

Law of Contract B

IDENTIFYING EXPRESS TERMS
CONSTRUING EXPRESS TERMS
GAP FILLING – IMPLIED TERMS
FRUSTRATION
PERFORMANCE, BREACH AND TERMINATION
REMEDIES
MISTAKE
MISREPRESENTATION
MISLEADING & DECEPTIVE CONDUCT
DURESS
UNDUE INFLUENCE
UNCONSCIONABLE DEALING
RESCISSION
STATUTES

Express terms – Identifying the Express Terms

Written terms and the effect of signature

What bargain did the parties make?

Is the term sought to be incorporated included in the parties' contract?

General rule – when an individual **signs a document** – they are bound by it, immaterial whether they have read it or not. ([L'Estrange](#)).

This is unless there has been **fraud** or **misrepresentation** ([L'Estrange](#)), **duress**, **mistake**, other **vitiating elements** or claim for **statutory relief** ([Toll v Alphapharm](#)), or the document signed would **not reasonably be understood** to be contractual in nature ([Curtis v Chemical](#)).

Any behaviour by **words** or **conduct** is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption; it is irrelevant whether this misrepresentation is innocent or negligent. ([Curtis v Chemical](#))

Incorporation of terms by notice

Is the party aware of the term sought to be incorporated, or has reasonable notice been given?

The onus is on the **party seeking protection** of the clause, to prove it was a term of the contract – or to prove they did what was **reasonable**. ([Thornton](#))

A person will be taken to have accepted the terms if they **knew of the term**, or was **aware there were terms** at the time the contract was formed, ([Thornton](#))

A person will be taken to have accepted the terms if the other party has done **what was reasonable** in the circumstances to **give notice** of the term to the party ([Thornton](#)), but notice must be given **before** the contract was formed ([Oceanic Sun Line](#)), and the notice must **be reasonable** having regard to the type of contract and the nature of the term. ([Baltic Shipping](#))

Incorporation of terms by course of dealings

Has the term been regularly displayed or delivered over a course of dealing?

A party is bound where they **is aware**, or **ought to reasonably be aware** from their previous course of dealings that the other party only contracted on the basis of a particular term. ([Balmain New Ferry](#))

The course of dealings must be **regular** ([Henry Kendall](#)) and **uniform** ([McCutcheon](#)), and the document containing the term must have been **reasonably considered** or treated by the parties as a contractual document, and not as a mere receipt. ([Rinaldi](#))

The parole evidence rule

Is evidence of the pre-contractual statement admissible?

If the contract is wholly in writing, the parole evidence rule applies to prevent the admission of extrinsic evidence. The rule has three main exclusions: 1) **extrinsic evidence of prior negotiations**, 2) extrinsic evidence of the parties' actual **subjective intentions**, and 3) extrinsic evidence of **subsequent conduct** of parties.

Despite this, **extrinsic evidence is admissible** to determine whether the **contract is wholly in writing**, depending on the **authority** of the person making pre-contractual statements to actually make additions. ([SRA v Heath](#))

Exception #1: Is the contract part oral part written?

The PER has no application if the contract is not wholly in writing, e.g. if the contract is found in oral statements made as part of pre-contractual negotiations as well as in the written document. ([SRA v Heath](#)) *****SEE BELOW**