LAWS1075 | JURD7175

Contracts

Comprehensive Course Notes

UNSW Law School | Term 1, 2024

Course Overview

LAWS1075 Contracts covers the formation, content, discharge, and remedies for breach of contract under Australian law.

Topics covered across ten weeks:
Weeks 1-2: Express terms (incorporation, parol evidence, construction) and implied terms.
Weeks 3-4: Termination for breach, repudiation, frustration, and consequences of termination.
Weeks 5-7: Damages (expectation, reliance, remoteness, mitigation, penalties).
Weeks 8-10: Vitiating factors (rescission, misrepresentation, mistake, undue influence, misleading conduct, duress, unconscionability).

Key statutes: Australian Consumer Law (ACL) s 18, ss 20-21; Contracts Review Act 1980 (NSW).

WEEK 1: EXPRESS TERMS

1.1 What is a Contract Term?

A term of a contract is a promise or undertaking that forms part of the binding agreement between the parties. Identifying the express terms of a contract is foundational because it determines what each party is obliged to do, and what remedies are available if those obligations are not met. Express terms are those that the parties have articulated, whether in writing, orally, or by conduct.

The process of identifying express terms involves two distinct questions. The first is whether a particular statement or document was incorporated into the contract. The second is the meaning and effect of the incorporated terms, which is a matter of construction. These questions are addressed in Chapters 12 and 13 of the casebook.

1.2 Incorporation by Signature

The foundational rule is that a person who signs a contractual document is bound by its terms whether or not they have read them. This rule operates as an objective standard; the subjective understanding of the signatory is irrelevant. The rule reflects the importance of certainty and the protection of the reasonable expectations of the other contracting party.

L'Estrange v Graucob | [1934] 2 KB 394

Facts: A cafe owner signed a sales agreement for an automatic vending machine without reading it. The agreement contained a clause excluding implied conditions under the Sale of Goods Act. The machine was defective, and the owner sought to rely on the implied condition as to fitness for purpose.
Held: The owner was bound by the exclusion clause. By signing the document, she was bound by all its terms, whether or not she had read or understood them.
Principle: The signature rule: a person who signs a written document containing contractual terms is bound by those terms absent fraud or misrepresentation.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd | (2004) 219 CLR 165 (HCA)

Facts: An invoice signed by an employee of the plaintiff contained a clause on the back that incorporated the carrier's standard conditions. The employee had no actual knowledge of those conditions.
Held (HCA): The signature rule applies in Australia. A party who signs a document that would reasonably appear to be a contractual document is bound by its terms. However, a party seeking to rely on an incorporated term must show that the document was presented as contractual.
Key addition: Toll confirms that the document must be objectively a 'contractual document'. Where a document is merely informational or descriptive (e.g., a delivery docket), terms on the back may not be incorporated.

Curtis v Chemical Cleaning and Dyeing Co | [1951] 1 KB 805

Facts: A customer handed a garment to a drycleaner and was asked to sign a receipt. When asked what the document contained, an assistant said 'it excludes liability for damage to the

beads and sequins'. In fact, the document excluded liability for all damage. The garment was stained.
Held: The cleaner could not rely on the wide exclusion clause. A misrepresentation by the party seeking to rely on the document about the nature or effect of the term limits its incorporation to the extent of what was represented.
Principle: Misrepresentation as to the scope of a term qualifies the operation of the signature rule.

1.3 Incorporation by Notice

Where a party does not sign a contractual document, terms may still be incorporated by notice if the party receiving the document knew or ought to have known that it contained contractual terms, and the other party took reasonable steps to bring those terms to their attention before or at the time of contracting.

Rules for Incorporation by Notice

1. The document must be contractual in nature, not merely a receipt or acknowledgment.
2. Reasonable notice of the terms must be given BEFORE or AT the time of contract formation, not after.
3. The more onerous or unusual the term, the greater the notice required (the red hand rule from Thornton v Shoe Lane Parking).
4. Constructive notice is sufficient: it is enough that the recipient knows or ought to know that the document may contain conditions.

Oceanic Sun Line Special Shipping Co v Fay | (1988) 165 CLR 197 (HCA)

Facts: A travel agent in Australia issued a ticket for a Greek cruise. The ticket referred to conditions incorporated into it and stated that disputes were to be heard in Greek courts. The passenger suffered injury on the cruise and sued in Australia.
Held: The jurisdiction clause was not incorporated. The ticket was issued after the contract was formed (when the booking was confirmed and deposit paid). Terms on the ticket could not retrospectively become part of the contract.
Principle: Terms must be incorporated at or before the time of contracting. Post-contractual documents cannot introduce new terms without fresh consideration.

Thornton v Shoe Lane Parking Ltd | [1971] 2 QB 163

Facts: A car park displayed a notice at its entrance and issued a ticket containing an exclusion clause. The plaintiff was injured inside the car park partly through the negligence of the defendant.
Held: The exclusion clause was not incorporated. The contract was formed when the plaintiff inserted money into the machine at the entrance. The ticket was issued after contract formation. Moreover, the exclusion of personal injury liability was so unusual and onerous that it required specific notice beyond a mere reference to 'conditions'.
Key principle (red hand rule): 'The more unreasonable a clause is, the greater the notice which must be given of it. Some clauses would need to be printed in red ink with a red hand pointing to it.' Lord Denning MR.

Baltic Shipping Co v Dillon | (1993) 176 CLR 344 (HCA)

Facts: A passenger purchased a ticket for a cruise. The ticket contained an exclusion clause limiting liability for personal injury. The passenger was injured when the ship sank.
Held: The ticket was given to the plaintiff prior to embarkation, but the contract was arguably formed when the booking was confirmed. The Court examined whether the plaintiff had accepted the risk in the ticket conditions.
Relevance: Key for two points: (1) incorporation of terms in ticket contracts; (2) damages for disappointment and distress in contract (discussed further in Chapter 27).

1.4 Incorporation by Course of Dealing

Even in the absence of signature or notice in a particular transaction, terms may be incorporated into a contract by reason of a consistent course of prior dealing between the parties. The principle is that if the parties have regularly contracted on identical terms over a sustained period, those terms become impliedly incorporated into subsequent contracts as a matter of course.

Requirements for Incorporation by Course of Dealing

1. The prior course of dealing must be consistent: the same terms must have been used in materially similar transactions.
2. The dealings must be sufficiently frequent and regular that the party can be taken to know and accept the terms.
3. The document containing the terms must be a contractual document (not merely a delivery docket or receipt).
Authority: Balmain New Ferry Co v Robertson (1906) 4 CLR 379; Rinaldi & Patroni v Precision Mouldings (1986).

Rinaldi & Patroni v Precision Mouldings Pty Ltd | [1986] WAR 100 (WASC)

Facts: The parties had conducted numerous transactions involving cart notes on which conditions were printed on the back. The defendant argued these conditions were incorporated by course of dealing.
Held: The cart notes were not contractual documents; they were understood by both parties merely as identification of delivery. Accordingly, despite the frequency of dealing, the course of dealing did not incorporate the conditions on the back of the notes.
Key point: For course of dealing to incorporate terms, the documents used in prior transactions must themselves have been contractual documents, not purely administrative ones.

1.5 Parol Evidence Rule

Where parties have reduced their contract to writing, the parol evidence rule limits the extent to which extrinsic evidence (evidence outside the written document, including oral statements, prior drafts, and negotiations) is admissible. The rule has two limbs: it prevents extrinsic evidence from adding to, varying, or contradicting the written terms; and it limits extrinsic evidence used to explain the meaning of written terms.

Parol Evidence Rule: Core Principles

1. The rule only applies to contracts that are wholly in writing (it is a question of fact whether a contract is wholly in writing or partly oral).
2. Even where the rule applies, extrinsic evidence is admissible to:
   (a) show that the document is not yet operative (e.g. subject to a condition precedent);
   (b) establish a wholly separate collateral contract;
   (c) identify parties or subject matter;
   (d) rectify a document for fraud or mistake;
   (e) support a claim of misrepresentation or non est factum.
3. Entire agreement clauses (merger clauses) reinforce the written contract as exhaustive.

SRA of NSW v Heath Outdoor Pty Ltd | (1986) 7 NSWLR 170 (NSWCA)

Facts: Heath Outdoor contracted to display advertising on the SRA's buses. The written contract contained an entire agreement clause and a clause giving the SRA power to cancel. An SRA officer had allegedly made oral representations about the duration of the contract.
Held: The parol evidence rule and the entire agreement clause prevented admission of the oral representations to add to or vary the written contract.
Key point: An entire agreement clause is not merely declaratory; it has substantive effect by reinforcing the parole evidence rule and precluding reliance on collateral contracts or prior oral representations as terms.

Hoyt's v Spencer | (1919) 27 CLR 133 (HCA)

Facts: A lease agreement contained a written condition giving the landlord the right to terminate on one month's notice. Hoyt's argued that a prior oral agreement had modified this right. Spencer gave notice to terminate.
Held (HCA): The oral agreement was inadmissible under the parol evidence rule to vary the written term. The written lease was wholly in writing and contained the whole agreement.
Key principle: A collateral contract must not contradict the main contract. Here, the alleged oral modification directly contradicted the written termination clause and was therefore inadmissible.

1.6 Oral Statements as Contract Terms

Not every statement made during negotiations will become a term of the resulting contract. Courts distinguish between terms (enforceable promises that form part of the contract) and mere representations (statements of fact that induce the contract but do not constitute a promise). If a statement is a term and it proves false, the remedy is for breach of contract. If it is only a representation, the remedy is rescission and possibly damages for misrepresentation.

Factor	Effect on Classification as Term
Importance to the other party	The more important the statement to the promisee, the more likely it is a term: Dick Bentley.
Special knowledge of promisor	If the promisor has superior knowledge about the truth of the statement, more likely a term: Oscar Chess.
Promise vs mere opinion	A statement of opinion is less likely to be a term; a clear promise is more likely: JJ Savage.

Lapse of time	A long gap between the oral statement and the written contract suggests the parties did not intend it as a term: Equuscorp.
Request to get it verified	If the promisee is asked to verify the statement independently, suggests it is a representation, not a term.

Oscar Chess Ltd v Williams | [1957] 1 WLR 370 (Eng CA)

Facts: Williams sold his car to a car dealer, representing it as a 1948 model (as stated in the registration document). The car was in fact a 1939 model. Williams had no way of knowing this.
Held: The statement was not a contractual term. Williams had no special knowledge; the dealer was in a better position to verify the year. The representation was innocent; the dealer's remedy (if any) was in misrepresentation, not breach.
Contrast: Dick Bentley v Harold Smith (Motors) [1965] 1 WLR 623 (Eng CA): a car dealer told a buyer the car had done 20,000 miles since a replacement engine; the car had actually done far more. Held: a term. The dealer had specialist knowledge and the statement was intended to be relied on.

Equuscorp Pty Ltd v Glengallen Investments Pty Ltd | (2004) 218 CLR 471 (HCA)

Facts: The parties entered into a written loan agreement following negotiations. Equuscorp sought to rely on an oral representation made during negotiations that the tax scheme involved was lawful.
Held: The oral statement was not incorporated as a term of the written contract. Where parties have reduced their agreement to writing, it is the writing that prevails.
Note: This case also illustrates the limits of collateral contracts: the alleged oral promise was not sufficiently distinct from the main contract to constitute a valid collateral contract.