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INCORPORATION OF TERMS

EXAM: For a party to enforce a term, it must have been incorporated as part of the agreement between the parties. This can be done through signature, notice or, in some cases, statements made during negotiations.

SIGNATURE

EXAM: A party who signs a contractual document is *prima facie* bound by the terms set out in that document, even if he or she has not read the document and has no knowledge of its contents (*L'Estrange* imported into Australian law by *Toll*). This is because the effect of signature at law is to evince assent to the terms contained within the document.

1. Was the term incorporated by signature?

- a. **RULE:** Parties are bound to the agreement if the document is signed, regardless of whether the terms have been read or understood, if the document was objectively known to contain contractual terms and there are not vitiating factors at the formation stage (*L'Estrange*, endorsed by the HCA in *Toll v Alphapharm*).
 - i. **Unusual Term?**

RULE: While the disputed term ___ may seem unusual, there is no requirement to bring notice to such terms (*Toll*). The signing party was able to abstain from signing until he understood it (*L'Estrange*), but in this case chose to sign without reading.
 - ii. **Note:** In international jurisdictions, there is debate as to whether reasonable notice is required for such stringent and onerous terms (*Tilden Rent-A-Car*). However, this is not considered law in Australia so the argument may be difficult to raise in the High Court
- b. **Has the document been signed?**
 - i. On the facts, we can objectively conclude that the document was/was not signed

CIRCUMVENTING SIGNATURE: *Can the effect of the signature be avoided?*

EXAM: The *L'Estrange* rule will not apply where the party signing the contract has been misled, where the plea of *non est factum* applies or where there are equitable grounds for setting aside the contract. The underlying rationale behind these exceptions is that the circumstances above negative the signing party's consent to the contract.

(a) I would advise X that because ____ the document may not be considered objectively contractual and therefore the *L'Estrange* rule may be avoided (*Toll*)

(b) I would advise X that because ____ they may run the argument that they have contracted on the basis of fraud/misrepresentation by Y. This will have the effect of rendering their assent ineffective (*Curtis*).

There are a number of circumstances in which the signature will not presumptively bind parties to a written document

a. Is the document objectively contractual?

RULE: *The rule in L'Estrange does not apply where the document could not reasonably be considered contractual (Toll)*

NB → Do not take into account the subjective beliefs of the parties (*Toll*)

- ii. Industry standard (*Toll*): is this type of contract usually considered to have contractual terms?
- iii. Document title/reasonable expectation
 1. A document headed 'Sales Agreement' evinces its contractual nature (*Toll*)
 2. A 'receipt' will generally not be contractual (*Curtis*)
 - a. However, if it is orally reinforced as such by the worker, it may be (*Curtis*)

- b. 'By failing to draw attention to the width of the exclusion clause, the assistant created the false impression that the exemption only applied narrowly' (Curtis)

b. **Was there misrepresentation?**

- i. **RULE:** When a signature to a condition of a contract, purporting to exempt liability, is obtained as a result of misrepresentation (innocent or otherwise) the party making the representation is disentitled from relying on the exemption (Curtis)
- ii. **RULE:** Where one party has been misled about the nature or extent of the terms, the rule in L'Estrange does not apply and the term will not bind the parties (Curtis)
- iii. The innocent party didn't mean to make the misrepresentation, does this matter?
 1. **RULE:** Per Denning LJ in Curtis, the intentions of the party making the misrepresentation are irrelevant. There is no distinction between innocent or deliberate misrepresentation. (Curtis)

FACT ANALOGIES – SIGNATURE.

L'Estrange: L buys cigarette machine from Graucob. Signs 'Sales Agreement' form. Machine unsatisfactory. L sues for breach of (statutory) implied warrant. G relied on clause in the agreement excluding implied warranted. L claimed not to have read them. There was no evidence of fraud or misrepresentation, the form was a contractual doc, therefore cl valid.

Toll v Alphapharm: A is vaccine sub-distributor. RT< acting for A, engages Toll to transport and store vaccine. RT signs 'application for credit' including statement 'please read conditions of contract (overleaf)'. Conditions indemnified F from liability for loss to RT or others. RT did not read the conditions. F negligent holds the drug at incorrect temp & A suffers huge loss. L'Estrange upheld. Signature binds party to terms, even if not read.

Curtis: C takes white satin dress to dry cleaner. Shop assistant presents C with a 'receipt'. Asks C to sign. "Receipt" contains an exclusion clause-exempting dry cleaner from 'certain specified risks...howsoever arising'. C signs. Dress returned with stain. Court held dry cleaner had misrepresented extent and effect of clause, so term not incorporated.

NOTICE

EXAM: Terms appearing on unsigned documents may be incorporated into the contract only if reasonable notice was given to X. This requires an analysis of when notice was given and whether the X had knowledge of these terms. Y must do all that was reasonably necessary to bring the term to X's notice (Thornton).

1. **Did Y provide notice to X before the contract was formed?**

EXAM: For delivered or displayed terms to be incorporated into a contract, and to therefore be binding, the terms must be made available *before* contract formation (**Oceanic**)

- a. **RULE:** The timing requirement depends on whether the terms were available for X to consider prior to formation. In Oceanic, the alleged terms on the ticket were issued after the contract was made and the exchange order issued. As such, the terms on the ticket were not incorporated into the contract. Notice provided after formation cannot add terms (Oceanic)
- b. **Practicality:** it must also be practicable for X to gain knowledge of the terms. Here, X could/could not have easily found out the terms by __, this is analogous/distinguishable from Oceanic (going to Greece!)
- c. Not enough reasonable notice to say that a client can go to their office to see the terms (Oceanic)

2. **Did X have knowledge or proper notice of the term?**

- a. **RULE:** a party who knows that a document or sign displayed before formation contains contractual terms will be bound by those terms (Parker).
- b. **Is the document objectively contractual?**
 - i. **RULE:** If the contract is one that a reasonable person in the circumstances would expect to contain the terms of a contract, the mere presentation of the document will be sufficient notice of the terms in the document.
- c. **Is the document not objectively contractual?**
 - i. **RULE:** There must be reasonable or actual notice for a term to be incorporated without signature. The requirement of reasonable notice depends on the factual circumstances of the case.
- d. If there is merely reference to another document which contains the terms, this is insufficient (Toll)
- e. *Is the clause peculiar?*
 - i. Note Brennan J's dicta in Oceanic. Brennan J stated that the peculiarity of the clause may increase the level of notice necessary.

3. Did X have an opportunity to accept or reject the terms?

EXAM: A party will be bound by delivered or displayed terms if the terms have been made available in such a form that the party to be bound can be taken to have been given reasonable notice of them... and has a reasonable opportunity to accept or reject the terms (*Thornton*)

- a. In Thornton, Sir Gordon Wilmer stated that the ticket was dispensed from an automatic machine, meaning the customer had no chance to refuse.
- b. In Oceanic, Brennan J held that the customer did not have an opportunity to accept or reject the terms as they were supplied upon receipt of the ticket. The customer in this case purchased an 'exchange order' and exchanged this for a ticket upon boarding, meaning they did not have an opportunity to reject the terms.

4. Are the terms onerous?

- a. **RULE:** If the terms are particularly onerous, more may be required for a court to consider the requirement of reasonable notice satisfied (Thornton)
- b. An onerous term here may be an unusual term, one which is destructive of rights. In these circumstances, there must be explicit attention drawn to the term (Thornton)
 - i. In Thornton, Denning LJ held that the extreme breadth of the exemption clause meant that the requirement for reasonable notice had not been met.

PRE-CONTRACTUAL STATEMENT

ISSUE: Can the verbal statement that was made prior to contract formation, but is not reflected in the written contract, be incorporated into the written contract?

EXAM: If the agreement has not been reduced to writing, or the term at issue has not been reduced to writing, the Court may incorporate the term if it is a sufficiently promissory term which carried an intention to be legally bound (JJ Savage). A court will objectively infer this by considering extrinsic evidence. Therefore evidence must be admissible through a circumvention of the Parole Evidence Rule.

SUB-ISSUE ONE: Is the statement promissory?

RULE: A statement is a contractual promise, rather than a mere representation, when the parties objectively intended it to be contractually binding (Oscar Chess). To determine if this is so, the court will ask whether an intelligent bystander would reasonably infer that the promise was intended to be binding (Oscar)

1. To determine the nature of the statement the courts will consider:

- a. Language: The language of the statement
 - i. If the language suggests a promise, such as 'I guarantee', the statement is likely to be construed as being promissory in its nature (Promissory: I guarantee, I warrant, I assure; non-promissory: I believe, estimate)
 - ii. However, it is difficult to ascertain its nature through form alone, so further considerations of the wider circumstances is required
 - iii. Oscar: O must show that W's statement was a term of the contract, court held that Williams was merely relying on the log book. He isn't promising it is a 1948.
 - b. Facts: Broader circumstances
 - i. Look the relative expertise of the parties. A statement made by the more knowledgeable party is more likely to be promissory (Oscar). Per JJ Savage, this is not always the case, but it adds to the inference of promise.
 1. Party with known inexperience: less likely to be promissory (Oscar: W had not seen registration books and thus had knowledge of the truth; the other party knew this)
 - c. The importance of the statement
 - i. If the statement goes to the commercial root of the contract, it will likely be promissory
 1. Not enough if it is fundamental (Oscar)
 - ii. However, the fact that such a term was not included in the contract may weaken the inference
 - d. Ability to contract
 - i. In *JJ Savage* the Court said that Blakney could have done one of three things: (1) required the speed provision to be incorporated as a term in the contract (2) sought a promise that the speed would be attained = a collateral contract (3) form his own judgment = the statement would not have been contractual (this is what happened).
 - ii. Note: evidence demonstrating the nature of pre-formation promises must be admissible under the PER
2. The effect of this analysis is that the statement is a mere representation of fact. There is no contractual obligation, so X cannot seek remedies for a 'breach' (Oscar). However, X could be provided relief through equitable or statutory doctrines.

SUB-ISSUE TWO: Does the PER exclude evidence of term including X?

EXAM: Generally, the Parol Evidence Rule functions to exclude evidence including direct statements of intention and pre-contractual negotiations that would subtract from, add to, vary or contradict the language of the written contract (Codelfa). Thus, even if the statement is promissory, it may be excluded by operation of the PER.

General Exceptions to the PER

1. Contracts partly in writing and partly oral (State Rail, Equusorp)
2. Collateral Contracts (JJ Savage, Hoyts)
3. Estoppel (Saleh v Romanous)

4. Rectification

Circumvention of PER: Part oral, part written contract?

1. Is the contract wholly in writing?

- a. The PER only applies to exclude evidence where the contract is wholly in writing (SRA). To argue that Term A is part of the contract, X would argue that the contract was partly written and partly oral.

2. Strict approach

- a. Primacy is given to the written contract. No extrinsic evidence is able to be admitted to add, vary or contradict the terms of the written contract (Hoyt's)

3. Flexible approach

- a. PER has no application until it is determined that the parties intended the written document to contain all the terms of their contract. Therefore, *extrinsic evidence will be admitted to establish* whether the document in question was intended to be an exclusive record of the contract and whether the parties intended the written document to be supplemented or varied by the promissory statements made during negotiations or other extrinsic material (SRA).
- b. While the HCA has not provided authority as to whether a strict or flexible approach to the PER is preferred, appellate State courts have evinced a preference to a flexible approach. Under the rule in Farrah Constructions, this is to be followed unless considered plainly wrong.

4. Factors of consideration

- a. Completeness of the written document
 - i. This acts as an evidentiary foundation for a conclusion that the agreement is wholly in writing (Heath)
- b. Consistency with the written terms
 - i. Courts will be unlikely to include oral evidence that would alter the terms of the written agreement (Equuscorp; SRA). To the extent of any inconsistency, the written contract trumps the oral term.

Circumvention of PER: Collateral Contract?

EXAM: Extrinsic evidence of pre-contractual statement is admitted if relied on to establish that before executing the contract, the parties made a collateral contract. This consists of promises given by one party prior to, and in consideration of, the other party's entry into the head contract.

1. What is the conduct?

- a. The additional promise may be one adding further benefit, or a promise not to enforce a term

2. For a statement to give rise to a collateral contract, it must

- a. Be made as a **promise** in exchange for entry into the main contract (have sufficiently promissory language)
 - i. Representations may result in a CC if they are intended to be binding (Crown v Cosmopolitan Hotel)
- b. Be **intended** to induce entry into the main contract (JJ Savage)
 - i. In JJ Savage, a promise was **not** sought from JJ that the boat would attain the speed as a prerequisite for ordering the boat, so no collateral contract
- c. Be **consistent** with the terms of the head contract
 - i. Can't alter the obligations or rights of the contract (Hoyt's)
 - ii. The collateral contract be able to stand with dependence on the head contract

- d. *Person making the collateral contract must be authorised to do so (Heath Outdoor [smoking])*

3. Is the statement consistent with the terms of the head contract?

- a. A collateral contract will stand only if it supplements the original promise, not substituting or contradicting it (Hoyt's). It cannot be inconsistent with the terms of the head contract.
- b. Inconsistency is equated with unenforceability, the contracts must be able to stand together

Circumvention of PER: Is X enforceable by way of estoppel?

EXAM: The PER may be circumvented through detrimental reliance on pre-contractual statements. However, the impact of estoppel on the construction of contracts is yet to be fully determined by a binding authority. The effect of promissory estoppel here is to include a term, ensure a term won't be enforced, or that the relying party can terminate the contract.

1. What is the nature of the representation?

- a. It must be clear, use precise and unambiguous language:
 - i. Crown: in Crown Melbourne, Cosmopolitan Hotel was unable to make out an estoppel claim as the representation made by Crown that Cosmopolitan would be 'looked after' at the time for renewal of the lease was vague and ambiguous and could thus not be reasonably relied upon.
 - ii. Saleh: Estoppel cannot be used as a cause of action.
- b. Clarity depends on their intended audience
- c. Words must be capable of misleading a reasonable person
- d. Was the assumption acted upon?
- e. Can *detrimental* reliance be established?

2. Use of extrinsic materials

- a. When attempting to establish an estoppel, the PER does not prevent extrinsic materials from being examined (Saleh).
- b. It will also trump an entire agreement clause in a contract. **** SEE BELOW**

Circumvention of PER: Does the agreement contain an entire agreement clause?

Issue __

EXAM: Entire agreement clauses are typically drafted in an attempt to invoke the PER and exclude claims (such as for misrepresentation) that would generally not be by the PER.

- 1. **RULE:** Entire agreement clauses have traditionally raised an equity on behalf of the drafting party. This equity operates to estop the relying party from claiming the benefit of an estoppel which might have otherwise arisen from the pre-contractual negotiations.
 - a. **However**, following the NSWCA decision in Saleh, the effect of entire agreement clauses in relation to PER has been questioned.
 - i. **RULE:** In Saleh, the court held that "equity would not permit an entire agreement clause to stultify the operation of its doctrines". In other words, equity trumps the common law; and a transaction that is ostensibly unfair will not be upheld by a court merely due to the inclusion of an entire agreement clause by the parties.
 - b. **SUB-CONCLUSION:** The Saleh approach has now received the weight of authority. As such I would X it would be followed.

- i. Saleh: Romanous and Saleh entered a contract for the sale of land on the assumption that Saleh's brother Edmond would participate in the joint venture. *Prior* to formation, Saleh said to Romanous "I'm taking responsibility for Eddie. If he doesn't want to build you'll get your money back." Eddie pulled out. Romanous attempted to terminate the contract and sought to recover the deposit. NSWCA held that estoppel could only operate defensively, but awarded him the recovery of the deposit under Statute (*Conveyancing Act 1919* NSW).

2. Look at Crown Melbourne case for establishing the elements of estoppel

Circumvention of PER: Is the contract subject to a condition precedent?

EXAM: Extrinsic evidence will be admitted for the purpose of establishing that a written contract is subject to a contingent condition that must be satisfied before the contract will become effective.

NB – Extrinsic evidence may also be admitted to show that the parties did not intend to make a binding contract