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## Answer Structures

1. **Terms** – Is this term ambiguous?
  - a. **yes**, if it is taken true
  - b. **no**, **what evidence can construe terms**?
2. **Facts discussed before contract** – **did term become part of contract**, no relief for mere puffery?
  - a. Not part of contract,
  - b. representation equity can come up and give remedy.
3. **Has there been a breach**?
  - a. **what** has this breach been?
4. **Termination** – what has happened, is there an agreement?
  - a. Conditions of the termination
  - b. has there been a **contingent condition**?
5. **Damages** - what is the **damage** and the **loss** of the parties?
  - a. **Is this a penalty or warranty**?
6. Has there been any;
  - a. **misrepresentation**?
  - b. **Duress**?
  - c. **Unconscionable dealing**?
7. **Remedies**; - Contract or Equity
  - a. recession,
  - b. rectification,
  - c. damages

## CONTRACTS - TERMS

### A. ISSUE: IS THE CONTRACT WRITTEN OR SIGNED?

|                                     |                                                                                                                                                                                                                                                                                                                                                         |
|-------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>L'Estrange - Vending machine</b> | A signing party is presumed bound whether or not they understood or read the contract, <b>UNLESS fraud or misrepresentation</b><br>If the document signed was a part of the contract, certain clauses can't be ignored                                                                                                                                  |
| <b>Exceptions</b>                   | <ul style="list-style-type: none"> <li><b>Misrepresentation</b> – <i>Toll v Alpha</i>; <b>S18 ACL</b> – <b>Misleading/deceptive conduct</b> <i>In trade or commerce</i></li> <li><b>Non-contractual document</b> – <i>Curtis v Chemical Cleaning</i> – rule won't apply if document in question couldn't reasonably be considered a contract</li> </ul> |
| <b>Note</b>                         | <b>Small-print too small</b> – can be regarded as <b>Unfair</b> – <b>S24ACL</b> – <b>In trade or commerce</b>                                                                                                                                                                                                                                           |

### B. ENTIRE AGREEMENT CLAUSES

|                                      |                                                                                                                          |
|--------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| <b>Franklins v Metcash - Trading</b> | The written contract represents the entire agreement between parties and no other extrinsic material can form part of it |
| <b>Note</b>                          | Entire agreement clauses can be used against <b>estoppel</b> ( <i>ACF v Norco</i> )                                      |

### C. INCORPORATION OF TERMS

#### I. PAROL EVIDENCE RULE

Prevents use of extrinsic evidence in identification and construction of terms

Identification – only applies where the contract is wholly in writing and courts use extrinsic evidence to decide it (**SRA**)

|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|-------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Goss</b>       | Limits extrinsic evidence being added to or varying the terms of the written contract                                                                                                                                                                                                                                                                                                                                                                   |
| <b>Exceptions</b> | <ul style="list-style-type: none"> <li><b>Collateral contract</b> – <i>Hoyts</i> <ul style="list-style-type: none"> <li>Requirements of a collateral contract – (1) promise independent of main contract, (2) to induce entry into main contract (3) not inconsistent of main contract (<i>JJ Savage; Hoyts</i>)</li> </ul> </li> <li><b>Estoppel</b> – <i>Saleh</i> – Elements of estoppel; assumption, inducement and detrimental reliance</li> </ul> |
| <b>Note</b>       | <b>Collateral contract</b> should be made at the same time or before the main contract                                                                                                                                                                                                                                                                                                                                                                  |

#### II. INCORPORATION OF TERMS (UNSIGNED)

|                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|---------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>BY NOTICE – two limb test</b>            | <p>Where terms are given by notice, A party will be bound if;</p> <p>A. Terms <b>available before contract</b> was made – <i>Oceanic Sun Line</i></p> <p>B. <b>Has either knowledge or reasonable notice</b> of the terms – <i>Thornton v Shoe Lane</i></p>                                                                                                                                                                                 |
| <b>Note</b>                                 | <p><b>Rule for Ticket Cases</b> – If handed a ticket or doc with terms and it is retained, party will be bound. Using ticket is analogous to signing so long as limb 2 is met (<i>Parker</i>)</p> <p><b>For Unusual terms</b> – For exemption of personal injury more 'fair and reasonable' notice usually required – <i>Thornton v Shoe Lane</i></p>                                                                                       |
| <b>BY COURSE OF DEALING – two limb test</b> | <p>Where parties have a history of dealings, terms from earlier contracts may be incorporated into a subsequent contract without signing. A party will be bound if;</p> <ol style="list-style-type: none"> <li>there is a regular and uniform history of dealing (<i>Balmain New Ferry</i>) and</li> <li>the document relied on can reasonably be considered a contractual document (not just a receipt/docket) – <i>Rinaldi</i></li> </ol> |

### D. ISSUE: STATEMENTS MADE DURING NEGOTIATIONS – TERMS OR MERE REPRESENTATION?

|             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Rule</b> | For oral agreement to be binding as a term, P must establish the statement was made as a promise and intended by both parties to be part of the contract – <i>Equuscorp</i><br>Intention is judged objectively – <i>Dick Bentley</i>                                                                                                                                                                                                                                                                                                                                                                                                               |
| <b>Test</b> | <ol style="list-style-type: none"> <li>Language – Strong words denote a binding promise (<i>Oscar Chess</i>)<br/>'Estimate', 'Guess' denote mere representation (<i>JJ Savage</i>)</li> <li>Expertise – Statement made by a party with expertise is more likely promissory than inexperienced parties – <i>Oscar Chess</i></li> <li>Importance – Highly significant/important statement more likely promissory – <i>Van v Chappell</i></li> <li>Timing – CONSIDER – Time between statement and written contract formation – <i>Van v Chappell</i></li> <li>Formality – CONSIDER – Already have the written contract? – <i>Equuscorp</i></li> </ol> |
| <b>Note</b> | If false representations – consider <b>MISREPRESENTATION</b> and <b>FRAUD</b> and <b>REMEDIES</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

## CONSTRUING EXPRESS TERMS

### A. PAROL EVIDENCE RULE

#### ONLY FOR WHOLE WRITTEN CONTRACTS – USED TO IDENTIFY TERMS

1. Have parties made a contract? **Establish that this contract is wholly in writing** – evidence can be used in this process
2. Is that contract **VOID OF VOIDABLE** because of **ILLEGALITY, FRAUD, MISTAKE** or any other reason?
3. Did parties assent to **particular writing** as complete and accurate “integration” of contract?

Current view (*Mount Bruce*), is narrow. Prev broad in *Electricity Generation* and *Pacific Carriers*.

English rule says evidence of surrounding circumstance should **always** be admissible in construction (*ICS*)

|                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|-------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Codelfa, Mason J</b>       | Evidence of surrounding circumstances is admissible to assist interpretation if the language is ambiguous or open to more than one meaning                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>Masterton Homes [2009]</b> | <p><b>PER only applies to contracts wholly in writing</b> - no scope to operate until ascertained</p> <ul style="list-style-type: none"> <li>• A document on its face appearing to be a complete contract provides evidentiary basis for inferring the document contains the whole of the express contractual, binding terms</li> </ul> <p><b>If arguing parties orally agreed on additional terms</b> - Open to a party to prove</p> <ul style="list-style-type: none"> <li>• Where a contract is partly written/oral, terms may be ascertained from <b>holistic circumstances</b></li> </ul> |

### B. PROCESS OF CONSTRUCTION OF CONTRACTS

|                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|----------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>A. Objective Approach</b>                 | <b>Parties intentions are determined objectively</b> ( <i>Pacific Carriers</i> ), referring to what a <b>reasonable person</b> would understand of the agreement ( <i>Toll v Alpha</i> )                                                                                                                                                                                                                                                                                                                               |
| <b>B. Surrounding circumstances</b>          | In case of ambiguity, <b>courts will consider surrounding circumstances</b> - <i>Codelfa</i>                                                                                                                                                                                                                                                                                                                                                                                                                           |
| <b>C. Reasonable Commercial Construction</b> | In case of ambiguity, courts favour interpretations that avoid unreasonable/non-commercial consequences. Even if producing an unreasonable result, clear words must be given effect - <i>ABC v APRA</i>                                                                                                                                                                                                                                                                                                                |
| <b>Circumstances:</b>                        | <ul style="list-style-type: none"> <li>• <b>Natural and ordinary meaning</b> of clause – <i>EGC v Woodside</i></li> <li>• Any <b>other relevant</b> provisions - <i>Royal Botanic Gardens</i></li> <li>• Overall <b>purpose</b> of clause - <i>Codelfa</i></li> <li>• <b>Facts and Circumstances</b> - <i>Royal Botanic Gardens</i></li> <li>• <b>Commercial common sense</b> - <i>EGC v Woodside; Pacific Carriers</i></li> <li>• <b>Disregarding subjective</b> evidence - <i>Western Export Services</i></li> </ul> |

### C. CONSTRUING EXCLUSION AND INDEMNITY CLAUSES

**Exclusion** – to exclude or exempt liability

**Indemnity** – exclude liability imposing on the other a duty for loss

Where not regulated by **statute**, [Relying Party] may seek to rely on an exclusion clause for its own benefit to reduce/exclude liability if:

- A. Was the clause properly **incorporated**?
- B. As a matter of **construction**, does the clause apply to exclude/reduce liability **in relation to the issue in dispute**

#### RULES

|                                |                                                                                                                                                                                                                                                                                                                                                                                                             |
|--------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Ordinary Principles</b>     | Exclusion clause to be construed with the entirety of the contract in mind – <i>Darlington Futures</i>                                                                                                                                                                                                                                                                                                      |
| <b>Contra proferentem rule</b> | In case of ambiguity, may be construed against the interest of the reliant party - <i>Darlington</i>                                                                                                                                                                                                                                                                                                        |
| <b>Four corners rule</b>       | Parties won't exclude liability for loss arising from acts not authorised under the contract – <i>SCC v West</i>                                                                                                                                                                                                                                                                                            |
| <b>Deviation rule</b>          | A carrier can't rely on ExclCI to exclude liability for loss occurring during a deviation from the agreed route – <i>Davis v Pearce Parking</i>                                                                                                                                                                                                                                                             |
| <b>Negligence</b>              | Clear words necessary to exclude liability for negligence. General and expansive may be enough - <i>Davis</i>                                                                                                                                                                                                                                                                                               |
| <b>Note</b>                    | <p>For Suppliers trying to <b>exclude or disclaim guarantees</b> - <i>ACL s64 – Guarantees not to be excluded, 64A – Limitations on liability for failure to comply with guarantees = Voidable terms</i></p> <p>Old English approach of 'rule of law' that fundamental breach disentitles the reliant party (<i>Photo</i>) not adopted in Aus. Need to examine the exclusion clause (<i>SCC v West</i>)</p> |

## IMPLIED TERMS

### A. OVERVIEW

If Contract has failed to sufficiently provide for a circumstance which has occurred.

Courts may imply a term in these circumstances. Terms may be implied:

- In **fact** – where a term was intended but not expressly stated
- In **law** - automatically implies to **all contracts in a defined category** of contract regardless of the intention of the parties
- By **custom** – in a particular industry
- By **statute** – **ACL ss 51-68 for consumer transactions**

Terms will **not be implied** where:

- The parties expressly excluded them – **EXCEPT** for **suppliers to consumers** (ACL s 64)
- The implied term would be **inconsistent with the express terms**

An entire agreement clause **does not** mean that terms will not be implied by the courts

### B. TERMS IMPLIED IN FACT

Based on **presumed intentions** of the parties

|                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>BP Refinery</b><br>All 5 to be satisfied                 | For a term to be implied, it must; <ol style="list-style-type: none"> <li>1. <b>be reasonable and equitable.</b> A term beneficial to one party and imposing a significant burden on the other is unlikely to be R&amp;E</li> <li>2. <b>give business efficacy to the contract.</b> No term will be implied if the contract is effective without it</li> <li>3. <b>be so obvious it goes without saying</b> - <i>Codelfa</i></li> <li>4. <b>be capable of clear expression</b> – <i>Ansett</i></li> <li>5. <b>not contradict any express term</b></li> </ol> |
| <b>Exception – Informal Contract</b><br>(ie doctor, lawyer) | Court must <b>identify actual terms</b> of contract <b>inferred from the kind of relationship</b> ( <i>Hawkins</i> )<br>Flexible approach to be taken, usually sufficient to look at business <b>efficacy</b> and <b>obviousness</b> ( <i>Byrne</i> )                                                                                                                                                                                                                                                                                                        |

### C. TERMS IMPLIED IN LAW – Higher requirement than ‘in fact’

Traditional examples = implied condition of reasonably fit for purpose & merchantable quality in contract for sale of goods

- Rule that payment and delivery of goods are concurrent conditions
- Implied condition on the renting of a furnished house that it is reasonably for habitation
- Implied promise by a servant not to disclose secret processes
- Implied promise of a banker not to disclose the state of his customers finances

|                  |                                                                                                                                                                                                                                                                                                                                                                                                            |
|------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Byrne</b>     | To determine if a <b>new term should be recognised as implied in law</b> must consider both; <ol style="list-style-type: none"> <li>A. Term must be <b>applicable to a defined class</b> of contractual relationships and</li> <li>B. Term must be <b>suitable</b> for it to be recognised as implied in all such contracts</li> </ol>                                                                     |
| <b>Liverpool</b> | To determine <b>whether a term meets the above</b> courts use a <b>TEST OF NECESSITY</b> , <ol style="list-style-type: none"> <li>1. Term can be implied if its omission would significantly diminish the rights of the parties (<i>Byrne</i>)</li> <li>2. General considerations such as the nature of the contract and relationship, justice, policy, social consequences (<i>UWA v Gray</i>)</li> </ol> |

*Codelfa* (best used for frustration) - Issue of **the implied warrant** in contract **upon which they were able to claim damages**.

- Mason - a term needs to be necessary & so obvious it goes without saying. It needs an objective framework – Uses *BP*

### D. TERMS IMPLIED BY CUSTOM

|                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Con-Stan</b><br>All 4 to be satisfied | Where a custom is well known, everyone making a contract in that situation can be presumed to have imported that term. <ol style="list-style-type: none"> <li>1. <b>Question of fact</b> – existence of a custom or usage that will justify the implication of a term into a contract</li> <li>2. Need not be universally accepted, but there must be evidence it is <b>well-known and acquiesced</b></li> <li>3. <b>Not contrary to express terms</b></li> <li>4. <b>Binding whether or not parties had knowledge</b></li> </ol> |
|------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|