Contracts

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Week 1—Incorporation of terms

Contracts subject:

- Terms: contractual obligations.
- Termination: circumstances in which contracts end or can be brought to an end.
- Vitiating factors: circumstances in which contracts can be avoided because of some unfairness in the process of making the contract.

Contract terms:

- Incorporation: how are terms expressly incorporated into a contract
- Implication: how can terms be implied in contracts
- Interpretation: how can terms be interpreted

Incorporation:

- By signature
- By giving notice of terms to the other party
- By verbal promise to each other during negotiations

**Different legal rules apply for different ways of incorporating terms into a contract*

Incorporation of terms by signature

Signature may signal consent after negotiation or with no negotiation (contracts prepared and presented on a take it or leave it basis) between parties.

L'Estrange v F Graucob Ltd (1934)- Divisional Court
(incorporation by signature, unread but signed contract, exclusion clause ousting of implied statutory warranties in sale of goods)

- **Facts**: P purchased a cigarette vending machine from D. During the sale, P signed a 'sales agreement' that said 'any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded'. The cigarette vending machine was faulty, and P brought action against D for damages for breach of implied warranty (legislative provisions in all common law jurisdictions imply certain warranties in contracts for sales of goods—i.e. the goods are fit for the purpose of purchase or are of satisfactory quality).
- **Procedural posture**: trial judge ruled in favour of P. Breach of implied warranty because the plaintiff had no knowledge of the contents of the signed form (was not read and writing was unreasonably small). D appeals.
- **Issue**: Can a clause that was not read form part of the contract? Yes.
- **Rule**: In the absence of fraud or misrepresentation, a signed document containing contractual terms binds the signing party. It is immaterial whether the signatory has read the document or not.

- *Rule does not apply if there was vitiating factor (misrepresentation, fraud, mistake) or the document cannot reasonably be considered a contract—i.e. bc it has another function such as being a receipt).*

- **Reasoning**:
  - Scrutton J:
    - *Parker v South Eastern Ry Co*: not a ticket case, but Mellish LJ laid down that 'an agreement is proved by proving signature, and in the absence of fraud, it does not matter whether signatory has read the contents'
    - Unsigned documents: it is necessary to prove that both parties were aware, or ought to have been aware of the terms and conditions
    - Document on the brown paper was a formal document
    - *The signed document was titled 'sales agreement'; P should have reasonably expected the clause that ousts implied warranties to be in the agreement.*
    - *There is no need for D to bring the relevant clause to the attention of P.*
  - Maugham LJ:
    - Disagreed with Scrutton: believed that document was not a formal paper, but the signature constituted it as a contract in writing.
    - Contract concluded not when the document was signed by plaintiff, but when the order confirmation was signed by the defendants.
      - Signature of plaintiff as part of a contract in writing→impossible to pick out certain clauses from it and ignore them as not binding to the plaintiff.
- **Holding**: Appeal allowed. There was a binding contract that ousted implied statutory warranties.

Toll (FGCT) v Alphapharm (2004)-High Court of Australia

(exclusion clauses, agent signing contract w/out reading, non est factum plea, sufficiency of notice on terms)

- **Facts**: Finemores (later taken over by Toll) entered into signed contract with Richard Thomson (acting for Alphapharm). F was to store and transport refrigerated vaccines that were imported for A. It was alleged F performed this contract negligently causing loss to A. F sought to escape liability by relying upon an exclusion clause in its contract with Thomson (representing A), which Thomson did not read despite the credit application form provided "please read 'conditions of contract' prior to signing". A conceded that there was a contract between F and Thomson but denied that it was bound by exclusion cl 6 as the conditions on the reverse side of the application for credit were not part of the contract. A also claimed that Thomson had not contracted as agent for them.
- **Issue**: Where the terms and conditions on the reverse of the Application for Credit part of the contract governing the storage and transportation of goods? If so, is A bound by exclusion cl 6, ousting implied statutory warranties? Yes.
- **Rule**: 1. Where a party has done reasonably sufficient to give notice of the terms and conditions by instructing the signatory to read terms and conditions before signing, those terms and conditions become part of a contract. 2. Where there is no suggested vitiating element, and no claim for equitable relief, a person who signs a document which is known to contain contractual terms and to affect legal relations, is bound by those terms. It is immaterial that the person has not read the document. 3. The fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms.
- **Reasoning**:
  - Objective and subjective theories of contractual assent (impeachment of contract for unilateral mistake):
    - Objective: contract voidable only
    - Subjective: contract void ab initio
    - The clear trend in decided cases and academic writings has been the objective theory.
  - Cases: *Parker, Wilton, Oceanic Sun Line Special, Foreman*
    - Agreement is proved by signature; it is wholly immaterial that signatory did not know the contents
    - Unless the signatory was prepared to be bound by the terms of agreement, it is up to him/her to abstain from signing.
    - Passenger signing exclusion clause who experiences loss arising out of carriage. It is immaterial if the signatory knew the contents

        - 'the plaintiff who sends an illiterate servant to sign the document is in no better or worse position than if he signed it himself without reading it'
    - Non est factum plea: plea that a written agreement is invalid because the defendant was mistaken about its character when signing it.
        - *Petelin*: (as per Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ) *'plea is one which must necessarily be kept within narrow limits';* this is because legal instruments are signed by people who have not read or understood all terms are nevertheless committed to those terms by act of signature and execution.
    - To speak of the operation of the law of contract with respect to signature requires attention to both significance attached by law to the presence of signature and also to the absence of any grounds (plea of non est factum), which at common law would render the contract void and attract equitable relief (misrepresentation) which may elicit curial dispensation under a statutory regime.
    - Principle: A person who signs a contract without reading it is bound by its terms only if the other party has done what is reasonably sufficient to give notice of those terms and there is no misrepresentation.
        - *Should not be limited to exclusion clauses.*
    - 3 circumstances were party that signed a document is not bound:
        - Document signed is not a contract but a memorandum of a previous contract that did not include the relevant term in the memorandum
        - There was misrepresentation
        - Non est factum applies
    - *Some judges in lower Court mentioned that a Credit Application would usually not contain terms of exclusionary clauses (and therefore*
- **Holding**: Appeal allowed. Finemores (Toll) had reason to believe that Alphapharm read the terms and intended to be bound by the terms. Exclusion clause apples and Finemores is not liable.