

Contracts

Exam Notes

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‘a person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. He may keep the question open, so long as he does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side’ (Mason J in *Sargent v ASL*).

1. Incorporation

1.1 Overview

Assent

Step 1: would a reasonable person understand the document to contain contractual terms?

- *Curtis* receipt but told to contain contractual terms
- *Toll* application for credit
- Timesheet signed by employee -> administrative, not contract (*Grogan v Robin Meredith Plant Hire*; English case)

Step 2: is the document signed?

- If yes: step 3
- If no: fail

Step 3: is there reason why signature should not bind?

- Misrepresentation: behaviour that misleads the other party about the existence or extent of a term of the contract
- i.e., misrepresentation about breadth (*Curtis*), type of document (*Curtis*), failure to mention unusual terms (*Toll*); even if innocent

Notice

Step 1: when was the contract formed?

- Keep **conventional ticket analysis** in mind -> formed when ticket is used (*MacRobertson Miller*)

Step 2: were the terms available before formation?

- If yes: step 3
- If no: fail

Step 3: did the other party have subjective knowledge about the terms?

- If yes: incorporated
- If no: step 4

Step 4: was reasonable notice provided?

- Consider scope(*Toll*), content(unusual *Oceanic*) and practical availability(*Toll* and *Oceanic*) of term in determining what constitutes reasonable notice

Statements made during negotiations

Step 1: what statement is being made?

Step 2: is the statement a **promise**?

- Would a reasonable objective bystander attribute promissory intent to the statement? (*JJ Savage*)
- Look at *Oscar Chess* factors

Step 3: is the statement **admissible**?

- Parol evidence rule only overcome through:
 - Partly oral contracts -> oral components cannot explicitly contradict the written components (*Equuscorp*)
 - Collateral contracts
- Last resort: equitable estoppel
 - Not bound by 'entire agreement' clause, parol evidence rule, or consistency requirement (*Saleh*)

1.2 Assent

L'Estrange v Graucob: if a party signs a contract, the party is bound, it is 'wholly immaterial whether he has read the document or not' (Scrutton LJ 403)

- Subjective rather than objective approach, affirmed in *Toll*

Toll: terms on back-page were also incorporated through signature because sentence above signature line:

- 'Please read 'Conditions of Contract' (overleaf) prior to signing'

Curtis: misrepresentation about breadth of exemption on signed receipt

- Obiter comments about misleading nature of:
 - 'receipt' as a header
 - Silence re: breadth of exemption clause

	<i>Toll</i> HCA 2004
Issues	Signature when terms have not been read
Parties	R <i>Alphapharm</i> - sub-distributor of influenza vaccine in Aus A <i>Finemores</i> - carrier hired by Thomson to transport vaccine

Facts	<p>R hired Thomson to look after a vaccine that is very sensitive to temperature</p> <p>Thomson signs contract entitled 'Application for Credit' with A without reading terms, on back of the signed page it read:</p> <p>Cl 3(b): To include persons having an interest in the goods.</p> <p>Cl 5: The customer entered into the contract on its own behalf and also as agent for the customer's [own] associates.</p> <p>Cl 6: In 'no circumstances shall the Carrier be responsible to the Customer for any injurious act or default of the Carrier... nor... any loss, injury or damage suffered by the Customer.</p> <p>Customer defined as including 'Customer's Associates.'</p> <p>Cl 8: The customer agrees to indemnify the Carrier... in respect of</p> <p>Cl 8(e): any demand or claim brought by or on behalf of the Customers' [sic] Associates arising out of, related to, or connected with this contract.</p> <ul style="list-style-type: none"> • Please read 'Conditions of Contract' (overleaf) prior to signing <p>Vaccine rejected because temperature was too low during transit/storage</p> <p>R sued A, on grounds that the terms on the back page did not form part of the contract, and that Thomson was not R's agent</p>
Held	<p>Signature demonstrated assent to all terms</p> <p>Terms formed part of the contract</p>
Reasoning	<p>The courts do not examine the subjective intentions of parties because time consuming and unrewarding [178]</p> <p>Signature</p> <ul style="list-style-type: none"> • Commercial convenience - third parties also rely on signatures as evidence of contract (e.g. banks) • To sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document [180] • Signatory taken to have read and approved the contents of the document or to be willing to be bound by those contents [181] <ul style="list-style-type: none"> ◦ Whether they actually read is immaterial • Exemptions: misrepresentations, unusual terms, doc not contractual <p>A did enough to make Thomson aware of the terms, because the sentence above the signature line requested him to read the terms [183]</p> <p>Thomson was R's agent because of the responsibilities bestowed upon him [193]</p> <p>Exceptions to rule:</p> <ul style="list-style-type: none"> • Misrepresentation (<i>Curtis</i>) • Non est factum • Equitable or statutory relief • If the document is a memo or receipt
Ratio	<p>On a document known to contain contractual terms/affect legal relations, a signature manifests assent to the incorporation of terms, regardless of:</p> <ul style="list-style-type: none"> • Whether signatory has actually read those terms

	<ul style="list-style-type: none"> • Subjective party intentions <p>Misrepresentation could include failure to mention unusual terms</p>
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	<i>Curtis</i> 1951 Kings Bench
Issues	Exceptions to signature rule
Parties	A <i>Curtis</i> - customer R - drycleaners
Facts	<p>A took a wedding dress to R to clean. R gave A a paper headed "receipt", asked A to sign. R told A signature is required so they are not liable for specified risks to the dress including damages to beads and sequins. A signed.</p> <p>Dress returned with unexplained stain, R claimed exemption from liability due to signed receipt.</p>
Held	Receipt not a binding contract
Reasoning	<p><u>Denning LJ</u>:</p> <p>Is the document a contract?</p> <ul style="list-style-type: none"> • Yes, because of the explanation from R about liability, A understood the receipt was a contract <p>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 [808]</p> <ul style="list-style-type: none"> • By failing to draw attention to the width of the exemption clause (includes stains), the assistant created the false impression <p>Therefore, this a misrepresentation case in which signature does not manifest assent</p> <ul style="list-style-type: none"> • <i>Not a vitiating factor that invalidates contract, just a rule affecting signature and contractual terms</i> <p>Would the outcome have been different if the customer and assistant had not discussed why the customer was being asked to sign the document?</p> <ul style="list-style-type: none"> • No, because the heading 'receipt' is misleading anyway • No, because silent <p>Even if the assistant did not say anything, the heading 'receipt' could create a false impression about whether the document gives rise to contractual terms, thereby forming a misrepresentation</p>
Ratio	<p>If there is a misrepresentation, signature does not manifest assent</p> <ul style="list-style-type: none"> • Even about breadth of a clause • Even if the misrepresentation is innocent

1.3 Notice

The time of contract formation is a key consideration for incorporation, because one party **cannot unilaterally alter the terms** of a contract after its formation (*Oceanic*)

According to the **conventional ticket analysis**, a ticket is formed when it is used, however this does not always apply

- Not in *Oceanic* because D was already under contractual obligations before the boarding, locked in when exchange order bought
 - If cruise was cancelled, bound to refund P
 - If not, had to supply a ticket for the exchange order
- Not in *Thornton* because there was no option for refund or refusal of ticket due to the machine (Lord Denning MR)

If terms were available before contract formation, the other party's **subjective knowledge** of the terms is sufficient to ensure incorporation

- If not, **reasonable notice** is required

What constitutes **reasonable notice** depends on:

- Normalcy of the term(s)
 - *Oceanic Sun*: exclusive jurisdiction is unusual
- The breadth of the term(s)
 - *Thornton*: complete exclusion of liability, destructive of rights, red ink, red hand (Lord Denning obiter)
- Availability of the term(s)
 - *Oceanic Sun*: Athens, when boarding the vessel, no chance to reflect; note in the brochure saying conditions printed in Passenger Ticket Contract in Sydney head office (wasn't even available there)
 - *Thornton*: the first attempt to bring the conditions to the customer's notice was when they were already in the carpark and couldn't withdraw (Megaw LJ), displayed on the premises but not immediately available, impractical to park car right before gate, then walk around looking for term(s)

	<i>Oceanic Sun Line</i> HCA 1988
Issues	Notice about jurisdiction on cruise ticket or exchange order?
Parties	P <i>Fay</i> - customer who booked cruise D <i>Oceanic</i> - cruise owner

Facts	<p>P pays fare for Greek islands cruise, handed an exchange order</p> <p>In Athens, P exchanges the order for his ticket, which said that Greek courts have exclusive jurisdiction in any action against the ticket's owner</p> <p>P is injured while on the cruise, sues D for negligence in NSW Supreme Court</p>
Held	Terms not incorporated by notice
Reasoning	<p><u>Brennan J:</u></p> <p>Issue: did P enter contract when buying exchange order or when exchanging it?</p> <p>D argued they gave reasonable notice by:</p> <ol style="list-style-type: none"> 1. Telling P the terms are available at an office 2. Putting the terms on the ticket <p>If contract formed in Greece, then reasonable notice is given, and the term stands</p> <ul style="list-style-type: none"> • If contract is formed in NSW, then reasonable notice is not given (terms not accessible from NSW), therefore term is not incorporated <p>Conventional analysis: contract is formed when P steps on boat - does not apply here</p> <ul style="list-style-type: none"> • The contract made when the exchange order was issued, obliged the D to issue a ticket in exchange for the exchange order when P boards the vessel [227] <ul style="list-style-type: none"> ◦ Not the parties' intention at the time when P pays his fare that the ticket to be given him on boarding should be a mere offer of [228] carriage • Contract was made when exchange order issued, D did not have an option to introduce new conditions of carriage by printing them on the ticket • No opportunity for passenger to read printed conditions on ticket as they board <p>Exemption: if carrier does all that is reasonably necessary to bring the exemption clause to the passenger's notice [229]</p> <ul style="list-style-type: none"> • D did not do this, their only mention was in the brochure, which states that clauses are in the passenger ticket contract, but the contract was not available to P <ul style="list-style-type: none"> ◦ Brochure is not a contractual document, people don't read brochures as carefully ◦ Relevant terms were not available in the brochure • Since P was not aware of the clause, the clause is not incorporated into the contract made when the exchange order was issued <p>Other consideration: the term is particularly unusual</p> <ul style="list-style-type: none"> • More unusual, more needs to be done <p>Once a contract is formed, cannot unilaterally alter the terms</p>
Ratio	<p>Party to be bound by the terms incorporated by notice must be aware of the terms</p>