

## **Contracts**

## PART 1:

(1) TERMS: WHAT DOES THE CONTRACT SAY
<b>INCORPORATION:</b> <ul style="list-style-type: none"><li>- Statements made during negotiations</li><li>- Terms incorporated by signature</li><li>- Terms incorporated by reasonable notice in unsigned documents</li><li>- The parol evidence rule</li></ul>
<b>INTERPRETATION:</b> <ul style="list-style-type: none"><li>- Objective meaning prevails</li><li>- Admitting extrinsic evidence where there is ambiguity</li><li>- Contra-proferentem interpretation</li></ul>
<b>IMPLICATION:</b> <ul style="list-style-type: none"><li>- Terms implied by fact</li><li>- Terms implied by law</li><li>- Implied duties to cooperate, act in good faith, and reasonableness</li></ul>

**Held:** In the absence of fraud or misrepresentation or mistake, a person who signs a written agreement is bound by it (*Toll*).

## MODULE 1.4 (B) COLLATERAL CONTRACTS

A Collateral contract is a contract in some way connected to, but independent from, the main contract, where one party makes a promise and as consideration for that promise, the other party agree to enter into the main contract.

- Evidence of pre-contractual statements may be relied upon to establish that the parties made a prior collateral contract, consisting of one party making one or more promises in consideration of the other party's entry into the contract recorded in the document.
- Promises are contained in a separate contract so do not, strictly speaking, add to or vary the original contract
  - o Thus, the parol evidence rule does not apply to exclude evidence from the existing contract
- Rule from *Hoyts v Spencer*: **The collateral contract can add to the main contract but cannot be inconsistent with it nor vary the terms of the main contract: Isaac J**

An Example:

- A says to B 'If you hire me to paint your house, I will do it in two days'
- Subsequently enter written agreement which omits any time stipulation for performance
- Can (a) treat it as a partly oral partly written contract, (b) written contract prevails (so that a 'reasonable time' is implied) or (c) recognise the oral statement as a collateral contract.

For a statement to give rise to a collateral contract, the statement must be:

1. Made as a promise (not merely representational) and sufficiently certain (*Oscar Chess* case)
2. Intended to induce entry into the contract
  - a. Judged objectively by reference to what a reasonable person in the position of the parties would have understood the statement to mean
3. Consistent with the terms of the main contract

Evidence for collateral contract will come from the pre-contractual negotiations:

For collateral contract- need to determine whether a statement was actually promissory, if it was designed to induce you to a contract etc.

Hypothetical: spot the fact that the argument could possibly be raised; but then demonstrate that any rights arising from the collateral contract are inconsistent with the main contract"

**Facts:**

- The defendant (Spencer) leased to Hoyt's Pty Ltd, the plaintiff/appellant, the premises for a period of four years.
- The lease contained the following proviso:
  - o "Provided always that the said Cosens Spencer may at any time during the currency of the term hereby created terminate this lease by giving to the lessee **at least four weeks' notice in writing** of his intention to do so."
- S gave notice
- The plaintiff brought action against the defendant alleging that in consideration of its taking the lease, the defendant agreed that he would not during the currency of the term give notice to his intention to terminate the lease unless requested and required to do so by the head lessor

**Issue:** Was S's promise to H a collateral contract?

**Held:** No, while collateral contracts are not subject to the parol evidence rule, **they must allow the parties to 'all...of the respective benefits and burdens of the main contract'** (per Isaacs J). Though a collateral contract was made between H and S, it is **unenforceable because it conflicts with the terms of the primary contract between them** (primary overrides secondary terms).

*ISAACS J:*

- It only remains to consider whether the alleged promise does leave the contractual rights of the respondent under the main contract unimpaired. Ex concessis, it does not
- The very argument on which the claim is founded is that but for the additional promise the respondent had the power by virtue of the proviso to do what he did.
- **If the argued collateral contract is inconsistent with the main contract, (any sort of inconsistency)/ cannot impinge on it, or alter its provisions or rights created by it. Any inconsistency will kill the collateral contract argument.**
- Here, the sub-lessor's rights under the main instrument have been limited and impinged upon
  - o Here, the main instrument gives an unlimited right of termination to the sub-lessor
  - o The so-called 'collateral contract' limits the use of that right to cases where the sub-lessor was instructed to use the power by the head lessor
- If someone has made a pre-signing representation that a contractual clause will not be enforced, a collateral contract argument is very unlikely to succeed, unless:
  - o The collateral promise adds to the contract
  - o Even then, only the additional promises could be enforced: not the ones altering/conflicting with the main contract
  - o You cannot impair the rights of the parties under the contract.

**MODULE 1.4 9 (C) PROMISSORY ESTOPPEL**

- A pre-contractual statement that does not create contractual rights may be enforceable by way of promissory estoppel.

- It follows that if A induces B to assume that a contract to be made between them includes a particular term or that A will not enforce a particular term, and B has reasonably relied on that assumption, B will also have rights against A arising by way of estoppel
- However, the application of estoppel depends on the admissibility of evidence of the statements
  - o Whether evidence required to mount an estoppel claim is admissible is not settled – probably yes
  - o Even if evidence is allowed in- still difficult to succeed in estoppel given the unreasonableness of relying on oral rather than written
- Estoppel is not restricted by the requirement of consistency

### Case 7: *Saleh v Romanous* [2010] NSWCA 274, (2010) 79 NSWLR 453

#### Facts:

- Appellants/vendors owned land at 163 Kissing Point Road, Dundas.
- Neighbouring property at 165 Kissing Point Road was owned by Edmond, the brother of the first appellant
- Two brothers obtained development approval for the construction of eight townhouses on the combined site.
- Respondents/purchasers entered into a contract to purchase the land at 163 Kissing Point Road from the appellants/vendors and paid them a deposit
- The purchasers entered into the contract of sale on the assumption, induced by the vendors, that Edmond would participate in a joint venture with the purchasers to develop the two properties.
- The trial judge found that, before the contract of sale was made, the first appellant said to the first respondent: "Leave Eddie up to me. I'm taking responsibility for Eddie. If Eddie doesn't want to build you don't have to buy and you'll get your money back."
- Romanous could not negotiate joint venture with Eddie
- The trial judge held that a promissory estoppel arose against the vendors which prevented them from enforcing the contract of sale

**Issue:** Did Parol Evidence Rule prevent operation of equitable estoppel?

**Decision:** No, equity prevails over common law. Promissory estoppel could operate as it acts as an equitable restraint on the enforcement of the promise of those rights (Handley AJA).

#### Handley AJA:

- Mr Rayment submitted that the collateral contract in *Hoyts'* case, like the promissory estoppel in the present case, was an attempt to restrict the exercise of rights under a written contract. He said that a collateral promise which could not be enforced as a contract could not be enforced as a promissory estoppel.
  - o I reject these submissions. A promissory estoppel is not enforced as a contract, but as an equitable restraint on the exercise or enforcement of the promisor's rights. *Hoyts'* case did not decide that the sub-lessee had no equity, and *Isaacs J* left that question open.
- In *Equuscorp Pty Ltd* the Court, in the joint judgment of Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ said:
  - o Where parties entered into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is

afforded by the operation of statute or some other legal or equitable principle applicable to the case

- The case is significant because, despite the parol evidence rule, the High Court remitted issues to the Queensland Court of Appeal which included the promissory estoppel pleaded by the borrowers.
- A promissory estoppel is a restraint on the enforcement of rights, and thus, unlike a proprietary estoppel, it must be negative in substance.
- In my judgment therefore the appeal fails. The purchasers sought to support the judgment on alternative grounds raised in their notice of contention

#### Finding:

- The claim based on an oral collateral contract was rightly rejected in accordance with Hoyts' case.
- However, use of promissory estoppel to confer *positive* rights is controversial so it is unclear whether it only operates in the negative (by limiting the way people can use their contractual rights) or also in the positive (by actually giving one party a right)
  - o *Negative*: stopping Saleh from enforcing the contract
  - o *Positive*: actually enforcing R's right to have S terminate the contract and refund the deposit
    - This would hugely undermine all the doctrines
- So, the result is a middle ground: the contract is still on foot, R has no right to the deposit but S cannot enforce a sale
- Appeal dismissed

NOTE: After arguing an incorporation defence, you should also argue Unfair Contract Terms and Consumer Guarantees

#### Collateral Contracts: Hypo Structure

1. *Is the statement promissory? Is it capable of becoming a term?*

- **Intelligent bystander test**: would an intelligent bystander infer that the statement was intended to have promissory intent having regard to the nature of the parties, their words and conduct (*Oscar Chess*)

2. *Can we admit the statement through an exception to the parol evidence rule?*

- **Contract not wholly written**: extrinsic evidence will usually be available to determine whether or not a contract is wholly written (*Heat Outdoor* per McHugh JA)
- Once admitted, you still need to show that it does actually prove that the contract is partly oral (cf *Heath Outdoor*)
  - o A separate, earlier oral agreement cannot contradict a later written agreement to which the parties are bound by signature (*Equuscorp*)
- **Collateral contract**: the parties might draft a separate contract which is used as an inducement to enter into the main contract
  - o A contract is not a mere inducement if it impinges upon the rights and burdens of the parties under the main instrument (*Hoyt's*)

- **Promissory estoppel:** statements may also become admissible for the purposes of establishing an estoppel which would restrain one of the parties from resiling from its pre-contractual promise by enforcing the contract; this is a little different to incorporation
  - o This is controversial but *Saleh* suggests that we can admit a statement in order to establish an estoppel but it would only operate negatively to restrain one of the parties rather than creating positive rights

### Summary: Incorporation of Terms

The simplest way of incorporating terms into a contract is through a written instrument either by **signature** or by proceeding with performance having been given **reasonable notice**.

Incorporating pre-contractual oral statements into a contract is more complicated because of the **parol evidence rule**.

Nonetheless, there are exceptions by which a statement might be allowed into evidence: to establish that the contract is **partly oral**; that there exists a **collateral contract** which induced entry into the main contract; or in order **to prove an estoppel** to restrain one party

## MODULE 2.0: INTERPRETATION OF TERMS

### 3 steps:

1. Identify the terms that need to be interpreted
  - o Is there a term which is ambiguous?
  - o Is a term capable of having more than one meaning?
  - o Contract interpretation is about weighing and choice, it's a matter of one fact being decisive
2. Identify the available evidence: is there extrinsic evidence? Is it available to be used?
  - o The second step is to identify the available evidence in the fact scenario or hypo the court will be able to use to resolve the question on interpretation.
  - o **True rule:** extrinsic evidence or surrounding circumstances are **only** admissible to assist in the interpretation of a term **if** it is **ambiguous or is 'susceptible of more than one meaning'** (Mason J in *Codelfa*; French CJ, Nettle and Gordon JJ in *Mount Bruce*).
    - **Extrinsic:** "events, circumstances and things external to a contract" (*Mount Bruce Mining*)
    - **Surrounding circumstances:** genesis of the contract; object of the contract; factual background to the contract; market in which the parties were operating
    - **Susceptible:** the competing constructions must be at least 'reasonably arguable' (*Technomin*)

### Admissible vs Inadmissible evidence:

- **Admissible:** the genesis of the contract, objective aims, meaning of a descriptive phrase, notorious facts and subjective intention to exclude something that might otherwise have been presumed (*Codelfa*). The common thread, with the exception of the last item on the list, is that the evidence must consist of objective facts which can inform the meaning of the terms
- **Inadmissible:** post-contractual conduct, subjective intentions or expectations even where those expectations are in agreement (*Brambles*).