

# IDENTIFICATION OF EXPRESS TERMS

## METHOD 1: Express/written terms and signature

- The execution of a written agreement and such terms creates a presumption that the parties intend the documents to constitute the full terms of their agreement: *Equuscorp*
- In a contractual document, a signature is prima facie binding, whether read or understood: *L'Estrange; Toll*
- NOT binding: if the doc does not appear to be contractual (*Toll*), doc has another function (*Curtis*) or is vitiated (*Toll*)

*Curtis* - Cleaning of a wedding dress no liability – **misrepresentation**

- Wedding dress taken to be cleaned
- Customer told no damage to beading would be covered. Signed receipt.
- Assistant had misrepresented the breadth of the exemption clause in the document
- Receipt is not a contract

## METHOD 2: Incorporation of terms by notice

Whether or not the other party will be bound depends upon whether;

1. Timing - notice of the terms must be given at or before the contract was formed: *Oceanic Sun Line*; AND
  2. Knowledge/notice - reasonable steps must be taken to bring the terms to the notice of the party to be bound: *Thornton*
    - 'Must do all that is reasonable' to bring terms to the other party → not non-contractual docs/ticket cases
    - Proportionality for what is 'reasonable notice' – where more unusual clause, more effort required to bring to attention: *Baltic Shipping v Dillon* i.e.
      - Proportionality re reasonable notice
      - More than mere availability of brochure being the notice
- NB: The following considerations have been held to be relevant to determining whether a particular condition has been incorporated into the contract:
- Size of the print of condition not visible at time of purchase: *Thornton*
  - Availability of condition for review prior to entering the contract: *Thornton*
  - Prominence of the condition amongst other conditions: *Thornton*
  - Other conditions only available to passengers attending office personally: *Baltic Shipping*

*Oceanic Sun Line v Fay* - Greece exclusive jurisdiction cl → **timing**

- P made booking for a cruise. On payment he was given an "exchange order" which would be exchanged for a ticket on boarding the vessel. In Athens obtained ticket with a condition that the courts of Greece should have exclusive jurisdictions in any action against the owner.
- The High Court held that the contract for the cruise had been made when the cruise was booked in Syd and accordingly the conditions of the ticket issued later, when the passenger arrived in Greece, did not form a part of the contract.

*Thornton v Shoe Lane Parking* - Injured in parking lot → **reasonable notice**

- P parks in D's garage. At bottom of the sign out front showing charges read a statement "All cars parked at Owner's Risk."
- On the ticket read in small print "This ticket is issued subject to the conditions of use as displayed on the premises"
- Whether a ticket to the car park contained conditions which removed liability

*Baltic Shipping – sinking ship* → **unusual terms**

- Dillon bought a ticket for a cruise but when on board the ship sank and as a result the respondent suffered physical injury, nervous shock and the loss of all her belongings.
- The mere availability of the conditions at the company's office was not adequate notice of unusual terms, such as those significantly limiting the company's liability.
- Any terms that wish to be incorporated need to be **given before or while contract** is formed. Steps need to be reasonable and the burden is higher for unusual terms

## METHOD 3: incorporation by a course of dealings

A party's knowledge of a system/procedure upon which a contract is based from previous dealings means that terms which are implied from that procedure will be incorporated into future dealings with the same procedure: *Balmain Ferry*

- Course of dealings must be regular and uniform: *Balmain New Ferry*; AND
  - The court considered that, having traveled on many occasions on the company's ferries and paid his fare, Robertson must have known of the terms upon which the ferry company conducted its business.
- Term must arise from a document that is reasonably considered a contractual document: *Rinaldi*
  - Contract for transportation of a fishing vessel that was damaged during performance of the contract.
  - Agree on phone orally, cost worked out and entered by the appellant's driver in a book of "cart notes" which was then prepared in triplicate for signature by consignee. Usual course of dealings.

## METHOD 4: pre-contractual negotiations

X needs to establish the statement was promissory and thus a term of the contract – remedy for breach of contract.

- Promissory term → breach → damages