

LAWS1075 – Contracts

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Class 1 – Introduction to Express Terms (I)

Readings – 12.05 – 12.40, 12.45 – 12.80

Terms and the Communications of the Parties

- In identifying the terms of a contract, courts seek to give effect to the intentions of the parties. However, as we have already seen, the modern law of contract generally favours an objective approach in assessing the parties' intentions
 - o The courts do not inquire into what the parties actually intended and instead consider the intention of a reasonable person in such a situation – Reardon Smith Line v Hansen-Tangen [1976] 1 WLR 989 at 996

Written Terms and the Effect of Signature

L'Estrange v Graucob [1934] 2 KB 394

***** GENERAL RULE – A party will be bound by the terms contained in a contractual document which she or he has signed, whether or not she or he has read the document**

Facts

- Plaintiff (L) purchased a cigarette vending machine from Defendant (G) – signed a form on a brown paper headed “sales agreement” filled out by G’s salesperson
- Form was an order form containing printed terms of sale and it was retained by the salesperson and two days later the defendant sent to the plaintiff an “order confirmation” signed on behalf of the defendant.
- When delivered it wasn’t working satisfactorily – L brought an action for damages for breach of an implied warranty that it was supposed to work
- The defendant relied upon the following clause in the sales agreement: “The 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.”
- Trial Judge believed defendant did not do what was reasonably sufficient to give the plaintiff notice of the conditions and hence a breach of implied warranty

Issue

- Whether that clause formed part of the contract

Judgment (Scrutton LJ)

- Not a ticket case – These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not
- Plaintiff believed she was induced by misrepresentation to sign without knowing its terms – no material in which fraud is found upon and no evidence that the plaintiff was induced to sign the contract by misrepresentation
- The plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them

Judgment (Maugham LJ)

- The brown paper document is not a formal instrument of that character, yet, in my opinion having been signed it may well constitute a contract in writing
- The contract was concluded not when the brown order form was signed by the plaintiff but when the order confirmation was signed by the defendant. If the document signed by the plaintiff was a part of a contract in writing, it is impossible [406] to pick out certain clauses from it and ignore them as not binding on the plaintiff ... The written document admittedly related to the purchase of the machine by the plaintiff. Even if she was told that [407] it was an order form, she could not be heard to say that it did not affect her because she did not know its content

Appeal Allowed

Class 2.1 – Interpretation of the Express Terms

Readings – 13.05-75

Introduction from Class

- Constructionists are willing to solve ambiguities by looking at the contract contextually
 - o Negotiation documents
 - o Practices
 - o Interpret in context of object/purpose of the contract
- Reasonable person – all requisite and background knowledge in a contract’s scenario – one who is fully informed
- Ambiguity as patent or latent
 - o **Patent** ambiguities evident on the face of the contract. A **latent ambiguity** arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an **ambiguity** appears by reason of some collateral matter.

Construction

- Process by which court determines meaning and legal effect of the terms of the contract
- Words assessed objectively – reasonable person
- Courts have regard to: (**Arnold v Britton [2015] UKSC 36, [15]**)
 - o (i) the natural and ordinary meaning of the clause,
 - o (ii) any other relevant provisions of the [contract],
 - o (iii) the overall purpose of the clause and the [contract],
 - o (iv) the facts and circumstances known or assumed by the parties at the time the document was executed [to the extent that these surrounding circumstances are admissible],
 - o (v) commercial common sense, but
 - o (vi) disregarding subjective evidence of any party’s intentions.

Extrinsic Evidence in Constructing a Contract

Evidence Excluded

- PER – where contract is in writing, meaning of terms will be ascertained from words the parties have used – subjective or private intentions generally not admitted

Evidence of the Surrounding Circumstances

- England – position is that evidence of the surrounding circumstances should always be admissible in construing a contract

Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28

- The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words.
- The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.
- The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

- Australia
 - o ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337, 352***, Mason J – “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”
 - ***One can use contextual analysis once an ambiguity is found – must reach conclusion of ambiguous before circumstances are analysed***
 - o ***Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70*** – Interpretation of a written contract involves, as Lord Hoffmann has put it: “the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which

would reasonably have been available to the parties in the situation in which they were at the time of the contract”.

- Reaffirmed in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 but then seemed to revert to the more generous approach to extrinsic evidence in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7

Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45

Facts

- The dispute concerned the construction of cl 3 of a “Letter of Agreement” concerning the franchising in Australia of Gloria Jean’s Gourmet Coffee Stores.

Judgement

- true rule” as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts
- **Before you can look at the context beyond the words of the contract, you must determine the ambiguity**

Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7

Judgement

- The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean
- It will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract
- Appreciation of the commercial purpose or objects is facilitated by an understanding “of the genesis of the transaction, the background, the context [and] the market in which the parties are operating” (*Codelfa*)
- Unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption “that the parties ... intended to produce a commercial result”.
- A commercial contract is to be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”

***** broader approach, not going to linger whether or not there is an ambiguity but they are more determined to ensure that the commercial result is achieved – willing to look upon contextual and broader circumstances**

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37

Judgement (FRENCH CJ, NETTLE AND GORDON JJ.)

- For reasonable person inquiry – consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract
- Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be presented to contradict its plain meaning (*Codelfa*)
- However sometimes external content is necessary – identifying commercial purpose
- A commercial contract should be construed so as to avoid it “making commercial nonsense or working commercial inconvenience”
- **Surroundings can be considered but must find ambiguity first, also set out reasonable businessperson consideration**

Judgement (KIEFEL AND KEANE JJ)

- The “ambiguity” which Mason J said may need to be resolved arises when the words are “susceptible of more than one meaning” (*Codelfa*)
- His Honour did not say how such an ambiguity might be identified. His Honour’s reasons in *Codelfa* are directed to how an ambiguity might be resolved

Judgement (BELL AND GAGELER JJ)

- That question is **whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances**
- question remains for other Australian courts to determine on the basis that *Codelfa*

Termination by Breach

What Constitutes a Breach of Contract?

- Breach occurs when a party fails to perform at the time or to the standard required by the contract
- An **aggrieved party** is entitled to **terminate a contract** when there is a breach by the other party
 - o For a breach of contract – there is a **right to damages**
- If an **aggrieved party terminates a contract** due to breach, the other party may argue that the **right to terminate has been lost by some conduct on the part of the aggrieved party**

When is there a Right to Terminate for Breach at Common Law?

- Tree-fold classification of term; conditions, warranties and intermediate or innominate terms
 - o 1. If **term is a condition** – aggrieved party will be entitled to terminate for any breach of that term by the other party regardless of the gravity or consequences of the breach. Damages to compensate for any loss suffered by the aggrieved party will also be available
 - o 2. If **term is a warranty** – aggrieved party will not be entitled to terminate merely by reason of a breach of the term by the other party, although damages to compensate for any loss suffered by the aggrieved party will be available
 - o 3. If **term is an intermediate or innominate term** – aggrieved party's right to terminate depends on the gravity and consequences of the breach of the term. If the breach is likely to have serious consequences for further performance of the contract then the aggrieved party will be entitled to terminate the contract in addition to claiming damages for any losses caused by the breach.

First step in deciding termination for breach is to **CLASSIFY THE TERM IN QUESTION**

- Most are conditions and intermediate terms
- Generally only warranties where required by statute, particularly under Sale of Goods Acts
- Classification as **intermediate** – likely to be preferred – gives greater **flexibility when dealing with breach**
- **Hongkong Fir Shipping v Kawasaki (1962)** – a term will only be classified as a warranty if the breach does NOT deprive the aggrieved party of any benefit of the contract

Termination for Breach of Condition

- Any breach, regardless of gravity gives aggrieved party right to terminate
- Matter of construction whether term is classified as a condition
- **Accepted test – *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632, 641***
 - o Whether a term in a contract is a condition or warranty, that is, an essential or inessential promise, depends upon the intention of the parties as appearing in or from the contract.
 - o **The test of essentiality** is whether it appears from the general nature of the contract, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor.
- ***DTR Nominees v Mona Homes***
 - o Look to the **general nature of the contract** and **particular provisions**
 - o Judgement takes into account the importance which parties attach to the provisions as evidenced by the contract itself as applied to the surrounding circumstances
 - o **Inference** – termination by **abandonment**

Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SR (NSW) 632

Facts

- Tramways Advertising (plaintiff) advertised on trams
- Entered into contract with Luna Park (defendant)
 - o Agreement to display “three seasons” of advertising material on 53 boards for at least 8 hours a day
- After two seasons, D objected that each board was NOT being displayed for 8 hours – **D did NOT regard itself as being bound** by the contract any further

- P admitted this, but said it had been displayed *for an average of 8 hrs per day*
- **Issue whether 8 hrs meant:**
 - At least 8 hours a day
 - At an average of 8 days
- P continued to display the boards, and D refused to pay
- P sued for the amount owing due to the advertising, **D cross sued for damages for breach of Contract**

Important Principles – TEST

First step: determine the **nature of the promise**

- **Condition = essential promise**
 - Innocent party able to:
 - Treat himself as **discharged from the contract** – recover damages for loss of contract § Keep contract on foot – recover **damages** for breach
- **Warranty = non-essential promise (simple, non-essential term)**
 - Innocent party **ONLY** able to:
 - Keep contract on foot – recover **damages** for breach (CANNOT set aside the contract via termination)
- **Test:** whether a term is a **condition or warranty**
 - Depends on intention of the parties
 - Test of **essentiality**
 - Innocent party would NOT have contracted unless assured of strict performance – considered a condition (treat himself discharged upon any breach of the promise)
- Note this question can be answered **expressly** (ie. that a term is **of the essence**) OR may be a question of **construction**

SECOND STEP: determine the **extent measure of relief**

- *Circumstances* can include:
 - Discovery of breach after whole or part performance
 - Conduct after breach may prevent innocent party from putting contract to an end
 - Contract NOT executed – may treat himself as being discharged from obligations
- **A communicated election** to avoid a contract (made by a party with right to avoid) is at **once operative and is final and irrevocable** (here, Tramways defied the election and continued to show ads)
 - If a defaulting party has **wholly (defectively) performed the contract** and innocent party accepted performance – only remedy is **damages**
 - However, if the **innocent party** is still able to **reject performance**, he may:
 - Refuse to perform
 - Recover any payments made due to failure of consideration § Recover damages for loss of the contract
- Therefore, following **part performance by defaulting party**, the **ISSUES** are:
 - Whether the innocent party who became aware of an essential breach, can rely on the breach as a ground for **putting the contract to an end** and **obtaining damages for loss of contract**
 - Whether the defaulting party is bound to accept and give consideration for the **defective part- performance**
- If an innocent party does not exercise the right to breach when he becomes aware, then he loses his right – remitted to remedy by way of damages only
- This may occur in the following events:
 - With knowledge of the breach, the innocent party **proceeds to do an act referable to the contract**
 - With knowledge of the breach, the defaulting party **proceeds to carry on with performance** at the **REQUEST**, express or implied, of the innocent party
- No right is lost when innocent party insists that a breach shall be remedied
 - But must give **reasonable notice of intention**
 - Loses right if the defaulting party acquires and exercises a right which relieves them from performance before the innocent party exercises their right
- If innocent party by choice refrains from putting contract to an end, the contract continues to be binding
 - The condition may be **reduced** to a warranty
- Essential promise **implied in every contract** – neither party can repudiate his obligations under a contract **without just cause**

In cases where a contract is to be **performed in instalments**, a breach may amount to a:

1. (1) Breach of a non-essential promise – damages
 2. (2) Breach of an essential promise – justifies avoidance of contract
 3. (3) An implied **repudiation of the obligations** – a breach of the **implied essential promise not to repudiate**
- Whether a breach amounts to an **implied repudiation** – **TEST**: whether there is an inference that similar breaches will be committed with respect to subsequent instalment
 - Vital breach of an essential promise – this is **good ground for avoiding the contract** (even if NO intention to repudiate can be established)

Appeal to the HC (Applying these Principles)

- Held that the contract was broken by P (since they did **not display the sign** for at least 8 hours every day)
- Thus, D is able to claim **for breach of contract**
- In respect of the “first two seasons” – impossible to ascertain on which days the boards were NOT shown for 8 hours – therefore, in the circumstances of the case, the **extent of the breach is undetermined**
 - o Calculation of damages is “incapable of being carried out with **certainty or precision**” (**Chaplin v Hicks**)
 - o The evidence put forward makes it impossible to reach any estimate of damage suffered – D is thus entitled to only **nominal damages**
- In regard to the “third season”
 - o **NOT able to claim damages** unless he was entitled to **determine the contract**
 - o Two reasons why D can determine the contract in this case:
 - 1. P actually breached the contract
 - 2. P’s evident intention to continue to perform the contract in the future in the same manner as the past
- The term is a **CONDITION** (not a warranty)
 - o It was a term so essential – The essential character was determined by
 - 1. The words “we guarantee” emphasizes the importance of the clause
 - Provision made clear that **completeness of the display** (had to appear on all 53 boards before payment was made) was an essential element in this contract – **indicates parties wanted strict performance of the contract**
 - The continuity of display was an **important factor**
- Note
 - o D was also entitled to determine the contract on another ground
 - o P gave Defendant the **right to believe** that contract would NOT be performed according to its true construction (ie. that it was only necessary to display on average 8 hours a day)
 - This gave rise to the inference that breaches which had **already been committed** would be **committed in the future**
 - **Thus, P must be regarded as renouncing the contract** (allowing D to determine the contract)

Outcome

- Appeal allows – Luna park entitled to **nominal damages** due to breach of contract