LAWS1075 – Contracts

Week 1B – Identifying the express terms

1. Identify express (verbal – incorporated) /implied terms
2. Interpret terms – construing terms
3. Determine whether breach exists
4. Remedy of breach – termination, damages, repudiation, relief against forfeiture

- Mere negotiation (no remedies available)
  - → Representation (only damages available, no breach occurred)
  - → Terms (damages, repudiation, termination)

Written terms and signature

- In identifying terms of contract, court favours objective approach → consider 'intention which reasonable persons would have had if placed in situation of parties' (*Reardon Smith Line v Hansen-Tangen* [1976])
- Parties be bound by terms contained in a contractual document which signed regardless if read (*L'Estrange v Graucob* [1934])

***L'Estrange v Graucob* [1934]**

Facts

- P purchased from D cigarette vending machine
- Signed order form and then D sent to P an 'order confirmation' signed by D
- Machine delivered not working
- P brought action for damages for breach of an implied warranty that machine be fit for purposes
- D relied on clause 'agreement contains all terms/conditions under which I agree to purchase machine + any express/implied condition/statement/warranty not stated is excluded'
- TJ held breach of implied warranty + when P signed form had no knowledge of its contents except for price, instalments, arrangements of instalment + D didn't do what was reasonably sufficient to give P notice of conditions

Issue

- Whether there had been a breach of an 'implied' warranty due to the P failing to read the contractual document?

Judgement

Scrutton LJ

- A signed ticket case → 'agreement is proved by proving his signature + immaterial that he didn't read the agreement' (*Parker v South Eastern Ry Co* (1877))
  - Unsigned ticket case, doc handed by one party to other → 'must be evidence independently of agreement to prove D has assented to it' (*Parker v South*)
- No evidence that P was induced to sign contract by misrepresentation or fraud

Maugham CJ

- Contract concluded not when brown order form signed by P but when order confirmation signed by D
- Order form was a contractual document, and so no implied warranty available

Ratio

- If party affected signs written document, knowing it to be a contract, yet not read contents, the signature is still evidence of his assent to whole contract and its terms

***Toll (FGCT) v Alphapharm Pty Ltd* [2004]**

Facts

- Respondent was a sub-distributor (to a company called EB) of a flu vaccine, who had a contract with a carrier, the Appellant.
- Appellant was to collect, deliver and store (storing the vaccine had special instructions) from various places.
- Appellant gave a cover letter with a quote, which also stated that its services are subject to the conditions on the other side of the consignment note. However, there was no consignment note.
- A representative of EB, signed a credit application form which also included 'Conditions of Contract' (on the other side of it). The conditions were not read.
    - Conditions:
    - Clause 5: Customer entered contract on its own behalf and as an agent for its associates.
    - Clause 6: the Respondent would not be held responsible for loss or damage to the goods.
- In the process of transportation, the vaccine was frozen and therefore rendered valueless.
- Respondent sued.

Argument

- Conditions attached to the application of credit were not a part of the contract:
- Weren't read, and "a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms." - no such effort here.
- Representative of EB was not an agent of the Respondent.

Legal issues

- Acceptance - Prevalence of the Objective approach
- Privity - Agency
- Legal effect of a signature

Judgment

Acceptance

- It doesn't matter that the representative didn't read the contract, signing it is his way of indicating that he read it and accepted it (intention and acceptance is measured objectively).
    - "It is not the subjective belief 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."
    - "References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement."

Privity - Agency

- "The evidence compels the conclusion that Alphapharm [Respondent] authorised Richard Thomson [Representative of EB and agent of Alphapharm] to contract with Finemores [Appellant] and to agree upon...standard terms and conditions of the contract...as required by Finemores. So long as the terms...were Finemores' standard terms and conditions then Richard Thomson was acting within its [Alphapharm/Respondent] authority" → Agency relationship exists, Respondent bound by the terms.

Effect of a signature

- Signature has a legal effect of reading and accepting the contract, regardless of whether the party actually did so.
    - "Legal instruments of various kinds take their efficacy from signature or execution. Such instruments are often signed by people who have not read and understood all their terms, but who are nevertheless committed to those terms by the act of signature or execution"
    - "It is that commitment which enables third parties to assume the legal efficacy of the instrument. To undermine that assumption would cause serious mischief"

Reasonably sufficient notice

- Court of Appeal said that "a person who signs a contractual document without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms." → should be given a narrow focus - only applies for exclusion clauses or unusual clauses → originates from cases "in which one party has endeavoured to incorporate in a contract terms and conditions appearing in a notice or an unsigned document."
- Whilst this was an exclusion case, the effect of a signature cancels the need to give reasonable notice: "where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation/duress/mistake, or any other vitiating element, the fact that person signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms."

Circumstances in which the effect of signature may be avoided

- *L'Estrange v Graucob*'s rule doesn't apply where:
    - signature induced by misrepresentation/fraud/mistake – 2 types: innocent misrepresentation and fraudulent misrepresentation
    - where document cannot reasonably be considered a contractual document e.g. has other function, receipt, voucher, memo, time sheet
    - where it's a 'non est factum' (genuinely mistaken about character of contract, limited doctrine)
    - unconscionable conduct

***Curtis v Chemical Cleaning & Dyeing Co* [1954]**

Facts

- P took wedding dress to cleaners, handed a paper headed 'Receipt', asked to sign, asked why signature required and told because cleaners wouldn't accept liability for specified risks e.g. damage to beads/sequins on dress, P signed paper which contained condition 'this article accepted on condition that cleaners not liable for any damages whatsoever
- Dress stained, brought action claiming damages
- Cleaners denied negligence, relied on exemption from liability contained in signed receipt
- TJ held onus of showing damage was not due to their negligence was on cleaners + they failed to discharge that burden + due to innocent misrepresentation couldn't rely on condition
- Cleaners appealed against finding of misrepresentation

Issue

- Whether signed 'Receipt' paper was a contractual document that exempted liability

Judgement

Denning LJ

- To exempt liability, must be done by an express stipulation brought home to party affected and assented to by him as part of the contract (*Olley v Malborough Court* [1946])
- Any behaviour/words/conduct sufficient to be a misrepresentation if it's to mislead other party about existence/extent of exemption
- If false impression created knowingly, it is a fraudulent misrepresentation + if created unwittingly, it is an innocent misrepresentation → both sufficient to disentitle creator to benefit of exemption
- When party puts forward form for signature, failure by him to draw attention to existence/extent of exemption clause may convey impression no exemption at all or width
- By failing to draw attention to width of exemption clause, assistant created false impression that exemption only related to beads/sequins + didn't extend to material
- Appeal dismissed

LAWS1075 – Contracts Summary

Contract

Wholly in writing? –

- The existence of a written agreement which appears to be complete doesn't automatically entail that the agreement is wholly in writing (*State Rail Authority v Heath Outdoor*)
- Favouring the lenient approach, extrinsic evidence should be considered to determine whether the agreement was made wholly in writing (*Corbin on Contracts* (1950))

Oral statements/partly written -

- *Equuscorp v Glengallen* held that where a written contract is followed by negotiations, it's assumed that the written contract would contain all terms that would be binding.
- For the statement to constitute a term of the contract, the statement must be made as a promise (promissory) and intended by the parties to be part of their contractual agreement.
    - In assessing the status of the oral statement, court considers:
        - significance of written contract
        - language
        - position of power/ability to verify: *Dick Bentley v Harold Smith* the dealer was in a position of power due to experience and had an ability to check → statement promissory
        - expertise of parties: *JJ Savage v Blackney* didn't have relevant expertise and wasn't meant to be a warranty, merely suggestion & *Dick Bentley* experienced party (dealer) had expertise
        - importance of statement/ timing of statement
- Any contradiction between oral statement and written terms? *Equuscorp v Glengallen* held where parties enter into a written contract, parties are bound by the written terms rather than oral agreements which contradict the written terms.
- If partly written → PER doesn't apply, oral statements are a party of the contract

- If wholly written → PER is applied, excluding the consideration of extrinsic material to a contract wholly written
- Oral statements may be a collateral contract which evades the PER. To establish a collateral contract, the oral statement must be:
    1. Made before or at the time of formation: *Hoyt's v Spencer*
    2. Promissory – language, position of party, expertise
    3. Intended to induce entry into the contract: *JJ Savage v Blackney*
    4. Consistent with terms of contract: *Hoyt's v Spencer* collateral contract cannot deprive the induced party's rights under main contract because the consideration for that promise is the other party's acceptance of all the terms of the contract

Express terms

- Courts construe terms of an agreement objectively (*Royal Botanic Gardens v South Sydney*)
    - Courts take into consideration: type of parties, nature of transaction *(Pacific Carriers v BNP*)

Exclusion clauses –
To determine whether a party can rely on protection of the clause, it must be shown that:

1. The clause was incorporated into the contract
2. The clause applies to exclude/restrict liability in relation to the issue in dispute:
    - Exclusion clause construed according to its natural and ordinary meaning and read in light of the contract as a whole (*Darlington Futures v Delco*)
    - Is the clause phrased in a way which extends to the liability at issue?
    - In the case of ambiguity, the clause is to be strictly construed contra proferentum (*Darlington*)

- Other bases for a narrow interpretation of an exclusion clause: deviation and negligence

<u>Implied terms</u>
Terms implied in fact
Partly written?

- There is a less stringent application of *BP v Hastings* due to flexibility of what was intended to constitute the contract (*Hawkins v Clayton*)
    - Test: Is the implication of the particular term necessary for the effective operation of the contract?
    - Can include *BP v Hastings* test elements if suitable

Formal contract?

- To determine whether a term is implied in fact, the following conditions in *BP Refinery v Hastings* must be satisfied:
    1. Reasonable and equitable
    2. Necessary to give business efficacy to the contract
    3. So obvious that "it goes without saying" – mere reasonableness is not enough or reflect only unilateral intentions, is there a common assumption? (*Codelfa v State Rail*)
    4. Capable of clear expression
    5. Not contract any express term of the contract

Terms implied in law

- To determine whether a term is implied in law, the test of 'necessity' is used (*University of WA v Grey)*. A term can only be implied if:
    1. The contract of a particular class (sale of goods) or is there an established legal relationship between the parties (*Byrne v Australian Airlines*)
    2. Its omission would entail that the rights of the parties under the contract were significantly diminished

Terms implied by custom

- To determine whether a term is implied by custom, the following conditions in *Con-Stan Industries v Norwich* must be satisfied:
    1. Existence of the custom is a question of fact:
    2. The custom is well-known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract:
        - Must be uniform
        - Quite as much certainty as written contract itself

3. Doesn’t contract express terms of agreement
4. Party can be bound by custom although he had no knowledge of it