Identifying the Express Terms

-Express terms may be:

- Incorporated into the parties' contract:

➢ **Incorporation by signature**

- When a document containing contractual terms is signed the party signing it is bound to the terms within, regardless of whether they have read the document or not (L'Estrange). This is in the absence of fraud or misrepresentation (L'Estrange), but also mistake (e.g. non est factum) or other vitiating elements (Toll). It doesn't matter how unusual or onerous the terms are (Toll).
- Where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms and it is immaterial whether they read the document or not (Toll).
- The signature acts as an objective indicator that there has been assent to the contractual terms provided therein (L'Estrange). It acts as "irrefragable evidence of his assent to the whole contract" unless the vitiating factors apply (Curtis).
- An order form is deemed a contractual document (L'Estrange).
- The document signed must be reasonably understood to be contractual in nature (Curtis). For example, the "receipt" paper was insufficient in Curtis, even if there wasn't misrepresentation- something needed to have been said.

➢ **Incorporation by notice**

- Occurs when:

1) P knew of the term(s) or had actual knowledge that there were terms at the time the contract was formed (Thornton). OR
2) D had taken reasonable steps in the circumstances to give notice of the term to the party to be bound (P- Thornton).

- **i) Timing-** Notice must be given before the contract was formed (Oceanic Sun Line Special Shipping. **Hint: Say when the contract was formed**- In Oceanic- "ticket containing conditions of carriage is ordinarily treated as an offer by the carrier to carry on those conditions, no contract coming into existence until the offer is accepted by the passenger" (i.e. typical ticket case). In Thornton, normal egs include ticket as offer and if customer retained it w/out objection it was acceptance. Cannot be "insufficiency of opportunity"- (contract in Oceanic formed when exchange order was issued and reasonable steps were not taken so clause not incorporated). Thornton contract happened when he drove up to the entrance and had the ticket thrust at him by movement of his car.
- **ii) Reasonable notice-** Notice must be reasonable having regard to the type of contract having regard to the type of contract and nature of the term (Thornton, Oceanic). Cannot rely on clause unless "at the time of contract…[one seeking to incorp terms] had done all that was reasonably necessary to bring the exemption [or other additions] to the passenger's notice" (Oceanic Shipping).
- For reasonable notice, reasonable steps will differ, especially if the clause is an "unusual one" (Oceanic Shipping). Regardless, they are bound if they know the

contract/ticket is issued subject to it [exempting clause] or what was reasonably sufficient to give notice was done (Thornton).

- Where terms are unusual (e.g. so destructive of rights) special notice must be given- "most explicit way"- red hand w/ ink pointing to it (Thornton), terms such as those significantly exempting company liability (Baltic Shipping), others were limitations for damages w/ liability in non-dollar sums- "unusual provisions" (Kirby P).
- Typically, notice of terms being in another document or location not immediately or readily available to the customer isn't reasonable notice (Baltic Shipping, Thornton).
- Where delivered or displayed terms are not contained in what is obviously a contractual document, the party seeking to incorporate the terms must take reasonable steps to bring those terms to the notice of the party to be bound (Causer v Brown). (e.g. shop docket or voucher).

➢ **Incorporation by course of dealings (e.g. works even when delivery of document containing terms after the contract is formed)**

- By continuing to deal with the party seeking to impose the term, the other party may be taken to have evinced acceptance of and readiness to be bound by the term (Hardwick Game Farm). Did other party know or ought reasonably to have known from prev course of dealings the other party only contracted on the basis of a particular term (Rinaldi). "over a period of time been conducting business…should be held that on the occasion in question they contracted upon that basis" (Rinaldi).
- i) Course of dealing must be regular (Henry Kendall- needs to occur enough over the time period. In Henry Kendall, 3/4 contracts per month over 3yr period was sufficient, but in Hollier v Rambler Motors (AMC) 3/4 contracts over 5yrs insufficient).
- ii) Course of dealing must be uniform (McCutcheon-i.e. be sufficiently consistent over the dealings- note if the same things were done each time).
- iii) Document relied on must reasonably be considered contractual in nature and not a mere receipt, docket or cart notes (Rinaldi).

- Found in statements made by the parties during their pre-contractual negotiations:

1) Is evidence of the pre-contractual statement/s admissible?

Parol evidence rule- With wholly written contracts, prevents extrinsic evidence being given to add to, vary or contradict the terms of the contract as they appear in the document. ("add to or subtract from, or in any manner to vary or qualify the written contract"- Goss v Lord Nugent).

However, the lenient approach in SRA and Masterton Homes provides that extrinsic evidence is admissible to determine whether the contract is actually in writing (i.e. whether the parol evidence rule applies to it). However the strict/traditional approach is that where a document appears on its face to be a complete record it will be taken to be a contract in writing and have the rule apply (Thorne).

Exceptions to the PER rule

- **Contract not wholly in writing** (i.e. part oral/part written or wholly oral)

- The rule "has no operation until it is first determined that the terms of the agreement are wholly contained in writing" (SRA). In SRA, McHugh JA says if it appears on its face to be a written document, it merely provides an "evidentiary foundation for a conclusion that their agreement is wholly in writing".
- Determination (Masterton Homes): 1) Document on its face appears to be a complete contract, provides evidentiary basis for inferring that the document contains the whole of the express contractual terms that bind the parties. 2) Despite this, it is open for a party to prove the parties have agreed orally on additional terms not in the writing. 3) PER has no application until first determined contract wholly in writing and extrinsic evidence of surrounding circs can be used to show this (SRA). 4) The terms of a part oral/part written contract terms are ascertained from "the whole of the circumstances as a matter of fact".

- **Collateral contract**

Def: One party makes a promise, connected to but independent of a main contract, and as consideration for that promise, the other party agrees to enter into the main contract (Shepperd v Muncipality of Ryde). Often seems to be a 'side promise' (Shepperd- are rare as the promises alleged often would be expected to be found in the main contract- promises such as to give a park as well, promise drains of a house are in good condition).

Reqs:

i) The collateral statement must be promissory and must be intended to induce entry into the contract (JJ Savage & Sons- note what promissory is).

ii) Collateral statement cannot contradict or be inconsistent with the terms of the main contract (Hoyts)

- A collateral contract does not alter "the contractual relations which are established by the main contract…cannot impinge on it, or alter its provisions or the rights created by it" (Hoyts). (E.g. Main contract said termination of lease by lessor as long as 4 weeks notice given, collat contract proposed to give notice only in certain circumstances- this was inconsistent and invalid as a collat contract.

iii) Entry into the main contract must be given in response to and exchange for the collateral promise (Australian Woollen Mills).

>Estoppel

- Differing views as to whether this is available (more recent case Saleh says yes from 2010, Australian Co-operative Foods from 1999 said no). Saleh- Estoppel allowed b/c it is enforced as an equitable restraint on the exercise or enforcement of the promisor's rights. Aust Co-op Foods- not available b/c evidence used in estbing estoppel "extensive, discursive and inconclusive" and very wasteful of resources.

- Elements:

1) Assumption (the relying party adopts an assumption as to a particular legal relationship that would eventuate (equitable)/ that had eventuated (CL)- clear and unambiguous- not just "find a way" (Mobil).

2) Inducement (through express representations or conduct of representor)

Reasonable: Is the assumption reasonable?

3) Detrimental reliance (the relying party has changed their position to their detriment in reliance on the assumption)

Detriment: Judged at time representor seeks to resile from assumed state of affairs (Je Maintiendrai)

- Is the detriment material, substantial or significant (Mobil)?

4) Unconscionable- It would be unconscionable for the representor to resile from the assumed state of affairs (see circumstances- knowledge and intention to induce- Verwayen).

2) Is the pre-contractual statement "promissory"?

- Is the pre-contractual statement "promissory" or just mere puff (Carlill), a representation (non promissory statement inducing entry- Oscar Chess) or a term (promissory statement with contractual force)?
- Intention of the parties can only be ascertained from the totality of the evidence. Whether a term was promissory rests on "the conduct of the parties, on their words and behaviour, rather than on their thoughts". If an intelligent bystander in the circumstances of the parties would infer it was meant as a promise that is sufficient (Oscar Chess). Consider precise words used (E.g. "I guarantee" is stronger than "I believe" which would be insufficient and likely a mere representation- expressions are opinion not enough).
- Considerations: Relevant expertise of the parties (Dick Bentley)- statement made by someone w/ experience to someone inexperienced more likely promissory (E.g. "dealer…in a position to know or at least to fine out"). Whether parties recorded their agreement in writing (Equuscorp), precise language used by parties (JJ Savage), importance of statement to transaction assessed objectively (Oscar Chess), time elapsed betw/ making statement and entry into contract (Oscar Chess).
-Rights and obligations turn on what their words and conduct would be reasonably understood to convey, regardless of subjective intentions (Equuscorp) or a party's "secret thoughts" (Hospital Products). With a loan agreement, each party is bound unless they can rely on the defence of non est factum or have it rectified (i.e. fixes agreement when terms weren't properly incorporated into the agreement).
- Oral agreements are sometimes disputable so courts will generally favour holding their parties to the written agreement (Equuscorp).
- Carefully considered actual words used by the promisor (E.g. "estimated speed 15 mph" was only an expression of opinion consider the dictionary meaning of the word 'estimate'-