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First consider: What is the form of the contract? What do the parties want?

Incorporation of terms

Sub-category #1: Incorporation by signature

Step 1: Has the document been signed?

- Where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document (*Toll v Alphapharm*, endorsing rule from *L'Estrange v Graucob*).

Step 2: Would a reasonable person believe the document to be one affecting legal relations?

- This is to be considered objectively (*Toll*).

Step 3: Is there a vitiating element (misrepresentation, duress, mistake, or anything else)?

- Any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough (Denning LJ in *Curtis*).
 - **Note:** Not a High Court of Australia case.

Step 4: Does an equitable or statutory exception apply?

Step 5: Conclude on whether and what terms can be incorporated.

Sub-category #2: Incorporation by notice

Step 1: Was there actual knowledge of the terms?

- If there was actual knowledge of the terms, the knowledge requirement is satisfied (Brennan J in *Oceanic*).

Step 2: If [Step 1] fails, was there reasonable notice of the terms?

General rule

- Absent actual knowledge, the party instigating the term must do all that is reasonably necessary to bring the term to the other party's notice (Brennan J in *Oceanic*).

Salient considerations

- What is reasonably necessary varies by situation, but it will be more onerous where (a) the **clause is an unusual one** (Brennan J in *Oceanic*); or (b) it is **particularly destructive of rights** (Denning J in *Thornton*).

- **Practicality** is relevant to determining whether notice satisfied what was reasonably necessary.
 - *Oceanic*: the plaintiff could not travel to Greece to study the terms of the ticket (since they were contained only on the ticket itself).
 - *Thornton*: not expected that the individual get out of his car, search for and study terms on signs after arriving at the ticket machine.

Step 3: Were the terms made available before the contract was formed?

- The asserted term must be made available before the contract is formed (*Oceanic*; *Thornton*).
- Where no opportunity to reject the term exists, the term cannot be incorporated into a pre-existing contract (*Oceanic*; *Thornton*)
 - *Oceanic*: the defendant was already bound to issue a ticket in exchange for the exchange order in performance of a contract already made, but the defendant was given no right to introduce new conditions of carriage by printing them on the ticket (Brennan J).
 - *Thornton*: The driver ‘is not bound by the terms printed on the ticket if they differ from the notice because the ticket comes too late’ (Lord Denning MR).

Step 4: Conclude on whether and what terms can be incorporated.

Sub-category #3: Incorporation of pre-contractual statements

Step 1: Identify the pre-contractual statement.

Step 2: Was the pre-contractual statement sufficiently promissory in nature?

General rule

- For a pre-contractual statement to be contractually enforceable, it must first be sufficiently promissory (*JJ Savage*; *Oscar Chess*).
- The question is whether ‘an intelligent bystander would reasonably infer that a warranty was intended’ (*JJ Savage*, adopting the test from *Oscar Chess*).

Salient considerations

- The ‘actual words’ used in the statement used are significant (*JJ Savage*).
 - *JJ Savage*: ‘Estimated speed of 15 mph’ was not a warranty, but ‘an expression of opinion’. For this to function as a warranty, needed either (a) the speed to be inserted as a condition of the contract; or (b) a promise, however expressed, that the boat would attain the relevant speed.
 - *Oscar Chess*: ‘I believe’ is a representation, not a contractual promise.
- The expertise of the parties is relevant.

- *Oscar Chess*: both parties knew Williams had no expertise in cars (since he relied on the registration book for the year of the car's make). By contrast, there might have been an implied promise if it came from a party with expertise.
- *JJ Savage*: Language trumps expertise.
- The importance of the statement may be relevant.
 - Morris LJ (dissenting) in *Oscar Chess*: the statement relating to a vitally important matter made it more likely to be promissory.
 - Note that this is heavily contentious and is not an authoritative view.

Step 3: Was the pre-contractual statement admissible?

General rule

Where a contract is wholly in writing, the law excludes extrinsic evidence of pre-contractual statements that would 'subtract from, add to, vary or contradict the language' of the document (*Codelfa*).

Step 3(a): Is the contract wholly written?

- A signed document which is ostensibly a complete record of a contract is normally accepted as such.
- Evidence of oral terms existing cannot be excluded by the mere production of a contractual document where one party asserts that such oral terms were agreed (McHugh JA in *State Rail Authority*).
- The authority to vary the terms of a contract is relevant to determination of whether pre-contractual promises can render a written contract 'partly oral, partly written' (*State Rail Authority*).
 - *State Rail Authority*: Mr Giles made it explicit in negotiations that he had no authority to change any condition of the contract.
- An entire agreement clause is usually treated as proof of an intention that the written document constitutes the entirety of the contract.
- Where there are inconsistencies between oral terms and a later written contract, the written contract supersedes the earlier oral terms (*Equuscorp*).
 - *Equuscorp*: Oral agreement about the limited recourse provision was superseded by the later written agreement between the parties.

Step 3(b): If the answer to [Step 3(a)] is ['No'], explain the rule for contracts partly in writing.

- In this case, the parol evidence rule does not exclude the evidence.

Step 3(c): If the contract is wholly written, is there a collateral contract?

- Where a statement is (a) made as a promise (*JJ Savage*); (b) judged objectively, intended to induce entry into a main contract (*JJ Savage*); and (c) consistent with the terms of the main contract (*Hoyt's*), it may give rise to a collateral contract (Gordon J in *Crown Melbourne*).

- A collateral contract can neither impinge on nor alter the provisions or rights created by the main contract (Isaacs J in *Hoyt's*).
 - *Hoyt's*: A collateral promise to not terminate a lease could not co-exist with the main contract's unfettered option to terminate the lease.
 - *State Rail Authority*: the unfettered discretion in cl 6 to terminate at any time on one month's notice could not co-exist with a collateral contract undercutting this provision.

Step 3(d): If the contract is wholly written, can an estoppel operate?

- Evidence of pre-contractual statements for equitable claims is not restricted by the parol evidence rule or entire agreement clauses governing contracts (Handley JA in *Saleh*, supported by Allsop J in *Branir*).
- Estoppel claim requires:
 - (a) an assumption induced by an unincorporated pre-contractual statement
 - *Saleh*: Saleh's positive statement that he would 'take care of Eddie' (to secure the joint venture) induced Romanous to assume that the joint venture was available.
 - (b) detrimental reliance
 - *Saleh*: Romanous entered into the contract on the basis of the joint venture assumption, provided a deposit to Saleh, and suffered loss as a consequence
 - (c) reasonable reliance
 - *Norco*: there might be significant difficulty in demonstrating the reasonableness of reliance on pre-contractual statements in the presence of contradictory written terms. This makes estoppel claims hard to make out, even if they can circumvent admissibility requirements (Bryson J).

Interpretation of terms

Step 1: Identify and stress that an ambiguity exists.

Step 2: Apply the objective approach to the contract itself.

General rule

The general rule for contractual interpretation is that it is an objective task, requiring consideration of what a reasonable businessperson in the position of the parties would understand the contract to mean (*Toll, Mt Bruce, Electricity Generation*, Heydon JA in *Brambles*).

Step 2(a): Consider the natural and ordinary meaning of the words.

- *Mount Bruce Mining*
- *Darlington Futures*
- Nettle J in *Ecosse*

Step 2(b): Consider the other provisions of the contract and the contract as a whole.

- *Brambles*: the definition of ‘trade refuse’ in cl 2(b) used to interpret ‘general waste’ in cl 21 (Heydon JA).
- *Ecosse*: cl 13 (articulating the intention for the 99-year lease to replicate a sale) used to interpret cl 4.
- *Electricity Generation*

Step 2(c): Consider what is necessary to give commercial sense to the agreement.

- *Ecosse*: ‘Clause 4 should be read consistently with the commercial object of the agreement. ... it makes no commercial sense, having regard to that objective [cl 13], for the lessor to remain liable for the payment of rates, taxes and other outgoings over the term of the lease’ (Kiefel, Bell and Gordon JJ).
 - Note this can appear both at the internal evidence stage, and at the extrinsic stage

Step 2(d): Conclude on the result of this interpretation on the contract. If ambiguity still exists, proceed to [step 3]. If ambiguity is resolved, proceed to [step 4].

Step 3: Apply the objective approach to the surrounding circumstances.

Step 3(a): Restate and again stress the ambiguity.

Step 3(b): Explain that the law on admissibility is unclear.

In *Codelfa*, Mason J provided that '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'. The proper effect of this statement of law remains disputed in the Australian context. Some cases have adopted permissive views, allowing recourse to surrounding circumstances where a constructional choice can be identified (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Royal Botanic Gardens*). Others have been restrictive, permitting reference to evidence outside the contract itself only in instances where an ambiguity exists (French CJ, Nettle and Gordon JJ in *Mount Bruce Mining*). Since it is unclear whether [AMBIGUITY], under the permissive view a constructional choice clearly exists, and so recourse to surrounding circumstances would likely be permitted (as in *Royal Botanic Electricity Generation, Maggbury*).

- Start with Mason J in *Codelfa*: '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'.
- Evidence of surrounding circumstances is not admissible to contradict the language of the contract where it has a plain meaning (Mason J in *Codelfa*).
- In *Mount Bruce Mining*, French CJ, Nettle and Gordon JJ offer a narrow reading of Mason J's judgment in *Codelfa* by writing that absent ambiguity, interpretation is ordinarily possible by reference to the contract alone.
- But in *Royal Botanic Gardens*, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ appear to adopt a more permissive approach, merely identifying a constructional choice before going to the surrounding evidence.

Step 3(c): Recognise that you have identified an ambiguity or constructional choice, possibly allowing recourse to surrounding circumstances.

- Given that the presence of a clear constructional choice, it is highly plausible that a court would permit recourse to surrounding circumstances for interpretation (*Royal Botanic Gardens, Electricity Generation, Maggbury*).

Step 3(d): Analyse the relevant evidence of surrounding circumstances.

Statements indicating the 'genesis or objective aim of the contract or the meaning of a descriptive term' may be considered (*Codelfa, Pacific Carriers, Electricity Generation*).

- Nature of the parties might be considered: public authorities in *Royal Botanic*.
- Purpose of the transaction: commercial transactions will be viewed in that light (*Ecosse*).
- Industry understanding: *Codelfa, Electricity Generation*.

- Objective background facts known to both parties: Mason J in *Codelfa*.
- Subjective evidence of shared intention to not include a term in the contract: Mason J in *Codelfa, Ecosse*.

Step 3(e): Conclude on the impact of the surrounding circumstances both (i) if it is deemed admissible; and (ii) if it is not ultimately admitted.

It is relevant to note in concluding that if a court were to take a restrictive view on the admissibility of surrounding circumstances, it is plausible that none of this analysis on surrounding circumstances would be permitted to occur. If this were the case, and the court were to rely purely on an objective view of the contract itself, [X OUTCOME]. But if permission to view surrounding circumstances was granted, [Y OUTCOME].

Step 4: Conclude.

Side note: exclusion and limitation clauses

An exclusion or limitation clause is to be construed ‘according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract...’ (*Darlington Futures*).

- *Darlington Futures*: cl 6 did not apply, as it only operated on ‘authorised activities’. Clause 6 did apply and was not ambiguous, so the defendant’s liability was limited to \$100.
 - Ie, if an exclusion clause is clear, it will apply even if its effect may appear unjust.
- In cases of ambiguity, an exclusion or limitation clause may be read *contra proferentem* (against the party which proposed or drafted the contract or clause).

Implication of terms

- NOTE: Standard form contracts are less likely to have terms implied (*Codefa*)
- 'If the contract has not been reduced to complete written form, the question is whether the implication of the particular term is necessary for the reasonable or effective operation of the contract in the circumstances'. (*Byrne*)

Consider what the parties want

Step 1: After considering incorporation and interpretation, is there a gap in the contract?

Step 2: Is the universally implied duty to cooperate relevant?

Step 2(a): Is this asserted duty one of cooperating to allow the other party to *perform* their contractual obligations?

In *Secured Income*, Mason J restated the position in *Butt v McDonald* by providing that 'it is easy to imply a duty to cooperate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract'.

Step 2(b): Is this asserted duty related to cooperation to allow the other party to access the benefits of the contract?

This would require establishment of a duty to cooperate to allow the other party to access the *benefits* of the contract. While this was held to exist in *Butt*, Mason J's more recent and more authoritative statement in *Secured Income* suggests that such a duty is unlikely to be universally implied. Mason J held that where those benefits are 'not essential to the performance of that party's obligations and are not *fundamental to the contract*', this form of the duty to cooperate is unlikely.

Step 2(c): If any such duty is (i) implied and (ii) relevant, what does it require?

- *Secured Income*: there was an obligation on St Martins to do all things reasonably necessary to enable leases to be granted. Any withholding of approval had to be reasonably based and couldn't be capricious or arbitrary (Mason J).
 - This obligation was not breached because there was no capricious or arbitrary refusal of a lease. St Martin has reasonable doubts about Secured Income's ability to pay rent.

- The duty to cooperate does not force St Martins to sacrifice their own interests to enable the other party's attainment of benefits from the contract.

Step 3: Is there a duty to act reasonably and in good faith implied in fact or by law?

Step 3(a): Note that there is ambiguity as to whether a duty to act reasonably and in good faith is universally implied in Australia.

In *Yum*, the Court explained that the duties to act reasonably and in good faith have substantively merged into one, common duty. The status of this duty is contested in Australian law. In *Burger King*, it was suggested that the exercise of contractual powers in good faith was one that was implied by law. But in a line of cases such as *Renard*, *Virk*, and *Esso*, courts have predominantly viewed it as a term to be implied in fact. Given this uncertainty, any reliance by M on this implied duty would depend first on the question of whether any such duty could be implied at all.

- State your formulation of the duty for this specific case.

Step 3(b): Is such a duty implied by law?

From *Byrne*, it is clear that for this duty to be implied by law, the class of contract into which this term should be implied must first be identified.

Next, the test from *Byrne* needs to be considered. McHugh and Gummow JJ articulated the requirement that for a term to be implied by law, it must be the case that 'unless such a term be implied, the enjoyment of the rights conferred by the contract would or could be rendered *nugatory, worthless, or, perhaps, be seriously undermined*'.

- Note that in *Renard*, Priestley JA alluded in obiter to the possibility that such a term could be implied by law.

Step 3(c) Is such a duty implied in fact?

NOTE! If partly oral, partly written, requirement is lower:

- ‘If the contract has not been reduced to complete written form, the question is whether the implication of the particular term is necessary for the reasonable or effective operation of the contract in the circumstances’. (*Byrne*)

- **Preliminary considerations should be made:**

- The more detailed and comprehensive the contract, the less likely an implication of terms will be made. Negotiated contracts are more likely to have implied terms than standard form contracts (**Mason J in *Codelfa***).
- Pre-contractual negotiations are admissible in determining implied terms. Deliberate silence on a matter (anti-implication), matters that were in the common contemplation of the parties (anti-implication), or matters overlooked by the parties (pro-implication) may be useful to consider (**Mason J in *Codelfa***).
- Adopt the test from *BP Refinery v Hastings Shire Council*, as applied in *Codelfa* and *Byrne*. There are five requirements:

For a duty to be implied in fact, the five requirements applied in *Codelfa* (and *Byrne*) (adopted from *BP Refinery*) need to be satisfied. These should be stepped through individually.

1. The term must be reasonable and equitable.

- *Byrne* (FAILED): implication of cl 11(a) of the *Transit Workers Award* into employment contract would inequitably favour the interests of the employee.
- Side note from Lord Neuberger in *Marks and Spencer*: ‘if a term satisfies the other requirements [from *BP Refinery*], it is hard to think that it would not be reasonable and equitable.’

2. The term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.

- *Commonwealth Bank of Australia v Barker* (FAILED): ‘... the implied term of mutual trust and confidence imposes mutual obligations wider than those which are necessary.’
- *Renard Constructions v Minister for Public Works* (SATISFIED): ‘no contractor in his senses would enter into a contract under which such a thing [unilateral termination of contract] could happen’
- **Side note from Lord Neuberger in *Marks and Spencer***: accepts that business necessity and obviousness (requirement 3) may be substitutable (ie, you only need to satisfy one of them).
- **Another useful side note from Lord Neuberger in *Marks and Spencer***: ‘... a more helpful way of putting [it] is ... that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.’

3. The term must be so obvious that ‘it goes without saying’.

- **Mason J in *Codelfa* (FAILED)**: ‘This is not a case in which an obvious provision was overlooked by the parties... negotiation about that matter might have yielded any one of a number of alternative provisions, each being regarded as a reasonable solution.’

4. The term must be capable of clear expression.
5. The term must not contradict any express term of the contract.

Step 3(d): If such a duty of good faith and reasonableness is implied, what is its content?

The content of any implied duty to act reasonably or in good faith must be considered. In *Virk*, the Court held that reasonableness may involve consideration of a party's real intention or purpose in exercising a contractual power or require consideration of whether that conduct is or is not honest, capricious, arbitrary or for an extraneous purpose.

- Reasonableness is not about the exercise of due care or skills to produce a reasonable outcome (*Virk*).
- Reasonableness may involve consideration of a party's real intention or purpose in exercising a contractual power or require consideration of whether that conduct is or is not honest, capricious, arbitrary or for an extraneous purpose (*Virk*).
 - *Virk*: the value strategy was not developed capriciously or arbitrarily. The franchisor acted reasonably and in good faith.
 - *Renard*: the termination option in the contract required that the non-satisfaction of the Minister with the contractor's work have a reasonable basis.
 - *Trampoline*: Trampoline delayed opening the Craigieburn store so that it did not have to pay the extra \$140,000 for opening within 180 days of the completion of the agreement. This was ulterior, dishonest, capricious or arbitrary, breaching the **express** good faith requirement contained in cl 2.5.
 - *Burger King*: Burger King's powers in cl 4 were extremely wide, permitting unilateral freezing of Hungry Jack's franchises, withdrawal of financial or operation support, and impeding Hungry Jack's ability to open new restaurants in accordance with agreed targets. These could not be exercised for a **purpose extraneous to the contract**.

Step 3(e): What is the effect of any such implied term?