

PART A: Signature / Notice / Prior dealing

FOCUS: <Contract signed but not read terms>

Look for:

Lack of Signature: Absence of a signature may indicate no acceptance of terms. (By signature)

Onerous Terms Not Highlighted: Important clauses buried in fine print can suggest inadequate notice. (By Notice)

Insufficient Opportunity to Review: Pressure to sign quickly limits understanding and acceptance of terms. (By Notice)

Unclear Language: Complex legal jargon not explained can hinder comprehension. (By Notice)

Indications of Pressure or Misrepresentation: Coercion may invalidate acceptance of the contract. (By Notice)

Issue: Is X bound by the contract with Y despite not reading terms and conditions?

Law:

A party is bound if terms are incorporated by **signature** (binding once signed), **notice** (terms made reasonably available before contracting), or **course of dealing** (consistent past transactions imply acceptance).

<select appropriate>

<p>By Signature:</p> <ul style="list-style-type: none">➤ signed without reading it.	<p>A party who signs a contractual document is generally bound by its terms, regardless of whether they have read it, reflecting the objective theory of contract (L'Estrange; Toll).</p> <p>Exceptions include cases of misrepresentation, fraud, or non est factum (Curtis; Petelin). Onerous or unusual clauses require explicit notice to be enforceable (Thornton).</p>
<p>By Notice:</p> <ul style="list-style-type: none">➤ hyperlink to the terms and conditions before completing the transaction – “click on” or “accept” terms without reading➤ Were terms pointed out before contracting?➤ External documents mentioned?➤ Was notice clear and timely?	<p>Terms not physically present in the contract may be incorporated if the party had actual or constructive knowledge of them before the contract was formed.</p> <p>Courts require notice to be given prior to formation and reasonably sufficient in the circumstances (Parker; Thornton; Oceanic Sun Line). Particularly onerous or unusual terms require prominent notice (Interfoto). Electronic acceptance valid if identity and intent shown (s 9 Electronic Transactions Act 2000 (NSW)).</p>
<p>By Course of Dealing: When previously dealt with the party before</p>	<p>Where parties have engaged in repeated and consistent dealings over time, terms from earlier contracts may be incorporated into new contracts (Henry Kendall & Sons; Hays).</p> <p>Incorporation fails if prior documents were purely administrative or not intended to have contractual effect (James; La Rosa).</p>

Application:

<select>

<p>X signs contract Read or without reading it</p>	<p><Select></p> <table border="1"> <tr> <td data-bbox="531 349 783 528"> <p>Read</p> </td> <td data-bbox="783 349 1489 528"> <p>As X signed and read the contract, they are bound by its terms (<i>L'Estrange</i>). External statements not incorporated are not binding, unless treated as terms due to expertise or reliance (<i>Oscar Chess; Bannerman</i>).</p> </td> </tr> <tr> <td data-bbox="531 528 783 674"> <p>Didn't read</p> </td> <td data-bbox="783 528 1489 674"> <p>As X signed without reading, they are still bound (<i>L'Estrange</i>) unless vitiating factors exist (fraud, misrepresentation, <i>non est factum</i>) or an onerous term was not fairly disclosed (<i>Toll</i>).</p> </td> </tr> </table>	<p>Read</p>	<p>As X signed and read the contract, they are bound by its terms (<i>L'Estrange</i>). External statements not incorporated are not binding, unless treated as terms due to expertise or reliance (<i>Oscar Chess; Bannerman</i>).</p>	<p>Didn't read</p>	<p>As X signed without reading, they are still bound (<i>L'Estrange</i>) unless vitiating factors exist (fraud, misrepresentation, <i>non est factum</i>) or an onerous term was not fairly disclosed (<i>Toll</i>).</p>
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<p>X buys via Weblink and doesn't read terms and clicks "I agree"</p>	<p>As Y gave a link to terms before contracting, the court considers if notice was reasonable (<i>Oceanic Sun Line</i>). If X didn't access it and Y gave no clear warning, X may argue lack of notice.</p> <p>In this case, Party X may be bound by terms referenced in <insert document/external material> if the court is satisfied that sufficient notice was given before the contract was formed.</p> <p>For example, if the contract mentions a separate "terms and conditions" document and Party X was given an opportunity to review it, the terms could be incorporated and enforceable. Conversely, insufficient notice would render these terms unenforceable.</p>				
<p>X and Y have had prior dealings</p>	<p>As X (the purchaser) and Y had consistent past dealings, terms may be implied by course of dealing (<i>Balmain New Ferry v Robertson</i>).</p>				

Conclusion:

<select>

<p>Signed contract and read</p>	<p>X (buyer) and Y(seller) are bound by the contract and its terms, unless affected by fraud or misrepresentation.</p>
<p>Signed but did not read</p>	<p>X is still bound unless they prove fraud, misrepresentation, or <i>non est factum</i> (<i>L'Estrange v Graucob; Toll v Alphapharm</i>).</p>
<p>Other</p>	<p>X's obligations depend on awareness of terms at acceptance; if none shown, X remains bound by the contract.</p>

PART B: Pre-Contractual (verbal) Statements

<Statements made BEFORE contract entered into – that influenced the decision to enter contract>

Issue: Is the statement(s) a term of the contract?

FOCUS: <pre-contract statement not included in contract – is it binding?>

TWO PARTS – to determine is statement forms part of the CONTRACT

A Are statements **Promissory**?

B if so, are they **admissible** into the contract?

Fact scan

Fact / Issue	Type	Notes / Examples
Vague / ambiguous language	Representation	“Could”, “I think”, “in my opinion”
Exaggerated claims	Puff	“This car is the best on the market!”
Lack of written confirmation	Representation	Not in written contract → may not be enforceable
Misleading statements	Representation	Factual but no intent to bind
Inconsistencies	Representation	Contradictory with written terms
Promise / guarantee	Promissory	“I warrant it will start every time.”

1. Are Y's (seller) pre-contractual statements promissory?

Law:

Whether a statement is a term of the contract depends on the **objective intention** of the parties, assessed at the time of contracting. Courts consider the **text, context, and commercial purpose** of the agreement (Mount Bruce Mining ; Electricity Generation Corp).

Under the **Parol Evidence Rule**, prior negotiations and oral statements cannot alter or contradict a written contract, unless used to resolve ambiguity, prove a **collateral contract**, or explain trade/custom (Cherry v Steele-Park; Esso Petroleum; Hoyts).

Factors such as **timing, importance, reliance**, and whether the statement was **reduced to writing** assist in determining if it was intended as a binding term rather than a mere representation.

Application:

Where **Party X** made a pre-contractual statement to **Party Y**, the court will assess whether a reasonable person in **Party Y's** position would have understood that statement as part of the contract.

In this case, the concerns are around the following statements and whether they form part of the contract:

- <insert statement>
- <insert statement>
- <insert statement>

There are three key indicators that distinguish promissory statement, that's **language** used, **importance** of the statement in entering the contract, and **expertise** of the seller.

<work through ALL Language / Importance / Expertise>

STEP 1 LANGUAGE

In this case, the **language** used may indicate promissory intent (JJ S v Blakney)

<IF more 1 statement – assess every statement against LANGUAGE categories – select ONE category to each statement>

<p>Exaggerated hype</p> <p>NOT factual</p> <p>NERE PUFF</p>	<p>Y (seller) statement about <insert statement> is seen as sales talk or exaggerated hype and represents mere puff (Carlill). Hence X (buyer) has <u>no remedy and no legal recourse</u>. Therefore in this case, the statement about <insert statement> statement is not promissory and <u>does not</u> form part of the contract.</p> <p>END HERE <for those statements></p>
<p>Opinions / Vague</p> <p>(not facts) Eg “in my opinion” “I think” “could”</p> <p>REPRESENTATION</p>	<p>As Y (seller) stated that an opinion that <insert opinion> without qualifications, this could be a mere representation (JJ/Oscar Chess).</p> <p>As the statement is deemed subjective and ambiguous, it constitutes mere representation.</p> <p>Phrases and words such as <what language used that shows NOT promise>, indicates that the statement is personal view and not a commitment or guarantee, indicating uncertainty or subjectivity rather than a definitive, promissory statement. On this basis, X (buyer) has <u>no basis to claim breach or damages</u> as the statement is not promissory and <u>does not</u> form part of the contract.</p> <p><If there is another one in this category write following></p> <p>The statement <insert statement> is also an expressed opinion of <seller name> as they use phrases and words such as < what language used that shows NOT promise>, suggest the statement isn't a promise as it is a subjective interpretation of events, rather than an objective fact. So, X (buyer) can't claim breach or damages, as it's not part of the contract.</p> <p>END HERE <for those statements></p>
<p>Promissory</p> <p>Factual and appears promise</p> <p>Eg “In fact” “I promise” “I guarantee”</p>	<p>Further, examining if the language is promissory such as phrases and words such as <what language used that shows promise>, indicates that the statement appears to be promissory in nature. Words/phrases such as <insert words/ terms> are <u>assuring</u> and conveys a <u>strong implication of commitment and intent</u>. In this case it could be argued the statement(s) <u>was/were</u> a promise made by Y (seller) to X (buyer).</p> <p>CONTINUE to Importance</p>

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STEP 2 IMPORTANCE

The relevance of the statement's **importance** is crucial in determining whether the statement(s) are promissory in nature (**Van den Esschert**) In this case,

<select>

Important	<p>X (buyer) can claim that they relied on the statement(s) made by Y (seller) when they entered the contract. The decision to enter the contract was contingent of this information.</p> <p><insert evidence that X relied on Y statement – did any conduct of Y (seller) indicate that they would uphold the promise or maybe they had already started to?></p> <p>Further, <select ONE></p>	
	<p>All (promissory) statements listed above were important in decision to enter contract</p>	<p>All statements were central to X's decision to contract, made to assure X, and relied upon as valid.</p>
	<p>One promissory statement</p>	<p>The statement about the <insert statement > was key to X's decision, made to assure X, and relied upon as true — it was a dealbreaker in forming the contract.</p>
<p>CONTINUE to Expertise</p>		
Not important	<p>The statement about the <insert statement> was not integral to the contract, therefore it is not likely to be promissory.</p> <p>END HERE <for those statements></p>	

STEP 3 EXPERTISE

only if relevant>

The relevant **expertise** may also be relevant (**Dick Bentley**). In this case,

<select>

<p>expert makes statement to inexpert</p>	<p>We have an expert in Y (seller) making a statement to inexpert X (buyer) indicating statement is likely promissory.</p>
<p>expert makes statement to expert</p>	<p>We have an expert making a statement to expert indicating representational comment.</p>

OVERALL CONCLUSION

<p>Yes promissory</p>	<p>The statements were promissory and relied upon by X, the issue is now whether they are admissible.</p> <p>Proceed to 2 Apply PER</p>
<p>No mere puff or mere representation Or Not expertise or important</p>	<p>The statements are not promissory and are therefore not incorporated into the contract. Neither party is bound by these statements.</p> <p>The impact is that X cannot base a claim on them; only the written contract terms govern rights and obligations.</p> <p>END HERE X</p>