

LAWS4103: CONTRACT LAW

key

Start of offence

Section in code

Element

case

or (case)

Privity

General rule

- a contract can only be enforced by, or against, a party to the contract. If C is not a party to a contract that was otherwise made between A and B, then C cannot enforce that contract irrespective of whether C will benefit from the performance of that contract: (*Tweddle v Atkinson*)

issues

- Limits the contractual freedom of A and B to confer rights/benefits directly on C;
- Defeats the reasonable expectations of C;
- Makes C dependent on B for a remedy against A (ie, C needs B for enforcement);

HOW TO FIGURE OUT A PRIVACY RULE QUESTION

1) Who is a party to the contract

- Rule: would a reasonable person in the position of the parties consider that C is also a party to the contract (*Coulls v Baggots Executor and Trustee*)
- What the court ways up in order to decide if C is a party:
 - The language in the contract
 - Whether C signed the contract
 - The operation of clauses (i.e. can they occur without C?)

Coulls v Bagots Executor and Trustee – B and C where husband and wife, A (Company) had a written agreement with B titled ‘Agreement between A and B’. C helped write up the contract and all A, B and C signed contract. B dies and A believes they do not have to pay C as they were not a party to the original contract.

- C was not a party because of the title of the contract ‘Agreement between A and B’
- C also not a party because they didn’t provide any consideration for the contract (it was technically B’s land that A wanted to use)

There is an exception to the privity rule (under common law) that states:

- Insurance contracts are exempt and if a third party can have access to insurance then it does not matter that their name isn’t explicitly listed under the contract (*Trident*)

Trident General Insurance Co ltd v McNiece Bros Pty Ltd – Blue Circle entered into an agreement with Trident for insurance which included ‘all subsidiaries and associated and related companies, contractors, subcontractors and suppliers’. McNiece was hired out by Blue Circle and an employee was injured. McNiece sort to use Trident’s insurance but Trident wanted to claim the privity rule.

- The court held that the entire doctrine of privity is subject to an exception in relation to insurance contracts

PROPERTY LAW ACT 1969 - SECT 11 Persons taking who are not parties

- (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or

respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.

- (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3) enforceable by that person in his own name but —
 - a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.

EXCEPTIONS TO THE PRIVACY RULE

- Novation: B can be substituted by C through the creation of a new contract.
(**Scarf v Jardine**)
- Agency: Where B acts as C's agent (**Flightvision v Onisforou**)
- Assignment: B can transfer their contractual right against A to C
(**International Airport v Clarence City Council**)

Identifying the express terms

- the terms of a contract reflect what the parties have agreed to
- contractual terms are the source of the parties legal relations
- NOT ALL TERMS NEED TO BE IN A SINGLE WRITTEN DOCUMENT → they can include email, notices, letters, phone conversations, and oral promises (**Realestate.com v Hardingham**)
 - However, most of the terms are included in the written contract because of the parole evidence rule (vvvvv)

HOW TO IDENTIFY TERMS OF A CONTRACT THAT BIND THE PARTIES

1) Signatures

- The general rule with signatures is that ‘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.’ (**L’Estrange v Graucob, Toll v Alphapharm**)

L’Estrange v Graucob – plaintiff bought a cigarette vending machine of Defendant by signing a sales agreement. The machine was delivered and it did not work. Given that the plaintiff did not read the contract, was the clause effective at displacing the warranty.

- The plaintiff was bound by the warranty clause which stated he would not be able to claim damages for the machine because he signed the agreement without reading it

Toll v Alphapharm – Alphapharm distributed vaccines and used Toll to deliver them at appropriate temperature. The first deliveries were rejected as because the storage temperature had dropped too low. Alphapharm sued for damages.

- Could not claim damages because they had signed a clause which stated that toll wouldn’t be responsible for any damages to the vaccine during transit
- The general principles regarding signature DO NOT change if there is an onerous term in the contract

- You are not bound by a signature if:
 - The Defendant misrepresents the effects of the signed document (**Curtis v Chemical Cleaning**)
 - The signature comes after the performance (**Dj and Co** – docket signed after machinery delivered)
 - The signature is on a non-contractual document (**Rinaldi** – on the back of a cart they signed a note)

Curtis v Chemical Cleaning & Dyeing Co – Curtis took a wedding dress to a dry cleaner and signed the receipt which stated they wouldn’t be liable for any damages. The shop keeper informed Curtis it was only if there was damage to beads or sequins. She collected the dress and it was stained

- Curtis was not bound by the signature because of the misleading words of the salesperson

2) Incorporation of terms by notice

- If there is no signature contractual terms can be incorporated by notice
- This can be done via:

- The terms were made available by A to B prior to contractual formation (i.e. B can only logically be bound by terms that were in existence and communicated prior to entry into the agreement) and;
- B must either have actual knowledge of the contractual terms or A provided a reasonable notice of those terms to B, including taking reasonable steps to bring the terms to B's notice. (before the formation or at the time of signing)
 - Also must be legible, accessible and prominent

Oceanic Sun Line Special Shipping Company v Fay – Plaintiff made a booking for a cruise. There was a clause on the ticket (which the plaintiff received when they boarded the cruise) stating that any injury would have to be dealt with in the country it occurred.

- Plaintiff could bring a claim against cruise company in Australia because she wasn't provided with sufficient notice for the clause

- ACTUAL KNOWLEDGE: A party who knows that a document or sign displayed before or at the time of entry into the contract contains contractual terms will be bound by those terms.
- REASONABLE NOTICE: In general, notice must be in such a form that it is likely to come to the attention of the party to be bound: (***Interfoto, Thornton v Shoe Lane Parking Ltd***)

Thornton v Shoe Lane Parking – Thornton parked his car in a car park, T bought a ticket for the carpark and on the ticket it stated that the parker was subject to the conditions displayed in the carpark. T's car was damaged and sort to sue the carpark owner.

- Carpark owner did not give sufficient notice to Thornton because it didn't say he was subject to the conditions until AFTER he bought the ticket

Interfoto picture library v stiletto visual programmes – stiletto bought 47 transparencies from interfoto. In the store there contained a sign which said that S would be charged for everyday he over kept the transparencies. S did not see the sign and was charged \$3000 pounds on return to the shop.

- S did not have to pay as one sign is not enough reasonable steps to bring to his attention by I

3) Electronic contracts

- There are 3 ways an individual can sign a contract electronically in which they are bound by the provisions (***Dialogue v Instagram***)
 1. Click-wrap: require the user to click on a box saying e.g. I agree to the terms and conditions
 2. Sign-in wrap: require the user to actively click on a box saying e.g. to 'sign up' with an accompanying sign saying that by clicking this you agree to terms and conditions
 3. Browse-wrap: Does not require any clicking just a notice as soon as you enter the site saying 'by using this site you agree to the terms and conditions'

Dialogue Consulting Pty Ltd – Instagram Inc – dialogue ran a marketing business through Instagram. Dialogue would sign into other peoples accounts which was against Instagrams terms of service. Instagram sued.

- Dialogue had been sufficiently notified (signed in on multiple accounts all asking him to accept the terms)
- Clicking accept signified a signature on an electronic contract

4) Terms incorporated by course of dealings

- the court will consider:
 - o First, whether there is uniform (consistent) course of conduct (***McCutcheon v David MacBrayne***)
 - o Second, whether the conduct constitutes a regular course of conduct (***Balmain New Ferry Co Ltd v Robertson***)
 - o Third, it must be appropriate to draw an inference from the previous transactions (***La Rosa v Nudrill Pty Ltd***)
 - o Fourth, it must be consistent with the parties' written contract.

UNIFORM

- *If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said 'of course not'.*
(***McCutcheon v David MacBrayne***)

REGULAR COURSE OF CONDUCT

- The relevant course of conduct must have occurred often enough that the reasonable person would consider the parties to have intended to contract on that basis (***Balmain New Ferry Co v Robertson***)

INCORPORATION OF PRE CONTRACTUAL STATEMENTS

- The statement needs to be promissory in nature; and
- was intended by the parties to form part of their contractual agreement (determined objectively).
- The Court may consider: (i) the significance of the written contract; (ii) the language used; (iii) the expertise of the parties; (iv) the importance of the statement; and (v) the timing of the statement.

JJ Savage and Sons Pty Ltd v Blakney – Blakney purchased a cruiser boat where JJ said it had an 'estimate speed of 25 miles per hour'. Written contract included no mention of speed.

- This statement was held to be not promissory

Oscar Chess Ltd v Williams – Williams traded in a car for a new car, the old car believed to be a 1948 model was actually a 1939. When he brought the old car in Oscar wouldn't take it and Williams sought to say that the trade was promissory. (no written agreement)

- The fact that it was stated to be a 1948 model was not promissory because Williams was not a professional and was simply going off what the registration book had. Therefore, court forced sale.

Dick Bentley Productions v Harold Smith (Motors) – buying a second hand car where the vendor said it had done only 20,000 miles. It had actually done over 100,000.

- The 20,000 was promissory in nature but not fraudulent. The vendor made the statement without any foundation. However, it did cause the purchaser to act on buying the car.

Parole evidence rule

- General principle: Extrinsic evidence is excluded where it will ‘subtract from, add to, vary or contradict the language of a written instrument’ (**Codelfa Construction Pty Ltd v State Rail Authority of NSW**)

State Rail Authority v Health Outdoor Pty Ltd - Health entered into a 5 year contract with SRA for putting advertising on SRA’s land. If they wanted to terminate the contract, H had to give 1 months notice (as in the written clause). H said to SRA that they would definitely use the full 5 year lease and they didn’t intend to act on the termination clause. 2 years later the NSW government said all cigarette adverts needed to be taken down. SRA terminated the contract.

- H’s statement about not terminating was not an assurance.
 - There was no clause in the written contract that stated it would run for the full 5 years and SRA could not rely on the oral statement in accordance with the parole evidence rule
- An ‘entire agreement’ clause is a clause in a contract which states that the written contractual document contains all of the terms of the parties’ agreement.
 - There is a rebuttable presumption that, where there is a written contract, there are no terms other than the written terms (**Masterton homes pty ltd v palm assests pty**)
 - ‘if the parties had intended those statements [statements made during the negotiation] to form part of their contract, then they would presumably have included those statements in the written contract document’

Construing the terms

- The principle of objectivity: It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. (**Toll Pty Ltd v Alphapharm**)
- Therefore, to determine the meaning of contractual terms, the courts look at the following:
 - The natural meaning of the clause
 - The competing interpretations of the clause
 - The underlying purpose of the clause
 - What interpretation makes more common sense
 - What background facts and circumstances known by the parties can shed light on the clause (subject to the limitations of the parole evidence rule)
 - Uncommunicated subjective beliefs are irrelevant (**Pacific carriers ltd v BNP Paribas**)

Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd – E leased farmland to GD for 99 years. The lease contained clause 4 which stated that GD had to pay all rates taxes assessments and outgoings whatsoever... to E. The issue was whether the clause meant GD had to pay all the taxes relating to the whole land or just those subject to GD as the lessee.

- The court held this clause was ambiguous HOWEVER, a reasonable business person would see that a lease for 99 years see's GD as an owner of the land and therefore, they have to pay ALL taxes relating to the land.

Royal botanic gardens and Domain Trust v South Sydney City Council – Royal entered into a long terms lease with SSCC for 50 years. The agreement contained a clause for SSCC to pay 'additional costs and expenses' to input a carpark on the land. The issue was whether Royal could increase the rent via these 'additional costs and expenses' based on market value of the carpark.

- The clause was ambiguous and not enforceable because 'additional costs and expenses' was too narrow to include rent

Electricity generation corporation v Woodside Energy Ltd – E would supply electricity to W. Agreement included a clause that the price could be increase based on 'all relevant commercial, economic and operational matters'. Was this clause ambiguous?

- The court determined the clause was not ambiguous and that the price of these matters could reasonably be found out by relevant gas supply prices at the time

- Ambiguity requirement: ambiguity is required when interpreting a contract before recourse can be made to further extrinsic evidence as to the wider surrounding circumstances known to the parties at the time of entry into the agreement. (**Codelfa construction v State rail authority of NSW**)
- Surrounding circumstances can be used to construe the meaning of terms only if:
 - (i) were reasonably known to both contracting parties at the time the contract was entered into; and (ii) provide relevant evidence of the background and context against which the parties formed their bargain (i.e. such evidence may include the genesis of the transaction, the background, the context and the market in which the parties are operating (**International air transport association v Ansett Australia Holdings Ltd**))

Codelfa v State Rail Authority of NSW

- '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. But it is not admissible to contradict the language of the contract when it has a plain meaning'.

Ambiguity could be:

- o Any genuine dispute about the language (***Hennessey Glass & Aluminium P/L v Watpac Australia***)
- o That the text is difficult to understand (***McCourt v Cranston***)
- o That the text is capable for bearing more than one meaning when read by an intelligible person and recourse is had to the context within the document (***Burns Philip Hardware Ltd v Howard Chia Pty Ltd***)
- o There are two possible meanings having regard to the language of the contract as a whole and what can be gleaned from that source as to the contractual purpose, the competing constructions must be reasonably arguable (***Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd***)

EXCLUSION CLAUSES

- An exclusion (or exemption, limitation or exception) clause is a provision in a contract which seeks to either: (i) limit; or (ii) exclude, A's liability for conduct that would otherwise be in breach of contract or a tort such as negligence.

Darlington Futures v Delco Australia Pty Ltd - A contract between a broker (A) and its client (B), 2 clauses provided → '[B] finally acknowledges that [A] will not be responsible for any loss arising in any way out of any trading activity undertaken on behalf of [B] whether pursuant to this Agreement or not ...' "[a]ny liability on [A]'s part ... for damages for or in respect of any claim arising out of or in connection with the relationship established by this agreement ... shall not in any event (and whether or not such liability results from or involves negligence) exceed one hundred dollars.' Was A's conduct covered by the exclusion clause?

- No, 'It can scarcely be supposed that the parties intended to exclude liability on the part of [A] for losses arising from trading activity in which it presumed to engage on behalf of [B] when [A] had no authority so to do'.

Implied terms

- There are 3 types of implied terms
 1. Implied by fact: unique to the contract between 2 parties, based on the presumed intentions of the parties (**Attorney General of Belize v Belize Telecom**)
 2. Implied by law: universally inserted into a contracts of specific types. Implied into a contract by statute or common law (e.g. **ACL**)
 3. Implied by trade custom or usage: factually common to a particular species of contracts (**Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd**)

IMPLIED IN FACT

- The test (**BP Refinery Pty Ltd v Shire of Hastings**)
 - Be reasonable and equitable (**BP Refinery (Westernport) Pty Ltd v Shire of Hastings**).
 - Be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it (**The Moorcock**).
 - Be so obvious that “it goes without saying” (**Byrne v Australian Airlines Ltd**).
 - Be capable of clear expression (**Ansett Transport Industries v Cth**).
- The starting point should be: is this (implied) term what a reasonable person in the parties’ position would have understood the contract to mean?
(**Realestate.com.au Pty Ltd v Hardingham**)

The Moorcock – a ship owner could discharge and load his vessel at a jetty. The boat would get damaged at low tide. Was there an implied term that the riverbed should be safe for a ship to settle on at low tide?

- Yes, the jetty owners breached the implied term requiring them to take reasonable care of the boats parking at their jetty therefore, making them liable

BP Refinery Pty Ltd v Shire of Hastings – BP had an oil refinery. They had an agreement with S to pay a discounted tax rate. BP eventually liquidated and gave the refinery to another party. S treated this as ending the tax rate agreement and put a levied rate on the new owner. Was there an implied term that S would maintain the discounted rate in new ownership

- There is no implied term that the rate only applied to BP

Byrne v Australian Airlines – Baggage handlers were fired for stealing. Baggage handlers claimed the dismissal was harsh, unjust or unreasonable under the award for industrial relations act. Handlers argued that the award was implied into their contract.

- No, the Acts clause was not implied as it was unlikely to be obvious to both parties and the contract worked without the included clause.

IMPLIED BY LAW

- Has to be consistent with the express terms of a contract
- Includes: