EXPRESS TERMS

- Express terms – expressly, excplicitly, consciously agreed upon by the parties – explicitly included in the contract
- Not all statements made in negotiations qualify as terms – 2 categories:
    1. Promissory statements: give rise to contractual oblig: express terms;
    2. Non-promissory: don't give rise to contractual obligations = representations
- Do these statements constitute terms of a contract? It's a matter of construction/interpretation
- Courts give effect to the true intention of the contracting parties
- Correctly classifying pre-contractual statements is essential as different remedies in each case:
    - Term – remedy for breach (damages, equitable remedies)
    - Collateral contract – remedy of breach of collateral contract (not always the same as breach of main contract)
    - Mere representation – no action for breach of contract; may be remedy for common law misreps or broader under ACL s 18

REPRESENTATION – a statement, or assertion made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it: Behn v Burness (1863) 122 ER 281, 282.

- Descriptive/representational – give info about subject matter
- Intended to induce but not made to be binding. No promissory intent
- Misrepresentation does NOT amount to breach. Rescission may be available for misrep
- Legal action is limited to actions in negligence/fraud/misleading/deceptive
- Sometimes might be important enough to become a term (eg. Give description of car – Ellul v Oakes)

TERM – usually specify what parties are to do in performance of contract

- Binding parts of contract indicating parties' obligations
- Breach of term may give right to termination and damages for breach

DIFFERENCE ^ - intention of the maker of the statement to guarantee its truth

- *Ellul & Ellul v Oakes* (1972) 3 SASR 377 – factors (not conclusive)
    1. Importance of the statement – more important = more likely term
    2. Time elapsed between making stmt & making agreement – longer = more likely rep: Brewer v Mann [2010] EWHC 2444 (QB) [129].
    3. Whether party making stmt was vis-à-vis the other party, in a better position to ascertain the truth of stmnt – yes? -> more likely term
    4. Whether stmt was subseq omitted when the agreement was embodied in a more formal written document – yes -> more likely rep: Brewer v Mann [129].

Oscar Chess Ltd v Williams [1957] Williams trade car w/ Oscar for a new car and told him it was 1948. He gave this info based on rego papers (last in a series of owners) for $290. Turns out it was 1939 worth 175. Oscar sued but English Court of Appeal ruled it wasn't a term – look objectively at totatility of evidence: he simply relied on rego papers and Oscar could've checked = innocent misrep.

Dick Bentley Productions v Harold Smith Motors [1965] Bently bought 2nd hand car from Harold. During negotiations, Smith said car has 20,000 miles since engine/gearbox replaced = false. English Court: it's a term, it had a purpose of inducing and also he's a dealer and should know history of cars selling however made statement without any foundation. Relevant expertise makes a difference whether stmts are promissory or representational.

J J Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435 Blakney entered contract with Savage to have boat built – during negotiations Savage said that boat, upon fitting particular engine, have estimated speed of 15mph. No reference was made in subsequent written contract. Boat didn't and he sued. Court said 'estimated' indicated an expression of opinion as the result 'of approx. calc based on probability. Blakley argued they wouldn't have entered w/o that but it was held that it needed to be promissory in nature and made to induce. It's not promissory – insufficient to use the idea that Blakney wouldn't have entered w/o the stmt.

INCORPORATION BY SIGNATURE

- Signature of a doc is a way in which the signatory is held to be bound by terms of the documents, regardless of whether or not they read/understood them.
- Note that signing a doc that refers to terms which are contained in separate doc (if it relates to this one) will generally result in them being part of contract

Signature Rule: *L'Estrange v Graucob* [1934] signatures bind to terms even if party hasn't read/understood. L'E owned café & ordered a cigarette machine from manufacturers which never worked properly. Although an implied term in the sale of goods is that goods will be suitable for purpose intended, contract signed that the manufacturers disclaimed all liability regarding the malfunction of the machine. Signed = bound unless there's fraud/misrep.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) reaffirmed ^. Toll entered contract with A to store/transport goods. Alleged that that Toll performed this contract negligently, causing loss to A. Toll sought to escape liability by relying upon excl clause in its contract with A. Above signature spot it said "please read t &c (overleaf)" didn't read and weren't mentioned. Court held it was part of contract – '..only if the other party has done what's reasonably sufficient to give **notice** of those terms'.

Ange v First Easy Action Holdings Pty Ltd (2011) signatory knew of terms set out in separate doc – these were held to be part of the contract. If terms in sep doc were unusual, notice of the terms may, depending upon the circumstances, be required for them to be incorporated.

- Additional terms will generally not be incorporated as express terms if signing of doc occurs after terms of agreement have been performed. Eg: *D J Hill & Co Pty Ltd v Walter H Wright Pty Ltd* [1971] excl clause formed part of the doc signed after goods were transported by the carrying company in accordance with earlier oral agreement.
- Oral agreement has been reached and the doc containing additional terms is subseq signed but performance of oral agreement takes place – subsequent signed doc may operate as a variation of earlier oral agreement, but only if it can be established that, in signing the doc, the parties intended such variation. Eg: *Warming's Used Cars Ltd v Tucker* [1956] signed doc stated used car (subject) was not encumbered. Earlier oral agreement made no reference to such a term – Court ruled that signed doc was of no effect as there was no intention by parties to vary the earlier oral agreement.

Exceptions to signature rule:

- *L'Estrange v F Graucob* – doesn't apply when docs signed as result of fraud/misrep/duress/undue influence/unsonscionable conduct. Non est factum also an exception
- Signature induced by misrepresentation: *Curtis v Chemical Cleaning & Dyeing Co* [1951] Curtis took her wedding dress to be drycleaned and signed doc 'Receipt' – when asked why signature

needed, she was told its because doc contained a clause excl liability for damaging the beads and sequins. She signed. However, it excluded liability from any damage to the dress. Held: not incorporated.
    - Effect of the receipt was misrep: *Axa Sun Life Services Plc v Campbell Martin Ltd* [2011]
    - Considered even if she didn't question, it'd be same result = receipt not a contractual doc
- Has been argued that clicking 'I agree' icon = signature rule doesn't include that

INCORPORATION BY NOTICE

- Refers to cases of unsigned docs or writing on signs which are alleged to be part of a contract
- Eg: tickets entry to car park, ski lift, signs displayed in hotels, amusement parks, etc.
- In these cases, clauses won't be incorporated as express terms unless reasonable notice of them has been given to the party allegedly be bound by them
- Thus a party will have notice of the term if they're aware of the existence of the term even if not aware of its content
- Two aspects of the notice rule:

Timing – notice of term has to be given at or before entry into the contract: *Baltic Shipping Co, The Mikhail Lermontov v Dillon* (1991)

Olley v Marlborough Court Ltd [1949] hotel sought to rely on a excl clause located inside a hotel room (notice on back of door) – was the express term? However, argument failed as it was held that the contract had been formed before the patron Olley had even stepped into the room.

Thorton v Shoe Lane Parking Ltd [1971] plaintiff drove into defendants carpark & received a ticket from machine which referred to 'conditions of issue' which could be found inside the premises. Plaintiff proceeded into car park & suffered personal injury while there. However the D denied liability bc of the terms of an excl clause displayed on a pillar inside the car park. Argued that these terms formed part of its contract with the plaintiff. The court held the offer was accepted when Plaintiff (T) drove up to the entrance and ticket came out. Contract was then concluded and couldn't be altered. Excl clause didn't form part of the contract – didn't protect the D.

Reasonableness – notice must be given reasonably (reasonably come to the attention)

- If party actually knows that the document/sign contains contractual terms then he/she is bound, irrespective of whether it has been read: *Parker v South Eastern Railway Co* (1877)
- In absence of actual knowledge, delivery of the doc or the placing of the sign must be done in a way that the other party can have been given reasonable notice of the terms

Parker v South Eastern Railway Co (1877) Mr P left a bag in cloakroom run by D. On desposing his bag & paying he received a ticket on the front it said 'see back'. On back it said railway excluded from liability. Mr P's bag was lost and he suied. Held that if a plaintiff doesn't see writing that contains conditions of the contract & no reasonable effort was made to ensure he was aware, then he isn't bound by its terms. However, if P does see it & either doesn't read/doesn't think it contains conditions, then he will be bound so long as the defendant delivered it in a manner that gave reasonable notice that there were conditions on the ticket.

- If doc = non-contractual in nature – handing it to party isn't enough, must take steps to draw attn to it.

Causer v Browne [1952] Dress left for dry cleaning & docket was given. On docket were exempting company from liability. Dress came back damaged. No one pointed out the terms on the docket to Causer – who assumed it was simply for collecting. Were the conditions exempting Browne from liability part of the contract? Conditions on the docket ought to have been made clear to Causer at the time docket was given. It was delivered merely as voucher/receipt. Not deemed part of contract as reasonable person wouldn't expect terms to be on a receipt/docket.

INCORPORATION BY PRIOR DEALINGS

- Express terms may be incorporated by course of prior dealings btwn the parties. Only possible if parties have had regular dealings with each other over a reasonable period of time prior to the contract in question; where this is the case the latest contractual terms used may be incorporated despite no specific reference to them.
- A changes term but B doesn't notice but keeps operating w/o objecting – that term may be expressly incorporated
- Court looks at facts & circumstances, number of past dealings, nature of those dealings, consistency of those dealings
- On some occasions a contract is entered into w/o expressly incorporating the terms used in the past. In some cases the terms of the past contracts are incorporated into the later contract. (was incorp, then wasn't – court might still consider it)

Henry Kendall & Sons v William Lillico & Sons Pty Ltd [1969] whether a record of earlier contracts leads to the incorporation of the previous terms into the later contract is ultimately a question of reasonableness (# + consistency of dealings in the past). Each case ultimately depends on own facts/circumstances. This case, 3-4 contracts per month over 3 yrs in regards to sale of animal feed were sufficient to establish a consistent course of dealings. For ea transaction 1 party would send noticein written doc to the other party after the oral contract was entered into. Back of note contained t&c of which the recipient was aware (although they didn't read them). These included an excl clause. Court considered they were incorporated.

Hollier v Rambler Motitirs (AMC) Ltd [1972] four contracts over 5 years in regards to car repair weren't sufficient to establish a consistent course of dealings.

D J Hill v Walter H Wright same as Henry but handed a delivery docket (contained terms) after each previous contract was entered into BUT those terms weren't incorporated into present contract as plaintiff knew of existence but not the content of the document. If he knew it was contractual doc, he'd be bound.

Hays Personnel v Motorline Pty Ltd [2008] (didn't follow D J) recruitment company had found 9 staff between Feb-Sep 2003. On each occasion, after employee hired they sent a letter confirming placement and attaching a doc "Terms of Business". Car sales company never objected to them. Court held that it was reasonable to assume that the terms of business doc formed part of the contract – no reason to provide such doc unless to bring its content to attn. as t&c to operate under.

La Rosa v Nudrill Pty Ltd [2013] L R transported equipment for Nudrill. The contracts were oral, except for the invoice LR would send to N following completion of the work. Invoices contained excl clause to exclude LR liability for any loss/dmg that occurred to property during transportation. N&LR negotiated a cartage contract for the transportation of a drill rig via telephone conversation. That conversation was confined to the price, destination, pick up and time of the transportation of the drill rig. During transportation, drill rig fell from LR's trailer and was dmged. Was excl clause in invoices

incorporated into the cartage contract? Decision indicates there are no circumstances where a prior course dealings will automatically incorporate a contractual term; it will always depend on facts. Was an express term incorporated as a result of inference arising from prior conduct of the parties as a whole? Two tests by McLure P:

1. "Ticket cases" test: whether the party seeking to rely on the term did what was reasonably sufficient to give to the other party notice of the term. Constructive knowledge of the term was sufficient.
2. Whether it could be reasonably inferred (eg, from regular course of dealing over a long period) that a party had shown that they had accepted, and been ready to be bound by, the terms, actual knowledge of the term may be sufficient, but wasn't essential.

Held that LR wasn't reasonably entitled to conclude from N's actions that it had accepted/agreed to be bound by t&c on invoice, and therefore weren't incorporated into contract by prior course of dealings.

PAROL EVIDENCE RULE (1st limb)

- Applies to wholly written contracts – GENERALLY excludes oral evidence (most cases but also relates to earlier drafts, etc.) extraneous to the doc that purports to add/substract from or vary the terms of the written contract
- Doesn't apply to contracts that are party written/partly oral
- Determining whether parties intended written doc to constitute the entirety of the contract between them – primary source of intentions = parties language.
- Threshold question of intention – now generally accepted that the PER has no application.

L G Thorne & Co Pty Ltd v Thomas Borthwick & Sons Ltd (1955) – if written agreement contains on its face a complete contract w/ provision for all matters relevant to the transaction, court won't allow evidence for the purpose of establishing an additional term. Intention of whether parties intended the written doc to represent entirely written contract must be established – therefore oral evidence can be admissible to determine whether they wanted an entirely written contract or partly.

State Rail Authority of NSW v Health Outdoor Pty Ltd (1986) Court held that PER is persuasive & the evidentiary burden is on the party wishing to rebut the claim that the whole contract wasn't in writing. Issue of whether contract is intended to be partly or entirely, oral evidence is admissible. Existence of a written agreement which appears to be complete doesn't automatically entail that the agreement is wholly in writing. It only serves as a foundation for that belief. '..mere production of a contractual doc, however complete it may look, cannot as a matter of law exclude evidence of oral terms if the other party asserts that such terms were agreed.'

Exceptions to the PER – rule is not obsolute: Courts may use extrinsic evidence to establish that:

1. Operation of the contract is not to occur until the happening of a certain event

Pym v Campbell (1856) considered the issue of parol evidence & whether or not verbal evidence was admissible to prove that a written doc was subject to a condition precedent & wasn't legally binding. A written agreement for the sale of a patent was draw up, and evidence was admitted of an oral stipulation that the agreement shouldn't become operative until a third party had approved of the invention.

2. A written contract incorrectly records the agreement of the parties, in which case, extrinsic evidence may provide the basis for the court to issue an order for rectification of the written contract

Ryledar Pty Ltd v Euphoric Pty Ltd (2007) addressed the Q whether evidence of pre-contractual negotiations was excluded by operation of the parol evidence rule

3. A prior collateral contract exists, provided the main contract doesn't contain an 'entire agreement' clause. Besides from alleging that the agreement was only partly written, a Plaintiff can also circumvent the PER by alleging a collateral contract.