

Option

Once an option is agreed, the offerer cannot withdraw the offer except in accordance with the option itself.

Isaacs J has stated that the only feature that distinguishes an option from a mere offer is the consideration. In his view, it's still an offer. The consideration merely ensures its continuance, by creating a relation in which the law forbids the offeror retracting it.

Death (offeror or offeree) does not necessarily mean the option has ended. The person responsible is the executor of the

Revocation

Revocation – an offer may be revoked at any time by the offeror prior to acceptance – even if a time frame has been given, and that time frame has not expired. *Goldsborough v Quinn*, *Dickinson v Dodd*

Revocation only takes effect on receipt. *Byrne v Van Tienhoven*

Acceptance

Acceptance must be unequivocal, unconditional and in terms identical to the offer.

Agreements to Negotiate are not, generally, considered binding - *Coal Cliff Collieries v Sijehama*

Subject to finance clauses are for the protection of the purchaser – and are valid - *Meehan v Jones*

Conditional Acceptance -preliminary agreements, requiring analysis of the case of *Masters v Cameron*

Masters v Cameron [1954] 91 CLR 353

Facts:

Cameron and Masters had an agreement for the selling of Cameron's farm worth 17,500 pounds. In the agreement between the two parties, a detail description of the farm was included.

Another detail, considered as provision in the agreement, is that the agreement first signed by the parties is pre-contract for the final contract for the sale which will be accepted by the solicitor of Cameron if the terms and the conditions are not altered.

Issue(s):

The issue of the *Masters v Cameron* (1954) was whether or not the pre-contract can already be considered as the final contract since the terms and the conditions were not altered.

Analysis:

The reasoning behind the ruling of the court is anchored on the following, which will still depend on the circumstances of the case.

Herron J stated, dissenting, in *Thorne* – Before applying the parol evidence rule it must be determined whether the parties have agreed that the document embodies the bargain

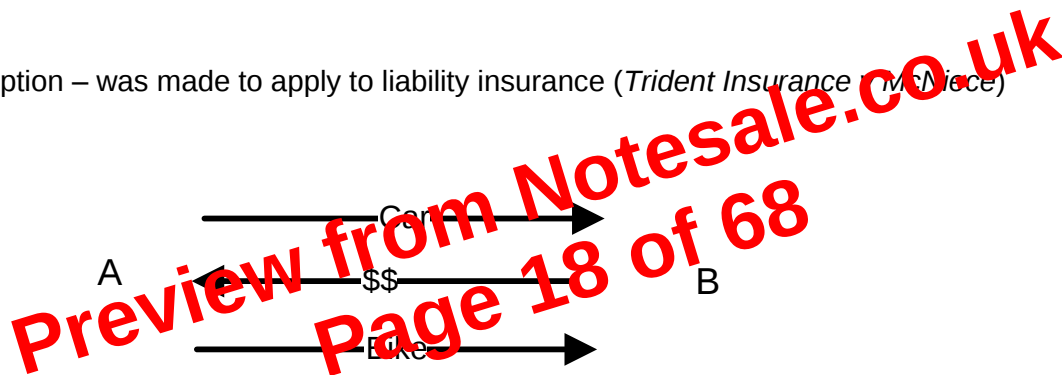
Main Principles for Parol Evidence Rule:

1. First – meaning of the words is the meaning a reasonable person in the position of the party to whom the words are addressed would place on them
2. Second – In a commercial situation, a court will strive to achieve a commercially sensible conclusion
3. Third – extrinsic evidence is not generally admissible in the interpretation
4. Evidence of the factual matrix is not regulated by the parol evidence rule

Privity

Only a party that is part of the contract can sue.

Exception – was made to apply to liability insurance (*Trident Insurance v McNeice*)

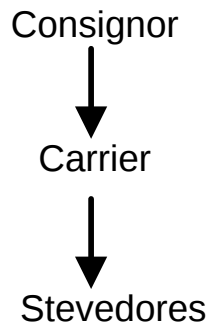


Each of the ways to do this doesn't break the privity rule:

1. Argue that C is a party, C sues
2. B sues A for breach
3. Specific performance
4. trust – trustee B sues on C's behalf

Contracts that attempt to burden a third party –

Himalaya Clause – the carrier excludes liability, this also extends to stevedores –



The Eurymedon – an exclusion clause that worked. Need to show four things:

1. Text of the clause covers the stevedores
2. Carrier enters the clause as the stevedores agent
3. Carrier has authority to act as the stevedores agent
4. Stevedores provide consideration to the consignor

Performance

The order of performance depends on the intention of the parties and is therefore a question of construction

If not stated in contract, assumption is that it's concurrent

Concurrent obligations – when the performance of the obligations is at the same time – presumption is that the parties are ready, willing and able to perform

Where a party cannot perform without the co-operation of the other, a tender is sufficient to make the other party liable. The offer to perform is treated as equivalent to performance to the extent that the party refusing to co-operate will be liable in damages (*McKay v Dick*)

Severable Contract

Payment obligations are apportioned in accordance with performance.

Stops the contract where it is and any other obligations are discharged (This includes future payments)

Repudiation/Renunciation

"An attitude problem"

Occurs when the promisor has an absence of willingness, or readiness, or capacity to perform.

Two kinds:

- 1) Inability – harder to prove
- 2) Words or Conduct

It's anticipatory if one of the parties calls it off before the other one has a chance to perform. If it happens after the other person has performed, then it's still repudiation, but not anticipatory.

Just repudiation does not obligate the other party to accept it. Once B accepts the repudiation, it's called anticipatory breach by A.

One party is not going to perform obligation x, and obligation x is a condition of the contract – then it's repudiation.

Level of seriousness is the same as breach, the consequences and impact needs to be serious. I.e., not going to perform contract at all (*Federal Commerce v Molena Alpha*)

Intention is not important but some courts do not talk about it.

Persistent misrepresentation of the contract can amount to repudiation

Only get damages when you accept and terminate the contract.

Innocent – Negligence – get damages in negligence tort

Fraudulent – where it's fraudulent misrepresentation you can get damages and also sue in the tort of deceit

In all cases you should be able to rescind – then it's a matter of damages

Fraud – if it doesn't fall in the following three, you're innocent of misrepresentation

1. You knew the statement was untrue
2. You make the statement not believing it's true
3. You make the statement recklessly – you don't know if it's true or false (Derry v Peek)

Example: land – CP is 100K – told it's zoned commercial worth 150K, turns out it's zoned residential it's worth 80K. Let's say the misrep is fraudulent. If it was innocent, Seddon's case would apply.

Option 1) Buyer can rescind the contract – gets 100K because all you care about is reversing the contract

Option 2) I'll affirm – sues in contract (zoning is a term in the contract) – Damage 70K

Option 3) keep land and sue in tort of deceit – gets 100K as if the tort had not occurred.

Best this would be for a breach of contract because then expectation would be used and that rewards a good deal

Deceit is made out where, as a result of the false representation made by the defendant, the plaintiff has acted to his or her detriment, and therefore suffered economic loss.

Statutory Prohibition of Misleading Conduct

Statute – Fair Trading Act (NSW) s42 this is wider because it applies to conduct, not just trade or commerce. Remedies are better, because they're more extensive than common law: 1) can get damages even for innocent misrepresentation 2) statute is more flexible – not bound by rescind or not

TPA (Cth) s52

To succeed under s52 you don't need to show that the conduct resulted in someone being misled or deceived – it is enough to show that they merely intended to mislead or deceive.

What actually has to be in the document is spelled out in *Pirie v Saunders*

A contract not complying with the conveyancing act is not void, but unenforceable

Has to 1) describe with precision the subject of the contract and 2) clearly identify the parties.

Restitution or Unjust Enrichment

Elements *Pavey v Mathews*:

- 1) Benefit received by the defendant (has to be a legal benefit, courts will often see what the benefit would be if there was a contract)
- 2) At expense of the plaintiff
- 3) Unjust factor""

What does it matter if contract is unenforceable v void

- If the contract is unenforceable – the money goes back
- If the contract is void no contract

Capacity

Parties must have legal capacity

Minors have limited capacity, only to buy necessities

Mentally ill people may have limited capacity

Corporations have legal capacity

Representations

Pre-contractual statements can be puffs, representations or terms. Representations are statements of fact which induce the representee to enter into a contract, but which are not guaranteed by the maker of the statement

1. If a statement is a puff, it has no legal effect
2. If a statement is a representation, the receiving party has certain rights, depending on if it was fraudulent, innocent or negligent misrepresentation

1. Did the party taking the ticket know that there was writing on it?
 - a. If no – they are not bound
 - b. If yes – go to 2 & 3
2. Did the party know that the writing referred to terms?
 - a. If yes – they are bound
 - b. If no – go to 3
3. Did the person issuing the ticket do what was reasonable to bring to the attention of the taker that there were T & Cs?
 - a. If yes – person taking the ticket is bound
 - b. If no – not bound

The words of a contract will not be incorporated as terms of the contract if there is misrepresentation (*Curtis v Chemical Cleaning*)

Sometimes receipts handed over – are actually notice boards (*Causer v Browne*)

In order for ticket cases to apply, the document relied on must be one which a reasonable person would regard as contractual in nature.

Notice Board Cases

Someone writes some T&Cs on a sign or poster. Different principles developed

- a. Did the person who wants to rely on those terms do what was reasonable to bring them to the attention of the other party? (*Thornton v Shoe Lane*)

Where the terms are unusual the ticket giver has to highlight them in some way (red hand pointing) *Thornton v Shoe Lane*

Incorporation by course of dealing

Two requirements (*Henry Kendall v William Lillico*):

- a. A consistent and sufficiently long course of dealing
- b. Evidence of assent to the terms, usually in the failure to object to the term at issue

Whether there is a consistent and sufficiently long course of dealing is a question of fact

In terms implied by law – for a class, you only have to prove to something that already exists (sale of goods, employment contracts), then it's up to the other party to disprove. If you can't prove to a class, then you have to show that it's necessary for contracts of that kind.

Gummow JJ brings up in necessity in that if a term is so unusual and different from their current contract, and that they had to behave in a certain manner to obtain the benefit, and the employee would not know about the term unless they were made aware of it - the employer has an obligation to bring it to the attention of the employee (Sally).

Plaintiff has to prove that there's a breach of the implied terms (*Liverpool City Council v Irwin*)

Good Faith – in the last 15-20 years courts have been willing to imply terms that the parties must act in good faith in relationships to exercise rights of performing obligations under the contract. This has been applied in commercial cases, mostly where one party goes to terminate.

Construction of Contract

It will be about interpreting the contract. We don't care what the parties meant to say – we care what the parties said.

- a. When the parties have dealt with the matter, the court tries to give meaning
- b. When the parties have not dealt with issue, but it's arisen – the courts will try to infer what the parties would have intended
- c. When the court does 1 or 2 it tries to take a business or commercial point of view
- d. What material can the court look at?

Courts treat the interpretation of spoken words as raising an issue of fact, but treat the interpretation of written words as raising an issue of law.

The words are construed according to their ordinary or natural meanings.

Commercial construction

- a. Universal approach – the general rule is that the same construction rules apply no matter what the form or nature of the contract
- b. Construe contract as a whole – in order to determine the meaning or legal effect of a particular term, the whole contract must be construed

been broken into and stolen in this area. She was concerned about damage to her new car because she had not yet got it insured. She drove up to Level 5 and parked her car without mishap. On the way up and whilst she walked back down to the street via the pedestrian exit she was looking for any signs that displayed the terms and conditions. There were none. It was dark and there was nobody around. When she came back to get her car one of the windows were smashed and her computer had been stolen out of the boot. She called the police. When she finally drove out of the carpark and past the boom gate exit, there she saw a sign facing her in the lane that said 'This car park accepts no liability for any loss or damage whatsoever'. Could Akira be successful in suing the carpark for loss and damage to her car?	What is exclusion clause? Generally means that the party admits it's liable – but there is this clause as a defence. Historically, there have been really big exclusion clauses. Statutes have been introduced to limit the exclusion clause Nowadays, the courts tend to assume there is statute to protect the consumer, therefore except in major commercial contracts, the main permitted use of exclusion clauses today is in relation to the breach of express contractual terms Main principles (<i>Darlington Futures v Delco Australia</i>): 4. Exclusion clauses are to be interpreted in sensible, ordinary meaning, in light of the surroundings 5. When there is ambiguity – read it contra-proferentum – read it against the person who is trying to protect themselves – courts lean towards making people liable 6. Guidelines & rules of thumb a. <u>The four corners rule</u>: When a clause is very broad, you tend to interpret it in a way that is inside the contract – the exclusion clause doesn't apply outside the contract (<i>City of Sydney v Mee</i>) - Deviation rule – old principle – comes from shipping cases and carrying goods for someone else. Exclusion clause works when you're following the agreed route, but not if you deviate from it. (<i>Thomas National Transport v May & Baker</i>) Case: - <i>Thornton v Shoe Lane Parking Co</i> [1971]. Summary: The plaintiff drove to the entrance of defendant's multistory car park and received a ticket from a machine. This ticket referred to certain 'conditions of issue' which could be found inside the premises. The plaintiff proceeded into the car park and while there suffered personal injury due to the defendant's fault. However, the defendant denied liability because of the terms of an exclusion clause displayed on a pillar inside the car park. It argued that these terms formed part of its contract with the plaintiff. Outcome: The Court of Appeal found that the exclusion clause did not form part of the contract and, therefore, did not protect the defendant.
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6) What are the factors that the court considers in determining whether a contract should be set aside due to undue influence?

Answer: In cases of presumed undue influence, in determining whether the defendant has rebutted the presumption, the courts consider:

- The condition of the party who was allegedly influenced, i.e., how vulnerable/frail/dependant on the dominant party they are.
- The amount or proportion of their estate/property that they have donated/transferred.

In general, the courts will consider factors such as:

- The relative bargaining power of the parties, e.g., consider whether the weaker party has experience negotiating business agreements
- Whether there was any impropriety on the part of the dominant party; see Westmelton (Vic) Pty Ltd v Archer and Schmitt [1982]
- Whether the party allegedly influenced received independent professional advice; see Garcia v NAB

Exercise 11.3

Issue: Whether Paul unduly influenced Maria in regards to the transfer of her property to the retirement home.

Rules: Undue influence entails improper or unconscionable use of an ascendancy acquired by one person over another for the benefit of him/herself or another person. The effect is that the acts of the person influenced are not truly voluntary. The remedy is that the victim of the undue influence may rescind the contract.

There are 2 types of undue influence: presumed undue influence; e.g., Lloyd's Bank Ltd v Bundy [1974] and actual undue influence; Mutual Finance v John Wetton and Sons [1937].

Presumed undue influence occurs where there is a special/fiduciary relationship between the parties, actual undue influence occurs in the absence of such a relationship between the parties.