LAWS1204 - Contracts

Contents

Incorporation

There are various ways in which a term can be incorporated in a written contract, this includes:

- By signature
- By notice
- By a course of dealings
- Statements made during negotiations

The incorporation of terms may also be affected by the **Parol evidence rule**, which excludes certain types of evidence that is extrinsic to the contract, when the contract is entirely in writing, and NOT partly in writing and partly oral.

You can determine if a contact is wholly written if there is no tangible (admissible) evidence of oral statements.

Incorporation by Signature

Consent to contractual terms is often manifested by the parties singing and document.

- ➔ This may be negated by the parties and signed at a formal signing ceremony, **OR**, it may be a standard form contract, designed by one party on a take-or-leave-it basis (e.g., a concert ticket, or a railway ticket).
- ➔ Signature or execution is not conclusive evidence for a contract when:
  - **The intention is clear**, as proposed to a mere memorandum of a pre-existing contract or a receipt.
  - **There is an absence of:**
    - **Misrepresentation**
    - A claim for equitable or statutory relief
    - A person who singed the document was not given sufficient notice (not given the chance to read)
      - Fraud/attempts to conceal the terms
    - Knowledge that he did not read the document
    - Mistakes
    - Duress
    - **Non est factum** (a plea that a written agreement is invalid because the defendant was mistaken about its character when signing it)
- ➔

Cases

- ➢ ***L'Estragne v Graucob*** – Established that a party who signs a contract is, in the absence of fraud or misrepresentation, bound by the terms set out in that document, regardless of whether they have read or understood those terms.
- ➢ ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165** – the presence of unusual terms in a signed contractual document might amount to misrepresentation, thereby rendering those terms non-binding.

- ***Curtis v Cleaning and Dyeing Co. [1951] 1 KB 805*** – The defendant was unable to rely on the exception clause because the defendant's assistant had misrepresented the breadth of the exemption clause and hence, the clause was not apart of the contract.

Incorporation by Notice

In this instance, there is no signed contract. One of the parties may seek to incorporate terms which have been displayed or delivered before, or at the time of the transaction, e.g., written standard form terms on a notice board, website, or in an unsigned document.

To decide whether the terms have been incorporated by notice, you must consider:

1. Whether the displayed terms were made available to the other party to be bound by the agreement prior to the formation of the contract; **and**
2. Whether reasonable steps were taken to bring the terms to the notice of the party to be bound.

Cases

- ***Oceanic Sun Line Spécial Shipping Co Inc v Fay (1988) 165 CLR 197.*** – Terms must be displayed to the other party before formation, and reasonable notice is needed to be provided of terms via notice.
- ***Thornton v Shoe Lane Parking Pty Ltd* [1971] 2 QB 163** – The more destructive a contract is to the plaintiff's rights, the more you have to do to bring it to the attention of a contracting party.

Incorporation by Course of Dealings

Where there is a history of dealings between parties, previously used contractual terms may be incorporated in a subsequent contract.

These terms can be voidable due to lack of completeness and certainty.

The criteria for these terms is that they are **regular, uniform, and the relied upon previous document can reasonably considered contractual**.

Cases

- ***Balmain New Ferry Co v Robertson (1906) 4 CLR 379*** – Frequent use of a service implies familiarity, thereby enabling the presumption of terms incorporated via dealings.

Statements Made During Negotiations

Not all contracts have be in writing, therefore it is possible for a party to argue that the contract contains terms in a written document, and, that additional terms were incorporated based on (verbal or written) statements made during negotiations.

To be enforceable in a contract these statements must be:

1. Sufficiently promissory in nature
    a. An oral or written statement made during negotiations may be:
        i. Of no legal effect (e.g., puffery/statement of belief – 'best car on the market')
        ii. Constitute a representation of fact (e.g., 'this is the cheapest car on the market)

        iii. Constitute a contractual promise (e.g., I guarantee/promise/warrant that this is the most recent model of this car).
    b. When a representational/contractual promise is false (misrepresentation), this may allow the person to whom the representation was directed to rescind the contract.
        - **This is decided objectively, and uses relevant factors such as language, relative expertise of the parties and the importance of the statement.**
2. Admissible (the Parol evidence rule)
    a. When a contract exists only in writing, verbal evidence (Parol) is not permitted to be given on what passed between the parties before the contract was made, or during its preparation.
    b. There is a "special status" of signed documents in contract law protected by the exclusion of precontractual statements which would "subtract from, add to, vary or contradict the language. (***Codelfa Constructions***).
    c. Restrictions to this rule are:
        i. When the contract is either wholly oral, or partly written and partly oral (informal)
        ii. When the court enforces the signed document as a prior or collateral contract
        iii. When equitable estoppel is established.
    d. If trying to incorporate a term based on extrinsic evidence, then argue that the contract is only partly in writing. If trying to exclude such statements, then argue that the contract is entirely in writing.

Denman CJ in ***Goss v Lord Nugent*** (1833) 5 B & Ad 58, 64-65 – '[I]f there is a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written document was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner vary or qualify the written contract.'

For Partly Written-Partly Oral contracts, consider that the party seeking to incorporate a term from extrinsic evidence will argue part-part, while the party wishing to exclude it will argue wholly-written. When asserting the status of a contract (determining if it is wholly or part-part) consider the 2 approaches:

1. Strict (written primacy, it is assumed that the document is wholly in writing)
2. Flexible (greater emphasis on determining if the contract is whole or part, until determined the Parol Evidence Rule has no effect).
    a. This approach is preferred by NSWCA, but has not been endorsed by the HCA. ***Masterton Homes v Palm Assets NSWCA.***

CASES

- ***SP - Oscar Chess v Williams*** - To be sufficiently promissory and form a warranty rather than a mere representation, the court must consider 3 factors:
    1) "the precise words that were used" and the implied promises
    2) relative expertise of the parties
    3) importance of the statement

based on whether an "intelligent bystander would reasonably infer that a warranty was intended". The statement wasn't sufficiently promissory and was thus a misrepresentation as a reasonable person not employed in the motor industry could not guarantee the car's age.

- ***SP - JJ Savage v Blakney*** - the precise words of the statement about the boat's estimated speed, lack of expertise of the parties in boat sales and the lack of importance of the statement given there was no additional confirmation about the estimated speed meant the statement wasn't deemed sufficiently promissory.
- ***PE – Goss v Lord Nugent*** - Extrinsic evidence to a pre-contractual oral statement made in negotiation was not permitted as the contract was wholly written.
- ***Masterton Homes v Palm Assets –***
  1. When there is a document that on its face appears to be a complete contract, that provides an evidentiary basis for inferring that it is wholly written
  2. It is open to a party to prove that the parties have agreed orally on additional terms.
  3. The Parol evidence rule doesn't operate until it has been established that contract is wholly in writing.
  4. Where a contract is partly written and partly oral, the terms of the contract are to be ascertained from the whole of the circumstances as a matter of fact.
  5. Completely separate: a contract wholly in writing and a separate, typical oral, collateral contract

Collateral Contracts

One party makes a promise, connected to, but independent of a main contract and as consideration for that promise, the other party agrees to enter into the main contract. The promise is included in a separate contract, therefore the Parol evidence rule does not apply to exclude evidence of collateral contract.

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

- Made as a promise ***(JJ Savage)***
- Intended to induce entry into the main contract ***(JJ Savage)***
- Consistent with the terms of the main contract ***(Hoyt's v Spencer)***

Estoppel

An estoppel is a principle which prevents a party in legal proceedings from asserting a position contrary to that which has been established. A court may prevent or "estop" a person from making assertions or from going back on his or her word, if they have induced someone else to make a reasonable assumption.

Types of estoppel by conduct:

- Estoppel by representation/common law estoppel – Operates when one person leads another to adopt and act on an assumption (i.e. making someone think that you have signed a contract).

- Equitable estoppel: comprised of proprietary & promissory estoppel, One person leads another to adopt and act on a promise or an assumption as the legal rights of the parties (including rights to land)
- Estoppel by convention – Contracting parties adopt and act upon a particular state of affairs as the basis of their contractual relationship

Estoppel can arise under a variety of circumstances:

- Formation: during negotiations to enter into a contract, an offeree, believing that the offer will not be revoked proceeds to act to his detriment upon that belief
- Variation: during negotiations, a party induces another to assume that a contract to be made between them includes a specific term or that the party will not enforce a specific term and the other has reasonably relied on that assumption to their detriment
- Formalities: Where there has been non-compliance with the statutory requirement of writing with respect to a contract involving land
- Privity: Where the doctrine of privity prevents a third party to the contract from enforcing it.

To establish estoppel, there must be:

- Assumption: Common law estoppel only from representation of fact, Equitable estoppel includes representations of future conduct
- Inducement: Does not have to be expressly induced (Walton Stores, defendant failed to correct assumption)
- Detrimental Reliance: So long as it is substantial, it need not consist of expenditure of money or other financial detriment **(Australian Financial Services and Leasing Pty Limited v Hills Industries Limited**)
- Reasonableness
    1. Did the relying party act reasonably in adopting the relevant assumption? ***(Legione)***
    2. Did the relying party act reasonably in taking the detrimental action? ***(Ciavarella v Polimeni)***
- Unconscionable conduct:

Cases

- ***Commonwealth v Verwayen***
    1. has induced the assumption by express or implied representation;
    2. has entered into contract with the other party on the conventional basis of the assumption
    3. has exercised against the other party's rights which only exist if the assumption were correct
    4. knew that the other party laboured under the assumption and refrained from correcting him.
- ***Waltons Stores (Interstate) Lts v Maher (1988) -*** The agreement satisfied promissory estoppel and was treated as legally binding.

Contract Construction/Interpretation

NOTE: Generally, where specific clauses or terms are included in the problem, a construction issue will arise. You need to ascertain the rights and liabilities of the parties.

3 Steps:

- Identify the terms,
- Determine what evidence is available to interpret the meaning of the terms.
- Apply the principles of interpretation to determine the legal meaning and effect of the terms/

Begin with the words of the contractual document themselves and where the words do not agree with the context and purpose of the agreement, then engage in a process of interpretation.

The parol evidence rule (strictly speaking) operates for wholly written contracts:

- **Incorporation**: the rule prevents extrinsic evidence being given to add to, vary or contradict the terms
- **Interpretation/construction:** limits the evidence that can be given to explain the meaning of the terms, when the language is ambiguous

To construe the meaning, reference is made to:

- The natural and ordinary meaning of the term/clause
- The other relevant provisions of the contract
- The purpose of the clause and the contract
- The facts and circumstances known to or assumed by the parties (parole evidence rule)
- Commercial common sense
- NOT subjective intentions

Determining Available Evidence

In an exam: where the meaning of contractual language is

- it will never be enough to just deal with the evidential point.
- You must also be able to explain how the evidence, if admitted, would assist in the interpretation and the impact of its inclusion.

Post Formation conduct: The general rule is that **it is not legitimate to use anything said or done by the parties after the contract was formed as an aid in the construction of a contract**.

- However, evidence of subsequent conduct can be used to help identify the contract's subject matter and to ascertain the terms of a contract <u>not wholly in writing.</u>

Extrinsic Evidence: May assist a court when the contract is partly written. When wholly in writing, the parol evidence rule may limit the evidence available to the court for the purposes of construing the contract.

- Uncertainty in Aus Law as to when such evidence is available

Codelfa Construction Pty Ltd v State Rail Authority of NSW

- Codelfa contracted for the construction of underground trainline with SRA
- Prior to the tender, the State government had legislated to prevent future restriction on the works
- The parties contracted on the assumption that construction work could proceed on the basis of three shifts per day (including at night)
- Residents complained about disruptions. Work could no longer take place at night.
- Codelfa seeks restitution for frustrated contract and if not, breach of implied term for compensation
- 'The true rule is that evidence of surrounding circumstances is admissible in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract if the language is ambiguous or susceptible of more than one meaning . Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.'
- PRECEDENT FOR: Parol evidence rule excludes extrinsic evidence, except surrounding circumstances. In cases of ambiguity, direct statements of intention are also an exception. We do not look at the intentions, but the facts.

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015)

- The High Court declined to resolve the question as to whether ambiguity acts as the gateway to when the interpretation of a written contract can have regard to background circumstances.
- This was because the matter had not been raised in the lower courts.

Applying the Principles of Interpretation

1. Objective test: the intention of the parties as determined objectively with reference to what the reasonable person would believe the parties meant by the provision in question.
2. Post contractual conduct is inadmissible, even if used to determine formation of contract.
3. Parol evidence rule excludes extrinsic evidence of the parties intentions and this leads to the tendency to separate intentions from obligations. Therefore, the court is not trying to ascertain the meaning subjectively attributed to the document by the parties.