CONTRACTS – EXAM NOTES:

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Incorporation of Terms:

By Signature:

Terms can be incorporated by signature or some other manifestation of assent (e.g. clicking 'I agree' in a scroll box).

STEPS:

1. The person (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ):
    a. Signed – is there a signature?
    b. Knows it affects legal rights – does the document appear contractual?
2. Any vitiating factors? Exceptions?
    a. Misrepresentation (*Curtis*, Denning LJ)
    b. Duress – p. 84
    c. Undue Influence – p. 88
    d. Unconscionable Dealing – p. 91
    e. Statutory unconscionable dealing – p. 102
    f. Third Party Misconduct - p. 102
    g. Unfair contract terms – p. 33
3. If yes to (1) and no to (2) – then it doesn't matter if they haven't read the contract – terms are incorporated

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General Rule: If a party (a) knows the document **affects legal rights**, (b) **signs**, (c) there are **no outs** (misrepresentation or vitiating factors, and no claim for equitable or statutory relief) – then if all there, **terms are incorporated and contract is binding**.

- (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)

If the General Rule is met then it is "immaterial that the person has not read the document" (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

Is the document reasonably expected to contain contractual terms?

- Compare *Toll* vs *Curtis*:
    - In *Toll* – there wasn't much more that could have been done to demonstrate that the contract affected legal relations.
        - The notice of the term and conditions was "Immediately" above the line to sign
    - In *Curtis* – the document had the title 'receipt'
        - In addition, she had been told it only limited specific liability not all as was the actual limitation.

Exceptions to General Rule:

Misrepresentation:

- "'any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough." (*Curtis*, Denning LJ)
    - Because the person does not sufficiently understand the legal rights that the document creates or alters.
- ACKNOWLEDGE THE TENSION WITH *TOLL*
    - "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." (*Curtis*, Denning LJ)
- The presence of unusual terms could amount to misrepresentation (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ – obiter)

Additional Info (e.g. essay):

The importance of the signature:

- The act of signing reasonably coveys "that the person who signs either had read and approved the contents of the document or is willing to take the chance of being bound by those contents" (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)
- The enforcement of the signature is also to protect innocent people who rely on it and have no reason to doubt its validity (*Petelin* cited in *Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)

Sufficient notice danger:

- "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." (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)
    - Circumstances where sufficient notice might be worthwhile
        - Misrepresentation is alleged, mistake is claimed (*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)
    - Consider impact on 3rd party if sufficient notice allowed a term to not be enforceable.

(*Toll*, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)

Ontario Court of Appeal held that the rule in *L'Estrange* (applied in *Toll*) does not apply where;

- a standard form printed document contains 'stringent and onerous provisions';
- the document has been signed without being read or understood; and
- the party seeking to rely on the contract knows or ought to know that the signature does not represent the true intention of the signer.

The drafting party must take reasonable measures to bring the terms to the attention of the non-drafting party.

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Facts of the Case:

- EB was the Australian distributor of a flu vaccine
  - The vaccine was sensitive to temperature
- RT, an Australian subsidiary of EB, was responsible for organising collection, storage and regulatory approval of the vaccine
- Alphapharm was a separate sub-distributor
- RT engaged Finemores (later Toll) to transport and store the vaccine
  - A letter stated that cartage was subject to conditions on the reverse side of the consignment note but no consignment note was attached
  - The letter also requested that RT complete and sign an 'Application for Credit'
  - The front of the 'Application for Credit' included the statement 'please read "Conditions of Contract" (overleaf) prior to signing'
  - The terms set out on the back of the Application for Credit exempted the carrier from liability for loss and indemnified the carrier for loss or liability to others
  - RT then engaged the carrier to deliver the vaccine (under a separate contract)
- Alphapharm had no direct dealings with the carrier but accepted the arrangements

Outcome:

- Appeal allowed – terms on the Application for credit were incorporated through signature.

Judgment (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ:

- No requirement of notice when you have a document that would be understood to contain contractual terms and that document is signed.
  - "Please read conditions of contract" indicates that it is a document that contains contractual terms.
- Cited L'Estrange: it is irrelevant whether the party signing the document has read it or not
  - It was reasonable for T to treat RT's signature as manifestation of assent to the conditions as RT's had been invited to read before signing
- No issues with fraud or misrepresentation

Curtis v Chemical Cleaning & Dyeing

NOTE – UK CASE – THIS HAS NO BINDING PRECEDENT ON AUS

Facts of the Case:

- C took a white satin dress to CCD for cleaning
- C was asked to sign a piece of paper headed 'receipt'
- C was told that her signature was required because CCD would not accept liability for certain specified risks, including the risk of damage by or to beads and sequins

- C then signed the 'receipt', which in fact contained an exemption clause limiting liability for all types of damage
- CCD returned the dress with a stain on it
- CCD denied negligence and relied on the exemption clause contained in the signed receipt

Key Takeaways:

- There are two types of misrepresentation but either are sufficient for preventing a term from being incorporated by signature:
  - Fraudulent/intentional misrepresentation
  - Innocent misrepresentation

By Notice:

If a contract does not involve a signature, incorporation of unsigned terms may occur by giving a notice of terms to the other party prior to contract formation.

- Examples:
  - Large signs at the entrance to business premises (e.g. at the entrace to a car park)
  - Setting out terms on the back of a ticket
  - Displaying a notice on a customer service counter
  - Making the terms available through their website

Question is: what makes those notices effective?

STEPS:

1. Terms are incorporated by notice if:
   a. Notice is given prior to contract formation
   b. Notice must bring the terms to the attention of the other party in a reasonably sufficient manner.

Timing:

Rule: Terms must be reasonably available prior to contract formation (*Oceanic Sun*, Brennan J)

- When was the contract formed?
  - Don't forget to consider alternatives.
- Needs to be reasonable opportunity to see the terms and conditions before acceptance (*Oceanic Sun*, Brennan J)
- A term cannot alter a contract if it is added after contract formation (*Oceanic Sun*, Brennan J).

Oceanic Example:

- Fay would have had to travel to Athens from Sydney to read the terms and conditions, it was impossible to forfeit ticket because of no refund policy, Fay already had contractual obligations before receiving his ticket which included the notice of conditions in Greece.

Proper Notice:

Rule: The terms and conditions must be brought to the other party's attention (*Oceanic Sun*, Brennan J).

- OBJECTIVE TEST
- This applies if the Party B is not aware that the terms and conditions are intended to form part of the contract
- Party A can only rely on the clause if Party B has "done all that [is] reasonably necessary to bring the [e.g.] exemption clause to [Party A] notice" (*Oceanic Sun*, Brennan J).

Factors:

- Accessibility of the terms?
- It depends on the facts – the more unusual or onerous the condition is, the more that will be required to bring it to the other party's notice (*Oceanic Sun,* Brennan J)
    - Is it destructive of rights? (*Thornton*, Denning LJ)
- Consider
    - Size of the text, colour, font, layout, is it clear
    - E.g. "red rink with a red hand pointing to it" – "startling" (*Thornton*, Denning LJ)

Examples:

- *Toll* – the request for a signature was immediately below a statement informing the reader that the terms and conditions were on the overleaf – sufficient
- *Oceanic* – a note in a brochure is not sufficient, the terms must be reasonably accessible (obiter)

Additional Information:

Conventional ticket analysis (*Oceanic Sun*, Brennan J):

- Tickets are an offer that have not yet been accepted. They are accepted not when the fare is paid but rather through the act of boarding the ship, or entering the theatre.
- Until that act, acceptance has not occurred therefore the ticket remains as an offer which can be rejected and be given a refund – within a reasonable period of time.
- Therefore, the terms and conditions on the back of a ticket, are part of the contract and bind the parties upon acceptance/contract formation.
- If the ticket is issued at the time of boarding – conventional ticket analysis does not apply – there has not been a reasonable opportunity for the passenger to examine and accept and the terms and conditions.

Oceanic Sun Line Shipping Company v Fay

Saleh v Romanous – NSWCA
Facts of the Case: • R entered into a contract to purchase the S's land on the assumption, induced by S, that S's brother, Edmond, would participate in a joint venture with R to develop the property • S: "'Leave Eddie up to me. I'm taking responsibility for Eddie. If Eddie doesn't want to build you don't have to buy and you will get your money back" • Joint venture did not eventuate so R sought to recover the deposit • S argued that PER and the entire agreement clause excluded evidence regarding the statement. Outcome – Appeal dismissed – deposit repaid to R