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### Extra cases

#### Baltic shipping case

- Unusual terms- those less commonly used in a particular contract
- 1) booking form
- 2) ticket of contract of carriage
- Ticket had exemption clause
- Booking form is issue of contract- exemption clause on ticket is too late into contract to be valid
- Criteria is needed to see whether terms apply

#### Salek v Romanous

- P purchased car, dealer said car only had certain mileage- not a true statement
- P wanted to sue- and mileage term then became an express term of the contract
- Misrepresentation term- had to be incorporated
- As P not a lay person, more likely to be an express term
- Must give notice of terms
- Other party must have knowledge of terms- whether they read it or not is not an issue

#### Oceanic Sun

- Exclusive jurisdiction clause on ticket- if dispute, go to court in Greece, not Sydney
- If contract formed in Sydney- terms cannot be brought into contract as lack of timing already formed
- Brennan J: Promise not illusory
- Contract formed in Sydney, yet ticket issued in Greece
- Too late to incorporate jurisdiction clause in Sydney as contract already formed- no right to introduce new terms

### TOPIC EIGHT: CONSTRUCTING TERMS OF THE CONTRACT

- Is about the construction of the terms
- Even when contract terms are established, issues may arise relating to the construction of the terms

#### Parole Evidence Rule P.E.R

- Courts emphasis on rules relating to constructing terms are to give effect to the parties
- Restricted to contracts only in wholly written form
- Has two parts
  - 1) Exclusion of extrinsic evidence that would add to or vary the terms of a written contract

- 2) Exclusion of extrinsic evidence that would otherwise have assisted the court in construing the contract
- 2 reasons for the rule
  - 1) Purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon verbal negotiations or upon mixed communing partly consisting of letters and partly of conversation
  - 2) where there is a dispute on terms in which contract was made, the application of the P.E.R narrows the issue and keeps the disputes within reasonable grounds
- These are the 2 reasons for the existence of P.E.R i.e. certainty and reduced litigation costs

#### **What does rule exclude?**

- Oral evidence
- Documentary evidence i.e. letters, memoranda, conversations, emails, correspondence between the parties, evidence about the commercial purposes of the contract or any of its terms

#### **Prior negotiations**

- Not clear whether excluded by P.E.R

#### Prenn v Simmons

- One party sought to include documents of prior negotiations to explain the word 'profit' and why this should be excluded. 'If previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual word? If same expressions are used, nothing is gained by looking back

#### Codelfa:

- Said prior negotiations can be admitted to establish the contract's surrounding circumstances

#### **Exceptions of P.E.R- an intro**

- When can courts look outside of contract? (extrinsic evidence) unclear whether exceptions will only apply if there is ambiguity

#### Codelfa

- 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 (emphasis added)
- Yet UK cases such as Maggbury v Hafele and International Air Transport v Ansett cases, say it is always relevant for extrinsic evidence when construing a contract
- Which approach to take? Follow Codelfa rule

#### **5 main exceptions**

##### **Ambiguity**

- Must be more than theoretical ambiguity: something is required to manifest uncertainty and confusion
- 2 types

#### 1) PATENT:

- Ambiguity or uncertainty apparent on the face of the document
- More than one meaning can be ascribed to the words used
- Language of intrinsically doubtful meaning: costs, abide by, may have regard to, brought about by
- Language, obscured by omission, defects in syntax or grammar, internal inconsistency

#### MacDonald v Longbottom

- Contract regarding wool, meant wool of the seller- termed 'your wool', did that mean wool from the buyer's farm only, or could it include wool acquired by buyer from another source?
- extrinsic evidence admitted- conversation between seller and buyer- anticipated wool could come from other sources as well

#### Matthews v Smallwood

- 'of the covenant' there were multiple covenants
- Scribe forgot to add an S

#### 2) LATENT AMBIGUITY

- Not necessarily apparent when first reading document e.g. term may mean a person, if read into it, could be another person

#### Hope v RCA Photophone

- Agreement for sound recording equipment
- Dispute about whether equipment would be new or used
- Lease did not specify
- Did 'equipment' include both new and used? Court said there was no latent ambiguity
- Court held 'it was a general term'- thus could be new or used
- Provided an example 'my nephew John' where testator had more than one nephew called John. 'word equipment' more general than this example provided

#### Bacchus Marsh Concentrated Milk v Joseph Nathan

- Patents for dried milk formula. Did they include 'Glaxo'- dried milk infant formula?
- Unclear
- extrinsic evidence showed patent Glaxo was not included in the contract

#### **To identify parties or subject matter**

- No doubt when subject matter is uncertain, extrinsic evidence necessary to prove this is what the parties found ambiguous

#### Gilbert v Kenny

- Contract referred to party as 'Mrs Kenny' and later as 'Mr Kenny'
- extrinsic evidence admitted to show Mrs Kenny was contracting for self and as agent for Mr Kenny
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### **Factual Matrix**

- To construe contract properly, courts should adopt same factual perspective of parties when they made the contract
- Thus- contract must be interpreted by adopting the perspective of the parties within the factual matrix of the contract
- Includes circumstances surrounding terms, setting, purpose/aim of contract

### Codelfa:

- Factual matrix may not be admitted, yet it is in exception cases
- The factual matrix of a common assumption that work would proceed on 3 eight-hour shifts

### Royal Botanic Gardens v South Sydney Council

- Clause 4 of a contract provided rent determined, provided trustees having regard to initial costs
- Trustee sought to increase rent as property price was rising
- Claimed trustee (lesser) could not do this
- Council argued trustee bounded by clause
- HC found clause ambiguous
- Court looked at contract- said only matters in clause, if unambiguous, shall be binding

### Pacific Carriers case:

- Also has factual matrix

### **Trade Usage**

- Such evidence can be admitted into contract
- If word has special definitions in trade or workplace, court will use trade usage to get correct meaning of the term

### Exclusion clauses

- Incorporated mainly by means of notice, if not notice, can be incorporated by signature, course of dealing or by trade usage

q: If incorporated, what does it cover?

### **Exclusion clauses- construing**

- Terms which 'aim to reduce or exclude a party's liability for conduct that would otherwise be in breach of contract or constitute a tort, such as negligence
- E.g. no refunds, breakages must be paid for, park at own risk
- Validity of these clauses differ between commercial and consumer situations

### **3 main forms**

- 1)** excludes legal rights to one party to sue the other party- extent of exclusion defined e.g. all negligence or for loss caused by any means
- 2)** restricts the legal rights of one party e.g. by providing that only specific type of breach will give right to terminate
- 3)** qualifies a party's rights by providing e.g. time limits or specific procedure to be followed
  - No common law prohibiting the exclusion of these terms in the contract
  - If ambiguous, relates to contra proferentem