I Incorporation of Terms

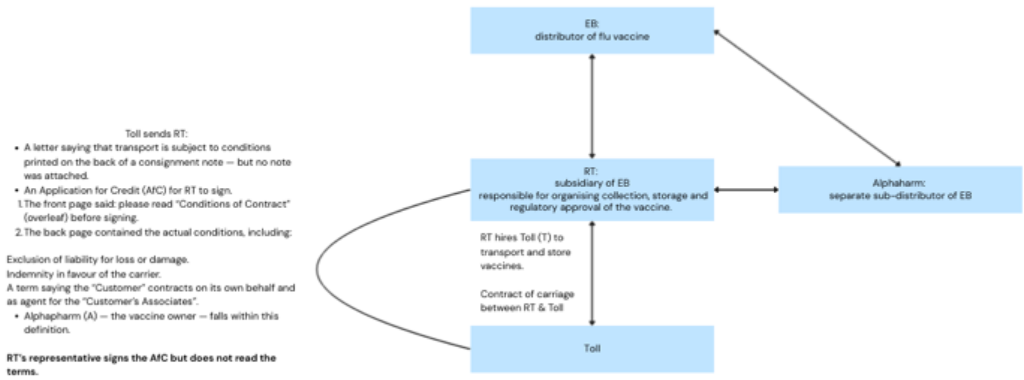
A Incorporation of Terms By Signature

Toll (FCGT) Pty Ltd v Alphapharm Pty (2004) HCA

Facts:

- EB = distributor of a flu vaccine (which is sensitive to temperature).
- RT (subsidiary of EB) was responsible for organising collection, storage and regulatory approval of the vaccine.
- Alphapharm was a separate sub-distributor.

- Distribution agreement between RT & Alphapharm
- Contract of carriage between RT & Toll (F)
    - RT entered into the contract as in agent of A.
- Alphaharm has no contract with Toll.
    - Brings a claim in negligence



<u>**Held**</u>: incorporated

Law:

General rule: Person who <u>signs a document</u> which is known to them to:

- Contain contractual terms, and
- Affect legal relations:

is bound by those terms.

- All terms are incorporated.
    - Immaterial that:
        - They have not read the document.
        - Were subjected to misrepresentation
- Must not be:
    - Suggested vitiating element,
    - Claim for equitable or statutory relief

'where a person has signed a document, which is intended to affect legal relations, and there is no question of misrepresentation, duress, mistake, or any other vitiating element, the fact that the person has signed the document without reading it does not put the other party in the position of having to show that due notice was given of its terms.'

Why?

- 'The representation is that the person who signs either:
    1. has read and approved the contents of the document or
    2. is willing to take the chance.
- That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it.'

Sufficient Notice?

- 'Where an attempt is made to introduce the concept of sufficient notice into the field of signed contracts, there is a danger of subverting fundamental principle based on sound policy.'
    - This should guide us in an unusual situation.
    - If you are trying to bring in the notion of sufficient notice, where there is a signed contract, danger of subverting the signature rule.
        - This is a very strict and adamant rule.
- Should be cautious of not following it.

Consumer Protection and other Legislation:

- Existence of consumer protection and other legislation means that:
    - 'there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked'.
    - Legislation like the ACL but consumer credit
    - Statutory protection exists.
    - Hence, the court should stick to the common law in that case
- Not the court's role to fashion the law ...

Application:

- Applied in the present case.
    - Concerned about producing a rule that generates too much uncertainty.

Curtis v Chemical Cleaning & Dyeing Co (1951) CA

Potential exemption to Toll – misrepresentation.
Facts: Curtis took a dress to a cleaner. Assistance asked Curtis to sign a receipt, advising Curtis that the cleaner did not accept some risks. The actual clause, 'This or these articles is accepted on condition that the cleaners are not liable for any damage howsoever arising, or delay'. A misdescribes the scope of the exemption clause.
Held: Curtis won. Finding of misrepresentation.

Denning LJ

- Accepted the signature rule but also allows for misrepresentation:
    - Exemption clause may not incorporated if it is misrepresented
        - 'Any behaviour, by words or conduct, is sufficient to be a misrepresentation if it misleads about the existence or extent of the exemption'
        - If it conveys a false impression, that is enough.'

'Where one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document.'

- If someone was unaware that it is a contractual document + just been given the receipt to sign = not bound to the contract.
- Here, woman asks the question about the clause and exemption clause is misrepresented = no liability
    - But inconsistent with Toll:
        - Suggestion here that you need to be actively drawn attention to an unusual or onerous exemption clause.
        - Does not outrank the HC in a clear, strident and unanimous judgment (Toll).
- Relying on Curtis to get out of an exemption clause:
    - Possible but need to recognise the tension
        - Toll's judgment supersedes.
- Cannot apply Curtis with full force after Toll.
    - Saying nothing may be a misrepresentation – Toll is strident in opposing this.
        - If you are at a dry cleaner's, what would be the terms, other than that which would limit the DC's liability

Practice Tip

1. Who is signing the document?
    a. Fact that there is a signature is insufficient.
        i. If the wrong person (eg. doesn't have authority, does not have the assets) signs, there is no relevant contract
    b. Does this person have the capacity to bind the entity that we actually want to be contracting with?
2. How are they signing it? (wet ink v electronically)
    a. Need to be conscious of fraudsters and the incompetent
3. Need to take special care where counterparty is
    a. A company
    b. A trustee
    c. A partnership
    d. Entering into the transaction as agent
    e. Someone you do not know

B Incorporation of Terms By Notice

Often, one party will claim that contract contains terms displayed or delivered before (or at the time of) transaction

- Whether such terms are incorporated into the contract will depend on:
    1. **<u>Proper notice:</u>** whether reasonable steps were made to bring the terms to the notice of the party to be bound; **and**
        a. 'the common law requires proper notice'
        b. Reasonable notice:
            i. What size was the font?
            ii. Where was it?
        c. Common law perspective: contract would still be enforceable despite
            i. But series of vitiating factors covered later.
    2. **<u>Timing</u>**: whether those steps were made <u>before</u> the contract was formed
        a. As neither parties can impose new terms
            i. But sometimes, at the moment of forming the contract, where there are complications

- For displayed or delivered terms to be incorporated, must be made available before the contract is formed
    - Naturally, one party cannot unilaterally add additional terms once the contract has been formed
    - Moment of formation is very important as:
        - The contract is interpreted at this time
        - Whether there are any implied terms, determined at this time.
    - Neither parties can add terms following contract formation.
    - Can change the contract but would require fresh consideration.
- Sometimes at the moment of contract formation, might have a complication.
    - One party is allowed to determine something or
    - Might have terms that are mentioned but not available at the time
        - This contract is subject to terms that are printed and available at our office in Dandenong.
- How to spot in an exam:
    - No signature and terms hanging around somewhere.

Oceanic Sun Line v Faye (1988) HCA (Brennan J)

If terms are not available before the contract is formed, won't be incorporated.
Facts: Faye booked cruise in Greece. Booking was made in Australia. On paying the fare, Faye was given an 'exchange order' which stated that it would be exchanged for a ticket on boarding the ship in Greece. Faye obtained the ticket in Greece. Faye was injured onboard. He wants to sue in negligence but issue is where the dispute occurs.

From the end of the glossy brochure:
Things to know before you go.
The attention of passengers is drawn to the General Conditions of transportation set out in the Passage Contract ... the transportation of passengers and baggage ... is governed by the terms and conditions printed on the Passenger Ticket Contract which may be inspected at any Sun Line office. Passenger's acceptance of that ticket constitutes agreement of those terms and conditions.

From the Exchange Order:
Article 2 of the Sun Line passage contract specifies that in the event of the passenger cancelling his passage or not using it for the sailing for which it was issues, passage money will NOT be refunded. ... Sun Line reserves the right to cancel any cruise, in which case the passage money will be refunded. ... This order will be exchanged for a Sun Line ticket when boarding vessel.

Ticket issued in Greece:
Notwithstanding anything to the contrary contained herein, any action against the Carrier must be brought only before the courts of Athens Greece to the jurisdiction of which the Passenger submits himself formally excluding the jurisdiction of all and other court or courts of any other country or countries which court or courts otherwise would have been competent to deal with such action.

Issue: whether a 'governing law' clause on the ticket issued in Greece was party of the contract. Advertising brochure, exchange order and ticket are relevant.
This question turns on whether the above clause was incorporated into the contract.
Need to consider when the contract was formed. Timing issue.

<u>Held</u>: clause is not incorporated into the contract.
Brennan

- Although we need notice + timing, timing issue is enough to resolve
    - New terms are added post contract formation

Timing
Oceanic had no right to introduce new terms.

- 'Apart from the insufficiency of opportunity for the passenger who is boarding a vessel to read the conditions printed on the ticket and to elect whether to accept them,
    - the election could only be made after travelling to Greece and obtaining the ticket.

- The defendant (Oceanic) was bound to issue a ticket in exchange for the exchange order in performance of a contract already made,
  - but the defendant (Oceanic) was given no right to introduce new conditions of carriage by printing them on the ticket.
- It was too late after the original contract was made to add conditions which were not incorporated in it.

Reasonable notice for tickets

- Notice is insufficient if the first time F can see the jurisdiction clause is in Greece.
  - Doesn't have the ability to withdraw from the contract and get his money back.
- If the passenger signs it is immaterial that the passenger did not trouble to discover the contents of the contract.
  - But where an exemption clause is contained in a ticket ... yet the other party is in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause
    - unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice.
  - In differing circumstances, different steps may be needed to bring an exemption clause to a passenger's notice, especially if the clause is an unusual one.

- In ticketing cases, may need to do what is reasonably necessary to bring an exemption clause to notice, especially if the clause is unusual.
- **Reasonable notice:** where there is an exemption clause in a ticket, the carrier cannot rely on that clause unless, at the time of the contract, they did all that was reasonably necessary to bring it to the passenger's notice.

C Statements Made During Negotiations

- Negotiations occur before the contract is formed.
  - Does this generate/ incorporate contractually binding terms?
- Parties often argue that in addition to written terms, their contract contains other (eg. oral) terms.
- A statement made by one party during negotiations may:
  1. Be of no contractual effect (eg. puffery)
  2. Constitute a representation of fact which induces the party to enter into the contract (and, if untrue, may allow that promisee to rescind the contract).
     a. Misrepresentation of fact
  3. Constitute a contractual promise
     a. Does not come from case law, rather from careful analysis facts.
     b. If it amounts to a promise, may be contractually enforceable.

(1) Is a Statement a Promise?

- For a statement to be contractually enforceable:
  1. Must be sufficiently promissory (Oscar Chess Ltd v Williams)
  2. Evidence of the pre-contractual promise must be admissible
     a. Parol evidence rule
- Whether a statement is a promise or merely a representation is decided objectively
  - A substance over form approach is adopted
- That a statement induced the other party to enter into the contract does not necessarily make that statement a contractually binding promise
- Factors relevant to whether a statement is a promise or a representation:
  1. Language used
  2. Relative expertise of the parties
  3. Importance of the statement

Oscar Chess Ltd v Williams [1957]

Whether a statement in negotiations is incorporated/ 'depends on the conduct of the parties' NOT THOUGHTS.
Facts: Williams traded his mother's car to a dealer, describing the car as a 1948 model shown in the car's registration book. Date had been fraudulently altered by the previous owner. Dealer paid 290 and later claimed the difference in value, 115; claim for damages for a breach of contract.
Issue: To claim damages, dealer had to establish that Williams' statement about the age of the car was a term of the contract (and not merely a representation).
Was it a binding promise or only an innocent misrepresentation?
Held: Williams won; it was a misrepresentation.
Williams does not have particular expertise in cars.

- On an objective basis, would it be inferred that a promise or representation was conveyed?
- Would expect the car dealer to have the expertise and knowledge.
  - Reason why the facts matter.

- Denning LJ, Hodson LJ similar:
  - Whether a warranty was intended depends on the conduct of the parties (on their words and behaviour), rather than on their thoughts.
  - If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.
  - Much depends on the precise words.