

# The parole evidence rule



One of the most essential common law rules on contract cases is the parol evidence rule. Parol Evidence Rule is a rule that has an extraneous evidence which is a verbal or written agreement that is not included in a significant black and white document. Besides that, it also preserves the reliability of written agreements by providing parties from trying to amend the meaning of the written document through the use of previous and concurrent verbal or written proclaimed that are not quoted in the document. Hence, the court will not accept any verbal evidence which would add or oppose the terms of the written document if the contract is entirely in writing. As in case *Henderson v Arthur*, the defendant's disagreement was that he had tendered such a bill of exchange in payment of the rent sued for, that the plaintiff had wrongfully refused to take it and that, as consequence, the plaintiff had no cause of action. The plaintiff argued that evidence of the antecedent agreement was not permitted. The justification to this rule is to avoid fraud. The purpose of this essay is to justify Parol Evidence Rule and converse on how collateral contract is used in proceedings by parties during pre-contract negotiations.

There are several exceptions emerged due to the rigidity of the Parol Evidence Rule. The first exception is proving that the written agreement is not the whole contract. The spoken evidence of other verbal term might be allowed if agreement which is written does not have all of the conditions approved by the parties. Most people try to escape from this rule whereby it consists partly two components in the contract which is written and spoken. For example, case *Van Den Eschert v Chappell*, Ms Chappell, the purchaser has asked Van Den Eschert, the tender for an assurance that the

house was termites' infestation free prior to signing the contract. The vendor then replied affirmatively and confirmed that the dwelling was free from infestation. Therefore, the purchaser signed that the agreement and brought over the house. Ms Chappell soon found out that the dwelling she bought was termites infested and decided to bring action against the vendor for the eradication cost and cost of repairing the house. Van Den Esshert then appealed to defend himself by introducing Parol Evidence Rule whereby pointing out that the agreement never state any questioning on the termites. As the judge, Wolf CJ said that Van Der Esshert undertaking did not form part of the transaction because it was a term of contract which he has breached. The court held that Ms Chappell could only claim for the eradication cost of the termites and not a rescission of the contract. Although it is hard to justify when there is an inaccuracy recorded in the written contract. The court will most probably question both parties, why they signed the contract without making changes if there is a mistake in the agreement. For example, the case of *Nemeth v Bayswater Road Pty Ltd* shows how one party might intend to unjustly inconvenience another party. For instance, the complainant was not successful to charge the defendant for additional hire charges because of the oral agreement that was made before writing it into the contract. The contract has written all the agreement's terms and other alleged 'term or contract' evidence was not allowed.

Next, the second exception is to show some trade usage or custom as part of the agreement. Assumption may be invalidated by evidence to the dissimilarity as when there is matter involving an assumption that the parties intended their agreement to be subjected to the alleged custom or trade

usage. The Parol Evidence Rule is not allowed to be used for excluding trade usage or custom of external evidence. According to Baron Parke, this exception to the rule was confirmed in the case of *Hutton v Warren*. The landlord had given the plaintiff, who is a tenant to the farm. There was a local custom whereby if he quit leasing, the landlord will give allowance to the tenant for seed and labour cost, notwithstanding the absence of any such provision in the lease. The court held the tenant won the case. The landlord has to pay a refund to him whereby a contractual right to get back justice. Secondly, the trade or custom usage relied upon must be clearly stated. For example, the case of *Smith v Wilson*, there was actually "1200 rabbits" in the evidence but a local custom stated mistakenly "1000 rabbits".

The third exception on the Parol Rule Evidence is contracts suspended by oral agreement. The oral evidence may be given to verify that the process of the contract as established in the written document is to be suspended until the happening of a certain event which has not as yet transpired. This exception is illustrated in the case of *Pym v Campbell*. Pym has written an agreement with Campbell for sharing royalties from an invention. The latter was then sought to adduce oral evidence whereby establishing that there is an oral agreement existed between the parties when the agreement is written contract would not be referred upon approval of a third party to the invention. The other engineer did not approve the agreement and therefore they are not bound. Pym has given an argument that the agreement was enforceable and there is no adduction on oral evidence. According to Lord Campbell CJ, the court held that Campbell is allowed to adduce the oral evidence as the submission of such evidence because it was a Parol

Evidence Rule exception. Therefore, Campbell was permitted to repudiate the contract which is written.

Besides that, invalid contract is also one of the exceptions of the Parol Evidence Rule. It has given the validity of the contract because the proof is not as to the contents of the contract. The innocent party can avoid or enforce the contract when fraud occurs. One of the elements to establish fraud is a falsification of a material fact must occur. It can be in form of terms or exploits. Nevertheless, opinions cannot be subjected to claim of fraud where it is subjected to debate. Therefore, it is admissible for seller to “huff and puff his or her wares” without being accuse for fraud. Other than that, innocent party may seek rescission or reformation on relying on an expert’s opinion. Secondly, there must be intention to cheat. As knowledge on misrepresenting party’s part that facts have been misrepresented, or also known as scienter, indicates that there was an intention to cheat. Thirdly, the blameless party must fairly depend on the falsification. If the blameless party knows the exact fact then reliance is not justified. For example in one case, an employee has just got his new job working as a brokerage firm. He has relying on assurances on the firm which was not about to be sold. He later able to sue the firm for fraud because negotiations of selling the firm were happening at moment he was hired. The court decides that he would be awarded for damages as a decision that was made on appeal.

The fifth exception of Parol Evidence Rule is where there are some clerical or typographic error has been made in minimizing the writing agreement.

Therefore, oral evidence will be allowed to rectify such mistake. For instance, external evidence is inadmissible but also compulsory to show there was an

agreement before and the court may rectify the mistake. Unconscionable behaviour is illustrated in the case of *Bacchus Marsh Concentrated Milk Co Ltd v Joseph Nathan & Co Ltd*, the rectification will be allowed to when it is evidently showed that word have been falsely left out or put into that the contract does not show what are intended to write by both the parties. In addition, Isaacs J added (at 427) that the rectification's aim is to improve the contract to agree with what the parties actually intended and for the other party to know the first intention. In order to take an endeavor on other party's unjust advantage is shown in the case of *MacDonald v Shinko Australia Pty Ltd*. Both parties have a contract to purchase and sell a home unit which was located on the proposed building on the northern side but the units were located on the southern side. The vendor seek changes of the agreement to suit the first intention of both parties ' continuing common intention' to purchase and sell the southern facing unit. The purchasers wanted their money back and argued that parol evidence rule of that alleged ' continuing common intention' could not be used to show there was a mistake in the agreement. The court held that in spite of Parol Evidence Rule, the modified solution operates outside of the contract. Hence, other evidence could be used to prove that the designated floor plan unit was not intended to purchase or sell by the parties. Thus, Parol Evidence Rule has to be relied on the rectification of the agreement.

The sixth exception to Parol Evidence Rule is to clarify any ambiguity or uncertainty. This exception applies where written contract's language is ambiguous. *Akot Pty Ltd v Rathmines Investments Pty Ltd* established the precedent that both parties has agreed to purchase and sell " unit 115" on

the proposed apartment building's fifth floor but the agreement did not notify them by number which has attached to the floor plan showing five units. However, both parties had agreed as shown on the brochure which the purchasers gave with support of affidavit evidence that the agent went with when he chose it. The court held that the subject of the contract was able to identify with the brochure and affidavit evidence.

Apart from that, the seventh exception is to give confirmation to clarify the individuality of the parties. McHugh JA stated that the rule in the contract has no application when the issue happened is whether he or she is individual suing or a party is being sued. As in the case *Giliberto v Kenny*, there are two sections in a written sale of land contract. Each individual section of the document has written one as ' Mr. Kenny' and the other part as ' Mrs. Kenny'. Surprisingly, the document was signed by Mrs. Kenny and a matter before the court was whether evidence was allowed to indicate that when she signed, her action had been for herself and as agent for her spouse. The court held that its proof was admissible.

The final exception is Collateral Contract which is to justify that verbal promise was made. It is determined the fact that the parties have reduced one contract to writing does not prevent the existence of a second contract which is in the form of verbal. Therefore, evidence may be given of an independent oral contract, the consideration for which was entry to main contract which is not subject to the Parol Evidence Rule. As case in *City & Westminster Properties v Mudd*, The defendant, who had been a the premises' tenant had stayed at the shop for six years, When the lease fell for renewal, the plaintiffs inserted a section for use of the premises to be for

<https://assignbuster.com/the-parol-evidence-rule/>

business purposes only. The defendant asked if he could sleep there, he was then told that he was allowed and he signed the contract. Even though this assurance is opposing the contract, evidence of it was held allowable to prove a collateral contract which the tenant could appeal in answer to a demand for breach of contract.

Collateral Contract is possible to be shown in two contracts individually which prove that the parties are linked although altering or adding is not allowed to be a term in Parol Evidence Rule of a written contract. A collateral contract is an agreement which is independent from the main agreement whereby the consideration for the main contract is to be made. Verbal promises made by parties before entering into the main contract which are not conditioned may have contractual effect as a preliminary contract on which the core contract is based. As shown in the case *De Lassalle v Guildford*, in respect of certain premises the parties had entered into a contract in writing. Guildford, the lessor gave assurance to De Lassalle also known as the lessee that the drains were in working condition. Guildford verbally gave such promise which later proved to be deceptive. When sued by De Lassalle, Guildford overcame the fact that there was no reference of the verbal assurance in the written contract signed by De Lassalle. The court held when assurance about the drain was given by Guildford, a collateral contract was formed. De Lassalle signed the contract through this matter. Lastly, the court awarded De Lassalle damages for breach of the collateral contracts. Next, the Collateral Contract must be coherent with the main contract. To prove this term, it is explained in the case *Hoyt's Pty Ltd v Spencer*. This is where the lessee, Spencer, sub-let the premises to Hoyt's Pty Ltd for four years under a



written sublease. This sublease includes upon ceasing the sublease, a four weeks notification should be given to Hoyts. Such notification was served on Hoyt's Pty Ltd prior to the validity of the four-year period whereupon Hoyt's Pty Ltd sued for breach of Collateral Contract. It was alleged that Spencer had given a verbal undertaking not to exercise his right to terminate the subtenancy unless he himself had been served with a similar notice by the head lessor and that this undertaking was a collateral contract. Knox CJ held that Hoyts' action failed. The "promise" in the alleged collateral contract and the convey words of the sublease were contradicting and they could not stand together. Consequently, the "promise" could not be imposed. Another argument for Collateral Contract is that the complainant only entered into the main contract on the basis of the collateral assurance made by the defendant. *JJ Savage and Sons Pty Ltd v Blakney* manifests that the complainant bought a motor cruiser from Savage where defendant recommended that a particular engine can meet Blakney's requirement. After Blakney bought the motor cruiser with that specific engine, he later sued for breach of collateral contract as found that it didn't actually reach that speed. Complainant said he wouldn't have bought it if the statement had not been made. Defendant appealed for lawsuit. High Court refused to infer such a contract, as at the time of the letter negotiations were still not complete. Therefore, Blakney could have either made the attainment of the speed a condition in the contract and ask the defendant to promise that the boat could reach such speed. He also had to make his own judgment based on the defendant's opinion. The court held that he failed as no collateral contract had made because only statement made as firm promises can provide rise to collateral contract.

As a conclusion, Parol Evidence Rule is to prevent contracting parties from unreliable terms of an unambiguous contract. Due to effectively abandon the rule, thus, creating uncertainty in contractual relationships, turning contract interpretation into a unsophisticated exercise that undermines expectations of certainty. Collateral contract is to insert an intention that the goods bought by the claimants should reflect the pre-contractual statements made as to their quality.