WEEK 8: **Express Terms**

Incorporation

1. Signature

When a document known to contain contractual terms is signed, then the party signing is bound (*Toll v Alpharpharm*, *L'Estrange v Graucob*)

It is immaterial whether he has read the document or not (*Toll v Alpharpharm*)

Non-binding if:

a) If terms are mispresented, or some other vitiating factor (*Toll*)
   a. (*Curtis v Chemical Cleaning,*)

b) Document is not reasonably recognisable as a contractual document
   a. (*Nalder & Biddle v C & F Fishing*)

c) Valid claim of *non est factum*

2. Notice

For terms to be incorporated by notice, a party must either:

a) Know of the terms; or

b) Be given reasonable notice of the terms (*Thornton v Shoe Lane Parking*)

   a. Document must be **contractual** in nature
      i. (*Chapleton v Barry Urban*)

   b. Notice must be given **prior to contracting**
      i. (*Thornton v Shoe Lane Parking*)
      ii. (*Oceanic Shipping v Fay*)
      iii. (*Baltic Shipping v Dillon*)

   c. Attention must be brought to **unusual or onerous** terms. Including: exclusion of liability clauses (*Spurling*), exclusive jurisdiction clauses (*Oceanic*) and holding fees (*Interfoto*)
      i. (*Spurling Ltd v Bradshaw*)

3. Course of Dealing

If dealing is long, consistent, and frequent, the terms may have been said to have been incorporated by dealing (*Kendall v Lillico*)

It is not an 'essential pre-condition' that terms were validly incorporated into any prior contract (*La Rosa v Hudrill*)

Integration

For a pre-contractual statement to be contractually enforceable, the following conditions must be satisfied:

1. The statement must amount to a **warranty**, not a mere representation. A warranty requires that:

    a. The statement must be **promissory** in nature (*Savage v Blakney*)

    b. An **objective test** must be applied, i.e. would a reasonable person conclude that an assumption of contractual obligation was intended (*Oscar Chess v Williams*)

        i. Must not be a statement of belief (*Oscar Chess v Williams*)
        ii. Must not be one's opinion (*Ross v Allis Charmers*)
        iii. Must be asked, if so important, why was the alleged warranty not included in the final contract? (*Shepperd v Ryde*)

        iv. Along with the above, the following considerations are influential in determining whether the statement is a warranty:

            a. Importance of the statement
            b. Expertise of the promiser
            c. Did the statement induce the plaintiff into contract?
            d. Was there reliance by the plaintiff?
            e. Can the content of the term be formulated precisely?

2. If a warranty is proven, it must either:

    a. Form part of the **main contract**

        i. **Parol Rule**:
            1. If the contract is fully integrated (wholly in writing), no evidence "may be adduced to subtract from, add to, vary, or contradict the language" of the contract
                a. (*Codelfa v State Rail*)
                b. (*State Railway v Heath*, *Couchman v Hill*, *Evans v Merzario*)

        ii. **Entire Agreement Clause**:
            1. Shows the intention of the parties that the document contains all terms; however, its effectiveness is not always certain in cases of
                a. Fraud and / or misrepresentation
                b. Operation of an implied term;
                    i. (*Hart v MacDonald*)
                c. Proof of a collateral contract;
                    i. (*McMahon v National Foods*)
                d. Informal variations on the contract
                    i. (*Commonwealth v Crothall Hospital Services*)
                e. Promissory estoppel
                    i. (*Franklins v Metcash Trading, Saleh v Romanous*)

    b. Form part of a **collateral contract**

        i. Consideration for the collateral contract (which contains the pre-contractual promise made) is the entering into of the main contract
            1. (*Van Den Eschert v Chappell*)
        ii. Collateral contract may **add** terms to main contract

iii. However, if in direct conflict with main contract, the parol evidence rule applies and collateral contract cannot impinge or alter main agreement
    1. (*Hoyts v Spencer*)
    2. Criticised, but the HC declined to overrule in *Crown Melbourne v Cosmopolitan Hotel*