TERMS

1. Are there express terms arising from pre-contractual oral statements?
    - **Is the statement promissory (vs mere representation?)**
        - *Hospital Products Ltd v United States Surgical Corp (1984):* Whether the representation creates a binding contractual obligation depends on the intention of the parties, ascertained objectively and can only be deduced from the totality of the evidence
    - **If there is a written document, will the parol evidence rule bar the plaintiff from adducing evidence of the statements?**
        - *Codelfa Construction Pty Ltd v State Rail Authority NSW:* The parol evidence rule is that where parties have objectively demonstrated that they intended to reduce their agreement to writing, extrinsic evidence cannot be adduced to contradict that writing's terms, or aid in its interpretation unless those terms are unclear
        - *State Rail Authority of NSW v Heath Outdoor* (1986): Parol evidence rule has no operation until it is first determined that the terms of the agreement are wholly contained in writing. The existence of writing which appears to represent a written contract between the parties is no more than an evidentiary foundation for a conclusion that their agreement is wholly in writing.
    - **Directly?**
        - *Oscar Chess v Williams* [1957]: whether there is a warranty (or representation) that is intended to be binding is to be objectively deduced from totality of evidence, which includes the conduct of the parties, on their words, conduct and behaviour. The skills and expertise of the parties may be relevant (i.e. if seller states a fact which is/should be in their knowledge and buyer is ignorant, intending the buyer should act on it and does so, easy to infer a warranty)
        - *Dick Bentley Productions v Harold Smith (Motors) Ltd:* Prima facie, the grounds for inferring whether a warranty was intended involves determining if the representation was made in the course of dealings for the contract for the purpose of inducing the other party to act upon it, with the other party consequently induced to act upon it. However, this can be rebutted if this was shown to be an innocent misrepresentation
    - **As a collateral contract?**
        - *JJ Savage & Sons Pty Ltd v Blakney* (1970): The mere finding that without the statement, the main contract would not have been made is insufficient alone to establish existence of collateral contract. Statement needs to be sufficiently promissory. Whether a pre-contractual oral statement gives rise to a collateral contract depends on the following questions answered in the affirmative:
            - Was the statement intended to be relied upon?
            - Did the party to whom the statement was made rely upon it?
            - Did the maker of the statement intend to guarantee its truth?
        - *Hoyt's Pty Ltd v Spencer:* A distinct collateral contract can be valid and enforceable even though the main agreement is in writing provided that the two consistently stand together. A collateral contract, which may be either antecedent or contemporaneous, being supplementary only to the main contract, cannot impinge on it, or alter its provisions or the rights created by it.
        - *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd:* collateral contract requires specific terms and "quality of a contractual promise of any kind"
        - *Saleh v Romanous (2010):* A collateral promise which is not able to be enforced as a contract can still be enforced as a promissory estoppel. The enforcement of promissory estoppel is not precluded by the parol evidence rule or an entire agreement clause.

EXCLUSION CLAUSES AND PRIVITY

Exclusion Clauses

1. Remember that an exclusion clause is a **term** like any other – so first consider whether it is **incorporated**. If the exclusion clause is (or may be) incorporated, it must then be **construed**
2. Determine whether the natural and ordinary meaning of an exclusion clause is ambiguous
    a. **If not ambiguous, then apply it**
        i. *Darlington Futures Ltd v Delco Australia (1986):* The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract
    b. **If ambiguous, the clause is construed contra proferentum. It may also be necessary or appropriate to consider the four corners**
        i. *Darlington Futures Ltd v Delco Australia (1986):* Construe the clause *contra proferentem* in case of ambiguity (i.e. interpreting an ambiguous exclusion of a liability clause narrowly and against the party who asserts it). The same principle applies to the construction of limitation clauses
        ii. *FOUR CORNERS RULE: Sydney Corporation v West (1965):* Conditions which were only intended to protect a party if they performed in the way contracted for, do not protect the party if they had failed to perform in that way.
        iii. *NEGLIGENCE RULES: Canada SS Lines Ltd v The King [1952]:*
            1. If a clause expressly excludes liability for negligence, then give effect to that clause
            2. If the clause does not expressly refer to negligence, then start with its ordinary meaning and apply the contra proferentem rule in case of ambiguity
            3. Even if the clause is wide enough to cover negligence (per step 2), it does not cover claims based on non-negligence grounds that are so 'fanciful or remote' that the party who asserts the clause 'cannot be supposed to have desired protection against it' i.e. can the exclusion be interpreted as protecting some other form of damage not "fanciful or remote" – purpose of that clause to protect different kind of damage not negligence?
        iv. *NEGLIGENCE: Davis v Pearce Parking Station (1954):*
            1. There need not be an express reference to negligence where negligence is the only conceivable basis of liability in that scenario
            2. Liability for negligence is excluded if the words in the contract are clear enough to apply to the circumstances which have occurred
3. Having construed the clause, offer a view as to whether the clause operates to shield the proferens from liability

Privity

1. Consider the facts and see whether it really is a privity problem i.e. is the party you are advising a party relevant to the contract
    a. **If the party is a party to the contract, they can enforce it**
        i. *Coulls v Bagot's Executor and Trustee Co Ltd (1967):*
            1. If A jointly promises B and C for consideration to pay B and C, and A fails to perform his or her promise, C can sue A as long as B has given consideration, since the action pertains to the enforcement of the same promise. Specifically, C need not have provided consideration since the consideration provided by B was given on behalf of both B and C. B can obviously also sue A. However, both B and C need to be parties to an action to enforce A's promise if both B and C are alive.

Frustration

1. Has the contract been frustrated?
    a. **No party defaulted?**
        i. *Davis Contractors Ltd v Fareham Urban District Council [1956]:* [F]rustration occurs whenever ... without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.
            1. Necessary to compare contract agreed by the parties, interpreted in light of the surrounding circumstances, with the situation produced by the disruptive event. If performance contemplated by contract and state of affairs produced by the event that disrupts this contemplated performance are "radically" or "fundamentally" different, the contract will be frustrated
        ii. *Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982):* A contract will be frustrated when the parties enter into it on the common assumption that some particular thing or state of affairs essential to its performance will continue to exist or be available, neither party undertaking responsibility in that regard, and that common assumption proves to be mistaken.
            1. It is legitimate to look at the relevant surrounding circumstances to assist with the interpretation of the contract in the case of frustration, so long as such circumstances do not contradict or vary the contract
            2. A frustrated contract is discharged *in futuro* from the time of frustration
            3. However, a change in the state of affairs affecting performance *may not* frustrate the contract where there is an alternative method of performance which, although more onerous, is not radically different from that contemplated under the contract
    b. **Event not reasonably foreseeable?**
        i. *Davis Contractors Ltd v Fareham Urban District Council [1956]:* If an event could reasonably have been foreseen (but the contract does not contain a provision covering the event), the usual inference is that frustration is not made out - consider whether or not there is a some threshold level of probability at which the event must reasonably have been foreseen to preclude the event from frustrating the contract
        ii. *Bank Line Ltd v Arthur Capel & Co [1919]:* (paraphrased) In determining whether the frustrating event is within contemplation of parties, you need to consider the contract in its broader factual matrix. The fact that the clause specifies the consequences of a broad class of potentially disruptive events does not necessarily prevent the contract from being frustrated by an event apparently within that class
    c. **No contractual provision?**
        i. *Davis Contractors Ltd v Fareham Urban District Council [1956]:* The task of the court is to determine [o]n the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances,...[and] whether the contract which they did make is...wide enough to apply to the new situation…
2. What are the consequences of frustration?
    a. **Discharges whole contract automatically from moment of the frustrating event**
    b. **Restitutionary claims upon frustration?**
        i. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943]: The requisite basis for such recovery is a total failure of consideration on the part of the defendant