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CONSTRUCTION

1. **Express terms:**
    a. **Statements made during negotiations**

i. ***JJ Savage & Son v Blakney 1970***

FACTS:
- Blakney (respondent) had negotiations with JJ Savage (appellant) to buy a motor boat from them.
- During negotiations prior to appellant agreeing to construct a motor cruiser for the respondent, appellant wrote respondent a letter considering various engines and recommending a single series GM diesel with 'estimated speed 15mph'. The final specifications adopted this engine but made no reference to the capacity of the cruiser to achieve any particular speed.
- Respondent sued for breach of an alleged warranty or collateral contract that the cruiser when fitted with the engine would have an estimated maximum speed of 15mph.

DECISION:
- "So far from being a promissory expression, 'estimated speed 15mph' indicates… an expression of opinion as the result of 'approximate calculation based on probability'." "the words in themselves tend… against the inference of a promise".
- The statement of *De Lassalle v Guilford 1901*- that without the statement the contract in that case would not have been made, does not provide an alternative and independant ground on which a collateral warranty can be established. (IE reliance does not= promise).

HELD:
- The evidence did not establish that the statement in the letter was promissory, but only that Blakney accepted Savage's estimate as sufficient to found his own judgement as to the powering of the vessel.

ii. ***Oscar Chess v Williams 1957***

FACTS:
- Williams sold his car to Oscar Chess in part exchange for a new Hillman.
- At the time of sale both parties assumed that it was a 1948 Morris, and Williams described it as such, since this was how it was shown in the registration book.
- Oscar Chess later discovered that in fact it was a 1939 model and sued.

DECISION:
- Williams' statement was no more than an innocent misrepresentation and did not amount to a promise or guarantee that the information was accurate so as to become a term of the sale.
- Warranty illustrates an intention to be bound to the statement.
- Denning LJ: Look at 'totality of the evidence' to see if it's a promise. The question whether a warranty was intended depends on the conduct of the parties, their words and behaviour and whether an intentillent bystander/ Reasonable person would infer that a warranty was intended.

HELD:
- William's statement ≠ a warranty. Appeal allowed.

iii. ***Dick Bentley Productions v Harold Smith (Motors) 1965***

FACTS:
- Smith said car had done 20 000 miles.

- Bentley had told Smith that he was looking for a 'well vetted Bentley car' and Smith had told Bentley that he was 'in a position to find out the history of cars.'
- The statement about mileage was untrue.

DECISION:

- Lord Denning: "the question 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."
- "If a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty."
- The maker of the representation can only rebut this inference if they can show that it really was an innocent misrepresentation (See *Oscar Chess v Williams)*

HELD:

- Smith's statement was a warranty

b. Written terms + signature

i. *L'Estrange v Graucob 1934*

FACTS:

- Purchase of a cigarette machine.
- Plaintiff claimed there was an implied warranty whereas the defendant claimed that they had signed a term stating that "this agreement contains all the terms and conditions under which i agree..."

DECISION:

- Scutton J: "In an ordinary case...[regarding] a written agreement which is signed by the defendant, the agreement is proved by providing a signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement or does not know its contents".
- NOTE TICKET CASES: Where a contract is contained in a ticket or another unsigned document, it is necesary to prove that the party was or ought to have been aware of its terms and conditions.

HELD:

- Where no misrepresentation or fraud can be found; Signature is always binding.

ii. *Toll (FGCT) v Alphapharm*

DECISION: Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ

- Consistent with the objective approach to the determination of rights and liabilities of contracting parties is the significance which the law attaches to the signature of a contractual document.
- A signature is widely recognised by the general public as a formal device and its value would be greatly reduced if it could not be treated as conclusive ground of contractual liability at least in all ordinary circumstances.

HELD:

Signature is binding- especially as Richard Thomson was authorised by Alphafarm to contract with Finemores on their behalf.

iii. *Curtis v Chemical Cleaning & Dyeing 1951*

FACTS:

- Shop assistant said receipt exempted shop from damage to beads or sequins. When in fact the receipt prevented liability of damage howsoever arising.
- The dress was returned with a stain.

DECISION: Denning LJ
- If the party affected signs a written document, knowing it to be a contract which governs the relations between them, his signatures is irrefragable evidence of his assent to the whole contract, including the exempting clauses.
- 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 whether it be knowingly (fraudulent misrepresentaiton) or unwittingly (innocent misrepresentation).

HELD:
- Misrepresentation, therefore signature not binding.

c. Terms incorporated by notice

i. *Oceanic Sun Line Special Shipping Company v Fay 1988*

FACTS:
- Plaintiff upon payment for a cruise recieved an "exchange order" which could be exchanged for the ticket in Greece.
- The ticket obtained in Athens contained conditions that courts of Greece had exclusive jurisdiction over any claims.

DECISION:
- The conventional formation of contracts for the carriage of passengers which involve tickets is that the ticket is regarded as an offer and the contract is only made through the subsequent acceptance of that offer by the passenger.
- A condition printed on a ticket is ineffective to alter a contract of carriage if the ticket is isssued after the contract has been made. The ticket was issued in performance of an antecedent contract.
- The carrier cannot rely on the new clause, unless at the time of the contract the carrier had done all that was reasonably necessary to bring the exemption clause to the passengers notice.

HELD:
- Exemption clause is not binding as the company did not take reasonable steps to notify Fay of the exemption clauses.
- Contract was formed in Sydney, therefore terms of carriage on ticket received in Greece not binding.

ii. *Thornton v Shoe Lane Parking 1971:*

FACTS:
- Mr Thorton parked in a car park which stated "All cars parked at the owners own risk".
- He drove in and took a ticket and was subsequently severely injured we he later returned to collect his car.
- The Car Park claimed to be exempt from liability to him as the ticket was a contractual document which incorporated conditions.

DECISION: Lord Denning MR:
- A customer is bound by terms if they are sufficiently brought to his notice beforehand, but not otherwise.
- The contract was concluded at the time of payment at which point one cannot refuse it, nor get their money back and the ticket was merely a receipt of that payment.
- Conditions thus cannot be printed on ticket as the acceptance has already happened (taking the ticket out of the machine). This is distinguished from ticket cases as it is a machine so the person cannot dispute the terms once they have taken the ticket.

McCutcheon v David MacBrayne Ltd:

(1) Did the person know there was printing on the ticket?

(2) Did they know that the ticket contained or referred to conditions?
(3) Did the defendants do what was reasonably possibly in the way of notification of terms and conditions?

HELD:
- No conditions were admissible on the ticket- Appeal dismissed.

iii. *Baltic Shipping v Dillon (The Mikhail Lermontov) 1991*

FACTS:
- Once booked and paid for a cruise the plaintiff recieved a ticket which contained terms and conditions limiting the liability of the shipping company.
- The ship sank and the plaintiff suffered physical injury, shock and loss of belongings.
- The appellant, after admitting liability claims that the provisions of the ticket limit such liability.

DECISION: Kirby P:
- It was the appellants responsibility to bring unusual terms and conditions at least to the notice of passengers before they were to be bound to them.
- The mere presentation of the ticket does not fix acceptance of the terms and conditions if the passenger hasn't had reasonable opportunity to see and agree to them.

HELD:
- Once contract made, ticket cannot impose more terms if the terms are *unusual and unexpected*.
- Appeal dismissed.

d. Incorporation by a history of dealings

i. *Balmain New Ferry v Robertson 1904*

FACTS:
- Plaintiff paid a fee of $1 and missed his boat.
- Tried to cross to another wharf without paying another $1 and was prevented from doing so.
- Sued for assault and false imprisonment.

DECISION: O'Connor J:
- As there was no express contract, the terms must therefore be implied from the circumstances.
- Having travelled on many occasions on the company's boats and having paid multiple fares he must have been aware of the company's method of conducting their business.

HELD:
- Roberston had travelled many times on ferry before, therefore he knew the terms incorporated into the contract.
- Appeal by company allowed.

ii. *Rinaldi & Patroni v Precision Mouldings 1986:*

FACTS:
- The parties had formed similar contracts on 9 or ten occasions
- The invoices contained a condition stating that the appellants were protected from action for damage done to the boat in negligence.
- Damage occured and the defendants attempted to rely on this condition.

DECISION: BURT CJ:
- Appellants argued that the respondant, regardless of whether they knew of the conditions, had constructive knowledge of the conditions and through oral transactions that condition had become a term of the contract.
- The document in this case was presented for signature AFTER the contract had been performed - ie paid and delivered goods.

- The respondant could not reasonably be expected to consider this document as a contract as it was presented as nothing more than an acknowledgement of delivery

HELD:

- Cart notes were not contractual documents and accordingly the terms on them were not incorporated by course of dealing into subsequent contracts
- Appeal Dismissed.

2. **Extrinsic evidence:**
    a. **Parol evidence**
    b. **Extrinsic evidence in identifying the terms**
        i. ***State Rail Authority of NSW v Heath Outdoor 1986***

FACTS:

- Heath Outdoor entered into a number of contracts with the State Rail Authority (SRA) relating to the advertising placed on land of the authority's.
- A clause was present that HO didn't like, but the SRA representative said State Rail wouldn't enforce the clause unless HO failed to pay rent or it was objectionable advertising.
- SRA terminated the agreement through use of the clause.

DECISION: McHugh J:

- It may be difficult to determine whether the writing of a contractual document is the exclusive repository of the bargain.
- "The mere production of a contractual document, however complete it may look, cannot as a matter of law exclude evidence of oral terms if the other party asserts that such terms were agreed."
- The existence of writing which appears to represent a written contract between the parties is no more than an evidenciary foundation for a conclusion that their agreement may be wholly in writing.
- The Court must decide whether the contract is wholly written or partly written and partly oral/ letter etc., can find out through extrinsic evidence.

Test:

1. Is the contract wholly contained in writing?
    a. Does the document provide evidence for this?
    b. What are the extrinsic factors that may provide evidence to show that the contract is/ is not wholly contained in writing?

HELD:

- It cannot be proven that the contract was partly oral and therefore the parole evidence rule applies to restrict the admission of extrinsic evidence.

ii. *H* ***Hoyt's v Spencer 1919:***

FACTS:

- Spencer leased to Hoyts certain premises for four years.
- The lease provided that Spencer can terminate at any time with 4 weeks notice.
- Spencer acted on this clause and Hoyts gave up the land.
- Hoyts took action alleging that in consideration of its taking the lease, Spencer agreed that he would not during the currency of the term give notice to quit.

DECISION:

- Spencer was justified in terminating, as the written contract was a full record of their agreement, "unless it can be shown that the document was not intended as the complete record of their bargain," therefore no oral evidence can be admitted.