption if he knows that the issue is subject to the terms, or if the company did what was reasonably sufficient to give him notice
          - ◇ Shoe lane acknowledges no reasonable notice
          - ◇ Denning: particular clause is incredibly wide, would require significant notice: "red ink with a red hand pointing to it"
        - ◇ Practicalities
          - ◇ Megaw: Unless the defendants genuinely intended that potential customers to [stop cars to read notice], it would be fiction, if not farce, to treat those customers as persons who have been given a fair opportunity.

- **Pre-contractual statements?**

- In order to be legally binding, the relevant statements must be sufficiently promissory (*JJ Savage, Oscar Chess*)
  - ◆ Consider
    - ◇ Language/conduct used
      - ◇ *Oscar Chess-Denning*: Whether a warranty was intended [to be binding] depends on the conduct of the parties, on their words and behaviour...If an intelligent bystander would reasonably infer that a warranty was intended [to be binding] that will suffice...Much depends on the precise words
      - ◇ *JJ Savage*: 'estimated speed' indicates expression of opinion as a result of approximate calculation based on probability
    - ◇ Relative expertise of parties
      - ◇ *Oscar Chess*: relative inexperience of Williams as car buyer; would have trusted the registration book
        - Denning: Unlikely that such a person would warrant the year of manufacture...the most he would do would be to state his belief, and then produce the registration book in verification of it.
    - ◇ Importance of the statement
      - ◇ *Oscar Chess-Morris* (dissenting): invoice described year of car
        - ▶ The statement made which described the Morris car was therefore an integral part of the contract.
- Admissibility of pre-contractual statements
  - ◆ Parole evidence rule: excludes evidence of pre-contractual statements that would 'subtract from, add to, vary or contradict the language' of the document (*Codelfa*)
    - ◇ Applies only when contract is wholly in writing
      - ◇ 'entire agreement clause' usually treated as proof of intention (but depends on wording)
    - ◇ FIRST: establish that the statement was sufficiently promissory
    - ◇ UNLESS:
      - ◇ Partly written, partly oral contract (extrinsic evidence used to establish whether so)
        - ▶ *State Rail Authority v Heath* [NSW]
          - ▶ cl6 right to cancel; representative said it's hard to change; 'promised' wouldn't use it unless no rent paid/objectionable content
          - ▶ Approaches
            - Williston
              - ◆ Document that appears on its face to be a complete record, it is conclusively presumed to be the contract
            - Corbin
              - ◆ Evidence of an oral term cannot be excluded until it has been determined the writing represents the whole agreement
            - McHugh
              - ◆ The correct rule is that the existence of writing which appears to represent a written contract between the parties is no more than an evidentiary foundation for a conclusion that their agreement was wholly in writing
                - ◆ Existence of document, no matter how complete cannot exclude evidence of oral terms if the other party asserts that such terms were agreed
              - ◆ cl6 had literal effect to give defendant right to terminate:
                - ◆ Employee had no authority to change it, Heath acknowledged this and agreed
                  - ◆ Not partly oral: Whatever the discussion, it did not add terms to the contract
    - ▶ *Equuscorp v Glengallan*
      - ▶ The oral limited recourse terms alleged by respondents contradict the terms of the written loan agreement. If there was an earlier, oral consensus, it was discharged and the parties' agreement recorded in the writing they executed
        - Exceptions (though not relevant here)
          - ◆ Rectification
          - ◆ Mistake
          - ◆ Non est factum-mistaken about character when signed
          - ◆ Misrepresentation of document
    - ◇ Collateral contract (must be not inconsistent). Bear in mind consideration
      - ▶ Must be (*Gordon in Crown Melbourne*)
        - ▶ Made as a promise (not merely representational and sufficiently certain)
          - *JJ Savage*: estimation of probability
          - *Crown Melbourne*: 'looked after'-merely vaguely encouraging

- ▶ Intended to induce entry into the contract (judged objectively)
      - *JJ Savage*
      - *Crown Melbourne*: induced into signing lease
    - ▶ Consistent with terms of main contract
      - *Hoyt's-Issacs*: a collateral contract, which may be either antecedent or contemporaneous, being supplementary only to the main contract, cannot impinge on it, or alter its provisions or rights created by it
  - ◇ Estoppel (bear in mind if there is valid estoppel claim ie. Induced assumption, detrimental assumption)
    - ◆ *Saleh v Romanous*
      - ◇ Handley: these remedies and defences trump the legal rules about parol evidence and entire contracts
    - ◆ *Brainir Pty Ltd*
      - ◇ Allsop: great force in McHugh's claim that equity is to be excluded from [parol evidence]
    - ◆ Compare to *Norco*
      - ◇ Bryson: 'estoppels here contended for would be inconsistent with the express terms
        - The estoppel could not be enforced because the new licence agreement is as its terms show intended to be a comprehensive written expression of the parties' agreement, so that its provisions cannot be qualified by evidence of the terms of the parties' negotiations.
    - ◆ Must still be promissory (*Crown Melbourne*)
- **Interpreting the contract**
  - *Electricity Generation* (reiterated in *Toll*): determined by what a reasonable businessperson would have understood those terms to mean...language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects
    - Is to be construed as to avoid 'making commercial nonsense'
  - **Consider:**
    - Text
    - Contractual requirements
      - Precise language
      - Maxims of interpretation (use with care)
        - ◆ Specifics trump general provisions
        - ◆ Express mention of some things implies other things deliberately omitted
        - ◆ Express term on a subject excludes implied term on that subject
        - ◆ Should construe against drafting party
        - ◆ No benefit from own wrongdoing
        - ◆ Need clear words to support interpretation leading to an unfair result
    - Interpret contract as a whole (may have order of precedence clause, interpretation clause, background/recitals, severability clause, entire contract clause)
    - Interpreting the language
      - Natural, ordinary meanings will usually prevail over strained interpretations
  - **Admissible evidence**
    - Parol evidence rule
      - When wholly in writing, limits evidence available to the court for construing the contract
        - ◆ Typically prevents the court from considering prior drafts of contract/negotiations
        - ◆ Partly written and partly oral: no restriction on evidence about surrounding circumstances
      - *Codelfa*
        - ◆ Mason: the true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning
      - What is evidence of surrounding circumstances?
        - ◆ Admissible
          - ◇ Genesis/purpose of contract
            - ◆ Court will prefer to give effect to purpose of transaction (*Ecosse, Royal Botanic*)
          - ◇ Background facts which both parties knew or were notorious (*Codelfa*: establish objective background facts)
          - ◇ Evidence of parties intention prevail over presumed intention if it transpires that the parties would have refused to include in the contract a provision which would give effect to the presumed intention (*Codelfa*)
        - ◆ Inadmissible
          - ◇ Subjective beliefs and expectations