Implied Terms and Statutory Guarantees

IMPLICATION OF TERMS
Terms of the contract may also arise by implication, either under common law principles or pursuant to statute. Such terms, though not express, are included in the contract because the parties intended that they would be incorporated. Courts are by no means keen to imply terms, however, occasionally inadvertence or bad drafting result in terms not being included in the formal agreement. Again, the intention of the parties is critical. Terms may be implied into a contract by virtue of custom or usage in the market, the facts of the particular case, and law.

CUSTOM OR USAGE IN THE MARKET
In appropriate cases, a term may be implied into a contract by reason of established mercantile usage or professional practice in the market. Parties are regarded as having contracted on the basis that the particular custom or usage is applicable and the term is implied in accordance with that custom or usage. There are four tests to be satisfied before a term will be implied on this basis (Con-Stan Industries P/L v Norwich Winterthur Ltd (1986) 160 CLR 226):

1. The existence of a custom or usage will justify the implication of a term into the contract is a question of fact.
2. There must be evidence that the matters relied on are so well known and acquiesced in that everyone making a contract in the situation can reasonably be presumed to have imported a term embodying them into the contract.
3. A person may be bound by custom notwithstanding the fact that she or he had no knowledge of it.
4. But a term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement.

TERMS IMPLIED IN FACT
If the contract appears complete on its face, i.e. a formal contract, there are five requirements to be satisfied before a term may be implied (Codelfa Constructions P/L v State Rail Authority (1982) 149 CLR 337):

1. Implication of the term must be reasonable and equitable between the parties.
2. The term must be necessary to give business efficacy to the contract (Byrne v Australian Airlines Ltd (1995) 185 CLR 410). If a contract is commercially effective without the term, the court will not imply it. A term will be implied if the contract is unworkable.
3. The term must be so obvious that implication goes without saying.
4. The term must be capable of clear expression and reasonably certain in its operation. In Codelfa Constructions P/L v State Rail Authority, the High Court refused to imply a term into the contract because it was impossible to say with any certainty what that term would have said.
5. The implied term must not contradict an express term of the contract nor deal with a matter already sufficiently dealt with by the contract.

In an informal contract (partly written/partly oral or an agreement not reduced to a complete written form), the question is whether the implication of a particular term is necessary for the reasonable or effective operation of the contract in the circumstances of the case (Byrne v Australian Airlines Ltd (1995) 185 CLR 410).

TERMS IMPLIED BY LAW
Such terms are usually implied because of the nature of the contract itself - the same term has been implied in contracts of this nature in the past (Liverpool City Council v Irwin (1977) AC 239). For instance, in a contract of employment, a term will be implied whereby the
Construction and Extrinsic Evidence

CONSTRUCTION
Construction is the process undertaken by the courts to ascertain the rights and obligations arising under the contract and the meaning of the language used by the parties. The court applies an objective test to determine the parties’ intention. Many disputes arise because of ambiguity of the language or something arises that was not contemplated by the parties. The evidence available to the court to decide these issues will be influenced by the parol evidence rule in circumstances where the contract is in writing. (On commercial construction, see also ‘Commercial Construction’, [2.03]-[2.05].)

PAROL EVIDENCE RULE
The parol evidence rule states that: ‘...where a contract is reduced to writing, where the contract appears in the writing to be entire, it is presumed that the writing contains all the terms of it and evidence will not be admitted of any previous or contemporaneous agreement which would have the effect of adding or varying it in any way.’ (Mercantile Bank Sydney v Taylor)

Traditionally, the parol evidence rule operates to exclude proof of contractual terms by oral evidence in relation to written contracts. The rule applies to both oral and written statements. Such evidence may be referred to as extrinsic (or outside the written contract). A party to a contract may allege that the written contract before the court does not contain all of the terms of the contract. In such circumstances, that party may seek to present evidence to the court of additional terms to the written contract.

At the outset, the issue is whether the parties intended that the whole of their agreement to be recorded in a particular document (or documents). Again, such intention is determined objectively - would a reasonable person have understood the writing to contain the whole of the agreement? Thus, the court is required to look at all of the evidence (including the surrounding circumstances) to determine the intention of the parties (Royal Botanic Gardens and Domain Trust v South Sydney Council (2002) 186 ALR 289, see [12.19]).
If the parties indeed intended that the written document was to contain the whole agreement, then no evidence can be accepted to vary, add to or contradict those written terms (Gordon v Macgregor (1909) 8 CLR 316). This restriction usually also included prior negotiations (Prenn v Simmonds [1971] 1 WLR 1381) Thus, what are often styled as exceptions to the rule are more usually cases where the court is determining the intention of the parties and for that purpose, the court is required to look at all of the evidence. See Herron J’s dissenting judgment in LG Thorne & Co P/L v Thomas Borthwick & Sons Ltd (1955) 56 SR (NSW) 81 [12.21] on this point.

EXTRINSIC EVIDENCE AS TO THE MEANING OF CONTRACTUAL TERMS
Where words in a contract are susceptible of more than one meaning extrinsic evidence is admissible to show the facts, which the negotiating parties had in their mind (Codelfa Construction v SRA (1982) 149 CLR 337).

COLLATERAL CONTRACTS
In some cases, statements made, while not a term of the main contract, are clearly intended to have commercial significance - such statements may amount to collateral contracts (see [10.36C]). The consideration for a collateral contract is the entry of the party into the main contract. A collateral contract cannot exist where the main contract has been made prior to the making of the statement that is allegedly the subject of the collateral contract. This would be past consideration. Note the following important points.
Exclusion Clauses

EXCLUSION CLAUSES
Not every contracting party wants to accept full responsibility for a breach of contract. Thus, it is common for a party to include terms that seek to reduce that party's liability under the contract. Liability may arise by reason of breach of contract, or negligent performance of contractual obligations. Such exclusion clauses are legitimate as either a defence to an action for breach of contract or as a mechanism to define obligations under the contract. Exclusion clauses may generally be one of three types.
1. The term may be drafted to exclude rights that a party might otherwise have under the contract.
2. The term may be drafted to limit or restrict the rights of one party.
3. A party's rights under the contract might be qualified by subjecting them to specified procedures.
Problems usually arise in the context of standard form contracts drafted by a party in a superior bargaining position; there is frequently no room for negotiation. In such situations, the courts view exclusion clauses carefully.

A MATTER OF CONSTRUCTION
According to the common law, exclusion clauses will be construed according to their natural and ordinary meaning (Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, Darlington Futures Ltd v Delco Australia P/L (1986) 161 CLR 500). Where the wording of the clause is ambiguous, exclusion clauses will be strictly construed. It is important to note that there have been significant legislative inroads in this area. For example, s64 of the Australian Consumer Law renders exclusion clauses ineffective in particular contracts.

FOUR CORNERS RULE
A contractor who breaches the contract by stepping outside the four corners of the contract will generally lose the protection of the exclusion clause (Council of the City of Sydney v West (1965) 114 CLR 481).

This is most common in bailment contracts (Davis v Pearce Parking Station (1954) 91 CLR 642). In Council of the City of Sydney v West, the contract for parking a car in a parking station contained an exclusion clause that excluded liability for loss or damage to the car howsoever caused. This clause could be construed as excluding liability for negligence. The car was stolen from the parking station as a result of the defendant's actions. It was held that the defendant could not rely on the exclusion clause because his agent had dealt with the car in a way that went beyond negligence; the agent's actions in releasing the car to the thief was neither authorised nor permitted by the contract.

THE NORMAL MEANING OF THE EXCLUSION CLAUSE
What is important is whether, properly construed, the clause is wide enough to cover the breach complained of. This will depend upon the intention of the parties and the natural and ordinary meaning of the clause. Only if there is ambiguity in the interpretation of the clause will an exclusion clause be construed against the person relying on the clause (i.e. contra proferentem) (Darlington Futures Ltd v Delco Australia P/L (1986) 161 CLR 500). However, it may be that the ‘deviation’ cases are also an example of the application of the contra proferentem rule; for instance, deviation by a carrier from the journey contemplated by the contract (Thomas National Transport P/L v May & Baker P/L (1966) 115 CLR 353).