



SCAFFOLD: CONTRACTS B

Semester 2 2017



Contents

<u>IDENTIFYING THE EXPRESS TERMS</u>	<u>3</u>
<u>STATEMENTS MADE DURING NEGOTIATIONS</u>	<u>5</u>
<u>CONSTRUING/CONSTRUCTING THE TERMS</u>	<u>7</u>
<u>GAP FILLING: IMPLIED TERMS</u>	<u>9</u>
<u>GAP FILLING: FRUSTRATION</u>	<u>11</u>
<u>PERFORMANCE AND BREACH: TERMINATION</u>	<u>12</u>
<u>TERMINATION CONT. & REMEDIES FOR BREACH OF CONTRACT</u>	<u>16</u>
<u>DAMAGES AND LIMITATIONS</u>	<u>20</u>
<u>VITIATING FACTORS: MISTAKE</u>	<u>23</u>
<u>VITIATING FACTORS: MISREPRESENTATION</u>	<u>26</u>
<u>VITIATING FACTORS: ABUSE OF POWER</u>	<u>32</u>
<u>RELIEF: RESCISSION</u>	<u>36</u>

Identifying the express terms

- Express term is an explicit declaration of a particular promise in the contract itself
- Must be oral or written

1. Incorporation of terms

- One party argues that terms set out in written form are part of the contract because the other party has accepted those terms

Terms can be incorporated by: (a) Signature

- General rule is that a party will be bound by all the terms set out in a contractual document if they have signed it regardless of whether they have read or understood the document or not (**L'Estrange v Graucob**)
- Signing a contractual document is generally seen in law as representing a willingness to be bound to the terms contained in the document – doesn't matter if they are unusual or onerous (Toll v Alphapharm)

Unless there has been...

- Fraud or misrepresentation (**L'Estrange v Graucob**)
 - Any behavior, 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 terms (Curtis v Chemical cleaning and Dyeing)
 - A false misrepresentation is enough: either created knowingly, fraudulently, unwittingly or innocently (Curtis v Chemical cleaning and Dyeing)
 - The presence of unusual terms in a signed contractual document might amount to a misrepresentation (Toll v Alphapharm)
- Non contractual documents (Curtis v Chemical Cleaning and Dyeing) (Rinaldi and Patroni)
 - General signature rules only applies where a person signs a 'contractual document' (document known to contain terms and intended to affect legal relations)
 - Document signed would not reasonably understood to be contractual in character
 - EG receipt given in (Curtis v Chemical Cleaning and Dyeing)

Terms can be incorporated by: (b) Notice

- The effect of displaying terms on a sign/notice or delivering them on a standard form/ticket/invoice/order form or similar
- P will be taken to have accepted those terms:
 - 1) Where P knew of the term(s) or was aware there were terms on the sign or ticket or form at the time the contract was formed (Thorton v Shoe Lane Parking) OR
 - 2) Where D has done what was reasonable in the circumstances to give notice of the term to P (Thorton v Shoe Lane Parking)

BUT:

- TIMING: notice must be given before the contract was formed (Thorton/Oceanic Sun Line)

- REASONABLE NOTICE: notice must be reasonable having regard to type of contract, and nature of term (Thorton/Oceanic/Baltic)
- There is a greater amount of notice needed for terms that are onerous or unusual (Baltic)

Terms can be incorporated by: (c) Course of dealing

- Test is whether the other party knew or ought reasonably have known from their previous course of dealing that the other party only contracted on the basis of a particular term (Balmain New Ferry v Robertson)
 - Course of dealings needs to be regular and uniform (previous occurrences) (Balmain New Ferry)
 - Document containing the term sought must have been reasonably considered or treated by the parties as a contractual document and not as a mere receipt (Rinaldi)

