

CONTRACTS LAWS50029

INCORPORATION

Is the term incorporated into a signed and written document?

- YES – follow signature incorporation
- NO – follow incorporation by notice below (if any sign etc.) or if statements during negotiations go there.

INCORPORATION BY SIGNATURE: (*L'Estrange, Toll, Curtis*)

- Explanation of the importance of act of signature (*Toll*):
Concerned with the objective analysis, not the subjective mindset of the person. A reasonable person would understand the signature to be a signal of a desire to be bound and to intimate that the person has read the terms and wants to be bound or has not read them but willing to take the risk anyways.

1. **Is the term contained in a written document?**

- *Rule from L'Estrange:* When a person signs a contractual document she/he will be bound by the terms in that document regardless of whether he/she read or understood those terms; in the absence of vitiating factors (*Toll*).

2. **Is it a document of a kind that a reasonable person would understand to contain contractual terms?**

- The document must be such that a reasonable person would have understood the document to be contractual in nature (*Toll*).
 - *Curtis:* A reasonable person would not expect that the receipt contained contractual terms. But because there was an express statement by the shop attendant a reasonable person would have understood it to be contractual.
 - *Toll:* A reasonable person would have understood it to be contractual in nature. 'Application for Credit' included the statement 'please read 'eConditions of Contract' (overleaf) prior to signing'

3. **Is it signed?**

- If yes, then the term is incorporated unless there are any vitiating factors. (fraud, misrepresentation; *Toll*).

4. **Any vitiating factors? – at the time of formation.**

- *Misrepresentation:*
 - Scope for arguing this is narrow: The HCA itself suggested there would have to be an element of concealment (*Toll*).
- *Is there an unusual term in the signed contract?* HCA left open the possibility that the presence of an unusual term in a signed contractual document might amount to a misrepresentation so as to render those terms non-binding. (*Toll*) (careful)
- *Consider:* Circumstances in which a document is presented for signature, if such as to mislead the person signing as to the significance of that conduct, the contractual effect will be negated (*Toll*).
 - *Toll:* No misrepresentation, the express direction to read the conditions was influential 'please read the conditions of contract prior to signing'. The mere title 'Application for Credit on the front page not sufficient to misrepresent.
 - Other vitiating factors: Mistake, duress, misrepresentation, fraud – for which the contract can be set aside.
 - *Curtis:* Actual misrepresentation at time of formation. The employee misrepresented the nature of the exclusion clause, hence not incorporated into the contract. (only nature of one clause that was then invalid because of that)

Denning LJ suggested she would not have been bound even if she had not asked, because the receipt would not be understood as a contractual doc → can extend this to timesheet, receipt, voucher.

- Electronic 'signature': clicking I accept may be equivalent to signature but engage in analysis of if regarded as significant an action as 'signature'.

UNSIGNED DOCUMENTS – INCORPORATION BY NOTICE: (*Oceanic, Thornton*)

1. Is the notice reasonable?

Rule: The notice must be such as will fairly and reasonably bring the terms to the attention of the party to be bound. (*Thornton*)

- Are the terms onerous terms? If the terms are onerous and particularly if destructive of rights the offeror must draw attention to the terms in a very expressive way → special notice (Red hand) (*Thornton*). Different standards of notice for different terms may be required (*Thornton*).
- Is it a ticket-like situation? If so, then set out the conventional ticket analysis and consider if this is a situation like in *Oceanic* to depart from the conventional ticket analysis:
 - *MacRobertson*: (conventional ticket analysis) Issuing a ticket is an offer, and then the passenger accepts by either presenting for travel or after they have had a reasonable time to reject.
 - *Oceanic*: Practicality + Bound to issue ticket; Upon paying fare F gets 'exchange order' which stated it would be exchanged for a ticket on boarding the ship. The passenger has rights at the issuing of exchange order, they are contractually bound to issue the ticket. The conventional ticket analysis not suitable as not practical to get to Greece before you make the decision to bind yourself.
- Are the terms readily available? If not then generally, will not be sufficient notice. Reference to terms available elsewhere will not be sufficient.
 - *Thornton* – inside the parking lot. Not sufficient plus onerous to get to.
 - *Oceanic* – said further terms available at the office (was not true) but still a mere reference to conditions is not enough (if only in a brochure). They were hard to get to.
- Consider: text size, placement, visibility

- **Thornton:**

Notice: The conditions referred to in the exclusion clause on the ticket were inside the carpark. No reasonable notice as the contract formed before you could see the conditions.

Liability for human excluded but for the car there was a notice outside the carpark before contract formed and valid exclusion.

Contract formed: At the ticket machine. Offer was the machine was there, acceptance was putting money into the machine.

Ticket: No opportunity to reject the terms on the ticket as it is dispensed by a machine.

- **Oceanic:**

Contract: Formed when payment was exchanged.

Ticket: Departure from conventional ticket analysis because it is not suitable where dealing with a ticket that the party is contractually obliged to issue. (got exchange order for payment, this was to produce ticket at the time of getting on the ship)

2. Timing: Was the notice at the time of formation

Rule: Only terms that have been made available in a timely manner can be incorporated into the contract (*Oceanic*)

→ *Oceanic*: No. The exclusive jurisdiction clause was on the ticket received in exchange for the exchange order, long after formation that took place at time of getting the payment. Departed from conventional ticket analysis (*MacRobertson*).

→ *Thornton*: Contract formed upon receiving the ticket. No opportunity to reject so not incorporated. The conditions inside. (machine there otherwise it would be formed then but here → cannot reject to it: 'subject to conditions displayed on the premises' but could not see when received the ticket).

- ➔ Remember one party cannot add additional terms unilaterally once the contract has been formed.

STATEMENTS MADE DURING NEGOTIATIONS:

1. Identify what the pre-contractual statement is.

2. Is the pre-contractual statement promissory in nature? (JJ Savage, Oscar Chess)

Rules: Look to the language and if do not get much look to the nature of the parties (inference) (*JJ Savage; Oscar Chess*).

→Remember if untrue representation of fact can seek relief under estoppel, misleading or deceptive conduct (s237 ACL) or statutory remedy

→Inducement is not relevant here, do not look to that.

i) Look at the language in the document first (*Oscar Chess*)

- 'estimate' in *JJ Savage* not promissory.

ii) If that does not provide assistance can consider the nature of the parties →Relative expertise of the parties (*Oscar Chess*) – what reasonable bystander would consider → words, conduct and actions.

→*Oscar Chess v Williams: (car)*

- The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.

- Here W said it was a 1948 model, the same date in the book. The car sold many times, unlikely to guarantee the year. A reasonable bystander would not think of W's statement as a contractual promise. If W asked to guarantee the year he would be unlikely to. (considered the nature of W – not an expert in cars).

→*JJ Savage v Blackney: (boat)*

- 'estimate' the speed – not promissory, an assessment of information, treated as expression of an opinion.

- If B wanted the speed in the contract should have done so, could have insisted on insisted on it, collateral promise or content to form his own opinion → this is what he did.

- B could have other causes open: estoppel (problem with inducement), collateral contract (not promissory, plus inconsistency).

3. Can it be incorporated? (if promissory must be admissible)

Rule: Parole evidence rule → Promissory statements are generally inadmissible due to the parole evidence rule that prevents extrinsic evidence from being given which would subtract, add to, vary or contradict the language of a wholly written contract. (Codelfa per Mason J).

There are however ways to get around parole evidence rule:

- i) Partly written, partly oral
- ii) Collateral contract
- iii) Estoppel
- iv) Misleading or deceptive conduct
- v) Rectification

i) Partly written, partly oral:

Why the parole evidence rule does not apply: The parole evidence rule only applies where a contract is wholly in writing. If it is partly written, partly oral, extrinsic evidence can be admitted.

- Threshold issue: Can look to extrinsic evidence on the threshold issue of deciding whether a contract is wholly written or not (*SRA v Heath Outdoor*).

- **Entire agreement clauses:** Usually will mean the contract wholly in writing but can potentially be set aside if the clause is unfair under ACL.
 - *Branir* (Federal Court only): Entire agreement clause, read down to exclude only common law not equitable actions (look to estoppel)
 - *SRA v Heath Outdoor* (NSW): No entire agreement clause, look at the whole document. Wholly in writing because of conversation with the representative, take it or leave it basis.
- **Detail/Comprehensiveness of contract:** Comprehensive and detailed contract indicated wholly written contract. (Manning Motel)
 - *Manning Motels*: No entire agreement clause but very detailed, indicating wholly in writing.
- **Acknowledge Equuscorp** (HCA, 2004): The modern HCA favour the finality of written agreements. If there is a written agreement it displaces previous verbal agreements. → not a hard and fast rule - factual
 - (→ go to other avenues because uncertainty here)
- **DO NOT FORGET:** if the extrinsic evidence is admitted how does it affect the contract. (like in *SRA* admitted but it showed that wholly in writing).
 - *SRA v Heath Outdoor*: (*cigarette advertising*)
 - Statement promissory enough (the only time the clause is invoked is for non-payment of rent, representative assures Heath that it will not apply to him; clause stays in the written doc)
 - No entire agreement clause so have to look at the whole document.
 - McHugh follows approach that can look at extrinsic evidence when deciding if wholly written. Looks to the conversation and because representative says he cannot change the clause, it is a take it or leave it contract a reasonable bystander would think the contract was wholly in writing.
 - Allowed the extrinsic evidence in to consider if wholly written – then decide it is wholly written.
 - *Equuscorp*:
 - Pre-contractual agreement had been reached (alleged) but the written agreement wipes out the verbal agreement made prior to the written one.
 - HCA stresses the finality of a written agreement.

ii) Collateral contracts:

Why parol evidence rule does not apply: The parol evidence rule does not apply because a collateral contract is a separate contract to the main contract and it does not add to, vary or contradict the main contract.

Collateral contract: Separate and supplementary promise given in consideration for executing the main contract (*Hoys v Spencer*).

Rule: For a statement to give rise to a collateral contract, the statement must:

1. **Be made as a promise** (*JJ Savage*)
 2. **Be intended to induce entry into the contract** (*JJ Savage*)
 3. **Be consistent with the terms of the main contract** (*Hoyt's Spencer*)
 - Cannot impinge on it, or alter its provisions or the rights created by it (*Hoyts* per Isaacs J)
 - *Hoyts*: Inconsistency here is a direct clash. Have 4 years or have a month when I tell you.
 - But argue that even just qualifying a term is in some way inconsistent with the obligations undertaken under contract.
- **Timing:** It must be made at or prior to formation, otherwise not inducing entry.

Hoyt's v Spencer: (lease, alleged promise not to give notice to quit)

- Statement was promissory. Intended to induce entry into the main contract.
- To the extent that evidence is let in via the collateral contract, if inconsistent, will go with the main contract.
- Have inconsistency here – direct clash: collateral says have 4 years, main says have a month when I give notice.

- **Special situation – Collateral contract with third party**

- ➔ The consistency requirement is relaxed. (The rule in Hoyt's v Spencer is for when it is the two parties to the main contract. This is based on the logic that the consistency is essential as it is the same people agreeing and if inconsistent it undercuts the consideration.)

Rule: When a third party is involved there is no consideration issue as when only 2 parties involved.

Hence the promise will be enforceable unless there is a direct and fundamental inconsistency

(collateral says do X and main says not allowed to do X). (Manning Motels)

➔ acknowledge that it is only NSW SC and that they did not directly deal with the collateral contract being inconsistent. (it was not in direct clash there)

Manning Motels: relaxes the consistency requirement and shows that the owner is a separate entity from what he/she owns.

iii) **Estoppel:**

What about parol evidence rule: There are contradictory lower court decisions as to the relationship of estoppel and the parol evidence rule. (acknowledge the uncertainty)

- *Norco* view (NSW)- conservative (finality of contract is crucial)
- *Saleh* view- less conservative, enforcement of pre-contractual estoppel is not barred by the rule on Hoyt's v Spencer. (Branir follows this)

- **Test:** A party has been induced to enter a contract in detrimental reliance on a representation. Detriment is entry into an agreement which negates the representation relied upon (Branir per Allsop J)
- **Entire agreement clauses:** Some courts read the entire agreement clause down so as to not exclude estoppel.
- *Branir:* The Court read the entire agreement clause down, the clause was held to mean that no more contractual arguments but does not mean the court cannot entertain an equitable course. (obiter). An entire agreement clause may prevent bringing an estoppel claim but did not here.
- *Manning Motel:* No estoppel as nothing unconscionable here, only a breach of a contractual promise. (\$4000 in referrals)

iv) **Misleading or Deceptive Conduct**

- Can get around the parol evidence rule because it would potentially render the contract as not on foot.
- **Timing:** The alleged misleading or deceptive conduct must occur prior or at formation. The bad behaviour cannot happen later.
- *Manning Motels:*
- Lindsay J fed up with seeing essentially contractual claims dressed up as misleading or deceptive conduct.
- The wrong occurred when the decision was made not to carry out the promise (\$400 referral) not when they made the statement so not misleading or deceptive.

v) **Rectification**

Parol evidence rule does not operate.