

LAWS1075 - Contracts: Sample Notes

Week 1A: Express Terms – Signature, Notice, Course of Dealings

Express Terms	
Principles	<ul style="list-style-type: none"> ❖ Contracts may be oral, in writing or partly oral and partly in writing ❖ Methods of express terms: <ul style="list-style-type: none"> Signed Terms: <ol style="list-style-type: none"> 1. Express agreement by signature (<i>L'Estrange v Graucob</i>) Unsigned Terms: <ol style="list-style-type: none"> 2. Incorporation by terms of notice 3. Incorporation by course of dealings
Electronic Transactions	<ul style="list-style-type: none"> ❖ Customers may be required to accept terms actually displayed ("clickwrap") or given notice by way of hyperlink of terms available to be read ("browsewrap"). ❖ Essentially the same principles discussed above apply to electronic transactions: see, for example, <i>eBay International AG v Creative Festival Entertainment Pty Ltd</i> (2006) 170 FCR 450; [2006] FCA 1768. ❖ In NSW, s.9 of the Electronic Transactions Act 2000 (NSW) makes provision for electronic signatures to be considered valid, where a signature is required under a NSW law (such as s 54A of the Conveyancing Act 1919).
1A Express Agreement by Signature	
Principles	<ul style="list-style-type: none"> ❖ Agreement is proved by proving the signature, even if the signing party did not read or know the content of the terms (<i>L'Estrange v Graucob</i>) <ol style="list-style-type: none"> 1. Unnecessary to sign every page of 20 page doc 2. Can incorporate by reference → signed document referring to any document effectively incorporates the document so as to say you have signed the secondary document as well 3. Question of what signature covers is a question of fact 4. Form of written is irrelevant – back on a napkin, T&Cs, typed paper document signed, location is irrelevant ❖ Limitations on the signature rule – SEE vitiating factors – if no vitiating factors continue <ul style="list-style-type: none"> ▪ (a) misrepresentation (either fraudulent or innocent) is alleged; (<i>Curtis v Chemical Cleaning & Dyeing</i>) <ul style="list-style-type: none"> • Facts: P handed 'receipt' document – clerk stated responsibility not accepted for certain specified risk e.g., beads sequins – P signed statement stating cleaners not liable for any damage however caused • Held: failure to draw attention to the existence or extent of an exemption clause may convey there is no exemption clause <ul style="list-style-type: none"> ♦ Innocent misrepresentation – voidable ♦ Fraudulent misrepresentation – void ▪ (b) mistake is claimed; ▪ (c) <i>non est factum</i> is pleaded; - no understanding ▪ (d) intention to create legal relations is denied; ▪ (e) document purports to be non-contractual such as a "receipt" [see (a) and (d) above]; ▪ (f) equitable or statutory relief is claimed.
1B Incorporation by terms of notice	
Principles/Test	<ul style="list-style-type: none"> ❖ Once incorporated, neither party can unilaterally introduce new terms ❖ TEST [Need to show]: <ol style="list-style-type: none"> 1. The terms were made available to the party sought to be bound before the contract was made (the timing requirement); and <ul style="list-style-type: none"> ▪ If timing requirement is not satisfied – stop here 2. Either the party sought to be bound knew of the terms in question, or reasonable steps were taken to bring the terms to the attention of that party (the knowledge or reasonable notice requirement)

	<ul style="list-style-type: none"> By actual knowledge is meant knowledge that the document in question contains contractual terms, regardless of whether the document/terms have been read. 	
1.1B Timing Requirement	<ul style="list-style-type: none"> ❖ Facts: Fay made booking to Greek islands on cruise – c. completion – handed exchange order for ticket boarding vessel – obtained conditions only on ticket when boarding cruise – Fay sustained personal injury onboard ❖ Held: D had no right to introduce new conditions of carriage by printing them on back of ticket 	<i>Oceanic Sun Line Special Shipping Company Inc v Fay</i>
1.2B Reasonable Notice	<p>General Principles</p> <ul style="list-style-type: none"> ❖ They know the notice displayed or delivered contains the contractual terms, whether or not they read the terms ❖ A reasonable person would expect the notice displayed or delivered to contain the contractual terms, whether or not they read the terms ❖ The other party takes reasonable steps to bring terms to notice of the party to be bound, if contained in a 'non-contractual' document <p>In general</p> <ul style="list-style-type: none"> ❖ Facts: Conditions on ticket – including sign saying 'All cars parked at own risk' – P suffered personal injury inside car park ❖ Held: <ul style="list-style-type: none"> ➢ Company needs to provide reasonably sufficient notice ➢ Exempting clause cannot be so wide & destructive of rights that courts can't hold anybody accountable – if so needs to be written in red ink w. red hand <p>Cases involving unusual terms</p> <ul style="list-style-type: none"> ❖ Facts: R made cruise booking w. shipping company – received booking form later – contract of carriage made only at time of issuing tickets on Day 10 of cruise – R suffered personal injury ❖ Held: Need to bring unusual terms to notice of P – several unusual terms found not brought to P's attention ❖ Consider: Was it in a form that was reasonably likely to come to the attention of the other party? Or was the term hidden away so it was difficult to access before formation 	<p><i>Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163</i></p> <p><i>Baltic Shipping Co v Dillon</i></p>
1C History of Dealings Together		
Principles	<ol style="list-style-type: none"> Uniform (consistent) course of conduct – <i>McCutcheon v David MacBrayne</i>; and <ul style="list-style-type: none"> ➢ Have terms varied from time to time? – If yes - unlikely to be included Regular course of conduct – used often enough that parties must have intended (objectively) to contract on that basis – <i>Balmain New Ferry Co Ltd v Robertson</i>; and <ul style="list-style-type: none"> ➢ 1-2 previous dealings are likely insufficient to be regular enough Contractual document from previous transactions – not a mere invoice or receipt, for example – <i>Rinaldi & Patroni v Precision Mouldings; D J Hill v Walter H Wright; La Rosa v Nudrill Pty Ltd</i> [2013] WASCA 18 	
	<ul style="list-style-type: none"> ❖ Facts: tow truck driver agreed to carry a very large drill rig for the Ps – drill fell – driver wanted to rely on exclusion clause to avoid liability – clause passed on 27 previous occasions – written on back of document titled 'invoice' – unread ❖ Held: Invoice was a non-contractual document – P could not expect to contain the terms of their dealings – no incorporation by terms of dealings – timing problem (sent after a contract) <ul style="list-style-type: none"> ▪ For there to be a course of dealing there have to be antecedent contracts that contain the relevant term 	<i>La Rosa</i>
	<ul style="list-style-type: none"> ❖ Facts: Barrister missed Balmain Ferry – refused to pay one penny to leave wharf – broke through ferry attendants – 	<i>Balmain Ferry</i>

	<p>argued no incorporation of the term requiring payment of the penny before exit by regular course of dealings with ferry company – notice on wharf that fair of one penny be paid whether entering or leaving regardless of catching ferry</p> <p>❖ Held: Robertson travelled back and forth by company's boats on many occasions – unclear whether notice or not/reasonable steps – due to earlier trips if he wished to leave turnstile compliance with usual conditions from earlier trips i.e., paying the penny</p>	
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Week 1B: Express Terms: Parole Evidence Rule Exceptions, Statements made in Negotiations

Parol Evidence Rule		
Principles	<p>❖ A promissory statement made during negotiations might or might not end up being included as a term of the contract formed (<i>State Rail Authority v Heath Outdoor</i>)</p> <ul style="list-style-type: none"> ➢ If not, it will be a representation rather than a term. ➢ Different consequences follow depending on the characterisation, whether as a (mere) representation or a term. ➢ <i>evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.</i> <p>❖ Electronic transactions treated as in writing</p>	
1A PER and "what the contract really was"	<p>❖ What communications comprise the contract</p> <p>❖ Modern law comprising 'what the contract really was' serves no more than an evidentiary starting point from which an inference may be drawn but not a hard presumption operating to exclude evidence e.g., oral (<i>Masterton Homes v Palm Assets</i>)</p>	
	<p>Whether term is oral, writing or partly both</p> <ol style="list-style-type: none"> 1. Does the document appear whole on its face via the express terms? (<i>Gillespie Brothers Co v Cheney, Eggar & Co</i>) 2. Open to party to prove party agreed to additional oral terms or that document should contain whole terms agreed (entire agreement clause); <i>NSW Cancer Council v Sarfaty</i> 3. Need to first ascertain that c. is wholly in writing; <i>Turner v Forwood</i> 4. Terms of c. ascertained from whole circumstances as a matter of fact; <i>Moore v Garwood</i> – question of fact 5. Surrounding circumstances may be used to aid finding what the terms of the c. are; <i>Stones v Dowler</i> <ol style="list-style-type: none"> a. If possible to make a finding about what were the words the parties said to each other, the meaning of those words is ascertained in the light of the surrounding circumstances: <i>Deane v The City Bank of Sydney at 209</i> b. If it is not possible to make a finding about the particular words that were used (as sometimes happens when a contract is partly written, partly oral and partly inferred from conduct) the surrounding circumstances can be looked at to find what in substance the parties agreed: <i>County Securities v Challenger Group Holdings at [7]-[8]</i> 	<i>Masterton Homes v Palm Assets</i>
1B PER and "what the contract"	<p>❖ Non-contractual statements cannot be evidence of what the contract meant (whether or not the contract is wholly in writing).</p> <p>❖ The rule considered from this angle excludes evidence of:</p>	

really meant”	<ul style="list-style-type: none">➤ (a) (subjective) intention as to meaning;➤ (b) prior negotiations; and➤ (c) subsequent conduct, in ascertaining the meaning of the contract.<ul style="list-style-type: none">▪ E.g., after signing contract you discuss what s 37 means	
Exceptions to the PER		
1A Collateral Contracts	<ul style="list-style-type: none">❖ Collateral Contract: One party makes a promise, connected to but independent of a main contract – as consideration for that promise the other party enters into the main contract; <i>JJ Savage & Sons v Blakney</i>.<ul style="list-style-type: none">➤ E.g., I will give you \$100 to enter into this contract1. For a statement to give rise to a collateral contract, the statement must be made as a promise2. The statement must be intended to induce entry into the contract: <i>JJ Savage & Sons Pty Ltd v Blakney</i> (1970) 119 CLR 435, extracted at [12.390].3. The statement must also be consistent with the terms of the main contract: <i>Hoyt’s v Spencer</i>❖ Collateral contract argument less likely to succeed if alleged term would more naturally be expected to be found in main contract: <i>Shepperd v Municipality of Ryde</i> (1952) 85 CLR 1 at 13.❖ A collateral contract is not necessarily precluded by an “entire agreement clause” unless it clearly has that effect, since collateral contracts are an exception to the PER: <i>McMahon v National Foods Milk Ltd</i> (2009) 25 VR 251; [2009] VSCA 153 at [38].<ul style="list-style-type: none">➤ Collateral contract not excluded as a possibility if there is an entire agreement clause in the main contract➤ If there is an entire agreement clause – end of story – don’t look at oral agreements (for purposes of contract law)	
1B Equitable Estoppel	<ul style="list-style-type: none">❖ Courts – divided as to whether the PER prevents admission of extrinsic evidence for the purpose of establishing an estoppel.❖ Estoppel can arise separate to PER limitations❖ Supportive of the PER rule to LIMIT evidence allowed prior to a contract – “often extensive, discursive and inconclusive”	<i>Saleh v Romanous</i> <i>Australian Cooperative Foods v Norco Co-operative</i>
When is an oral statement part of a contract		
Principles	<ul style="list-style-type: none">❖ This turns fundamentally on the intention of the parties, objectively ascertained.❖ Factors to be weighed include:<ul style="list-style-type: none">➤ (a) is there a written document? (cf. <i>Equuscorp v Glengallan Investments, but note limitations on parol evidence rule</i>);➤ (b) how important the statement is;➤ (c) the words actually used (cf. <i>JJ Savage v Blakney</i>);➤ (d) the relative expertise of the parties (contrast <i>Oscar Chess v Williams with Dick Bentley Productions v Smith</i>).➤ (e) language used➤ (f) timing of the statement➤ (g) form of the written contract❖ Objective of particular expertise	
	<ul style="list-style-type: none">❖ Facts: A set out details in letter of fuel consumption, power output, ‘estimated speed’ & comparative costs of 3 types of engines - in letter – A made recommendations in favour of one engine – estimated speed stated at 15 miles/hr❖ Held: When letter was written – negotiations incomplete – on receipt 3 courses of action open to R:<ul style="list-style-type: none">➤ (1) Required the attainment of the speed to be inserted in the specification as a condition of the contract	<i>JJ Savage v Blakney</i>

	<ul style="list-style-type: none"> ➤ (2) Sought promise/assurance/guarantee that boat would attain speed as a prerequisite of buying the boat ➤ (3) Content to form his own judgment as to the suitable power unit for the boat relying upon the opinion of the appellant <p>❖ R took 3rd course (only 2 would give rise to a collateral warranty)</p>	
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