

Incorporation of Terms

INCORPORATION BY SIGNATURE

- Would an **ordinary reasonable person know** the document has the capacity to affect legal relations or contain contractual provisions? (*Toll*).
 - A request to read all the terms and conditions before signing, which in *Toll* was directly above the place for signature (*Toll*).
 - Where the other party has informed the party of the impugned document that it is a legal document. (*Toll*).
 - That the type of document is customarily used in the industry. (*Toll*).
 - A document titled with something otherwise conveying the existence of a legal document (*Le Mans*).
 - An informal legal document (*Curtis*).
 - The type of paper used – thin paper would normally be used with receipts for instance (*Toll*).
 - For *electronic transactions*, clicking a box must be to assent to the terms and conditions; not enough by simply clicking ‘next’ to amount to a signature.
- Is there a **mistake, misrepresentation, or non est factum** so as to vitiate the contract? (*Toll*).
 - A **misrepresentation** can be about the **existence or the breadth of a term**. (*Curtis*).
 - A misrepresentation can exist through **words or by conduct and in the document itself** (Jarrod stated this – e.g. the document conveying a different impression). (*Curtis*).
 - Can talk about misrepresentation and the legal document itself as two separate points.
 - Misrepresentation disentitles the other party to the benefit of the exemption (*Curtis*).
 - A **false impression** is enough to amount to a misrepresentation. (*Curtis*).
- In the absence of equitable or statutory relief, a person who signs a contract is bound by its terms. (*Toll*).

INCORPORATION BY NOTICE

- **Reasonable notice**: Are there reasonable steps taken to bring the terms of the contract to the notice of the party to be bound, or are the terms known to the party? (*Oceanic*).
 - Three questions to inform oneself of reasonable notice in ticket cases: (*Thornton citing Hood*)
 - (1) Did the person **know** there was printing on the railway ticket?
 - (2) Did he **know the ticket contained or referred to conditions**?
 - (3) Did the railway company do what was **reasonable in the way of notifying** prospective passengers of the existence of conditions and where their terms might be considered?
 - Where a clause is an **unusual one**, different steps may be required to give notice of the clause. (*Oceanic*).
 - Where a clause is **destructive of rights**, the party must draw to the other party the clause in the **most explicit way**. (*Thornton*).
 - Stating the full terms and conditions are available in a travel agency in a brochure and omitting an exclusion clause does not constitute reasonable steps. (*Oceanic*).
- **Timing**: Were these steps made before the contract was signed?
 - Were these terms notified to the party entering into the contract before they did so? (*Oceanic*).
 - Automated ticketing machines – the timing requirement is satisfied at the moment the ticket is printed – the **terms on the ticket do not satisfy the timing requirement**. (*Thornton*).

STATEMENTS MADE DURING NEGOTIATIONS

- Statements made during negotiations, before the contract is formed, fall into three categories:
 - **No legal effect**
 - **A representation of fact**
 - **Contractual promise**
- To determine a **contractual promise**, consider whether **a reasonable person** would find a contractual promise from assessing the **conduct, the words and behaviour of the parties**. (*Oscar*).
 - Examine the **language** used by the promisor. (*Oscar*).
 - If it is a **guarantee, assurance or promise** then it can be incorporated (subject to parol evidence rule); (*JJ Savage*).
 - If it is a **belief or an opinion** then it cannot be incorporated. (*JJ Savage*).
 - An **estimation** of something is a belief or opinion.
 - If it is **vaguely encouraging**, then it cannot be incorporated. (*Crown*).
 - Examine the **knowledge** of the promisor about the asserted fact. (*Oscar*).
 - If they do not know of the asserted fact, then it is a belief.
 - Examine the **importance of the statement**. (*Oscar*).

PAROL EVIDENCE RULE

- Statements made before the execution of the contract are excluded, and written statements extrinsic to the contractual document are excluded, including notes, drafts, letters, reports, invoices, receipts.
 - An **entire agreement clause** can more certainly manifest the intentions of the parties to exclude parol evidence but may be void subject to consumer guarantees.

- The parol evidence rule can be overcome to override its exclusionary effect through the following ways:
 - Contracts partly in writing;
 - Collateral contracts;
 - Estoppel; and
 - Rectification.
- **Partly oral and partly written**
 - **Flexible approach:** A contract will be **partly oral and partly written** where an *objective assessment of the contract and the parol evidence* reveals it was the objective intention to be partly oral and partly written. (*Heath*).
 - The parol evidence rule does not apply in determining if the contract is partly written and partly oral, a written contract is just an evidentiary foundation for conclusion that contract is wholly in writing. (*Heath*).
 - In *Heath*, the inclusion of clause 6 as an *unfettered right to terminate the contract*, and the plaintiff's acknowledgement in oral negotiations of it being part of standard form and it cannot be removed indicates the parties' intention that the contract is wholly written. (*Heath*).
 - **Strict approach:** The words of the parties included in a written document represent the objective intention of the parties, excluding prior oral agreements of the parties as they are less reliable. (*Equuscorp*).
 - This approach was applied in the context of the plaintiff alleging the written agreement was entirely negated by the oral agreement; cf. a party claiming a contract is partly oral and partly written.
- Evidence to prove a **collateral contract** is admissible to allow parol evidence, because strictly speaking they do not add to or vary a document. (*Hoyt's*).
 - A *collateral contract* can exist to incorporate terms into an agreement where the *promise* made in the inducing contract does not impinge, reduce or alter the provisions or rights in the main contract. (*Hoyt's*, *Heath*).
 - Examples of impinging, reducing or altering the provisions or rights include an oral assurance that the exercise of a main contractual right to terminate the agreement will not be exercised (*Heath*); and that an oral assurance that the right to give notice to terminate will not be exercised unless head lessor approves (*Hoyt's*).
- Evidence of a pre-contractual statement that *does not create contractual rights* may be enforceable by way of **promissory estoppel**, and this avoids the parol evidence rule.
 - The pre-contractual statement must be a representation that induces a party to rely on an assumption that a term of the contractual will/will not be relied on and must be relied on to their detriment. (*Waltons*).
 - This operates as an equitable restraint on the promisor's rights and trumps the legal rules about parol evidence and entire contracts. (*Saleh, Branir*).
 - Compare with the view in *Norco*, whereby it is found an estoppel claim is inconsistent with an entire agreement clause – estoppel representations are often inconsistent, discursive and inconclusive – the written terms in the contract are not. (*Norco*).

Interpretation of Terms

- **Identify** the terms to be interpreted.
 - **Apply** the rules of evidence to determine *whether extrinsic evidence about the term are admissible*.
 - Apply the principles of the *objective approach, plain meaning and commercial sense*.
- ### ADMISSIBILITY OF EVIDENCE
- *Evidence* of the **actual terms** and the contract itself is always admissible.
 - *Evidence of surrounding circumstances is admissible if the language in the contract is ambiguous or susceptible of more than one meaning*, but it is *not admissible to contradict the language of the contract when it has a plain meaning*. (*Codelfa per Mason J*).
 - Can adopt either a *restrictive* or *permissive* approach to the interpretation.
 - The *restrictive* approach supports finding an ambiguity in the text of the contract before considering the surrounding circumstances. (Arises from *Codelfa* on the basis that the use of 'if' was a 'if and only if'.
 - The *permissive* approach allows consideration of surrounding circumstances without consideration of whether an ambiguity arises. (Arises from *Codelfa* on the basis that the use of 'if' was merely an if, comparable to a 'when'. (*Botanic, Woodside, Ipp in Brambles*).
 - To the extent that evidence of the surrounding circumstances creates an *objective foundation of facts, or the presumed intentions of the parties, it is admissible*. To the extent it doesn't, by looking at the actual intentions, it is inadmissible. (*Codelfa, Woodside*).
 - The *commercial purpose or objects to be secured by the contract* is admissible provided it does not rely on subjective intentions, including the genesis of the transaction, background, context and market in which the parties are operating. (*Woodside, Mount Bruce*).
 - *Evidence of post-contractual conduct* is not admissible to interpret the terms, but is admissible on the question of whether a contract is formed. (*Brambles*).
- ### OBJECTIVE APPROACH
- The construction of a contract is an *objective question* for the court, and the subjective beliefs of the parties *are generally irrelevant*. (*Brambles*).

- This is critical for third parties, e.g. the third party being Pacific Carriers in the transaction. (*BNP*).
- What was **not written** in the contract is important – e.g. that the bank was merely authenticating the sale and not indemnifying. (*BNP*).
- **Units of measurement and analogous examples can be interchanged** between the reference in the contract and in pre-contractual materials. (*Brambles*).
- **Prior dealings** between the parties, to the extent they establish objective background facts, can be used as an aid to interpret the terms. (*Botanic*).
- **Deleted words** in the contract identify an intention of both parties to reject something. (*Ecosse*).
- The construction of the document on an objective basis takes place on:
 - The text;
 - The contract as a whole, including its context; (*Botanic*).
 - The surrounding circumstances;
 - The commercial purpose of the contract, including the genesis, the background, context and market in which the parties are operating.