

CONTRACTS: FORMATION AND INTERPRETATION

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- ▶ Matters are to be assessed objectively according to what a reasonable person would conclude to be the party's intentions from the admissible evidence
- ▶ Tension with desire to look at mutual but subjective intention of parties – eg subsequent conduct of parties
- ▶ A constraint on true freedom of contract? “Stat Pro Ratione Voluntas” – “Will stands in place of reason”
- ▶ Rectification theoretically fills the gap if true shared subjective intention is mis-recorded – interpretive correction of mistake also goes some way

OBJECTIVE APPROACH

- ▶ Risk of being unintentionally bound greatest in client to client discussions, or with property agents
- ▶ *Stellard v North Queensland Fuel* found binding contract in spite of words “subject to contract”
- ▶ As lawyers, authority to negotiate terms of contract does not extend to authority to contract on client’s behalf; that must be given expressly or by necessary implication ... BUT ...
- ▶ Lawyers have ostensible authority to bind client to contracts relating to litigation, especially
compromises: *Pavlovic v Universal Music Australia Pty Limited* [2015]
NSWCA 313

FORMATION DISPUTES – RISK OVERVIEW

- ▶ Considerations: Offer and acceptance, intention to be bound, certainty of terms/essential terms, consideration:
 - ▶ intention to create or affect legal relations is key
ISSUE: *G R Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [24]-[25].
 - ▶ If court concludes that parties intended to make a contract, it will if possible give effect to their intention no matter what difficulties of construction arise: *York Air Conditioning and Refrigeration (Australasia) Pty Ltd v The Commonwealth* (1949) 80 CLR 11 at 26
 - ▶ “...Uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains” *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502 at 523
 - ▶ Consideration essential, but usually not hard to find: eg exchange of mutual promises, continued provision of goods or services in return for guarantee, advancing date of payment.

FORMATION – THE BASICS

- ▶ Categories are not end in themselves - parties' intention will always govern; but provide some common reference points within which to frame conclusion on facts.
- ▶ Three categories plus an aspirant:
 - ▶ parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound, and will restate terms more precisely but not to different effect – [binding agreement]
 - ▶ parties have agreed all the terms and intend no departure or addition, but have made performance of one or more terms conditional on execution of a formal document - e.g. payment on execution of agreement - [binding agreement]
 - ▶ the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract - [no agreement]
 - ▶ [**MAYBE**] parties intend to be bound immediately and exclusively by agreed terms but expect to make a further contract in substitution containing additional terms - [binding agreement] - *Factory 5 Pty Ltd (In Liq) v State of Victoria (No 2)* [2012] FCAFC 150 at [48]

MASTERS V CAMERON

- ▶ ‘Slimline agreements’ create emphasis on completeness and implied terms necessary to carry them into effect
- ▶ In *Moffatt*, only six points addressed in sale of land, but contract found: price, deposit, form of contract as unconditional put & call, settlement date, insurance risk, and security. *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60
- ▶ Essential matters : principal undertakings, the subject matter and (usually) the price; but this begs the question.
- ▶ “Subjects which the parties regard or would ordinarily be expected to regard as matters to be covered by the contract are relevant”, though as much to intention to be bound as to legal certainty: *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540 at p 548.
- ▶ ‘Usual subject matter’ may be within the experience of the Court, be apparent from communications between the parties, or require further evidence.

ESSENTIAL TERMS / SUPPLEMENTING PARTIES’ TERMS

- ▶ “Once it is accepted that the parties intended to be legally bound by their exchange of correspondence, the facilitation of the mechanical details of the implementation of the agreement could be supplied by implied terms and considerations of reasonableness which obviated the need for further express agreement” *Moffat* at [56]
- ▶ Contrast *Ashton v Pratt* where uncertainty found because duties of mistress and duration of role not specified, nor identify of trustee or vesting date: *Ashton v Pratt* (2015) 88 NSWLR 281 at [92]

ESSENTIAL TERMS / SUPPLEMENTING PARTIES' TERMS 2

- ▶ “The intention of the parties may be found in a series of communications, or it may be shown that the signed document is only part of their putative contractual relationship. Further, in ascertaining the intention of the parties, whether from a series of communications or from a single document, regard can be had to the commercial circumstances in which the parties exchanged their communications or arrived at the document and to the subject-matter of the putative contract. The objective intention of the parties is fact-based, found in all the circumstances including “by drawing inferences from their words and their conduct in the making of [their] agreement” ... *Sagacious Procurement Pty Ltd v Symbion Health Ltd (formerly Mayne Group Ltd)* [2008] NSWCA 149 at [68]-[69].
- ▶ “Presumptions” that a contract is not intended without written & executed terms or other formalism no longer appropriate. Eg domestic context, religion, sale of land (*Ermogenous* at [26]; in the property context *Moffat Property Development Group Pty Ltd v Hebron Park Pty Ltd* [2009] QCA 60 at [22]-[31]).

FORMATION: EVIDENCE & INFERENCE

- ▶ Evidence of subsequent conduct admissible:
 - ▶ whether or not a contract has been formed *Pavlovic v Universal Music Australia Pty Ltd* [2015] NSWCA 313 at [118];
 - ▶ who are the parties to a contract *Lederberger v Mediterranean Olives Financial Pty Ltd* (2012) 38 VR 509 at [23]-[34]
 - ▶ Whether a particular term (usually oral) forms a part of a contract *Johnston v Bright Stars Holding Company Pty Ltd* [2014] NSWCA 150 at [78]-[84]
- ▶ Nature: Mutual conduct manifesting an intention not to be bound, or conduct amounting to an admission against interest.
- ▶ Question of weight: nature of alleged conduct or admission, and position and knowledge of its author.

FORMATION: SUBSEQUENT CONDUCT

- ▶ “subject to contract” may still have some negative weight;
- ▶ Complexity of subject matter and dearth of terms - negative weight
- ▶ use of solicitors to negotiate - negative weight;
- ▶ “offer” and “accept” - favourable weight;
- ▶ Does nature and quality of language show a present intention from each party to be bound? Eg words “will sign” are unlikely to show such a present intent;
- ▶ “unconditional” proposal - favourable weight;
- ▶ Long course of interest / negotiation which reaches a consensus as to major terms - favourable weight;
- ▶ evidence of continuing negotiations can point against a concluded contract, but equally consistent with a “fourth class” *Masters v Cameron* situation;
- ▶ subsequent conduct [only] consistent with giving effect to an alleged agreement – favourable weight.

INTENTION: PRACTICAL SIGNS

▶ *Pavlovic v Universal Music Australia Pty Ltd:*

[The defendant] would readily appreciate, as would any reasonable person, that to indicate you will sign something which has been reduced to a deed in agreed terms negotiated over weeks or months means there is a binding contract.

- ▶ Thoroughly overturned on appeal, including specifically finding that the words “will sign” do not (as any reasonable person would readily appreciate) indicate an intention to be bound.

... BUT YOU NEVER CAN TELL



- ▶ Meaning determined by what a reasonable businessperson would understand those terms to mean;
- ▶ Requires consideration of the language used by the parties, the commercial purpose or objects of the contract [*and at least where there is an ambiguity*] the surrounding circumstances known to them;
- ▶ Appreciation of the commercial purpose or object is facilitated by an understanding of the genesis of the transaction, the background, the context and the market in which the parties are operating;
- ▶ Unless contrary intention indicated, give a commercial contract a businesslike interpretation;
- ▶ Construe so as to avoid it making commercial nonsense or working commercial inconvenience;
- ▶ Consider whole of contract - meaning of any one part, or the existence of ambiguity, may be revealed by other parts

INTERPRETATION: CORE PRINCIPLES

- ▶ [Evidence of surrounding circumstances] is not admissible to contradict the language of a contract when it has a plain meaning: *Codelfa* at 350
- ▶ In *Mount Bruce Mining v Wright Prospecting* [2015] HCA 37, three restate and support *Codelfa* as source of ambiguity threshold, but four equivocal and reject *Western Export Services* as restatement of ambiguity threshold;
- ▶ Of the four, two query whether *Codelfa* itself requires ambiguity and two choose to say nothing about scope of *Codelfa*.
- ▶ Proceed on basis that the ambiguity threshold is required, unless need to challenge the rule.

AMBIGUITY THRESHOLD

- ▶ “... 'ambiguity' means any situation in which the scope or applicability of a contract is, for whatever reason, doubtful. It is not confined to lexical, grammatical or syntactical ambiguity.” *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261 at [73] –citations omitted
- ▶ Author’s view: may still use internal context / contractual purpose shown on face of contract to identify ambiguity
- ▶ Example - rent review provision: *Royal Botanic Gardens and Domain Trust v South Sydney Council* (2002) 240 CLR 45
 - ▶ “... rent ... may be determined by the Trustees ... PROVIDED that ...
 - ▶ (iv) in making any such determination the Trustees may have regard to additional costs and expenses [caused by carpark]”
- ▶ ‘Ambiguity’ – does “may” mean “may only”? Ambiguity better seen wider context - other parts of lease indicated non-market relationship.
- ▶ Proviso that if unambiguous literal words will lead to absurdity or inconsistency, may correct mistake: *Bank of Queensland Ltd v Chartis Australia Insurance Ltd* [2013] QCA 183 at [36].

IDENTIFYING AMBIGUITY

- ▶ Reasonable and equitable, necessary for business efficacy, obvious, capable of clear expression, not inconsistent with express terms: *BP refinery (Westernport) Pty Ltd v Shire Hastings* (1977) 180 CLR 266 at 283.
- ▶ Generic terms may suffice, or be melded into specifics:
 - ▶ ‘do all things reasonably necessary to allow the other party benefit of agreement’;
 - ▶ requirement to ‘act within reasonable time’
- ▶ Implied terms difficult where situation was not in the contemplation of the parties, more than one reasonable solution exists, or posited term imposes different or substantial additional obligation.

IMPLIED TERMS

- ▶ Court may supply omitted words, or correct words inserted in error, where clearly necessary to avoid absurdity or inconsistency. Limited to the extent of modification required to avoid the absurdity: *Fitzgerald v Masters* (1956) 95 CLR 420; *Watson v Phipps* (1985) 63 ALR 321 at p 324.
- ▶ Cautious approach, usually seen only in simple and obvious cases. But has been used aggressively by QCA:
 - ▶ put and call contract mistakenly granted the purchaser a distinct advantage by failing to limit the call option in the same manner as the put option; Court made a substantive amendment inserting a similar limitation: *Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158
 - ▶ allowed the purchase price for business sale paid in 12 monthly instalments under guise of a rental arrangement; Court deleted roll-over term mistakenly retained in standard form agreement, so that “rental” obligations could not roll for another 12 months: *Business and Professional Leasing Pty Ltd & Anor v Akuity Pty Ltd & Anor* [2008] QCA 215.

CORRECTION OF TEXTUAL ERRORS

- ▶ If contract appears complete on its face, inference is that it contains complete terms, but the contrary may be proven - that there are additional oral terms;
- ▶ Entire agreement clauses depend on their drafting: *McMahon v National Foods Milk Ltd* [2009] VSCA 153; (2009) 25 VR 251 from [36]
 - ▶ Unless express, will not exclude collateral agreements, nor exclude implied terms.

EXTENT OF AGREEMENT

- ▶ Yes, where parties have united in rejecting a term which is sought to be implied: *Queensland Power Co Ltd v Downer EDI Mining Pty Ltd* [2010] 1 Qd R 180 at [74]
- ▶ Arguably also in the “private dictionary” where an ambiguous word is given the meaning subjectively agreed to by the parties: *Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors* [2012] QCA 18 at [68]
- ▶ Care: this approach, from *The Karen Oltmann*, not broadly adopted and now rejected by the House of Lords on doctrinal grounds: *Chartbrook Limited v Persimmon Homes Ltd* [2009] 1 AC 1101.

INTERPRETATION: SUBJECTIVE
EVIDENCE?

- ▶ Rectification:
 - ▶ clear evidence of a mutually mistaken recording of the parties' agreement; OR
 - ▶ Unilateral mistake known to other party who takes advantage of it including by staying silent
 - ▶ onus on the party seeking rectification is a heavy one
 - ▶ recourse permitted to parties' prior negotiations.
- ▶ Conventional Estoppel: *Ryledar Pty Ltd & Anor v Euphoric Pty Ltd* [2007] NSWCA 65 from [193]
 - ▶ Common assumption of state of fact/mixed fact & law) as to basis of legal relations between parties;
 - ▶ Relationship in fact conducted on that basis in reliance on assumption, and each intended the other to act on that basis
 - ▶ Departure will occasion detriment to plaintiff

RECTIFICATION, CONVENTIONAL ESTOPPEL

- ▶ Much written over the years, but little change to principle:
 - ▶ Courts have forever striven to uphold apparent agreements eg *York*
 - ▶ *Masters v Cameron* remains as relevant as ever, though fresh emphasis that intention of the parties is overriding question & these categories just an analytical tool
 - ▶ Back to square one with *Codelfa* which, though unwelcome, should not affect majority of cases
- ▶ Perceived changes are in willingness to apply these doctrines:
 - ▶ preparedness to find a contract in a 'slimline agreement';
 - ▶ What happens next with the push to remove "ambiguity threshold"
 - ▶ Willingness to find ambiguity and correct mistake
- ▶ Arguably adds a dash of commercial morality to black letter law – but remain enduring themes, and fact specific

CONCLUSION