

TERMS

INCORPORATION

YES SIGNATURE

L'Estrange (vending machine//signature) // Toll (vaccine//signature objectivity) // Curtis (dresser//misrepresentation)

Toll → Signature enables **third parties** to assume the legal efficacy of the instrument and are an objective means of communicating an intention to be bound.

RULE: A party who signs a contractual document is normally bound by the terms set out therein; it is 'wholly immaterial' whether they have read the document or have knowledge of its contents. (*L'Estrange*)

Reading the document

Toll → Not a search for uncommunicated subject motives/intentions

No need to read: *L'Estrange (Scrutton LJ)* she only read the price, installation guide

Font size: *L'Estrange* → the font size was small but it didn't matter.

Was it likely/known to have objectively contained contractual terms?

This question turns on whether a reasonable reader of a signed document would believe the ____ contain contractual terms affecting legal relations.

L'Estrange → Intention for it to contain terms more clearly evinced if it was a deed. It was a 'brown paper document (informal)' but still constituted a contract in writing.

- **Commercial context:** **Toll** → general business of applications for credit should normally contain general terms
+ **Presence and reference to TCs** → presupposes that it will be contractual in nature
- **Obiter Commercial transaction:** *L'Estrange* → cases where contract in a railway tick or other **unsigned document**, it is necessary to prove the alleged party was aware or ought to have been aware of the TCs.
- **Memorandum:** **Toll** → signature is invalid if it was a memorandum instead of a contract
- **Competition (obiter)** **Toll** → when entering into a competition, unlikely to be contractual. (esp. when rushed, heading is conveying something else, nko charge for entry, no contract for entry)
- **'Receipt':** *Curtis* → 'contract' was headed 'receipt'. **Obiter** → commonly understood to be just a receipt, voucher and NOT to contain conditions exempting liability. Questionable whether the 'receipt' would have been binding if the liability was not limited, Court infers that it would not have been valid anyway.

What was the nature and quality of the signature? (Placement in regards to terms, size, document type, title of the document)

An issue arises over the nature and quality of the signature provided by ____.

- **Separate document:** *L'Estrange* → doesn't have to a signature on the actual doc, can be on an independent that expresses consent
- **TCs on the back:** **Toll** → terms on the back of the contract and statement 'please read TC's prior to signing' → valid
- **Not rushed:** **Toll** → The party was not rushed or tricked into signing the document. Finemores had no way of knowing whether he had read it.
- **Request to read:** **Toll** → Signature conveys a stronger intention to form legal relations if it is below a perfectly legible written request to read the document before signing → this is sufficient notice

Vitiating Factors: Has there been misrepresentation / fraud ?

General Rule (Curtis) Sufficient Misrepresentation: '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.*

- **Shop assistant misrepresented the extent of the exclusion**, thereby limiting the nature of the TC.
- knowledge of misrepresentation = irrelevant
- said the risks only related to damage from beads and sequins

L'Estrange → In the absence of misrepresentation, the signer is bound despite having not read the entirety of the contract
Toll → Mistake about identity and misrepresentation will cancel out signature.

No Signature — Incorporation of additional terms

Oceanic Sun Line (cruise//insufficient notice) // *Shoe Lane (car parking//rejection ability and sufficient notice)*

L'estrage (Scrutton LJ) only in the absence of a signature is it necessary to prove that the alleged party was aware of the Terms and Conditions.

Timing: When was the term 'incorporated'?

The term to be incorporated must be given before the contract is made (*Oceanic*). Ask which incidence is the actual contracting

In *Oceanic Sun Line*, the time of the original contract was when the money was exchanged for the 'exchange order' → when there is consideration. The ticket with terms was given later → adding to invalidity.

- Insufficiency of opportunity for passenger to read and agree to terms.
- To reject is to forfeit the payment for the fare and travel to the ship.
- reasonable person would have seen the *booking* as being contractually binding.

Thornton v Shoe Lane Parking

- **Inability to reject:** Customer in that position can't get their money back. They pay (acceptance) for the ticket, is completed before they read TCs on the ticket. It's a machine where you can't give it back.

Was there sufficient/reasonable notice at the time of contract? (objective signs, time to consider, ability to reject terms) + Knowledge

Oceanic (rule → Brennan J): In a contract not expected to contain contractual terms, where one party is unaware, the other party attempting to incorporate additional terms must do all that is necessary to bring the clause to the passenger's attention. (If it objectively known to be contractual, mere presentation = sufficient notice)

Party will be bound by delivered or displayed terms as long as they are sufficiently brought to the person's notice beforehand. (*Thornton*)

In *Oceanic*:

- Mere statement in the Brochure is not enough notice.
- Those mentioned on the exchange order were too vague

In *Thornton Parking*:

- vague terms next to the ticket box (they referred to the terms displayed on the premises)
- The terms on the premises were inconveniently placed and certainly not explicit to validly incorporate the terms, the reasonable customer would likely miss the sign

Was there a right to introduce new conditions?

Oceanic → given no right to introduce new conditions by printing them on the ticket and the terms were already full agreed upon as the final conditions → complete agreement. Can't thrust something new on them.

Unusual/Onerous Terms

The Courts suggests that where terms to be incorporated are unusual, special notice — such as will fairly and reasonably bring the terms to the attention of the party to be bound — must be given. (*Baltic Shipping*)

Were the statements made during negotiations promissory?

Oscar Chess (car dates//clear language warranty) // *JJ Savage (boat speed//estimation not promissory)*

1) Linguistic analysis: Does the language itself convey promissory words?

Oscar Chess (car date)

- language can resolve the problem is the words 'guarantee', 'promise'...etc. → promissory language is used
- 'I expect', 'I believe', qualification will make it difficult to establish promissory statements
- There was just a non-committal statement: 'I believe it is a 1948 Morris'

JJ Savage (boat)

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TERMINATION

Krell v Henry, // Brisbane CC v Group Projects; // Beaton v McDivitt, // Taylor v Caldwell, // Codelfa Constructions

Frustration

Remember that frustration is only activated if there has been formation and the event occurs **after**

General rule: *Codelfa* → Frustration occurs whenever the law recognises that, **without default** of either party, a contractual obligation has become **incapable of being performed because the event has rendered performance radically different** from that which was undertaken by the contract.

1 Without Default

Taylor → **Hall burning down** was not the fault of the parties. 'neither of whom contemplated the occurrence of the destructive event'

Codelfa → the injunction on the **workable hours** was done by the government and out of the control of either party. They had been acting on the lawyers' advice who said that it was 'reasonably foreseeable' that **an injunction** would not occur.

Krell → the **postponing of the procession** was from an outside event.

2 Not foreseeable

Taylor → fire was unforeseeable.

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3 Radically different

Destruction of the subject matter *Taylor v Caldwell*

➤ Where performance depends on the continued existence of a thing or person...a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance

Disappearance of the basis of the contract: see *Krell*

Change in state of affairs necessary to permit the contract to be **performed** in the manner contemplated by the parties: see *Codelfa Constructions*

- Not impossible, they could still complete the construction agreement. Only the costs would increase.
- The clause's imply that *Codelfa* could work in an unrestricted manner. The injunction forced a fundamental difference in the situation contemplated and specified in the agreement: their work schedule and ability to complete performance had altered.

Fibrosa → advent of war → could not deliver the machinery, there were no transfer of consideration. Amounts already paid may be refundable under a 'money had and received' claim where there is a 'total failure of consideration'

Event not provided for in contract

Taylor → what would happen in the event of a fire was not expressly provided for. There was 'no express or implied stipulation with reference to the possibility of a disaster'

Codelfa → There was a specification that the builders would be able to get more time, but there was nothing concerning additionally remuneration for the extended period of work. This did not adequately address *Codelfa's* concerns*

UNILATERAL Mistake

Common law relief

Common Law — Snapping up Cases

The common law may provide relief for unilateral mistake whereby the non-mistaken party is aware of the mistake and the mistake was as to a fundamental term. Pursuant to *Hartog*, where the plaintiff could not reasonably have supposed that the offer contained the offeror's real intention, the common law protects the non-mistaken party, upholding the objective basis of the contract. Per *Digiland*, this objective bar is relaxed in circumstances where one person is aware of the error.

This then turns on the question of whether a reasonable person would have known a mistake had occurred.

Upon the balance of the facts, it is clear that *X party* was aware of the unilateral mistake, thus allowing *Y party* the prima facie relief as the objective requirements holding the contract intact are diminished. However, though there is scope for the common law to effectively address unilateral mistake, these cases were not decided in the Australia jurisdiction meaning the Courts are not obliged to adopt these approaches — indeed, *Taylor* held that equitable relief more appropriate, despite relative factual similarities. Thus, this lack of certainty necessitates a consideration of equitable relief.

Common Law — Non Est Factum

The principle of *non est factum* allows persons under a disability which affects their comprehension of a signed document to escape any contractual liability given they radically misunderstood the effect of the contract (*Petelin*).

Analogous to *Petelin* who was illiterate to the extent that his understanding of the agreement was severely impinged, *X Party* hasdisability.

The majority identified several factors in *Petelin* necessary to satisfy non est factum:

Carelessness

First, failure to read and understand the document must not be the result of carelessness on the part of the mistaken party. The Court qualifies 'carelessness' as 'failure to take reasonable precautions in ascertaining' the document's character before signing. *Analogise*.

However, the importance of this factor was superseded by other facts in *Petelin*. Thus, *X party's* carelessness may not influence the Court's decision of a non est factum finding.

Radically Different

Secondly, owing to this misunderstanding, *Petelin* signed the document with the belief that it was radically different from what it was in fact — he thought it was a receipt as opposed to another contractually binding option contract.

Was the belief inspired by an representation?

Finally, this question turns on whether *X party's* mistaken belief was inspired by any representations made by *Y party* before signing. In *Petelin*, *Petelin's* mistaken belief that the financial option was a receipt was 'inspired by ...representations...that the document acknowledged...payment' merely. Analogous to this,

One further analogy between *Petelin* and the current facts can be drawn:

-Analogue these facts-