

## ***Week 1 & 2 – Express Terms***

Disputes arise over the terms of a contract

Five matters to consider when attempting to resolve disputes:

1. Identify the express terms agreed by the parties
2. The terms must be construed to determine their meaning and legal effect (whether

the terms apply)

3. Consider the admissibility of extrinsic evidence (parol evidence rule)
4. If the express terms are silent on an issue, it must be determined if silence is

intentional or whether there is a gap

5. Consider the effect of the statute on the party's contractual rights and obligations

### *Objective Approach*

The aim of the courts is to give effect to the “presumed intentions” of the parties

References to intention usually means “the intention which reasonable persons would have had if placed in the same situation of the parties”

### **What are express terms?**

- Terms which are an explicit declaration of a particular promise in the contract itself
- These terms must be oral or written
- This contrasts with implied terms where no declaration has been made

They may be:

1. Incorporated into the parties' contract
  - By a party signing a written document
  - By notice – displaying or delivering a written document to the other party - By a course of dealing between the parties
2. Found in statements made by the parties during their pre contractual negotiation
3. Combination of the above

### **Terms and the communications of the parties**

Terms = those proposed by the offeror and accepted by the offeree

Challenge = where there has been a lengthy negotiation process and a formal contract has not been written and signed

## Written terms and the effect of signature

### *Rule in L'Estrange v Graucob*

General rule – a person who signs a contractual document will be bound by the terms in that document, regardless of whether he or she has read and understood those terms (*L'Estrange*) and no matter whether the terms are unusual or onerous (*Toll v Alphapharm*)  
The act of signing a document is seen as a willingness to be bound by those terms

### *L'Estrange v Graucob Ltd [1934] 2 KB 394*

#### *Facts*

Ms L'Estrange purchased a cigarette vending machine from F Graucob Ltd. Ms L'Estrange signed a "Sales Agreement" which contained the terms of sale. When the machine was delivered, it didn't work satisfactorily. She brought action for damages for breach of an implied warranty that the machine was reasonably fit for purposes for which it was required. There was a clause in the sales agreement which stated that any express or implied condition, statement or warranty not stated is excluded, which the defendant relied upon

#### *Judgment*

The trial judge had relied upon the ticket cases to argue that notice had to be given of the terms of the document (here the exclusion clause). However, this is not a ticket case and the law applicable is not the same. Here the document involved is signed. When the document is signed it is immaterial that a party has not read it and does not know its contents. He is bound unless there has been fraud or misrepresentation. As there was no fraud or misrepresentation here the Plaintiff was bound by the exclusion clause.

### *Toll (FGCT) v Alphapharm Pty Ltd [2004] HCA 52*

#### *Facts*

Toll entered into a contract with Richard Thomson (acting for Alphapharm) to store and transport goods being imported for Alphapharm. It was alleged Finemores performed this contract negligently, causing loss to Alphapharm. Finemores sought to escape liability by relying upon an exclusion clause in the contract with Richard Thomson

Issue: must the defendant do what is reasonably necessary to give notice to unusual terms

#### *Held*

When signing a document, you are making a representation that you have read and understand the contents of the terms contained in the contract and that there was no reason to depart from the general rule. As a result, the terms and conditions formed part of the contract for the storage of goods

"the general rule... a person who signs a document which is known by that person to contain contractual terms... is bound by those terms, and it is immaterial that the person has not read the document"

**“to sign a document known and intended to have legal relations... conveys a representation... that the person who signs has read and approved the terms or is willing to take the chance to be bound by those contents”**

**Circumstances in which the effect of signature may be avoided** (where signature won't presumptively apply to bind parties)

### *1. Misrepresentation*

General rule won't apply where the contents of the document signed have been misrepresented, where the plea of non est factum would apply or where there are equitable grounds for setting aside the contract

*Non est factum* is a plea that a written agreement is invalid because the defendant was mistaken about its character when signing it.

Term in question is not binding on the parties

There must be some element of concealment

#### ***Curtis v Chemical Cleaning & Dyeing Co [1951] 1 KB 805***

##### ***Facts***

**Curtis took a white satin wedding dress to the defendant for cleaning. The shop assistant gave Curtis a paper headed “receipt” to sign. Curtis asked why her signature was required and was told it was because the defendant wouldn't accept liability for certain specified risks, including the risk of damage to the beads and sequins. Curtis signed the receipt.**

**The paper contained a term excluding the defendant from liability for any damage “howsoever arising”. When the dress was returned there was a stain on it. Curtis claimed damages.**

##### ***Held***

**The English Court of Appeal held that the defendant couldn't rely on the exemption clause to exclude liability as the shop assistant misrepresented the breadth of the exemption clause**

### *2. Non-contractual documents*

The rule won't apply where the document in question could not reasonably be considered a contractual document e.g. a timesheet/receipt/voucher

#### **Criticisms of the rule**

The rule takes the objective fact of a party's signature as indicating his or her acceptance of the terms in the signed document, without considering whether the party understood the terms

Everyday people may not have the skills necessary to understand all terms of a contract - may be difficult to read or contain unfamiliar legal concepts

#### **Incorporation of terms by notice**

A business that doesn't rely on signed contracts in its dealings may attempt to incorporate the terms it wants to govern the transaction through the device of notice. Adequate notice before the contract is made makes those terms binding even though no document has been signed.

Whether terms are to be incorporated into a contract depends on two issues:

1. Whether the displayed or delivered terms were made available to the party to be bound before the contract was formed (*Thornton v Shoe Lane Parking*)
2. Whether reasonable steps were taken to bring those terms to the notice of the party to be bound (*Thornton*)