

# **CONTRACTS EXAM NOTES**

**2019 SEMESTER TWO**

# Topic 1: Incorporation

## Incorporation by signature

### *L'Estrange v Graucob (1934)*

A party who signs a document known (objectively) to contain contractual terms is, in the absence of fraud or misrepresentation, bound by the terms set out in that document, even if he or she has not read the document and has no knowledge of their contents.

#### 1. Signed document

- The representation made by signature is that the person who signs has either read and approved the contents, or is willing to take the chance of being bound by those contents (*Toll*)
- The representation is even strong where the signature appears below a perfectly legible written request to read the document before signing it (*Toll*)

#### 2. Reasonable person would understand the document to contain contractual terms

- Document titled 'Application for Credit' with the statement "Please read conditions of contract" indicates that it is a document that contains contractual terms (*Toll*)
- Contract titled 'Receipt' would not usually be considered contractual in nature (*Curtis*)

#### 3. No misrepresentation or fraud

- Any behaviour, 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 the exemption (*Curtis*)
- It is enough if it conveys a false impression; If the false impression is created knowingly, it is a fraudulent misrepresentation (*Curtis*)

## Incorporation by notice

#### 1. Actual knowledge or reasonable notice

- Reference in a brochure that the conditions were available elsewhere, which were not actually available, was not reasonable notice (*Brennan J in Oceanic*)
- Conditions displayed far elsewhere on the premise, and not practically accessible until the contract has been made, was not reasonable notice (*Denning L in Thornton*)
- **Notice for exemption clauses:**
  - Where an exemption clause is contained in a ticket intended to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless they had done all that was reasonably necessary to bring the exemption clause to the passenger's notice (*Oceanic*)
  - The more onerous or destructive of rights, the more effort is expected to raise the clause to the party's attention (*Obiter in Thornton*)

#### 2. Timing

- Terms to be incorporated must be given in notice before the contract was formed (*Oceanic, Thornton*)
- **When was the contract formed?**
  - Automated ticket machine meant that acceptance was made before receiving the ticket, which could not be rejected or returned after its issue (*Thornton*)
  - Departure from the conventional ticket analysis from *MacRobertson* (O = ticket; A = boarding) when the person had to travel overseas before receiving the ticket (*Oceanic*)

[Preview.....]

## Case overview

| Incorporation by signature                            |  |
|---|--|
| <i>L'Estrange v Graucob Ltd</i> [1934]                | <p><b>Held:</b> incorporated</p> <ul style="list-style-type: none"> <li>When a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not</li> </ul>   |
| <i>Toll v Alphapharm</i> [2004]                       | <p><b>Held:</b> incorporated</p> <ul style="list-style-type: none"> <li>1. Is the document signed? <ul style="list-style-type: none"> <li>No → was there reasonable notice given?</li> </ul> </li> <li>2. Would a reasonable person understand that the document contained contractual terms? <ul style="list-style-type: none"> <li>Need to ask exactly what facts led to the conclusion that there was a contract</li> </ul> </li> <li>3. Has there been a misrepresentation?</li> </ul>   |
| <i>Curtis v Chemical Cleaning &amp; Dyeing</i> [1951] | <p><b>Held:</b> not incorporated due to misrepresentation</p> <ul style="list-style-type: none"> <li>The heading 'Receipt' = usually not considered to be contractual in nature, but the assistant's statement gave notice to the customer that there were contractual terms on the receipt</li> <li>The signed contract, including the exemption clause, would have ordinarily protected the cleaners from liability, but because the statement was misrepresented the width of the exemption, it did not exempt the cleaners from liability in this case</li> </ul>  |
| Incorporation by notice                               |  |
| <i>Oceanic Sun Line Shipping Company v Fay</i> (1998) | <p><b>Held:</b> not incorporated due to insufficient notice</p> <ul style="list-style-type: none"> <li>Ordinary approach used for tickets is the <b>conventional ticket analysis</b> (<i>MacRobertson</i>) but this cannot be applied when the ticket is only issued at the time of boarding</li> <li>Where an <b>exemption clause</b> is contained in a ticket and the other party is not aware when the contract is made that an exemption clause exists, the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice</li> <li>A mere statement in a carrier's brochure that they operated according to terms available elsewhere was not considered 'reasonable notice'</li> </ul> |
| <i>Thornton v Shoe Lane Parking</i> [1971]            | <p><b>Held:</b> not incorporated due to insufficient notice</p> <ul style="list-style-type: none"> <li>The customer is not bound by the terms printed on the ticket if they differ from the notice, if the ticket comes after the contract has already been made.</li> <li>No reasonable notice where the customer is required to track down the terms inside the garage</li> <li>Obiter: In an exclusion clause, the more destructive of rights, the more you need to bring it to explicit attention to the other party.</li> </ul>   |
| Incorporation of pre-contractual statements           |  |
| <i>Oscar Chess v Williams</i> [1957]                  | <p><b>Held:</b> not incorporated due to statement not promissory</p> <ul style="list-style-type: none"> <li>The linguistic form of the statement will have a bearing on whether or not it should be regarded as promissory (Denning LJ) – "I promise you" or "I guarantee"</li> <li>Look at the relative expertise of the parties to determine if they were in the position to make a promise.</li> <li>Statements that are not in the form of a promise may contain implied promises.</li> <li>The importance of the term may be relevant in determining if it was a promise (Morris LJ dissenting; Denning LJ disagrees)</li> <li>Apply the <b>intelligent bystander test</b> – how would a reasonable person in that position interpret the statement?</li> </ul>   |
| <i>JJ Savage &amp; Sons v Blakney</i> (1970)          | <p><b>Held:</b> not incorporated due to statement not promissory</p> <ul style="list-style-type: none"> <li>The statement must be promissory and that must be established otherwise than showing that it induced entry into the contract</li> <li>An expression of opinion, "Estimated" is insufficient to incorporate the term</li> </ul>   |
| <i>SRA v Heath Outdoor</i> (1986)                     | <p><b>Held:</b> not incorporated due to being a wholly written contract</p> <ul style="list-style-type: none"> <li>All evidence can be admissible in determining whether the contract is partly or wholly written</li> <li>The mere production of a contractual document, however complete it may look, cannot exclude evidence of oral terms if the other party asserts that such terms were agreed</li> <li>Suggestions that there was no ability to alter the terms of the contract suggest that it was a wholly written contract</li> </ul>  |
| <i>Equuscorp v Glengallen</i> [2004]                  | <p><b>Held:</b> incorporated as the earlier oral agreement was superseded by the following written contract</p> <ul style="list-style-type: none"> <li>Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement</li> </ul>  |

[Preview...]