

1. Express Terms

- **Constituent** parts of the contract → **binding** on parties
- Whether a statement IS a contractual term depends on the parties' **intention**.
- **Objective test** (reasonable person)
- Requirements: **promissory** in nature, **incorporated**

a. Promissory in nature

1. **Irrelevant statements**: no effect on the agreement
2. **Puffs**: hyperbole, no reasonable person would take it seriously
3. **('mere') representations**: fact/opinion that are simply descriptive or "merely" representational. If false → misleading/deceptive conduct (**§18 ACL**) but no breach
4. **Contractual terms**: promissory, intention evident

JJ Savage & Sons Pty Ltd v Blakney (1970)

- statement was honest opinion, not a promise or warranty → no breach.
- Mere statement = an opinion, not a contractual promise.
- Only **statements intended as promises are binding express terms**.

Ellul & Ellul v Oakes (1972)

More likely to be a term if:

- important
- made at the time or shortly before was formed
- language clear & precise
- maker had special skill/knowledge
- included in a subsequent written contract
- context dependent

Less likely to be a term if:

- not very important
- made long before the contract was formed
- language vague/equivocal
- maker had no particular skill/knowledge
- left out of any subsequent written contract
- context dependent

b. Incorporated into the Contract

i. Precontractual oral promissory statements

Incorporated unless **Parole Evidence Rule** prevents it.

ii. Incorporation by Signature Rule

L'Estrange v Graucob [1934]

- A person is bound by a signed contract, whether or not they have **read or understood its terms**.
- **Signature = assent**; only exceptions → fraud/misrepresentation

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)

- Signature rule applies – signing binds a party **even if terms aren't read**.
- Where a doc appears contractual & no fraud, misrepresentation/duress exists, the signer is bound.
- *Reasonable notice rule* doesn't apply to signed contract

Fitness First v Chong [2008]

- Principle/Held: Signature rule confirmed – signing a contract (gym membership form) binds the signer.
- **Bound despite not reading the terms**

Electronic Signatures (ETA s 9)

- Electronic assent (eg clicking "I agree") can be a valid signature if:
- Must reliably identify the person and show consent; method depends on transaction significance

Exceptions to the Signature Rule:

Curtis v Chemical Cleaning [1951]

- Vitiating factors: fraud, misrepresentation, duress.
 - Misrepresentation of clause (told it only excluded sequins damage) → exclusion clause not binding.
- Document appears non-contractual (e.g. mere receipt)

iii. Incorporation by Reasonable Notice Rule

- Applies only when the signature rule does not.
- Terms can be incorporated if reasonable notice of them is given before or at formation.

a. Timing Requirement

Olley v Marlborough Court [1949] – GENERAL RULE

- Notice given after formation (eg room signs)=ineffective.
- Terms must be communicated before or at the time of contract formation.

Exception to the general rule: "old ticket cases", where exclusion clauses on the back of train/ferry tickets.

- Held incorporated (for public policy reasons) on the theory that customers could read and then reject or accept the "offer". These usually involved a human selling the tickets.

Thornton v Shoe Lane Parking [1971] — EXCEPTION

- Exclusion clause displayed after entering car park → not incorporated.
- Contract formed at entry, so later notice invalid.
- Onerous terms require explicit, prominent notice to be effective.

eBay International AG v Creative Festival Entertainment [2006] – WEBSITE INTERACTIONS

- Terms printed on the back of concert tickets were not incorporated because they were not visible during the online purchase process.
- Reasonable notice requires terms to be accessible before acceptance.

b. Reasonableness Requirement

- Terms must be reasonably brought to attention of the party to be bound.
- Exception: no need for this rule if proven that the party already knew the terms were included prior to the dealings.

Oceanic Sun Line Special Shipping Company Inc. v Fay (1988)

- Exclusion clauses provided after booking not incorporated.
- Terms must be communicated and reasonably available before contract formation.
- Reasonable notice depends on timing, clarity, nature of the term.
- The more unusual or onerous the clause, the more explicit the notice required.

Parker v South Eastern Railway Co (1877)

- exclusion clause valid bc railway company gave reasonable notice by printing "see back" on ticket, alerting customer to terms, even if he didn't read them.

Causer v Browne [1952]

- exclusion clause not binding bc the doc looked like a receipt, not a contract, so the customer wasn't reasonably warned it contained terms.