**Introduction**

X has… and wants….

He seeks to enforce exemption clause/Y’s obligation.

He must prove this exemption clause/obligation is part of his contract with Y or is enforceable through statute. He may alternatively seek relief in equity.

**X may seek to enforce obligation k through contract**

**Formation**

X has promised to provide … in exchange for Y to provide k.

* Offer
  + It is more than a mere invitation to treat (Pharmaceutical society v Bootcash)
  + Terminated through revocation (Dickinson v Dodds), time lapse (Barrick v Clark), counter-offer (Hyde v Wrench) or condition failure (Financings v Stimson)
  + Tenders
    - Tenderer’s are bound to the terms of their unilateral process contract (Hughes Aircraft system)
* Acceptance
  + Acceptance must be on faith of the offer (R v Clarke), accepted unconditionally (Butler Machine), and communicated to the offeree
    - Unilateral contract dispensed with the need of communication (Carlil v Carbolic Smokeball)
    - Silence is not acceptance (Felthouse v Bindley)
    - Accepting, paying, or servicing indicates acceptance by conduct because the other party has ‘taken the benefit of offer’ (Empirnall; Brogden)
    - The ETA notes when the email is ‘received’, but acceptance by electronic communication depends on: (Brinkibon)
      * Reasonable expectation of parties
      * Respective ability to control the risk
      * Sound business practice
* Consideration
  + K is a sufficient legal detriment for consideration because even a mere peppercorn will suffice (Thomas v Thomas).
  + Although K was a past consideration, it falls within the exception. It was done at the request of the promisor, with mutual understanding of payment (Re Casey’s Patent)
  + Although K is an existing contractual duty to Y, it is valid because X undertook additional duty (Harley v Ponsonby)
  + Although K is an existing contractual duty to Y, it is valid because X undertook additional duty by being responsible to Z (Pao On)
  + Although K is an existing contractual duty to Y, it is valid because Y accrued benefit from X undertaking their duty (Musumeci)
  + K is a valid consideration because Y accepted it in return for a release of obligation (Ashton v Pratt).
  + K is valid consideration because it is a bona fide compromise of a legal claim, even if it is not substantiated (Wigan v Edwards).
* Intention to be bound
  + “Subject to contract” is a strong presumption against intention (Masters v Cameron). Contract has not formed until a more formal document is outlined and agreed to.
  + “Please forward contract” was held to mean ‘forward formal document outlining our binding agreement’. (Lennon v Scarlet).
  + There is no presumption against domestic relations (Ermogenous).
  + There is a strong presumption that commercial parties intended to be bound (Edwards v Skyways; Shahid v Australasian College of Dermatologists)
* Certainty in terms
  + Discretion whether to perform contractual duty renders the contract invalid (British Empire Films). In Meehan v Jones, discretion to perform subject to “sufficient finance” was held not to be too wide because the plaintiff’s discretion is fettered by reasonableness and honesty.
  + Court may look to external standards for ‘usual’ or ‘reasonable’ terms (Whitlock v Brew). However, there must be a fixed standard (G Scammel v Ouston) and the standard must exist (Biotech v Pace).
  + Ambiguous words may be severed if they are inessential to the contract (Whitlock v Brew)
  + Court cannot determine an essential term (Hall v Bust). However, court may substitute machinery to determine essential term if the machinery outlined breaks down (Sudbrook v Eggleton)
    - However, machinery must be non-essential in nature, meaning that it is not a body with a ‘peculiar knowledge’ (Nelson v Cook)
    - Both parties must do what is reasonably necessary to ensure that the machinery is enforced (Booker v Wilson)
  + Agreement to negotiate in good faith
    - Agreement to negotiate in good faith are enforceable (United Group Rail Services v Rail Corporation of NSW)
      * Examples of bad faith negotiations include
        + Threatening a future breach in contract to lower settlement amount
        + Pretending to negotiate to force the other party into an expensive arbitration that one believes the other party cannot afford
    - However, the conditions of the negotiation must be certain for courts to police it (Walford v Miles). It was uncertain in Walford because parties did not specify a duration for negotiations.
    - Parties must keep an open mind (Stzelecki)
* Formalities
  + Contract for interest in land must be in writing and is signed by the party to be charged (s 59 of PLA)
  + For memorandum, the names, consideration and subject matter of transaction must be stated (Pirie v Saunders)
  + More than one document can be joined if there is

1. A reference to another document (Parol evidence rule to find the other document)
2. The referring document must have the signature of the party to be charged (Timmins v Moreland)
   * Party will be bound if their name is on a document and there was intention to be bound to that document (Leeman v Stocks)
   * An unsigned contract may be valid but unenforceable. Plaintiff may use the unenforceable contract to protect against countervailing claims like recollection of deposit (Thomas v Brown). However, they may not use it to create interest in land (Perpetual Executors v Russel). (Clarified by Head v Kelk)

* Circumventing need for signature
  + Restitution
    - Partial performance by one party which confers benefit to the non-performing party (Pavey v Paul)
    - Calculated on a quantum meriut basis (reasonable sum)
  + Equitable doctrine of partial performance
    - Where one party performs acts done in execution of the contract
    - The act must be done on request by the plaintiff and is not incidental to the request.
    - The act must be sufficiently probative of the alleged contract without reference to evidence of the oral contract (Regent v Millet).
      * Sufficiently probative (Regent v Millet)
        + Taking of possession
        + Renovation
        + Making mortgage payment
      * Not sufficiently probative of (Wakeham v MacKenzie; Ogilvie v Ryan)
        + Giving up home to move into another house
        + Taking care of someone
        + ‘The acts could be explicable by love and affection’
      * Does not include (TA Dellaca)
        + Taking possession alone is not sufficient (cf Regent v Millet)
        + Making renovations before receiving possession date is not sufficiently probative of a purchase/sale agreement because it could be mistaken for an arrangement of long-term lease.
  + Equitable estoppel
    - Look to promissory estoppel (below)
    - Where it is unconscionable for second party to use their legal title to defeat the oral bargain (Walton v Maher)
    - Riches v Hogben
      * P emigrated from London to take care of his mother, leaving his job behind on the oral promise that she would purchase him a house. Promise fell through
      * P was granted expectation damages (Good to distinguish equitable estoppel and equitable doctrine of part performance because factually similar to Ogilvie v Ryan).

**Contractual term**

X must prove that the terms used were contractual. Contractual terms have promissory intent (Hospital Products) and this can be shown by:

1. Nature of language used
   1. I guarantee (Oscar Chess v Williams)
   2. I estimate (JJ Savage v Blakney)
   3. My own experience (Ross v Allis Chalmers)
2. Position of knowledge (Oscar Chess v Williams)
3. Importance of contract (Dick Bentley v Harold)
4. Reduction to writing post-negotiation (Nemeth)

**Incorporation of express terms**

**Oral terms**

X must prove that his statement was incorporated into the terms of the contract. The parole evidence rule excludes extrinsic evidence where it varies or adds to wholly written contracts (Codelfa). However, X may prove it is an exception because it is a (collateral contract/part oral, part written)

* Part oral, part written
  + Couchman v Hill
* Collateral contract
  + X entered into the (main contract) as a consideration for (non-main contract)
  + Relying on project details before purchasing house (Shpperd v Ryde Corporation)
  + Relying on promise that house was fit before purchasing house (Van Den Esschert v Chappel)
  + However, the terms of the collateral contract must not contradict the terms of the main contract (Hoyts v Spencer; Skyrise Consultants v Metro)
* Entire clause contract/sophisticated commercial parties/detailed contracts are strong evidence against incorporation of oral promises (Nemeth)

**Written terms**

X must prove that the written terms were incorporated into the terms of the contract.

Signature indicates that all terms are accepted and hence binding, regardless whether they were read (Toll v Alphapharm)

* However, the signature may not be binding if (document signed is non-contractual in nature/misrepresented/Y can prove non-est factum/surprise term)
* Non-contractual in nature
  + Signed job cards with “we accept your terms and condition” (Nalder v Biddie)
* Misrepresentation
  + Exemption clause only applies to x and y (but in reality applies to all exemption) (Curtis v Chemical Cleaning)
* Non-est factum
  + Specific notice must be given where transaction is fundamentally different to what was assented to.
  + Requires a disability and reasonable care by assenter to be taken (Petelin v Cullen)
* Surprise term
  + Specific notice must be given where the document for signing contains a particularly onerous term (Tilden v Rent-a-car Clendenning)
  + However, L’Estrange rejected this notion and reaffirmed Toll v Alpharpham where signature represents assent to all terms

X may prove that the terms were incorporated through notice. Terms are taken to be incorporated if *reasonable steps* are taken to notify X of the terms (Oceanic v Fay)

* Notice must refer to a document which is contractual in nature
  + Deck chair receipt is not contractual in nature (Chappelton v Barry)
* Notice must refer to the terms before the contract is made
  + Notice saying, “deck hair for hire” and after hire, received receipt with additional terms “not liable for injury” (Chapelton v Barry)
  + Notice outside building saying, “cars parked at owner’s risk”. P was injured and P’s car was damaged. Sufficient notice was given to exclude P’s car damage (not injury) (Thornton v Shoe Lane Parking)
  + After paying for ticket, received receipt saying, “refer to wall for additional terms”. Insufficient notice (Thornton v Shoe Lane Parking)
  + Purchased ticket online before receiving conditions in person (E-bay v Creative Festival)
* The terms the notice refers to are accessible
  + Notice on brochure saying, “governed by terms on ticket (available at every office)”. Travel agent did not have ticket. After paying in full, received ticket with additional terms “not liable for injury”. (Oceanic v Fay)
  + Took 6 weeks before access to terms (Ebay v Creative Festival)
  + Notice saying, ‘terms available at office’. Terms were onerous. Not sufficient notice to onerous terms to collect terms from office (Baltic Shopping v Dillon)
  + Notice saying refer to document attached, but there are none. However, received a similar set of terms weeks ago. Considered as accessible (Ange v First East Auction Holdings)
* More notice is required for unusual terms (J Spurling v Bradshaw)
  + Excluding all liability for injury and damage to car in carpark (Thornton v Shoe Lane Parking)
  + Notice saying, ‘terms available at office’. Terms were onerous. Not sufficient notice to onerous terms to collect terms from office (Baltic Shopping v Dillon)
  + Notice in jiffy bag with 9 terms and one was particularly onerous (pay $5 per transparency for every day late). Needed to bring this to the attention. All terms were not incorporated. (Interfoto Picture Library v Stiletto Programmes)

Terms taken to be incorporated if there is a consistent course of dealings on the same matter (Balmain v Robertson)

* P used ferry regularly and there were terms on notice board which were obvious (Balmain v Robertson)
* P used ferry on 4 occasions and only on some occasions he signed it. Not consistent course of dealings (McCutcheon v MacBrayne)

**Interpretation (Has there been a breach of term?)**

* No ambiguity
* Where there is no ambiguity, words are interpreted in their plain and ordinary meaning and read as a whole (Codelfa).
* Ambiguity
* Words are interpreted in their plain and ordinary meaning and read as a whole (Codelfa).
* The parole evidence rule excludes extrinsic evidence to vary or add to the contract. However, where there is ambiguity, the factual matrix such as ‘the genesis of transaction, background, and market in which the parties are operating’, may be admitted to determine commercial object of transaction (Codelfa, reaffirmed by Mt Bruce).
* Parties are taken to have a result consistent with commercial object (Ecossee Property)
  + Woodside:
    - “reasonable endeavour” was ambiguous. The commercial object was to balance the business interest of both parties. Thus, it meant ‘willingness to supply goods taking commercial matters into account’ and not ‘physical capacity to supply goods’ because it was more consistent with the commercial object.
      * Both parties knew that the price of gas fluctuated (market conditions)
  + Escosee Property Holdings
    - Cutting the words was ambiguous. The commercial object was to make a purchase/sale agreement. Thus, it meant sale of the house because it was consistent with the commercial object.
      * Took into account background
* Ambiguity gateway (side issue)
  + Identifying ambiguity and whether ambiguity is a gateway for factual matrix.
    - *Traditional approach –* Establish ambiguity based on the words (Codelfa, reaffirmed by Mt Bruce)
      * Only consider extrinsic evidence when the words are ambiguous (Codelfa per Mason)
    - *Modern approach –* Establish ambiguity based on the words AND extrinsic evidence (Toll; Pacific Carries v BNP; Investors Compensation Scheme v West Bromwich Building Society per Lord Hoffman)
      * Not necessary to look for ambiguity before admitting extrinsic evidence (Franklins v Metcash)
      * Mason’s rule for ambiguity is a ‘soft impediment’
        + To determine if there is ambiguity, extrinsic evidence may be looked at first (Maintek v Stein)

**Implied terms**

X must prove that Y’s obligation was implied in the contract.

* By custom
  + X may prove that the term is implied within the contract as part of custom (Con-stan Industries)
    - Term is implied if the custom is so notorious within the industry that both parties are taken to have known about it (Summers v Cth)
    - The custom is reasonable, certain and uniform
    - The custom is not inconsistent with the main terms of the contract.
* By law
  + X may prove that y’s obligation is a necessary legal incident implied in all (type of relationship) contract (Liverpool City Council
    - Landlord and tenant contract
      * Liverpool City Council – Maintenance of common amenities is a legal incident to landlord-tenant contracts.
    - Employment contract
      * CBA v Barker – Mutual trust and confidence is not a legal incident to employment contracts. English case Malik cannot be affirmed in Australia “subject to inspection to determine adaptability in native soil’.
    - Work and material contract
      * Helicopter Sales v Rotor-Work – Warranties is a legal incident in this type of relationship. However, was excluded expressly.
  + X may prove that Y has an obligation to co-operate in that he must do all that is necessary for X to have benefit from the contract. (Beaton v McDivitt)
    - The obligation is reasonable and not merely ‘being nice’ (Sydney v Goldspar)
    - ACT Cross Country v Cundy – Failure to inform road authorities of agreed race in a timely manner
    - Beaton v McDivitt – Did not attempt to subdivide land so as to transfer property.
  + X may prove that Y has an implied obligation to perform the contract in good faith
    - The obligation is limited to the ‘legitimates business interests of other party’
    - Implied duty of good faith is breached if one party prevents the other from performing their contractual obligations. (BK v HJ)
    - However, it is still unclear to the direction (CBA v Barker)
* By fact
  + X may prove that Y has an implied obligation because this implied term would be ‘obvious to the officious bystander’ (Moorcock). BP Hastings provide factors which determine if a term is implied:

1. Must be reasonable and equitable
2. Must be necessary to give business efficacy to the contract
3. Must be so obvious that it goes without saying that the terms must be implied or otherwise the ‘officious bystander test’. (Moorcock)
4. The term must be capable of clear expression
5. It must not contradict any express terms of the contract

* Factors 2 and 3 are cumulative – if one is satisfied, the other is likely to be satisfied and if one fails, then no terms can be implied (AG Belize; Marks v BNP Paribas). Factor 1 is likely satisfied if either 2 or 3 is satisfied.
* Moorcock
  + Contract would not have come to being without guarantee of ship’s safety at low tide because both parties knew it was dangerous. Implication was necessary to give contract business efficacy.
* Codelfa
  + Argued that it was an implied term that if an injunction was granted, more time would be given to complete project.
  + Breached 3 because there might be a rejection of contract if term was mentioned during negotiations (Brennan).
  + Breached 3 because there was a comprehensive set of negotiations prior to contract formation (Mason).
  + Breached term 4 because there was no single way of expressing the term (Mason)
* By legislation
  + X may prove that the term was implied by the SOGA legislation.
    - Sale by description (s 16)
      * Goods shall correspond with description.
        + Norwegian herring meal but low quality. Description goes to identity, not quality (Ashington Piggeries v Hill; Grant v Australian Knitting Mills)
      * Implied conditions to quality
        + S 17(c) Where goods bought by description, implied that the goods shall be of merchantable quality. Grant v Australian Knitting Mills – P got dermatitis from
        + S 17(d) However, if buyer have examined the goods, s 17(c) does not apply.
      * Bulk of goods must correspond with the sample
      * However, Y’s exclusion clause may exclude conditions from the SOGA (s 54 SOGA)

**Exclusion clause (Has exclusion clause been incorporated?)**

(As above)

**Interpretation (Does exclusion clause cover the breach)**

Y must prove that the exclusion clause applies to the breach of obligation k.

* Exclusion clauses must be read in their plain ordinary meaning, read as a whole, with regard to surrounding context (Darlington v Delco)
* Special rules of interpretation apply to exclusion clauses
  + Exclusion clauses are read in contra proferentem in cases of ambiguity (Wallis, Son and Wells v Pratt and Haynes). Very high threshold, applies only when there is ambiguity after all other construction have been exhausted.
  + There must be an express exclusion for excluding liability for negligence (Davis v Pearce Parking Station). If the terms of exclusion is too wide, this may only protect strict liability (contract) and not negligence.
  + A fundamental breach of obligation does not necessarily ‘destroy exemption’ (TNT v May and Baker). However, the more serious the breach, the less likely that the words are intended to exclude it.
    - ‘Unauthorised departure’ from performance of contract are not covered by exemption clauses (Sydney City Council v West)
      * Sydney City Council v West – Exemption clause excluded responsibility to damaged vehicle in carpark. Car was delivered to a thief who had a duplicate ticket for P’s car.
      * TNT v May and Baker – Exemption excluding responsibility to goods damaged during transit. Goods burned down while taking a detour. Exclusion clause applied because P failed to specify a stipulated route, merely that the goods be dropped off at a certain point. This lead to a wide discretion to performance of contract.
      * Photo production v Securiror Transport – Exemption excluding responsibility from an act of an employee unless it is within their course of employment. Employee started a fire and burned down P’s factory. Exemption clause was clear enough to apply.
      * Darlington v Delco – Even if the action is unauthorised, the liability for breaching the 4 corners rule can be limited.

**Is the exclusion invalid? (Unfair terms)**

Y’s exclusion clause may be invalid if it is ‘unfair’ for the purposes of the ACL.

* Who does it apply to?
  + Small businesses
    - Less than 20 people
    - Contract’s value is less than $300,000. If the duration is longer than 12 months, less than $1000000.
  + Consumers
* Is the contract covered?
  + Only standard form contracts pertaining supply of goods/services and interest in land covered (s 23)
    - Presumption that it is a standard form contract and D has burden of disproving this (s 27)
      * One party has all bargaining power
      * Contract prepared by one party before discussion
      * Required either to accept or reject the terms in form prepared
      * Given effective opportunity to negotiate
      * Terms take into account specific characteristics of party
* Which terms covered?
  + Only non-core terms are covered (s 26)
    - Core terms are terms that define the main subject matter or sets upfront price payable.
* Are the terms unfair?
  + Unfairness given by 3 factors, it is the burden of consumer/small business to prove two of them (s 24)
    - Consumer/small business:
      * Significant imbalance in rights
      * Detriment
    - Defendant:
      * The exclusion clause was reasonably necessary to protect the D’s legitimate interest
  + Factors for consideration include:
    - The contract as a whole
    - Transparency of exclusion clause
      * Expressed in reasonably plain language
      * Legible
      * Presented clearly
      * Readily available to any party affected
* Examples of unfair terms (s 25)

(a) one party avoids or limits performance;

(b) permit one party to terminate contract;

(c) penalises one party (but not another party for breach or termination;

(d) permits one party to vary terms;

(e) permits one party to renew or not renew contract;

(f) permits one party to vary the upfront price without the right of other to terminate;

(g) permits one party unilaterally to vary characteristics of goods/services/interest in land;

(h) permits one party unilaterally to determine whether contract breached or to interpret meaning;

(i) limits one party’s vicarious liability for its agents;

(j) permits one party to assign contract to the detriment of other without consent;

(k) limits one party’s right to sue another party;

(l) limits evidence one party can adduce;

(m) imposes evidential burden on one party;

(n) prescribed by regulations

* Contracts not covered? (s 28)
  + Contract for marine salvage/towage
  + Chartering of a ship
  + Carriage of goods by ship
  + Company constitution

**X may seek to enforce obligation k through statute**

**Which guarantee applies?**

ACL provides guarantees that Y may not exclude through exclusion clauses.

* Who does it apply to?
  + Consumers
    - Price of goods/services did not more than $40,000 or
    - If higher price, goods were of a kind ordinarily acquired for personal domestic use or consumption
    - Is a van/trailer for use on public roads
* What are the guarantee for goods?
  + Section 51- Guarantee as to **title**
  + Section 52- Guarantee as to undisturbed position
  + Section 53- Guarantee as to undisclosed securities etc
  + \*\*Section 54- Guarantee as to **acceptable quality.** S 54 (2) provides definition for acceptable quality
    - Fit for all the purposes for which goods of that kind are commonly supplied
    - Acceptable in appearance and finish
    - Free from defects; and
    - Safe
    - Durable
  + Section 55- Guarantee as to **fitness for any disclosed purpose** etc
  + Section 56- Guarantee relating to the **supply of goods by description**
  + Section 57- Guarantees relating to the supply of goods by sample or demonstration model
  + Section 58- Guarantee as to **repairs** and spare parts
  + \*\*Section 59- Guarantee as to **express warranties**
* Guarantees do not apply if customer is fully acquainted with the goods (s 5(2)). This is given by

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods

(d) any representation made about the goods by the supplier or manufacturer of the goods

(e) any other relevant circumstances relating to the supply of the goods.

**Limiting guarantees**

* Y cannot exclude guarantees (s 64), however, he may limit the guarantees (s 64A)
  + - s 64A(1) Goods: can limit to repair/replacement (or money equivalent) EXCEPT
      * Personal, domestic/household use
    - S 64A(2) Services: can limit to repeating the service (or money equivalent)EXCEPT
      * Personal, domestic/household use
* USEFUL OBSERVATION: Thus, consumers always have their guarantees retained, but not for small businesses.
* S 64A(3): Exceptions to limiting guarantees
  + - Where buyer can show that it is not fair or reasonable to rely on the limit on guarantee. This is given by S 64A:
      * + Take account of all circumstances of case
        + Strength of bargaining position
        + Inducements
        + Alternatives
        + Goods specially made/adapted

**Remedies for breached guarantees**

* Supply of goods (s 259)
  + Non-major failure
    - Remedy within reasonable time, otherwise may reject or recover cost incurred from failure to remedy.
  + Major failure
    - Reject goods, compensation in any reduction of value of goods.

**X may seek relief through promissory estoppel**

* Parol evidence rule does not apply in equity (Saleh v Ramanous)
* Suspending a pre-existing right because it would be unconscionable to enforce it (shield)
  + High trees – Confining the promise for withholding a pre-existing right
  + Je Maintiendrai v Quaglia – Promise in discounting rent agreement
  + Collier v MJ – Promise to pay severally as opposed to joint and severally
* Enforcing a right that is not pre-existing because it would otherwise be unconscionable (sword)
  + Walton stores
* Elements to prove equitable estoppel
  + P assumed that a legal right existed and D would not be free to withdraw from expected legal relationship
  + D induced P to adopt this expectation
  + P acts or abstains in reliance on the assumption
  + P’s action will occasion in detriment if their assumption is not fulfilled
  + D failed to act to prevent the detriment.
* Reliance must be reasonable
  + Qualified statements/assurance without authority (Legione v Hateley)
  + Pre-contractual promises for well resourced, commercial entities (Austotel v Franklins)
  + Ambiguous statement
* Remedy provided by promissory estoppel
  + Maximum-equity principle: start with expectation based remedy and work downwards to reliance based remedy (Giumelli v Giumelli).
    - Riches v Hogben
  + Entitlement may be lesser if:
    - Exigencies and uncertainties of future (Ronowska v Kus)
    - Impossible to give promise an expectation remedy unless it is unjust to a third party
      * Giumelli v Giumelli
    - Disproportionate detriment to promisor
      * Beaton v McDivitt per Kirby
  + ‘Expectation damages’ is not necessary to be the value expected, but a ‘just and conscionable satisfaction of P’s expectation (Ronowska v Kus)
  + Courts may enforce promise if it includes ‘life changing decisions’ (Sidhu v Van Dyke; cf Ashton v Pratt)