

# Contract Law- Summary Notes

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# 1. Express Terms

## 1.1. Express Methods of Incorporation

Signed Terms - Incorporation by Signature	<ul style="list-style-type: none"> <li>- As a general rule, a party will be bound by terms in a contractual document which they signed, whether or not they read the document (<b><i>L'Estrange v Graucob Ltd</i></b>)</li> <li>- Exceptions to the rule in <i>L'Estrange v Graucob</i> <ol style="list-style-type: none"> <li>1. Misrepresentation (<b><i>Curtis v Chemical Cleaning &amp; Dyeing Co</i></b>) (<b><i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd</i></b>)</li> <li>2. Fraud</li> <li>3. Non-Contractual document</li> <li>4. Mistake/non est factum ("it is not my deed") – very narrow – eg, if blind or cannot read English, fundamental misunderstanding, and not due to carelessness</li> </ol> </li> </ul>		
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Unsigned Terms - Incorporation by Notice	<ul style="list-style-type: none"> <li>- Requirements for incorporation by notice:           <ol style="list-style-type: none"> <li>1. Time of incorporation - terms must be available to the party to be bound before the contract is made: (<b><i>Oceanic Sun Line Special Shipping v Fay</i></b>)</li> <li>2. Actual knowledge or reasonable notice of terms – the party is bound by terms if:               <ul style="list-style-type: none"> <li>- They know the notice delivered or displayed contains the</li> </ul> </li> </ol> </li> </ul>		

	<ul style="list-style-type: none"> <li>contractual terms, whether or not they read the terms</li> <li>- A reasonable person would expect the notice delivered or displayed to contain the contractual terms, whether or not they read the terms</li> <li>- The other party takes reasonable steps to bring the terms to notice of the party to be bound</li> <li>- Reasonable notice = in a form that it is likely to come to the attention of the party to be bound before the contract is formed (<b>Thornton v Shoe Lane Parking Ltd</b>)</li> <li>- Particularly if there are unusual or unexpected terms, party seeking to incorporate must take extra efforts to give notice such as will fairly and reasonably bring to attention of other party (<b>Baltic Shipping Co v Dillon</b>)</li> </ul>	
	<b>Thornton v Shoe Lane Parking</b>	<ul style="list-style-type: none"> <li>- D could not rely on the exemption clause because it did not form part of the contract. The offer of the garage was accepted by P putting money in the machine, so that the exemption clause referred to by ticket could only be discovered after the contract was made</li> </ul>
	<b>Baltic Shipping Co</b>	<ul style="list-style-type: none"> <li>- Shipowner did not give reasonable notice – clause was unusual and the owner should have done more to bring the clause to the notice of the passenger before the time of contract, eg by drawing attention to the clause on the booking form</li> </ul>
<b>Incorporation by Course of Dealings</b>	<ul style="list-style-type: none"> <li>- If the parties have a history of dealings together, and they have contracted on certain terms in the past, those terms may be incorporated in a later contract on the basis of a course of dealings, even if the terms have not been expressly mentioned or pointed out on this occasion.</li> <li>- Requirements for incorporation of terms on the basis of a course of dealings: <ul style="list-style-type: none"> <li>- Uniform (consistent) course of conduct (<b>McCutcheon v David MacBrayne</b>)</li> <li>- Regular course of conduct – used often enough that parties must have intended (objectively) to contract on that basis (<b>Balmain New Ferry Co Ltd v Robertson</b>)</li> <li>- Contractual document from previous transactions – not a mere invoice or receipt, for example (<b>Rinaldi &amp; Patroni v Precision Mouldings</b>) (<b>D J Hill v Walter H Wright</b>) (<b>La Rosa v Nudrill Pty Ltd</b>)</li> </ul> </li> </ul>	
	<b>Balmain New Ferry Co Ltd v Robertson</b>	<ul style="list-style-type: none"> <li>- Past history/former contracts can be considered in determining whether terms are incorporated.</li> </ul>

## 1.2. Parol Evidence Rule

<b>Rule</b>	<ul style="list-style-type: none"> <li>- If the agreement is wholly in the written contract, the parol evidence rule (PER) applies, and evidence about prior statements cannot be presented to vary, add to or</li> </ul>
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	contradict the written terms.	
<b>Overview of Steps</b>	<ol style="list-style-type: none"> <li>Is the contract wholly in writing? To answer this question, consider: <ul style="list-style-type: none"> <li>Is there an “Entire Agreement” or “Merger” clause in the written agreement?</li> <li>Have the parties otherwise indicated their intent that the whole of the agreement is in the written contract?</li> </ul> </li> <li>If the agreement is wholly in the written contract, the Parol Evidence Rule applies, and evidence about prior statements cannot be presented to vary, add to or contradict the written terms.</li> <li>If the agreement is not wholly in the written contract, the PER does not apply and the court must determine whether, objectively speaking, the parties intended the relevant statement as a promise which formed part of their contract.</li> <li>Whether or not the agreement is wholly in the written contract, prior statements may still be relevant in other ways: <ul style="list-style-type: none"> <li>collateral contracts</li> <li>consumer protection</li> <li>exceptions to the rule in <i>L’Estrange v Graucob</i> – fraud or misrepresentation</li> <li>estoppel</li> </ul> </li> </ol>	
<b>Step 1: Indications Whole Agreement Reduced to Writing</b>	<ul style="list-style-type: none"> <li>Entire agreement or merger clause?</li> <li>Is the writing “the exclusive repository of the bargain”? (<b>SRA of NSW v Heath Outdoor, at 191, McHugh JA</b>)</li> <li>If there is a document that appears on its face to be a complete contract, there is “an evidentiary foundation for a conclusion that their agreement is wholly in writing” (<b>SRA of NSW v Heath Outdoor, at 191, McHugh JA; cf Williston’s conclusive presumption.</b>)</li> <li>But, even if there is such a document, it is still open to a party to prove the parties have agreed on terms additional to those contained in the writing and according to McHugh JA, the parties were entitled to present evidence of oral terms to allow the court to decide whether the contract was in fact wholly in writing. (<b>State Rail Authority of NSW v Heath Outdoor, at 192, McHugh JA</b>)</li> </ul>	
	<b>SRA v Heath Outdoor</b>	<ul style="list-style-type: none"> <li>The PER only applies once it is determined that the contract is wholly in writing. Tendering of oral evidence to prove a contractual term could not be excluded until it was determined that any terms in writing record the whole agreement</li> <li>PER did not apply if the contract was partly written partly oral</li> </ul>
<b>Step 2: If Wholly in Written Agreement, Parol Evidence Rule applies</b>	<ul style="list-style-type: none"> <li>(<b>English Law Reform Commission’s Report, 1986</b>) <ul style="list-style-type: none"> <li>“[W]hen it is proved or admitted that the parties to a contract intended that all the express terms of their agreements should be recorded in a particular document or documents, 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.”</li> </ul> </li> </ul>	
<b>Step 3: If the agreement is not wholly in writing, court must still determine whether statement is a</b>	<ul style="list-style-type: none"> <li>The terms of the contract are to be ascertained from the whole of the circumstances as a matter of fact, including the following: <ul style="list-style-type: none"> <li>whether intended as a promise (<b>JJ Savage</b>)</li> <li>significance of a written contract (<b>Equuscorp</b>)</li> <li>relative expertise of the parties (<b>Oscar Chess</b>)</li> </ul> </li> </ul>	

term		
<b>Step 4: Other ways in which prior statements may be relevant</b>	<ol style="list-style-type: none"> <li>1. Collateral contracts <ul style="list-style-type: none"> <li>- One party makes a promise, connected to but independent of the main contract, and as consideration for that promise, the other party agrees to enter main contract.</li> <li>- The collateral contract must be consistent with the terms of the main contract (<i>Hoyt's v Spencer</i>)</li> <li>- The statement giving rise to the collateral contract should be made as a promise and intended to induce entry into the main contract.</li> </ul> </li> <li>2. Consumer protection – misleading or deceptive conduct under the ACL.</li> <li>3. Exceptions to the rule in <i>L'Estrange v Graucob</i> – eg, fraud or misrepresentation.</li> <li>4. Estoppel <ul style="list-style-type: none"> <li>- "Enforcement of a pre-contractual promissory estoppel is not barred by Hoyt's case" (<i>Saleh v Romanous</i>)</li> </ul> </li> </ol>	
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1.3. Statements Made During Negotiation		
<b>Pre-Contractual Statements Steps</b>	<ul style="list-style-type: none"> <li>- During negotiations, D may make a statement concerning the subject matter of the contract, which later turns out to be wrong. Can P sue D in contract for breach of contract? The answer depends on how the statement is classified</li> <li>- Is the statement made during a pre-contractual negotiation: <ul style="list-style-type: none"> <li>o Sales puff</li> <li>o Term of contract</li> <li>o Representation</li> </ul> </li> </ul>	
	<b>Sales Puff</b>	<ul style="list-style-type: none"> <li>- Sales puffs are intended as praise of the product or service (and thus are intended to induce the contract) but are not to be taken literally. <ul style="list-style-type: none"> <li>- eg "This is the best second hand car that I have ever seen."</li> <li>- eg "It is just like a new car."</li> </ul> </li> <li>- Puffs have no legal consequences if they turn out to be untrue.</li> </ul>
	<b>Terms of Contract</b>	<ul style="list-style-type: none"> <li>- Terms are statements of a promissory nature about existing or future facts or conduct that are agreed on by the parties as</li> </ul>

		<p>defining the obligations they undertake. They are intended to be enforceable.</p> <ul style="list-style-type: none"> <li>- If a term is breached, an action lies in contract law (primarily for damages) whether the breach is innocent or not.</li> </ul>
	<b>Representation</b>	<ul style="list-style-type: none"> <li>- Representations are statements of fact that are intended to induce the contract and to be relied on, but are not part of the terms of the contract.</li> <li>- A misrepresentation may give rise to remedy of rescission (and restitutionary damages) and, if negligent or fraudulent, may give rise to compensatory damages in tort law. They may also give rise to statutory remedies under the ACL</li> </ul>
<b>Terms and Representations</b>	<ul style="list-style-type: none"> <li>- Test of whether a statement is a term is an objective one - whether an innocent bystander would consider that it was intended to be a term of the contract (JJ Savage &amp; Sons v Blakney)</li> <li>- Useful factors include: <ul style="list-style-type: none"> <li>o Time between statement &amp; conclusion of contract</li> <li>o Whether statement is subjectively important to one of the parties (and this is known or ought to have been known to other party)</li> <li>o Was the innocent party asked to check the statement?</li> <li>o If written contract, whether statement is reduced to writing &amp; included in contract</li> <li>o Who is in a better position to know truth? Did the party who made the statement have special knowledge or skill regarding the subject matter?</li> <li>o Was the statement made with intention of stopping the innocent party from finding any defects?</li> </ul> </li> </ul>	
<b>Elements</b>	<b><i>JJ Savage &amp; Sons Pty Ltd v Blakney</i></b>	<ul style="list-style-type: none"> <li>- <b>Was the language used promissory?</b> <ul style="list-style-type: none"> <li>- “The actual words used by the appellant in the letter should be considered. So far from being a promissory expression, “estimated speed 15 mph” indicates, in our opinion, an expression of opinion as the result “of approximate calculation based on probability” to use the dictionary equivalent of “estimate” referred to by the Full Court. ...</li> <li>- The words in themselves tend, in our opinion, against the inference of a promise that the boat would in fact achieve the nominated speed.”</li> </ul> </li> </ul>
	<b>Equuscorp Pty Ltd v Glengallan Investments Pty Ltd</b>	<ul style="list-style-type: none"> <li>- <b>Significance of a written agreement</b> <ul style="list-style-type: none"> <li>- “The obligations of written agreements between parties cannot simply be ignored or brushed aside. ... In another case it may leave open the possibility that the contract is partly oral and partly in writing. ... But that cannot be so here. The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. If there was an earlier, oral, consensus, it was discharged and the parties’ agreement recorded in the writing they executed.”</li> </ul> </li> </ul>

	<b>Oscar Chess Ltd v Williams</b>	<ul style="list-style-type: none"> <li>- <b>Expertise of the parties</b> <ul style="list-style-type: none"> <li>- “What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant it was a 1948 model.” (Denning LJ at 376)</li> </ul> </li> </ul>
	<b>Dick Bentley Productions v Harold Smith Motors</b>	<ul style="list-style-type: none"> <li>- “[I]n the present case it is very different [to the facts in Oscar Chess v Williams]. ... Here we have a dealer, Mr Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it.” (Lord Denning MR at 67)</li> <li>- In Dick Bentley, the car dealer “stated a fact that should be within his own knowledge. He had jumped to a conclusion and stated it as a fact.”</li> <li>- In Oscar Chess, the private seller of the car honestly believed on reasonable grounds that [the statement] was true and thus the dealer purchaser could not sue for breach of contract.</li> </ul>

## 2. Construction and Implication

### 2.1. Construing the Express Terms

<p><b>Summary of the applicable principles</b></p>	<p><b>1. What is the object of construction?</b></p> <ul style="list-style-type: none"> <li>- The object of construction is to determine and give effect to the intention of the parties, as reflected in the terms of their contract.</li> </ul> <p><b>- How is the intention of the parties determined?</b></p> <ul style="list-style-type: none"> <li>- The intention of the parties is ascertained from the words they have used.</li> <li>- The question is not what the parties meant to say or what the other party actually understood to have been intended. It is the meaning of what the parties have said.</li> </ul> <p><b>- How is the meaning of the language used construed?</b></p> <ul style="list-style-type: none"> <li>- The objective approach is taken.</li> <li>- The purpose of the inquiry is to establish what a reasonable person in the position of the parties would have understood the parties to have meant.</li> </ul> <table border="1" data-bbox="367 931 1501 1525"> <tr> <td data-bbox="367 931 619 1283"> <p><b><i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd</i></b></p> </td><td data-bbox="619 931 1501 1283"> <ul style="list-style-type: none"> <li>- Test is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.</li> <li>- The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean.</li> </ul> </td></tr> <tr> <td data-bbox="367 1283 619 1525"> <p><b><i>Pacific Carriers Ltd v BNP Paribas</i></b></p> </td><td data-bbox="619 1283 1501 1525"> <ul style="list-style-type: none"> <li>- <b>The case provides a good example of the reason why the meaning of commercial documents is determined objectively:</b> it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean."</li> </ul> </td></tr> </table>	<p><b><i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd</i></b></p>	<ul style="list-style-type: none"> <li>- Test is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement.</li> <li>- The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean.</li> </ul>	<p><b><i>Pacific Carriers Ltd v BNP Paribas</i></b></p>	<ul style="list-style-type: none"> <li>- <b>The case provides a good example of the reason why the meaning of commercial documents is determined objectively:</b> it was only the documents that spoke to Pacific. The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean."</li> </ul>
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<p><b>The General Approach</b></p>	<ul style="list-style-type: none"> <li>- To what will courts have regard?             <ul style="list-style-type: none"> <li>o The literal meaning of the relevant provision; and</li> <li>o other relevant provisions of the contract.</li> </ul> </li> <li>- When admissible, evidence of context will also be considered, including evidence as to:             <ul style="list-style-type: none"> <li>o the aim or object of the relevant provision and contract as a whole;</li> <li>o the genesis of the contract; and</li> <li>o the background against which the parties contracted (i.e., surrounding circumstances).</li> </ul> </li> <li>- A commonsense approach is taken to the interpretation of commercial contracts (<b><i>Australian Broadcasting Commission v Australasian Performing Right Association Ltd</i></b>). It is presumed that the parties did not intend their contract to operate in an unreasonable way (<b><i>Electricity Generation Corporation v Woodside Energy Ltd</i></b>).</li> </ul>				