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Summary

ALWAYS START WITH TERMS
'A and B are bound by the express terms incorporated by… in the [document] (authority)..." → go to PER

OR

The express terms of the contract between A and B were delivered orally and were mutually intended to form the basis of their contract"
PER Does the PER apply? No → were the terms expressed orally promissory? Yes → extrinsic evidence/pre contractual statements cannot be incorporated but give **in the alternative.**
Are the terms/statements in contention in the contract or outside? Inside the contract → termination Not included in the contract → Vitiating factors

Termination possible? Breach or repudiation → Election → Requirement of Readiness and Willingness **Date of assessing damages → how and when does the right to damages arise?** **Limitation of Award of damages**	**Or Vitiating Factors?** Misrepresentation → Misleading or deceptive conduct Duress Mistake Undue influence Unconscionable dealing →ACL →then equity **Right to rescind?** Any bars to rescission
Damages Liquidated damages or penalty Expectation damages Reliance (wasted expenditure) damages if expectation damages unable to be calculated Loss of a chance damages	Rescission Can be full or partial (depends on whether performance has been executed) Can have any payment returned to the person

Construction

- A contract is a **voluntary assumption of legal liability**
- The terms of a contract are **binding** and therefore what the parties have agreed to be its terms imposes **obligations** on both parties
- Contractual disputes often concern whether or not a term was **agreed to**, regard the **scope** and **meaning** of a term, and subsequent issues such as **termination** and **damages**

Key issues

- When can you know that a party has expressly agreed to certain alleged terms of a contract?
- How is express agreement manifested?
    - Where there is a signature; or
    - Where notice of a term is given (but there is no signature); or
    - Where there is a course of dealings

1. Terms must be construed to determine their meaning and legal effect
2. May be necessary to consider the admissibility of extrinsic evidence
3. If the express terms of the contract prove silent on the issue of dispute, it must be determined whether there is a gap in the terms into which the court may imply a term dealing with the issue in dispute
4. Consider the effect of statute on the parties' contractual rights and obligations

Formation of a Contract

1. Agreement
2. Consideration
3. Certainty
4. Intention to create legal relations

Summary – Construction of Terms in a PQ

Note this is only a brief summary - refer to construction of terms flowcharts

- Determine what parties have agreed to do by way of performance of contract; legally bound to
- Courts seek to give effect to party intentions; objective approach 'the intention which reasonable persons would have had if placed in the situation of the parties' (*Reardon Smith Line v Hansen Tangen*)
- Courts determine contractual terms by application of rules concerning express and implied contractual terms

Step 1	Formation/type of contract ● Is there a **written** contract? ● Did parties intend for it to be **wholly in writing?** ● If document conclusive, **PER applies** and written agreement supersedes any oral agreements. If not wholly in writing, consider whether **prior statements** can be considered terms of the contract. ● Any **exceptions** to PER? (collateral, estoppel, ACL etc.) ● Existence of any **exclusion** clauses? Do they apply?
Step 2	What are the express terms of the contract agreed by the parties? How are they **incorporated**? ● Signed contract - Incorporation by signature ● Unsigned terms - Incorporation by notice ● Incorporation by course of dealings ● Promissory statements made in negotiations (if PEL does not exclude)
Step 3	Process of **construction** of express terms. Consider: ● The objective intentions of the parties ● Normal and ordinary meaning of the words ● What the words of the contract would convey to a reasonable business person with the knowledge of the contracting parties

	• Consider extrinsic evidence for surrounding circumstances → in NSW, there is **no 'ambiguity gateway'** required before considering extrinsic evidence • Commercial common sense approach to construction Following construction, what is the **meaning** and **legal effect** of the terms?
Step 5	Are the express terms **silent** on the issue in dispute? Consider implied terms. • Implied in fact • Implied in law • Implied in custom • Implied in statute → ACL and UCL
Step 6	What is the **effect** of the statute on the parties' **contractual rights** and **obligations?**

Express terms

Incorporation by Signature *Rationale? → Commercial certainty, no complex steps required to prove consent, freedom of contract*	
Preliminary	A and B are bound by the express terms…
Step 1	Did the person sign it? **YES** → incorporation by signature (*L'Estrange v Gracoub*): proceed to step 2 - 'Although the document is headed [***], it is intended to function as a contract given it contains contractual terms and cannot reasonably be considered as serving an alternative purpose (cf *Curtis)* - A person who signs a contractual document will be bound by the terms in that document, **regardless** of whether he or she has read or understood those terms (*L'Estrange v Graucob*) - A person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is **immaterial that the person has not read the document";** immaterial person has not read doc; words and conduct objectively assessed to what a reasonable person would have been led to believe (*Toll*) → *Toll* suggests that a person who signs a contractual document without reading it is bound by its term *only if the other party has done what is reasonably sufficient to give notice of those terms (misrepresentation).* **NO** → not incorporation by signature
Step 2	Do any limitations apply? (*L'Estrange v Graucob*): (a) Misrepresentation (either fraudulent or innocent) is alleged (b) Mistake is claimed/non est factum is pleaded - *Note this is very narrow - examples include illiteracy, blindness, fundamental misunderstanding → NOT CARELESSNESS* (c) Fraud (d) Non-contractual document such as a 'receipt' (*Curtis v Chemical Cleaning & Dyeing Co*) - Curtis: shop assistant created a false impression by failing to draw the customer to the width of the exemption clause (e) A signed term may also be void under Australian Consumer LAW (ACL) -