THE CONTENTS OF A CONTRACT

The contents of a contract depend primarily on the words used by the parties in entering into the contract: these make up its express terms. A contract may, in addition, contain terms which are not expressly stated, but which are implied, either because the parties so intended, or by operation of law, or by custom or usage.

SECTION I. EXPRESS TERMS

Where a contract is made orally, the ascertainment of its terms raises in the first place the pure question of fact: what did the parties say? Once this has been determined, a further question can arise as to the meaning of the words used. In answering this question, the court applies the objective test of agreement. Under that test, a party cannot enforce the contract in the sense which he gave to the words, if that sense differs from the one which the other party reasonably gave to them. Further problems of ascertaining or proving express terms can arise where the contract is, or appears to have been, reduced to writing.

1. Joinder of Documents

(1) Incorporation by express reference

The terms of a contract may be contained in more than one document. One of these may expressly refer to another, e.g. where a contract is made subject to standard terms settled by a trade association. Those terms are then incorporated by reference into the contract; if there are several editions of the standard terms, the contract is prima facie taken to refer to the most recent edition. It may also incorporate amendments validly made by the association.

The parties may purport to incorporate one document in another by express reference, not realising that the terms of the two documents conflict. In Adamastos Shipping Co v Anglo-Saxon Petroleum Co clause 1 of a charterparty provides: "This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the United States 1936, which shall be deemed to be incorporated herein. ..." The object of this clause was to reduce the shipowner's duty to provide a seaworthy ship from the absolute duty existing at common law to that of due diligence imposed by the Act. But s.5 of the Act stated that its provisions "shall not be applicable to charterparties. ..." Two difficulties arose out of this contract. First, the parties had described their contract as "this bill of lading" when it was a charterparty; but, as this was a simple mistake, it was held that the phrase
could be taken to mean "this charterparty." Secondly, the parties had apparently provided that the charterparty was to take effect subject to an Act which expressly provided that it did not apply to charterparties. The House of Lords could have held the whole contract meaningless, or rejected clause 1 of the charterparty, or rejected s.5 of the United States Act. The House chose the last course, and so gave effect to the intention of the parties that there should be a contract under which the shipowner was only bound to use due diligence to provide a seaworthy ship. The case is a good illustration of the anxiety of the courts to make sense, if possible, of loosely and sometimes carelessly drafted commercial documents.

(2) No express reference

A contract may be contained in several documents even though one does not expressly refer to the other. Suppose, for example, that a series of dealings takes place under a "master contract", a separate document being executed each time an individual contract is made. All these contracts may be subject to the master contract, even though they do not refer to it. Similarly, a policy of insurance can be read together with the rules of the mutual insurance society which had issued it, although the policy does not expressly refer to the rules; and a contract to purchase securities may be held to incorporate the terms of a prospectus on the faith of which they were bought. Such incorporation without express reference appears to depend on the intention of the parties, determined in accordance with the objective test of agreement.

2. The Parol Evidence Rule

(1) Statement of the rule

The parol evidence rule states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument. In relation to contracts, the rule means that, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e. on evidence not contained in the document. Although the rule is generally stated as applying to parol evidence, it applies just as much to other forms of extrinsic evidence. Of course, if a contractual document incorporates another document by reference, evidence of the second document is admissible, but the rule prevents a party from relying on evidence that is extrinsic to both documents.

There are obvious grounds of convenience for the application of the parol evidence rule to contracts: certainty is promoted by holding that parties who have reduced a contract to writing should be bound by the writing and by the writing alone. On the other hand, the parol evidence rule will commonly be invoked where a dispute arises after the time of contracting as to what was actually said at that time; and in such cases

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one of the parties could feel aggrieved if evidence on the point were excluded merely because the disputed term was not set out in the contractual document. Evidence extrinsic to the document is therefore admitted in a number of situations (to be discussed below) which fall outside the scope of the rule.

1 See above, pp.1, 8.
3 Smith v South Wales Switchgear Ltd [1978] 1 W.L.R. 165.
6 Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1972] 2 Q.B. 711.
8 For difficulties relating to joinder where contracts have to be evidenced in writing, see above, p.185
9 Jacobs v Batavia & General Plantations Trust Ltd [1924] 1 Ch. 287; affirmed [1924] 2 Ch. 329: another possible explanation of the case is that there was a collateral contract; below, p.199.
10 Jacobs v Batavia & General Plantations Trust Ltd [1924] 1 Ch. 287 at 295; Rabin v Gerson Berger Association
14 Contrast AIB Group plc v Martin, above at [4] with ibid. at [44] on the question whether this was the position in that case.

Referring Principles:

IV.5.5 - Falsa demonstratio rule