

Exclusion clauses

A particular type of term in a contract

- Exclusion clauses or exemption clauses: what are they?
 - Terms in a contract used to limit or exclude a party's liability for breach of contract or negligence.
- When will an exclusion clause be effective?
 - The clause must be a term in the contract, and
 - The clause must cover the breach or liability that has occurred
- Issues with exclusion clauses:
 - how is the clause incorporated into the contract?
 - how is the clause interpreted by the courts?
 - how does the clause interact with legislation?

Incorporation into the contract

- Is the exclusion clause a term of the contract?
 - How can an exclusion clause be incorporated into the contract?
- a) By signature
- *"To sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. **The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents,...** whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it": [Toll \(FGCT\) Pty Ltd v Alphapharm Pty Ltd \(2004\) 219 CLR 165 at \[40\]](#)*
 - Contract contained an exclusion clause.
Clearly stated:
Please read 'conditions of contract' (overleaf) prior to signing.
Signature was binding even if did not read contract
 - Signature rule: parties bound by terms in signed document, even if they have not been read: [Toll \(FGCT\) Pty Ltd v Alphapharm Pty Ltd \(2004\) 219 CLR 165](#)
 - BUT there are exceptions to the general rule:
 - the contract is of no effect
 - fraud
 - misrepresentation
 - duress
 - undue influence
 - unconscionable conduct
 - *non est factum*
 - Signature rule: parties bound by terms in signed document, even if they have not been read unless the terms have been misrepresented
[Curtis v Chemical Cleaning & Dyeing Co \[1951\] 1 KB 805](#)
 - C took dress to dry cleaners and was asked to sign a receipt stating dry cleaners not liable for damage whatever the cause.
 - C asked why she had to sign and was told that cleaners not accepting liability for damage to beads and sequins. C signed. Dress was returned stained.

- Signature obtained by misrepresentation as to the effect of the document – signature rule not applicable.
- Could dry cleaners rely on the exclusion clause? No.
- Did dry cleaners have to pay for damage? Yes.

Unsigned documents

- Unsigned documents (an unsigned contract) (i.e. ticket, receipt) may contain an exclusion clause.
- Will it be binding?
- Consider:
 - ✚ Is the document 'contractual'?
 - ✚ Has reasonable and sufficient notice of the exclusion clause been given before the contract is made?

b) By notice

- If the exclusion clause is on a document, the document must be 'contractual' (i.e. understood to contain terms of contract)

Causer v Browne [1952] VLR 1

- Is a dry cleaning receipt a contractual document? OR
- Is a dry cleaning receipt a mere voucher to produce when collecting goods?
- Dry cleaner had to prove customer had notice of exclusion clause that was on the receipt. Failed.
- The document could be understood as a mere receipt to produce when collecting the dress and not notice of the contract or exclusion clause

- Timing of the notice - notice of the term must be given before or at the time of formation of the contract – notice after the contract has been made is ineffective:

Olley v Marlborough Court Ltd [1949] 1 KB 532

- Hotel guests paid for room in advance. Notice on back of door of their room excluded liability for safety of articles left in room.
- Guests property stolen because of negligence of hotel.
- Is the exclusion clause part of the contract?
- When was the contract made?
- When did guests have notice of the exclusion clause?
- Exclusion clause ineffective.

- Timing of the notice - notice of the term must be given before or at the time of formation of the contract:

Baltic Shipping Company v Dillon (1993) 176 CLR 344

- Mrs D. pays deposit for cruise. She receives a booking form stating that contract of carriage is made at time of issue of ticket and that conditions of carriage are printed on the ticket and also available at shipping company.
- Mrs D pays balance and receives ticket 2 weeks before cruise start date. Conditions limit liability for personal injury/loss of baggage.
- Ship sinks near NZ because of negligent navigation. Mrs D sues.
- Sufficient notice on booking form? No.
- Is the exclusion clause effective? No.

- Timing and reasonableness of notice – the harsher the term, the more notice will be required.

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

- T goes to car park for first time. Sign outside states: "All cars parked at owners risk". T takes ticket from machine at entry. Small print on ticket: "subject to conditions as displayed on the premises".
- Sign on pillar inside car park states: "Carpark accepts no liability".
- T injured when he returned to his car.
- Can carpark rely on exclusion clauses? No.