

MOD 3.1: EXPRESS TERMS

Issue-spotting checklist

- ☐ Identify the alleged express term and distinguish a promise from a representation.
- ☐ Determine whether the written agreement is intended to be exhaustive; apply the parol evidence rule.
- ☐ Test any collateral contract for promise, inducement, reliance, consideration and consistency.
- ☐ Determine whether the party signed a contractual document and whether an exception applies.
- ☐ If unsigned, assess notice timing, prominence and whether the term is onerous or unusual.
- ☐ Assess whether prior dealings were regular, consistent and sufficiently similar to the current transaction.
- ☐ Conclude whether the term forms part of the contract before considering its construction or breach.

Scaffold

3.1.1 Introduction to terms

Step	Scaffold
1. Characterise the statement	An express term is a promissory statement forming part of the contract; a representation induces entry but is not itself a contractual promise, while a puff is exaggerated sales talk not intended to be taken literally (<i>Oscar Chess v Williams</i>). Whether a statement is a term depends objectively on the parties' words and circumstances, including its importance, specificity, the maker's expertise, timing and reliance (<i>Van den Esschert</i>). Here, [party] stated [X], which [other party] considered important because [Y]. Its specificity and [maker's expertise / recipient's expressed concern] support a term; however, its qualified wording, the maker's lack of expertise or omission from the final written agreement may support a representation.

2. Apply case analogies Choose the most relevant one to facts	In <i>Dick Bentley</i>, a car dealer's mileage assurance was a term because the dealer had superior expertise; conversely, Oscar Chess treated a private seller's statement about a car's age as a representation because the seller lacked superior knowledge. In <i>Van den Esschert v Chappell</i>, an assurance about termites was a term given its importance to the purchaser; In <i>JJ Savage v Blakney</i>, a speed estimate was not a contractual promise. Here, [maker] resembles [case] because [material similarity], although [contrary fact] supports distinguishing it. On balance, [X] is likely [a term/a representation] because [decisive factor]. If merely a representation, consider misrepresentation or ACL s 18 where relevant.
--	--

3.1.3 The parol evidence rule

Step	Scaffold
1. Determine whether the agreement is wholly written	The parol evidence rule generally prevents extrinsic evidence from adding to, varying or contradicting a written contract intended to contain the parties' entire agreement (<i>State Railway Authority</i>). A document appearing complete supports that inference, but does not conclusively establish it. Here, the document's [comprehensiveness / incompleteness] supports [party's] argument that it [does / does not] exhaust the terms; the alleged oral promise concerning [X] may therefore [be excluded / form part of a partly oral agreement].

2. Determine the purpose of the evidence	In <i>Codelfa</i>, the High Court confirmed that extrinsic evidence cannot ordinarily be used to add to, vary or contradict the language of a wholly written agreement. Evidence may nevertheless be relevant to a distinct issue, including validity, rectification or a collateral contract. Here, [party] relies on [oral statement / negotiation] to [alter clause X / establish a distinct promise / address validity]. If it contradicts a complete written bargain, the rule weighs against its use; if the agreement was partly oral and written, the terms must instead be determined from the agreement as a whole.
3. Distinguish construction from variation	Evidence of surrounding circumstances may assist construction where the written words are ambiguous or susceptible to more than one meaning, but cannot simply replace clear language with a party's subjective intention. <i>Codelfa</i> supports this distinction. Here, [evidence] may clarify the objective context of [ambiguous phrase], but if clause [X] is clear and the evidence is offered to impose a different bargain, it is unlikely to assist.
4. Consider a collateral contract	A separate collateral contract must independently satisfy its requirements and cannot contradict the principal contract. In <i>Hoyts v Spencer</i>, the alleged collateral arrangement could not override an inconsistent express term. Here, the promise that [X] [supplements / contradicts] clause [Y]. If inconsistent, <i>Hoyts</i> weighs against enforcement; if consistent, assess whether a distinct enforceable promise was made. The existence of relevant evidence does not itself establish a contractual term.

3.1.4 Collateral contracts

Step	Scaffold
------	----------

1. Establish the collateral contract	A collateral contract is a separate contract in which a promise is made to induce entry into a principal contract. The claimant must establish a sufficiently promissory statement, an intention to induce entry, actual inducement, consideration and consistency with the principal contract. Here, [party] promised [X] before [other party] entered the principal contract. Its definite wording and importance support a promise; however, qualified language or a mere statement of opinion may undermine that characterisation.
2. Establish inducement and consideration	The promise must have induced the promisee to enter the principal contract, and that entry may constitute consideration where it was sought in exchange for the promise. Here, [promisee's conduct / communications] supports reliance because [X] addressed a concern material to the transaction. Conversely, if the promise was made after formation or did not influence entry, inducement is doubtful. The promisee's entry supplies consideration only if it was the act sought in exchange for the promise.
3. Ensure consistency with the principal contract	A collateral promise cannot ordinarily contradict an express term of the principal contract. In <i>Hoyts v Spencer</i>, an inconsistent collateral arrangement was not enforceable against the written lease. Here, the promise that [X] [supplements / negates] clause [Y]. If it contradicts the clause, enforcement is unlikely; if it adds a consistent obligation, a collateral contract may be established.
4. Conclude	The collateral contract is [likely/unlikely] established because [promise] was [sufficiently promissory / merely representational], [did/did not] induce entry, was [supported/unsupported] by consideration and [is/is not] consistent with the principal contract.