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9. Incorporation of Terms

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Abstract

This chapter discusses the incorporation of terms into a contract. Three principal options are available to ensure the incorporation of terms, the first of which is to make sure that the other party to the contract signs the document that contains all the relevant terms. A party is generally bound by terms he has signed, whether or not he has read them. The second option is to take reasonable steps to bring the terms to the notice of the other party. In order to be effective the notice must have been given at or before the time of contracting, in a document that was intended to have contractual effect, and reasonable steps must have been taken to bring the terms to the attention of the other party. The third option is incorporation by course of dealing or by custom. In order to constitute a 'course of dealing' there must have been a series of transactions between the parties that was both 'consistent' and 'regular'.

Keywords: English contract law, incorporation, contract terms, signature, reasonable notice, course of dealing

Central Issues

1. In order to be effective a term must have been incorporated into the contract between the parties. Incorporation can be a surprisingly difficult issue in commercial practice. Many businesses spend significant sums of money on legal advice in relation to the drafting of their standard terms of business but then adopt what appears to be a surprisingly lax approach when it comes to ensuring that these standard terms are incorporated into the contracts they conclude. It is a noticeable feature of litigation concerning standard form clauses, such as

exclusion clauses and retention of title clauses, that the defendant frequently takes the point that the term in issue between the parties has not been incorporated into the contract. Incorporation issues are not, however, confined to exclusion clauses or retention of title clauses. They can arise in relation to any contract term.

2. The simplest method of incorporation is signature. A party is generally bound by terms he has signed, whether or not he has read them. This rule can produce harsh results and it has been criticized on this basis. The justification that is usually offered in support of the rule is that it promotes certainty and protects the interests of third parties who may rely to their detriment upon the validity of the signature.
3. Terms can also be incorporated into a contract by notice. In order to be effective the notice must have been given at or before the time of contracting, in a document that was intended to have contractual effect and reasonable steps must have been taken to bring the terms to the notice of the other party. Where the term is 'onerous' or 'unusual' greater steps must be taken to bring it to the attention of the other party. This rule is firmly established in English law but it is open to criticism on the ground that it gives rise to uncertainty (in terms of defining a clause that is 'onerous' or 'unusual') and on the basis that no convincing justification has been offered for differentiating between different terms in relation to their incorporation. Attempts to regulate the fairness of the terms of a contract should be done directly and not by the back door of the rules relating to the incorporation of terms.
4. Finally terms can be incorporated into a contract by virtue of a course of dealing or as a result of the custom of the trade. In order to constitute a 'course of dealing' there must have been a series of transactions between the parties that was both 'consistent' and 'regular'.

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9.1 Introduction

The incorporation of terms into a contract can be a contentious issue in practice. A failure by a party to take adequate steps to ensure that its standard terms are incorporated into the contracts it concludes can be an expensive mistake. A simple illustration of this point is provided by the facts of *Poseidon Freight Forwarding Co Ltd* v. *Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep 388. A fax was sent by the defendants to the plaintiff. At the bottom of the fax appeared the words 'NOTE: The only conditions on which we transact business are shown on the back'. Unfortunately, it would appear that no one had informed the employee of the defendants who was operating the fax machine that it was necessary to fax the back page as well as the front page. So the terms on the back were never sent to the plaintiff. The Court of Appeal held that, in these circumstances, the defendants' terms had not been incorporated into the contract so that the defendants were unable to rely on an exemption clause contained in their standard terms. Leggatt LJ stated (at p. 394):

> [t]his is not a case where a party declares that the terms are available for inspection. It is a case where, on documents sent by fax, reference is made to terms stated on the back, which are, however, not stated or otherwise communicated. Since what was described as being on the back was not sent, it was a more cogent inference that the terms were not intended to apply.

How can a party take adequate steps to ensure that its terms are incorporated into the contracts it concludes? Three principal options are available. The first is to ensure that the other party to the contract signs the document that contains all the relevant terms. The general rule in English law is that a party is bound by his signature and this rule applies whether or not the party signing the document has read it. The second is to take reasonable steps to bring the terms to the notice of the other party. This is a less reliable method of incorporation than signature because of the need to persuade the court that 'reasonable steps' have been taken (and, as we shall see, it is not always an easy task to persuade a court that reasonable steps have been taken). The third option is incorporation by course of dealing or by custom. The last option is the least satisfactory option, largely because of the difficulties involved in establishing the existence of a course of dealing that is sufficiently consistent and regular for it to amount in law to a 'course of dealing'. Incorporation by custom is easier to establish where both parties transact in a particular market or trade: in such a case the court may be relatively willing to infer that the customary trade terms have been incorporated into the parties' contract. It is, however, the case that it is safer to take more active steps to ensure that terms are incorporated into a contract, whether these active steps take the form of obtaining the signature of the other party or taking reasonable steps to bring the terms to the notice of the other party.

9.2 Incorporation by Signature

A party is, in general, bound by his signature. This being the case, a party who signs a contract will, in principle, be bound by its terms. This is so, whether the party signing the document has actually read it or not. A party who does not want to be bound by the terms contained in the document should not sign it. The
p. 311 law does not in general allow him to sign ↵ the document and afterwards claim that he is not bound by its terms on the basis that he had not read or understood its terms. The general rule that a party is bound by his signature can lead to harsh results, as the following case demonstrates:

L'Estrange v. F. Graucob Ltd
[1934] 2 KB 394, Divisional Court

Two of the defendants' representatives visited the plaintiff and asked her to buy an automatic slot machine for cigarettes. The plaintiff was the owner of a café in Llandudno. She agreed to buy the machine and signed a 'Sales Agreement' produced by one of the defendants' representatives. The document, so far as relevant, provided:

> 'Sales Agreement. Date Feb. 7, 1933. To F. Graucob, Ltd, ... Please forward me as soon as possible: One Six Column Junior Ilam Automatic Machine ... which I agree to purchase from you on the terms stated below ... and to pay for the same in the following manner: Instalments 8l. 15s. 0d. down. 18 payments of 3l. 19s. 11d.'

There then followed some clauses in small print which, so far as material, provided:

> 'I agree to take delivery of the machine upon receiving notice that it is ready for delivery, and to make the first monthly payment 30 days after the date following that of the posting of such notice and all subsequent payments on the corresponding date of each succeeding month. ... If any payment shall not have been received by you within a fortnight after it has become due, all the remaining payments shall fall due for immediate payment, and I agree to pay interest on these remaining payments at the rate of ten per cent. per annum as from the date of their so falling due. In consideration of your undertaking to put in hand at once work on this machine I agree not to countermand this order. ... This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded. ... (sgd.) H. M. L'Estrange.'

The machine was delivered to the plaintiff some six weeks later but the machine did not work satisfactorily and after a few days became jammed and unworkable. The plaintiff brought an action against the defendants. One of the claims advanced by the plaintiff was that the machine was not fit for the purpose for which it had been sold. The defendants denied liability on the basis that the agreement expressly provided for the exclusion of this and all other implied warranties. The plaintiff in turn contended that she was induced to sign the contract by the misrepresentation that it was an order form and that at the time when she signed she knew nothing of the conditions. The county court judge held that the defendants were not entitled to rely upon the clause which excluded implied warranties from the contract on the ground that they had not done what was reasonably sufficient to give the plaintiff notice of the conditions. The defendants appealed to the Court of Appeal who allowed the appeal. It was held that the plaintiff had not been induced to sign the contract by any misrepresentation and that she was bound by her signature. She was therefore bound by the terms of the contract, including the exclusion clause, and judgment was entered for the defendants.

Scrutton LJ

[set out the facts and continued]

As to the defence that no action would lie for breach of implied warranty, the defendants relied upon
p. 312 the following clause in the contract: 'This agreement contains all the terms and ↵ conditions under which I agree to purchase the machine specified above and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded'. A clause of that sort has been before the Courts for some time. The first reported case in which it made its appearance seems to be *Wallis, Son & Wells* v. *Pratt & Haynes* [1911] AC 394, where the exclusion clause mentioned only 'warranty' and it was held that it did not exclude conditions. In the more recent case of *Andrews Brothers (Bournemouth), Ltd* v. *Singer & Co* [1934] 1 KB 17, where the draftsman had put into the contract of sale a clause which excluded only implied conditions, warranties and liabilities, it was held that the clause did not apply to an express term describing the article, and did not exempt the seller from liability where he delivered an article of a different description. The clause here in question would seem to have been intended to go further than any of the previous clauses and to include all terms denoting collateral stipulations, in order to avoid the result of these decisions.

The main question raised in the present case is whether that clause formed part of the contract. If it did, it clearly excluded any condition or warranty.

In the course of the argument in the county court reference was made to the railway passenger and cloak-room ticket cases. ... These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

The plaintiff contended at the trial that she was induced by misrepresentation to sign the contract without knowing its terms, and that on that ground they are not binding upon her. The learned judge in his judgment makes no mention of that contention of the plaintiff, and he pronounces no finding as to the alleged misrepresentation. There is a further difficulty. Fraud is not mentioned in the pleadings, and I strongly object to deal with allegations of fraud where fraud is not expressly pleaded. I have read the evidence with care, and it contains no material upon which fraud could be found. ...

In this case the plaintiff has signed a document headed 'Sales Agreement', which she admits had to do with an intended purchase, and which contained a clause excluding all conditions and warranties. That being so, the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them.

Maugham LJ

I regret the decision to which I have come, but I am bound by legal rules and cannot decide the case on other considerations.

> The material question is whether or not there was a contract in writing between the plaintiff and the defendants in the terms contained in the brown paper document. ...
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> In the present case on February 7, 1933, an order form, for such I consider the brown paper document to be, was signed by the plaintiff. It was an elaborate form containing a number of clauses, and among them certain terms and conditions in regrettably small print but quite legible. The plaintiff having signed that document gave it to a canvasser of the defendants, who took it away. It had been filled up in ink by the canvasser before she signed it. Another document called an order confirmation dated February 9, 1933, was sent to her by the defendants. In my opinion the contract was concluded not when the brown order form was signed by the plaintiff but when the order confirmation was signed by the defendants. If the document signed by the plaintiff was a part of a contract in writing, it is impossible to pick out certain clauses from it and ignore them as not binding on the plaintiff. ...
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> p. 313 ↵ I deal with this case on the footing that when the order confirmation was signed by the defendants confirming the order form which had been signed by the plaintiff, there was then a signed contract in writing between the parties. If that is so, then, subject to certain contingencies, there is no doubt that it was wholly immaterial whether the plaintiff read the small print or not. ...
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> There are, however, two possibilities to be kept in view. The first is that it might be proved that the document, though signed by the plaintiff, was signed in circumstances which made it not her act. That is known as the case of Non est factum. ... The written document admittedly related to the purchase of the machine by the plaintiff. Even if she was told that it was an order form, she could not be heard to say that it did not affect her because she did not know its contents.
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> Another possibility is that the plaintiff might have been induced to sign the document by misrepresentation. She contended that she was so induced to sign the document inasmuch as (i.) she was assured that it was an order form, (ii.) that at the time when she signed it she knew nothing of the conditions which it contained. The second of these contentions is unavailing by reason of the fact that the document was in writing signed by the plaintiff. As to the first contention it is true that the document was an order form. But further, if the statement that it was an order form could be treated as a representation that it contained no clause expressly excluding all conditions and warranties, the answer would be that there is no evidence to prove that that statement was made by or on behalf of the defendants.
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> In this case it is, in my view, an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms. I may add, however, that I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties.
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> I agree that the appeal should be allowed.

Commentary

The decision in *L'Estrange* has given rise to a considerable amount of debate and controversy. The analysis of the decision will proceed in three stages. At the first stage we shall consider the scope of the rule, before moving on to consider, briefly, the justifications that have been advanced in support of the rule and the criticisms that have been levelled against it before turning, finally, to consider the various exceptions that exist to the rule.

In terms of the scope of the rule it applies to a document that has been signed by a contracting party (it may of course have been signed by both parties but the point of the rule is to bind a party who has signed the document to the terms to be found within the document). On the facts of *L'Estrange* the signature took the form of a traditional handwritten signature. Would an electronic signature suffice to attract the operation of the rule? There would appear to be no reason why not and it was assumed that it did suffice in *Blu-Sky Solutions Ltd* v. *Be Caring Ltd* [2021] EWHC 2619 (Comm), [2022] 2 All ER (Comm) 254. However, an electronic signature should only suffice to attract the operation of the rule where it is the electronic equivalent of a handwritten signature so that, for this purpose, ticking a box on a screen or clicking on a hyperlink should
p. 314 not be regarded as a signature (the significance of ↵ the difference being that ticking a box or clicking on a hyperlink should be regarded as an example of incorporation by notice, on which see 9.2, and not of incorporation by signature).

The signature must also do more than merely acknowledge the existence of the terms. It must evidence assent to the terms. The question whether a signature manifests assent in this way should be determined as a matter of construction of the document that has been signed. So, for example, in *TRW Ltd* v. *Panasonic Industry Europe GmbH* [2021] EWCA Civ 1558 it was held that a party who had signed that it had 'received and acknowledged' the terms and conditions of the other party was bound by these terms and this conclusion was reinforced by the fact that below the signature were the words 'legally binding signature of the Customer'. In appending a signature in this way it was held that the party who had signed the document had done more than acknowledge the existence of the terms; it had accepted that these terms were incorporated into the contract between the parties.

There would also appear to be a difference between attaching a signature to a document which contains the relevant terms and conditions and signing a document which seeks to incorporate into the contract terms to be found in another document or on a website. The rule in *L'Estrange* applies in the former case but it has been held not to apply in the latter context (see *Blu-Sky Solutions Ltd* v. *Be Caring Ltd* [2021] EWHC 2619 (Comm), [2022] 2 All ER (Comm) 254). If this is correct, the latter case is properly classified as an example of an attempt to incorporate terms by notice, to which the more stringent rule relating to the incorporation of 'onerous or unusual' terms is applicable (see 9.2). However, as a matter of principle, it is not easy to see why the two cases should be treated differently. If I sign a document which contains a statement that I have read terms to be found in another document and agree to their incorporation, is this different in principle from the case in which I acknowledge that I have read and am bound by the terms to be found in the document which I have signed? Admittedly, there is a difference between the two cases in the sense that, where the term is to be found in the document itself, there is no doubt that the party who signed the document had the opportunity to read the terms before attaching his or her signature whereas this is not necessarily the case where the term

is to be found in a document located elsewhere. But the difference would appear not to be one of principle and it is not clear why a party should not be bound by his or her signature that they have read and agree to be bound by terms which are in fact located in another document.

Turning to the justifications for the rule, why has English law adopted the general rule that a party is bound by his or her signature? The answer lies in the significance that is attached to a signature. Professor Atiyah has stated ('Form and Substance in Contract Law' in *Essays on Contract* (Oxford University Press, 1986), p. 109) that:

> [a] signature is, and is widely recognized even by the general public as, a formal device, and its value would be greatly reduced if it could not be treated as a conclusive ground of contractual liability at least in all ordinary circumstances.

A signature provides a measure of certainty and it is frequently relied upon by third parties. As Moore-Bick LJ observed in *Peekay Intermark Ltd* v. *Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 (at [43]) the rule in *L'Estrange* is 'an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions'.

However, not everyone is convinced of the merits of the rule. One criticism of the rule is that it can generate
p. 315 unfair outcomes, as demonstrated by the facts of *L'Estrange* itself where ↵ the defendant was held to be bound by a wide-ranging exclusion clause. It is therefore not surprising to find that Maugham LJ expressed regret at the outcome of the case, although he stated that he was bound by authority so to conclude. However, were the facts of the case to recur today, such an exclusion clause would now fall within the scope of the Unfair Contract Terms Act 1977 (see 13.3) and so would be the subject of legislative control. But at the time at which *L'Estrange* was decided the court did not have the power at common law to strike down exclusion clauses on the ground that they were unreasonable or unfair. In so far as the criticisms of *L'Estrange* are based on the unfairness of the result, it can be argued that any such unfairness is best addressed by giving to the courts the power to control unreasonable or unfair terms and not by modifying the rule that a party is bound by his own signature.

Others have challenged the view that the court was bound to decide as it did and, in doing so, have invoked some of the cases discussed in Chapter 2 (see 2.2, 2.3, and 2.4) concerned with the objective approach adopted by the courts when seeking to ascertain whether or not the parties have reached agreement. In his article 'Signature, Consent, and the Rule in *L'Estrange* v. *Graucob*' [1973] *CLJ* 104, JR Spencer has this to say of *L'Estrange* (at pp. 114–115):

When Miss L'Estrange signed the order form on which were written various terms, she gave the appearance of agreeing to everything that was written on the document. To borrow the words from *Smith* v. *Hughes* itself, she so conducted herself 'that a reasonable man would believe that she was assenting to the terms proposed by the other party'. It would usually follow from this that she was bound by her apparent consent to all those terms. However, a person is not bound by apparent consent where the other party knew that his mind did not go with his apparent consent, or where the other party is responsible for the mistake which has been made. Didn't the facts of the case bring Miss L'Estrange within the scope of these exceptions to apparent consent?

The order form which Graucob Ltd provided seems to have been drawn up in a most confusing way. Maugham LJ said ' ... I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print'. Not only was the clause printed in small print, but it was also printed on brown paper, which must have made the small print even harder to read. The general layout of the form also appears to have been confusing, too, the exemption clause being in a part of the document where it easily escaped notice. Then was this not one of those cases where although A apparently consented to B's terms, he did so because B had earlier confused him as to what those terms should be? In principle, the case is surely the same as *Scriven* v. *Hindley*, where A was allowed to deny his apparent consent to a contract to buy tow, because the auction catalogue had been confusing, and had contributed to form A's belief that he was offering to buy, not tow, but hemp.

Perhaps Miss L'Estrange could have gone even further than this, and also denied her apparent consent to the exemption clause on the ground that the company either knew or ought to have known that her mind did not go with her apparent consent. Why did Graucob Ltd use order forms printed on brown paper containing obscure exemption clauses in minute print in unexpected places? Was it because it knew that if it said what it meant more plainly, its customers would understand the document they were being asked to sign, and would refuse to do so? Who in their right mind would sign a document headed 'I agree to pay for your goods even if they are useless, and not to sue you even if they injure me?' Even if Graucob Ltd had used the words it did use—'any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded'—Miss L'Estrange might still have refused to sign if those words had been printed clearly where they could be seen. ↵ She would not have understood them, of course, but ... she might have asked the salesmen what the words meant. If the salesman had explained correctly, presumably she would not have signed. If he had explained incorrectly, then the company would have misrepresented the legal effect of the form, and ... would have been unable to rely on the exemption clause.

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The truth is that whatever may have been Graucob Ltd's intentions disreputable companies put harsh exemption clauses in minute print in order to 'put one over' people like Miss L'Estrange. Then why should people in her position not be allowed to deny their apparent consent to the clause because the company either knew or ought to have known that their mind did not go with their apparent consent?

> Yet the Divisional Court, which felt sorry for Miss L'Estrange, did not allow her to deny her assent to the exemption clause by alleging either that Graucob Ltd were to blame for her mistake, as in *Scriven* v. *Hindley* [see 2.4], or that they had actual or constructive knowledge of the mistake she had made, as in *Hartog* v. *Colin and Shields* [see 2.3]. Why not?. ...
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> The reason why the [court In *L'Estrange* v. *Graucob*] ... refused to admit the usual defences based on *Smith* v. *Hughes*, and restricted the range of available defences to fraud, misrepresentation and *non est factum*, appears to be that [the court] thought that there was something special about a signed document. Where there is a signed document, the courts thought that some kind of magic operated to take the contract out of the usual rules that govern the formation of contracts, and to bind the signatory almost absolutely.

An approach similar to that advocated in the penultimate paragraph of Professor Spencer's article was adopted by the Court of Appeal of Ontario in *Tilden Rent-A-Car Co* v. *Clendinning* (1978) 83 DLR (3d) 400. The defendant, Mr Clendinning, rented a car from Tilden Rent-A-Car at Vancouver airport. He was asked whether or not he wished to have additional insurance cover and he replied that he did. He was given a form to sign which he signed without reading, as would have been apparent to the clerk. The question for the court was whether or not the defendant was bound by an exemption clause in the policy which had the effect of imposing liability upon him for damage done to the car. The Court of Appeal concluded that he was not bound by the term.

> In ordinary commercial practice where there is frequently a sense of formality in the transaction, and where there is a full opportunity for the parties to consider the terms of the proposed contract submitted for signature, it might well be safe to assume that the party who attaches his signature to the contract intends by so doing to acknowledge his acquiescence to its terms, and that the other party entered into the contract upon that belief. This can hardly be said, however, where the contract is entered into in circumstances such as were present in this case.
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> A transaction, such as this one, is invariably carried out in a hurried, informal manner. The speed with which the transaction is completed is said to be one of the attractive features of the services provided.
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> [The judge then noted that the clauses upon which Tilden Rent-A-Car relied were inconsistent with the essential purpose of the contract into which Mr Clendinning had entered, and that in such circumstances Tilden Rent-A-Car was required to do something more to draw the attention of the terms to Mr Clendinning than simply handing them over to be signed and continued.]
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> In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or
> p. 317 ought to know that the signature of a party to the contract does not ↵ represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.
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> … Tilden Rent-A-Car took no steps to alert Mr Clendinning to the onerous provisions in the standard form contract presented by it. The clerk could not help but have known that Mr Clendinning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses. …

The orthodox analysis of English law is that the exceptions to the rule that a person is bound by his signature are much narrower in scope than that recognized by the Court of Appeal of Ontario. Two exceptions were acknowledged on the facts of *L'Estrange* itself and a third has been recognized subsequently. A more difficult question is whether there is a wider exception which may take English law closer to the position adopted by the Court of Appeal of Ontario in *Clendinning*. We shall return to the latter issue after first reviewing the more established exceptions to the rule that a party is bound by his or her signature.

The first exception arises where the party signing the document can invoke the defence of *non est factum*. The scope of this defence is discussed in more detail in a subsequent chapter (see 16.8). Here it suffices to note that it is a defence that operates within narrow confines. In essence it allows a party to deny that the document which he has signed is his deed on the basis that he was unable, through no fault of his own, to have any real

understanding of a document, without being given an explanation of it. The causes of the lack of understanding can be 'defective education, illness or innate incapacity' (see *Saunders* v. *Anglia Building Society* [1971] AC 1004, 1016).

The second exception arises where the person is induced to sign the document as the result of a misrepresentation made to him. In *Curtis* v. *Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805 the plaintiff took a white satin wedding dress to the defendants for cleaning. She was asked to sign a document that contained a clause which stated that the dress was 'accepted on condition that the company is not liable for any damage howsoever arising'. Prior to signing the document the plaintiff inquired why it was that she was being asked to sign the document. She was told that it was because the defendants did not accept liability for damage done to beads or sequins on the dress. The plaintiff then signed the document but did not take the time to read its terms. When the dress was returned to her there was a stain on it. She brought a claim against the defendants who attempted to rely on the exclusion clause by way of defence. The Court of Appeal held that they could not do so in the light of the representation made by the defendant's employee prior to the plaintiff signing the document. Denning LJ stated (at pp. 808–809):

> If the party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation: see *L'Estrange* v. *Graucob*. ... What is a sufficient misrepresentation for this purpose?. ...
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> p. 318 ↵ In my opinion, 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. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. It was held in *R* v. *Kylsant (Lord)* [1932] 1 KB 442 that a misrepresentation might be literally true but practically false, not because of what is said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation. When 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, any rate, not so wide an exemption as that which is in fact contained in the document. The present case is a good illustration. The customer said in evidence:
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> > 'When I was asked to sign the document I asked why. The assistant said I was to accept any responsibility for damage to beads and sequins. I did not read it all before I signed it.'
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> In those circumstances, by failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption clause related to the beads and sequins only, and that it did not extend to the material of which the dress was made. It was done perfectly innocently, but, nevertheless, a false impression was created ... [I]t was a sufficient misrepresentation to disentitle the cleaners from relying on the exemption, except in regard to the beads and sequins.

The third exception, acknowledged in *Grogan* v. *Robin Meredith Plant Hire* [1996] CLC 1127, is that the document which has been signed must have been a document which purports to have contractual effect and not an administrative document, such as a time-sheet. The latter does not purport to constitute the contract; rather, it records or gives effect to a part of the contract that has already been concluded (for example, by recording the number of hours for which a piece of machinery has been hired out, so that the price payable can be calculated). Whether a document amounts to a contractual document or not is a decision that must be reached in the light of all the facts and circumstances of the case.

A more controversial question is whether or not there is a wider exception in English law, similar in scope to that recognized in *Tilden Rent-A-Car Co* v. *Clendinning*. This could be done by extending the rule relating to the incorporation by notice of onerous or unusual terms (on which see *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433, 9.3) to cases in which the document has been signed by the party who is claiming that he is not bound by its terms. The courts have been reluctant to extend the *Interfoto* rule to cases of signature but, importantly, they have not ruled out the possibility that there may be exceptional cases in which the rule may be so extended (see, for example, *Cargill International Trading Pte Ltd* v. *Uttam Galva Steels Ltd* [2019] EWHC 476 (Comm), [89] where it was recognized that there may be 'exceptional cases in which the signing party was under undue pressure or had no real opportunity to read and consider the contract before signing'). If there is such an exception its requirements are not satisfied simply by proof that the term is onerous or unreasonable (*Higgins & Co Lawyers Ltd* v. *Evans* [2019] EWHC 2809 (QB), [2020] 1 WLR 141, [78]). It is necessary to go further and to establish the 'exceptional' or 'extreme' circumstance that the party signing
p. 319 the document did not, for some legitimate ↵ reason, read the document prior to signing it and that this fact was known to the other party to the transaction. However, the status of this exception remains unclear and, to the extent that it exists, it is likely to apply within very narrow limits.

9.3 Incorporation by Notice

A party who wishes to incorporate terms into a contract by giving his contracting party notice of them must satisfy three requirements. First, notice must have been given at or before the time of contracting. This may require the courts to apply the rules of offer and acceptance in order to ascertain the moment in time at which the contract was concluded. Two cases illustrate this point. The first is *Olley* v. *Marlborough Court Ltd* [1949] 1 KB 532. Here the notice was located in a hotel bedroom. It was held that it was ineffective to exclude liability towards a guest of the hotel on the basis that the contract between the hotel and the guest had been concluded before she set foot in the hotel bedroom. It was therefore too late to be effective. A second example is provided by the case of *Thornton* v. *Shoe Lane Parking* [1971] 2 QB 163. There the exemption clause was to be found inside a car park. The Court of Appeal held that the defendants had not taken reasonable steps to bring the clause to the attention of the customer (this aspect of the case is analysed by Bingham LJ in his judgment in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433, later in this section). But Lord Denning also held that the clause was too late to be incorporated into the contract. The car park was described as a 'multi-storey automatic car park' and a ticket was issued to a customer when he drove up to the machine at the entrance to the car park. Lord Denning held that the contract was concluded at the moment of entry

into the car park so that the notice contained inside the car park and the terms printed on the ticket were too late to be included. He analysed the nature of the transaction between the parties in the following terms (at p. 169):

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made.

The second requirement is that the terms must have been contained or referred to in a document that was intended to have contractual effect. So, for example, where the terms are contained in a document that is a receipt rather than a contractual document, the receipt will not be effective to incorporate the terms into the contract (see, for example, *Chapelton* v. *Barry UDC* [1940] 1 KB 532 where a ticket given to someone who hired a deckchair was held not to be a contractual document and so was not effective to give the hirer notice of the terms).

p. 320 ↵ The third requirement is that reasonable steps must have been taken to bring the terms to the attention of the other party. This requirement has generated a considerable amount of case-law which dates back to the decision of the Court of Appeal in *Parker* v. *South Eastern Railway* (1877) 2 CPD 416. This case-law was helpfully reviewed by the Court of Appeal in the following case:

Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd
[1989] QB 433, Court of Appeal

The defendant advertising agency wanted some photographs for a presentation for a client. On 5 March 1984 Mr Beeching, a director of the agency, telephoned the plaintiffs who ran a library of photographic transparencies and inquired whether they had any photographs of the 1950s which would be suitable for the defendants' purpose. The plaintiffs responded that they would look into the matter and, later the same day, they sent forty-seven transparencies to the defendants in a jiffy bag together with a delivery note which contained a number of terms. The delivery note stated that the date for the return of the transparencies was 19 March 1984. At the bottom of the delivery note, under the heading 'Conditions' which was 'fairly prominently printed in capitals', there were nine conditions, printed in four columns. Condition 2 provided:

> 'All transparencies must be returned to us within 14 days from the date of posting/delivery/collection. A holding fee of £5 plus VAT per day will be charged for each transparency which is retained by you longer than the said period of 14 days save where a copyright licence is granted or we agree a longer period in writing with you.'

On receipt of the transparencies Mr Beeching telephoned the plaintiffs to say that the defendants were very impressed with the speed of the service, that one or two of the transparencies could be of interest and that they would get back to the plaintiffs on the matter. The defendants did not, however, use the transparencies for the presentation. Instead they put them to one side and forgot about them. The plaintiffs attempted to contact Mr Beeching on 20 and 23 March but were only able to speak to his secretary. In the event, the transparencies were not returned until 2 April. The plaintiffs then sent an invoice to the defendants for £3,783.50, which represented the holding charge in respect of their retention of the transparencies. The defendants refused to pay. The plaintiffs brought an action to recover the £3,783.50. The trial judge gave judgment for the plaintiffs. The defendants appealed to the Court of Appeal where it was held that condition 2 had not been incorporated into the contract. The defendants' appeal was therefore allowed and the defendants were ordered to pay £3.50 per transparency per week on a quantum meruit basis for the retention of the transparencies beyond a reasonable period, which was fixed at fourteen days from the date of their receipt by the defendants.

Dillon LJ

[set out the facts and continued]

Condition 2 of these plaintiffs' conditions is in my judgment a very onerous clause. The defendants could not conceivably have known, if their attention was not drawn to the clause, that the plaintiffs were proposing to charge a 'holding fee' for the retention of the transparencies at such a very high and exorbitant rate.

p. 321 ↵ At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is, in my judgment, a logical development of the common law into modern conditions that it should be held, as it was in *Thornton* v. *Shoe Lane Parking Ltd* [1971] 2 QB 163, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties.

I would therefore allow this appeal and reduce the amount of the judgment which the judge awarded against the defendants to the amount which he would have awarded on a quantum meruit on his alternative findings, i.e. the reasonable charge of £3.50 per transparency per week for the retention of the transparencies beyond a reasonable period, which he fixed at 14 days from the date of their receipt by the defendants.

Bingham LJ

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the transparencies were not returned in time and, when the 14 days had expired, to point out to the defendants the high cost of continued failure to return them.

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.

The well-known cases on sufficiency of notice are in my view properly to be read in this context. At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature.

p. 322 ↵ In the leading case of *Parker* v. *South Eastern Railway Co* (1877) 2 CPD 416, Baggallay LJ plainly thought on the facts that the plaintiffs were right, Bramwell LJ that they were wrong; Mellish LJ thought that there had been a misdirection and there should be a re-trial, a view in which the other members of the court concurred. The judgments deserve to be re-read. Mellish LJ said, at pp. 422–423:

> 'Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. … The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability.'

Baggallay LJ's analytical approach was somewhat similar. He said, at pp. 425–426:

> ‘Now as regards each of the plaintiffs, if at the time when he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he became bound by them. I think also that he would be equally bound if he was aware or had good reason to believe that there were upon the ticket statements intended to affect the relative rights of himself and the company, but intentionally or negligently abstained from ascertaining whether there were any such, or from making himself acquainted with their purport. But I do not think that in the absence of any such knowledge or information, or good reason for belief, he was under any obligation to examine the ticket with the view of ascertaining whether there were any such statements or conditions upon it.’

Both Mellish LJ and Baggallay LJ were, as it seems to me distinguishing the case in which it would be fair to hold a party bound from the case in which it would not. But this approach is made more explicit in the strongly worded judgment of Bramwell LJ, at p. 427:

> ‘The plaintiffs have sworn that they did not know that the printing was the contract, and we must act as though that was true and we believed it, at least as far as entering the verdict for the defendants is concerned. Does this make any difference? The plaintiffs knew of the printed matter. Both admit they knew it concerned them in some way, though they said they did not know what it was; yet neither pretends that he knew or believed it was not the contract. Neither pretends he thought it had nothing to do with the business in hand; that he thought it was an advertisement or other matter unconnected with his deposit of a parcel at
p. 323 the defendants’ cloak-room. They admit that, for anything they knew or believed, it might ↵ be, only they did not know or believe it was, the contract. Their evidence is very much that they did not think, or, thinking, did not care about it. Now they claim to charge the company, and to have the benefit of their own indifference. Is this just? Is it reasonable? Is it the way in which any other business is allowed to be conducted? Is it even allowed to a man to “think”, “judge”, “guess”, “chance” a matter, without informing himself when he can, and then when his “thought”, “judgment”, “guess”, or “chance” turns out wrong or unsuccessful, claim to impose a burthen or duty on another which he could not have done had he informed himself as he might?’

He continued in the same vein, at p. 428:

> 'Has not the giver of the paper a right to suppose that the receiver is content to deal on the terms in the paper? What more can be done? Must he say, "Read that?" As I have said, he does so in effect when he puts it into the other's hands. The truth is, people are content to take these things on trust. They know that there is a form which is always used—they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. If they did, then dealing would soon be stopped. Besides, unreasonable practices would be known. The very fact of not looking at the paper shews that this confidence exists. It is asked: What if there was some unreasonable condition, as for instance to forfeit £1,000 if the goods were not removed in 48 hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told "our conditions are on this ticket", and he did not read them. In my judgment, he would not be bound in either case. I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand. I am of opinion, therefore, that the plaintiffs, having notice of the printing, were in the same situation as though the porter had said, "Read that, it concerns the matter in hand"; that if the plaintiffs did not read it, they were as much bound as if they had read it and had not objected.'

This is not a simple contractual analysis whether an offer has been made and accepted. ...

J Spurling Ltd v. *Bradshaw* [1956] 1 WLR 461 concerned an exemption clause in a warehousing contract. The case is now remembered for the observations of Denning LJ, at p. 466:

> 'This brings me to the question whether this clause was part of the contract. Mr Sofer urged us to hold that the warehousemen did not do what was reasonably sufficient to give notice of the conditions within *Parker* v. *South Eastern Railway Co* 2 CPD 416. I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.'

Here, therefore, is made explicit what Bramwell LJ had perhaps foreshadowed, that what would be good notice of one condition would not be notice of another. The reason is that the more outlandish the clause the greater the notice which the other party, if he is to be bound must in all fairness be given. ...

Lastly I would mention *Thornton* v. *Shoe Lane Parking Ltd*. [1971] 2 QB 163. Lord Denning MR said, at pp. 169–170:

> ‘Assuming, however, that an automatic machine is a booking clerk in disguise—so that the old fashioned ticket cases still apply to it. We then have to go back to the three questions put by Mellish LJ in *Parker* v. *South Eastern Railway Co*, 2 CPD 416, 423, subject to this qualification: Mellish LJ used the word “conditions” in the plural, whereas it would be more
> p. 324 apt to ↵ use the word “condition” in the singular, as indeed the Lord Justice himself did on the next page. After all, the only condition that matters for this purpose is the exempting condition. It is no use telling the customer that the ticket is issued subject to some “conditions” or other, without more: for he may reasonably regard “conditions” in general as merely regulatory, and not as taking away his rights, unless the exempting condition is drawn specifically to his attention. (Alternatively, if the plural “conditions” is used, it would be better prefaced with the word “exempting”, because the exempting conditions are the only conditions that matter for this purpose.) Telescoping the three questions, they come to this: the customer is bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it.
>
> Mr Machin admitted here that the company did not do what was reasonably sufficient to give Mr Thornton notice of the exempting condition. That admission was properly made. I do not pause to inquire whether the exempting condition is void for unreasonableness. All I say is that it is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in *J Spurling Ltd* v. *Bradshaw* [1956] 1 WLR 461, 466. In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it—or something equally startling.’

The judgment of Megaw LJ was to similar effect. …

The tendency of the English authorities has, I think, been to look at the nature of the transaction in question and the character of the parties to it; to consider what notice the party alleged to be bound was given of the particular condition said to bind him; and to resolve whether in all the circumstances it is fair to hold him bound by the condition in question. This may yield a result not very different from the civil law principle of good faith, at any rate so far as the formation of the contract is concerned.

Turning to the present case, I am satisfied … that no contract was made on the telephone when the defendants made their initial request. I am equally satisfied that no contract was made on delivery of the transparencies to the defendants before the opening of the jiffy bag in which they were contained. Once the jiffy bag was opened and the transparencies taken out with the delivery note, it is in my judgment an inescapable inference that the defendants would have recognised the delivery note as a document of a kind likely to contain contractual terms and would have seen that there were conditions printed in small but visible lettering on the face of the document. To the extent that the conditions so displayed were common form or usual terms regularly encountered in this business, I do not think the defendants could successfully contend that they were not incorporated into the contract.

> The crucial question in the case is whether the plaintiffs can be said fairly and reasonably to have brought condition 2 to the notice of the defendants. The judge made no finding on the point, but I think that it is open to this court to draw an inference from the primary findings which he did make. In my opinion the plaintiffs did not do so. They delivered 47 transparencies, which was a number the defendants had not specifically asked for. Condition 2 contained a daily rate per transparency after the initial period of 14 days many times greater than was usual or (so far as the evidence shows) heard of. For these 47 transparencies there was to be a charge for each day of delay of £235 plus value added tax. The result would be that a venial period of delay, as here, would lead to an inordinate liability. The defendants are not to be relieved of that liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention. I would accordingly allow the defendants' appeal and substitute for the judge's award the sum which he assessed upon the alternative basis of quantum meruit.
>
> p. 325 ↵ In reaching the conclusion I have expressed I would not wish to be taken as deciding that condition 2 was not challengeable as a disguised penalty clause. This point was not argued before the judge nor raised in the notice of appeal. It was accordingly not argued before us. I have accordingly felt bound to assume, somewhat reluctantly, that condition 2 would be enforceable if fully and fairly brought to the defendants' attention.

Commentary

It is important to get the focus of attention right. The focus is not upon the recipient of the notice. The test applied by the court is not whether the recipient has read the terms or taken reasonable steps to discover their existence (although where the recipient has actual knowledge of the existence of the terms it would appear that, in principle, he is bound by them: *Parker* v. *South Eastern Railway* (1877) 2 CPD 416, 421). Instead, the courts focus attention upon the party relying upon the terms and ask themselves whether that party has taken reasonable steps to bring notice of the term or terms to the attention of the other party. The case-law can be traced back to the old 'ticket cases', of which *Parker* v. *South Eastern Railway* (1877) 2 CPD 416 is a leading example, where the issue between the parties was generally whether or not a sweeping exclusion clause had been incorporated into the contract with the passenger.

In determining whether or not reasonable steps have been taken in order to draw the term to the attention of the other party, the courts have regard to obvious factors such as the location of the notice and its prominence. A notice which is located on the back of a document is unlikely to be incorporated in the absence of a reference on the front of the document alerting the reader to the presence of terms, or a reference to terms, on the back (see *Henderson* v. *Stevenson* (1875) LR 2 HL (Sc) 470). Similarly, a notice that has been obliterated by a stamp is unlikely to be incorporated (*Sugar* v. *London, Midland and Scottish Railway Co* [1941] 1 All ER 172). On the other hand, where the term, or the reference to the terms, is located prominently on the front of the document, then the likelihood is that the term will be incorporated (*Thompson* v. *London, Midland and Scottish Railway Co Ltd* [1930] 1 KB 41). Similarly, reference to terms on a website may in an appropriate case amount to

the giving of reasonable notice (*Impala Warehousing and Logistics (Shanghai) Co Ltd* v. *Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 25 (Comm)) as may ticking a box on a computer screen or clicking on a hyperlink (*Parker-Grennan* v. *Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB), [44]).

However, as the judgment of Bingham LJ in *Interfoto* makes clear, the inquiry undertaken by the courts in this connection is no mere mechanical exercise. It requires the court to evaluate the nature of the term that one party is seeking to incorporate into the contract. The more onerous or unusual the term, the greater the steps that must be taken in order to draw its existence to the other party's attention. This principle is applicable both to consumer and to commercial contracts (*Kaye* v. *Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep 40, [37]). Bingham LJ in his judgment endeavours to demonstrate that this approach has a sure foundation in the authorities. Its foundation in terms of principle is perhaps more debatable. Why seek to differentiate between different terms in relation to their incorporation into a contract? If the law's concern is with the unfairness of the term itself, would this not be better expressed by conferring on the court a direct power to regulate unfair terms? One answer to this question is that the law does not presently confer upon the
p. 326 courts such a ↵ broad power and, in its absence, the courts have to make use of what might be said to be the 'second-best alternative' of regulating the incorporation of terms into contracts. While the Unfair Contract Terms Act 1977 does confer a limited power upon courts to regulate certain clauses which seek to exclude or restrict liability (on which see 13.3), the Act does not extend to the type of clause in issue in *Interfoto*. In the absence of a power directly to control the substantive content of the clause, the court chose to regulate it by concluding that it had not been incorporated into the contract.

Post-*Interfoto* the courts have had some difficulty in identifying which terms are 'onerous' or 'unusual' and which are not and, as a result, the authorities 'do not always agree' (*Goodlife Foods Ltd* v. *Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] BLR 491, [33]). The hurdle to be overcome in terms of showing that a term is 'onerous' or 'unusual' is a high one (*Bates* v. *Post Office Ltd* [2019] EWHC 606 (QB), [979]). It should be noted that the term need not be 'onerous' in order to attract this more rigorous scrutiny. It suffices that it is 'unusual' and, when deciding whether a term is 'unusual' a court will have regard to the practice of the particular market or industry in which the contracting parties are engaged and it may also have regard to the transactional history between the parties (*Parker-Grennan* v. *Camelot UK Lotteries Ltd* [2023] EWHC 800 (KB), [73]). Presumably, therefore, a party who changes his terms in significant respects may be under an obligation to take greater steps to draw these changes to the attention of the other party. Two cases illustrate the difficulties that the courts are currently experiencing.

The first is the decision of the Court of Appeal in *AEG (UK) Ltd* v. *Logic Resource Ltd* [1996] CLC 265. The plaintiffs sold goods to the defendants and the defendants in turn sub-sold them to their customers in Iran. The goods proved to be defective when they were inspected by the sub-buyers in Iran. Arrangements were made to air freight the goods back to the plaintiffs' factory in the UK at a cost of some £4,230, so that the necessary modifications could be carried out. The defendants refused to pay the £4,230. The plaintiffs sued to recover the sum on the basis of clause 7.5 of the contract which stated: 'the purchaser shall return the defective parts at his own expense to the supplier immediately upon request by the latter'. One of the issues before the court was whether or not this term had been incorporated into the contract between the parties and this depended upon whether or not the term was 'particularly onerous or unusual'. The majority, Hirst and Waite LJJ, concluded that it was both 'extremely onerous … and also unusual in the absence of any evidence that it is a standard or common term'. The basis for their conclusion was that the only right available

to the purchasers under the contract in the event of the goods proving to be defective was to exercise their right to return the goods to the plaintiffs. To append to this right the requirement that the purchaser pay for the cost of returning the goods was held to be both onerous and unusual. The position would probably have been different had the purchasers had available to them a range of rights in the event of the goods being defective. In such a case a seller might legitimately attach to the exercise of the right to return the goods for repair a condition that the purchaser meet the cost of returning the goods. Hobhouse LJ dissented and he did so in forthright terms. He stated:

> In my judgment … it is necessary before excluding the incorporation of a clause *in limine* to consider the type of clause it is. Is it a clause of the type which you would expect to find in the printed conditions? If it is, then it is only in the most exceptional circumstances that a party will be able to say that it was not adequately brought to his notice by standard words of incorporation. … This case is not analogous to either of the two cases upon which the appellant founds. The *Interfoto* case
> p. 327 involved an extortionate clause which did not relate ↵ directly to the expected rights and obligations of the parties. In the *Shoe Lane Parking* case, it related to personal injuries and the state of the premises and not to the subject matter of the car parking contract. …
>
> Therefore, in my judgment, it is necessary to consider the type of clause, and only if it is a type of clause which it is not to be expected will be found in the printed conditions referred to then to go on to question its incorporation. These conditions do include clauses which, in my judgment, do fall foul of the *Interfoto* principle, but I do not consider that clause 7 comes into that category. In my judgment, it is desirable as a matter of principle to keep what was said in the *Interfoto* case within its proper bounds. A wide range of clauses are commonly incorporated into contracts by general words. If it is to be the policy of English law that in every case those clauses are to be gone through with, in effect, a toothcomb to see whether they were entirely usual and entirely desirable in the particular contract, then one is completely distorting the contractual relationship between the parties and the ordinary mechanisms of making contracts. It will introduce uncertainty into the law of contract.
>
> In the past there may have been a tendency to introduce more strict criteria but this is no longer necessary in view of the Unfair Contract Terms Act. … and it is under the provisions of that Act that problems of unreasonable clauses should be addressed and the solution found. In the present case, it is my opinion that the Act provides the answer to the question which has been raised.

The second case is *O'Brien* v. *MGN Ltd* [2002] CLC 33. The claimant thought that he had won a prize in a scratchcard game in the defendants' newspaper. Unfortunately for him, a mistake had been made by the defendants in that they had failed to notice that a number of cards had been issued with the winning numbers on them. Instead of there being two winners of the £50,000 prize, some 1,472 people rang up to claim the prize. In these circumstances the defendants refused to pay out to all the 'winners'. They relied upon rule 5 of the competition rules which provided that, if more prizes were claimed than were available in any prize category for any reason, a separate draw would then take place for the prize. The question for the court was whether or not rule 5 had been incorporated into the contract between the parties. The trial judge found that a contract was concluded between the parties on 3 July 1995, the day on which the claimant bought the paper. The offer was contained in the paper that day, and the claimant accepted the offer when he telephoned the

hotline in order to claim his prize. Alongside the instructions relating to the telephone hotline were the words: 'Normal Mirror Group rules apply'. Was this reference to the rules sufficient to incorporate them into the contract? The Court of Appeal held that it was.

This time the Court of Appeal held that the clause was neither 'onerous' nor 'unusual'. It was not onerous because it did not seek to impose a burden on the claimant, nor did it attempt to exclude liability for negligently caused personal injury. It simply deprived 'the claimant of a windfall for which he has done very little in return'. Nor could it be said that the clause was 'unusual' given that other games and competitions had similar rules.

Hale LJ concluded (at [23]):

> [T]he words 'onerous or unusual' are not terms of art. They are simply one way of putting the general proposition that reasonable steps must be taken to draw the particular term in question to the notice of those who are bound by it and that more is required in relation to certain terms than to others depending on their effect. In the particular context of this particular game, I consider that the
> p. 328 defendants did just enough to bring the rules to the ↵ claimant's attention. There was a clear reference to rules on the face of the card he used. There was a clear reference to rules in the paper containing the offer of a telephone prize. There was evidence that those rules could be discovered either from the newspaper offices or from back issues of the paper. The claimant had been able to discover them when the problem arose.

Sir Anthony Evans was much more hesitant. He held that the rule had been incorporated but only because he was not prepared to interfere with the finding of fact by the trial judge that the rule had been incorporated. In his view 'the promise of significant riches' deserved more and he stated that a rule which gave the 'winner' no more than a further chance to obtain the prize was sufficiently onerous, if not unusual, to require greater prominence than was given to this one. While the result in the case was ultimately unanimous, the judgments nevertheless display a degree of unease about the meaning of the words 'onerous or unusual' and about the application of this test to any given fact situation.

Where a term is held to be 'onerous' or 'unusual', what steps are required in order to incorporate it into the contract? It is not sufficient to bury the term away 'in the middle of a raft of small print' (*Goodlife Foods Ltd* v. *Hall Fire Protection Ltd* [2018] EWCA Civ 1371, [2018] BLR 491, [53]). However, the plaintiffs in *Interfoto* did not attempt to hide their conditions on the delivery note and the defendants were presumably capable of reading them. Yet condition 2 was not incorporated. What should they have done to ensure that it was incorporated? In *J Spurling Ltd* v. *Bradshaw* [1956] 1 WLR 461 (referred to in the judgment of Bingham LJ in *Interfoto*, extracted earlier) Denning LJ famously referred to the need for a 'red hand' pointing to the clause. While his comment may have made its mark on the judicial memory and on textbook writers, it has not been translated into commercial practice. Little red hands are not to be found in commercial contracts in the UK. A more realistic step to take is to put the clause in bold print or specifically to draw the other party's attention to the existence of the clause in a letter. A court may be more likely to conclude that reasonable steps have been taken where there has been 'an express acknowledgement in the contractual documents that the terms and conditions in question were incorporated' (*Ocean Chemical Transport Inc* v. *Exnor Craggs Ltd* [2000] 1 Lloyd's Rep 446, 454). This was confirmed by Edwards-Stuart J in *William McIlroy Swindon Ltd* v. *Quinn Insurance Ltd* [2010] EWHC

2448 (TCC), [2011] BLR 136, [42], when he questioned whether the result in *Interfoto* would have been the same if Interfoto's secretary had typed onto the delivery note words to the following effect: 'The printed terms set out below affect your rights. Before accepting delivery of the transparencies you are strongly advised to read them to ensure that they are acceptable.' While one cannot guarantee that a clause of this type will be effective, it will almost certainly increase the likelihood that the term will be incorporated into the contract between the parties.

9.4 Incorporation by Course of Dealing and by Custom

Finally, a term may be incorporated into a contract as a result of a course of dealing between the parties or as a result of the custom of the trade in which the parties work. The leading case on incorporation by course of dealing is the following decision of the House of Lords:

p. 329 ***McCutcheon v. David MacBrayne Ltd***
[1964] 1 WLR 430, House of Lords

Mr McCutcheon, the appellant, asked his brother-in-law, Mr McSporran, to arrange for his car to be shipped from Islay to the mainland. Mr McSporran took the car to the respondents' office in Port Askaig where he was quoted a price for a return journey for the car. He paid the fare and was given a receipt. He delivered the car into the possession of the respondents. The vessel sank on the journey as a result of the negligence of the respondents' employees and the car was a total loss. The appellant brought an action in negligence against the respondents, who sought to rely on the terms of an exclusion clause contained in their conditions of carriage.

The usual practice of the respondents was to ask the person sending the goods to sign a risk note by which the person sending the goods agreed to be bound by the respondents' terms and conditions. But on this occasion Mr McSporran was not asked to sign the risk note and so did not sign one. He gave evidence to the effect that he had shipped goods before with the respondents and had sometimes been asked to sign a risk note but had never read it. The appellant himself had consigned goods with the respondents on four occasions. On three of them he had been acting on behalf of his employer and on the other occasion he had shipped his own car. On all four occasions he had signed a risk note. He admitted that he knew of the existence of the conditions but stated that he was not aware of their content. The House of Lords held that the respondents' terms had not been incorporated into the contract with the consequence that the respondents had not excluded their liability in negligence.

Lord Reid

The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said 'of course not'. But again the facts here will not support that ground. According to Mr McSporran, there had been no consistent course of dealing; sometimes he was asked to sign and sometimes not. And, moreover, he did not know what the conditions were. This time he was offered an oral contract without any reference to conditions, and he accepted the offer in good faith.

The respondents also rely on the appellant's previous knowledge. I doubt whether it is possible to spell out a course of dealing in his case. In all but one of the previous cases he had been acting on behalf of his employer in sending a different kind of goods and he did not know that the respondents always sought to insist on excluding liability for their own negligence. So it cannot be said that when he asked his agent to make a contract for him he knew that this or, indeed, any other special term would be included in it. He left his agent a free hand to contract, and I see nothing to prevent him from taking advantage of the contract which his agent in fact made.

> 'The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.' [*WM Gloag on Contract* (2nd edn, W Green, 1929), p. 7.]

In this case I do not think that either party was reasonably bound or entitled to conclude from the
p. 330 attitude of the other as known to him that these conditions were intended by the other ↵ party to be part of this contract. I would, therefore, allow the appeal and restore the interlocutor of the Lord Ordinary.

Lord Guest

All that the previous dealings in the present case can show is that the appellant and his agent knew that the previous practice of the respondents was to impose special conditions. But knowledge on their part did not and could not by itself import acceptance by them of these conditions, the exact terms of which they were unaware, into a contract which was different in character from those in the previous course of dealing. The practice of the respondents was to insist on a written contract incorporated in the risk note. On the occasion in question a verbal contract was made without reference to the conditions.

Lord Devlin

In my opinion, the bare fact that there have been previous dealings between the parties does not assist the respondents at all. The fact that a man has made a contract in the same form 99 times (let alone three or four times which are here alleged) will not of itself affect the 100th contract in which the form is not used. Previous dealings are relevant only if they prove knowledge of the terms, actual and not constructive, and assent to them. If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication. No implication can be made against a party of a term which was unknown to him. If previous dealings show that a man knew of and agreed to a term on 99 occasions, there is a basis for saying that it can be imported into the 100th contract without an express statement. It may or may not be sufficient to justify the importation—that depends on the circumstances; but at least by proving knowledge the essential beginning is made. Without knowledge there is nothing. …

If a man is given a blank ticket without conditions or any reference to them, even if he knows in detail what the conditions usually exacted are, he is not, in the absence of any allegation of fraud or of that sort of mistake for which the law gives relief, bound by such conditions. It may seem a narrow and artificial line that divides a ticket that is blank on the back from one that says 'For conditions see time-tables', or something of that sort, that has been held to be enough notice. I agree that it is an artificial line and one that has little relevance to everyday conditions. It may be beyond your Lordships' power to make the artificial line more natural: but at least you can see that it is drawn fairly for both sides and that there is not one law for individuals and another for organizations that can issue printed documents. If the respondents had remembered to issue a risk note in this case,

they would have invited your Lordships to give a curt answer to any complaint by the appellant. He might say that the terms were unfair and unreasonable, that he had never voluntarily agreed to them, that it was impossible to read or understand them and that anyway if he had tried to negotiate any change the respondents would not have listened to him. The respondents would expect him to be told that he had made his contract and must abide by it. Now the boot is on the other foot. It is just as legitimate, but also just as vain, for the respondents to say that it was only a slip on their part, that it is unfair and unreasonable of the appellant to take advantage of it and that he knew perfectly well that they never carried goods except on conditions. The law must give the same answer: they must abide by the contract they made. What is sauce for the goose is sauce for the gander. It will remain unpalatable sauce for both animals until the Legislature, if the Courts cannot do it, intervenes to
p. 331 secure that when contracts are made in circumstances ↵ in which there is no scope for free negotiation of the terms, they are made upon terms that are clear, fair and reasonable and settled independently as such. That is what Parliament has done in the case of carriage of goods by rail and on the high seas.

Lord Pearce

The defenders rely on the course of dealing. But they are seeking to establish an oral contract by a course of dealing which always insisted on a written contract. It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. When the conduct is *not* consistent, there is no reason why it should still produce an invariable contractual result. The defenders having previously offered a written contract, on this occasion offered an oral one. The pursuer's agent duly paid the freight for which he was asked and accepted the oral contract thus offered. This raises no implication that the conditions of the oral contract must be the same as the conditions of the written contract would have been had the defenders proffered one.

Recourse is then sought to knowledge and intention. This is not a case where there was any bad faith on the part of the pursuer or his agent. Had the pursuer's agent snatched at an offer that he knew was not intended, or deliberately taken advantage of the defenders' omission to proffer their usual printed form for his signature, the situation would be different and other considerations would apply. But neither the pursuer nor his agent gave any thought to conditions. Nor had they any knowledge that Clause 11 would contain, wrapped in 30 lines of small print and in language intelligible only to a lawyer or a person of education and perspicacity, a total exclusion of liability for almost every conceivable act of the defenders that might damage the pursuer's goods.

The defenders never intended to offer or make any oral contract on the terms of the printed conditions. They intended to offer a written contract and by mistake they offered an oral one. The pursuer was unaware of the mistake. He accepted an oral contract but he never intended to accept an oral contract on the printed conditions. He knew that he usually had to sign a form which he supposed contained some conditions. When he was offered an oral contract without conditions he accepted with no thought about its terms. Why should such intentions or knowledge on the part of

> the contracting parties lead the Court to create a contract which neither intended? The furthest to which this argument of the defenders could lead is to the conclusion that the parties were never ad idem; in which case there was no special contract and the common-law contract prevails.
>
> Some reliance was placed on the fact that the pursuer and his agent were in no wise misled nor suffered from the absence of the written form since they would not have read it or paid any attention to it in any event. This argument has a cynical flavour. It really amounts to saying that because the pursuer would have been bound by a harsh condition, of which he did not know, if the defenders had taken the proper legal steps, he should be likewise bound when they neglected to take those steps. The law inflicts some hardship on ignorant or careless plaintiffs who accept a ticket or sign a printed form in that it holds them bound by printed conditions which they have not read and of which they know nothing. The reasons for this are given in *Parker* v. *South Eastern Railway Company* (1877) 2 CPD 416. If the defenders are to have the benefit of the reasoning in *Parker's Case*, they must take the necessary steps. To decide in the defenders' favour on the facts of this case would be a further extension of the protection afforded to defendants by the ticket cases. Such an extension seems to me very undesirable.
>
> ***Lord Hodson*** delivered a concurring judgment.

p. 332

Commentary

In order to establish the existence of a course of dealing there must be both a regularity and a consistency of dealing between the parties (see also *Transformers & Rectifiers Ltd* v. *Needs Ltd* [2015] EWHC 269 (TCC), [2015] BLR 336). The downfall of the respondents in *McCutcheon* was the lack of consistency in their previous dealings with the appellant and Mr McSporran. But the consistency point should not be taken too far. Both Lord Guest and Lord Pearce emphasized the fact that the respondents were attempting to establish an oral contract by reference to a course of dealing which always required a written contract. This should not have been a decisive factor. A party will generally only rely on a 'course of dealing' argument where he has, for some reason, failed to comply with his standard practice and, if this failure also had the effect of negativing the consistency of dealing, incorporation by course of dealing would be almost an impossibility. So the mere fact that the contract in the present case was an oral contract should not, of itself, have prevented the respondents from establishing a course of dealing on the basis of written contracts. The better reason for the failure of the respondents to incorporate their terms into the contract was given by Lord Reid, namely that past practice was itself inconsistent. As Mr McSporran stated in evidence, 'sometimes he was asked to sign [a risk note] and sometimes not'. The extent of the consistency required must ultimately depend upon the facts of the case. In essence the courts are looking for a consistency of dealing which is such as to lead both parties reasonably to believe that the standard terms have been incorporated into their contract.

It can also be difficult to prove a sufficient regularity of dealing, especially where the contract is concluded between a consumer and a business. In *Hollier* v. *Rambler Motors (AMC) Ltd* [1972] 2 QB 71 the plaintiff brought an action for damages against the defendant garage after his car had been badly damaged in a fire at the defendants' garage. The car had been left with the defendants so that repair work could be undertaken. The defendants sought to rely on an exclusion clause contained in an invoice which stated that '[t]he Company is not responsible for damage caused by fire to customers' cars on the premises'. The plaintiff had signed this

invoice on at least two previous occasions when the defendants repaired his car but he was not asked to sign it on this occasion. The plaintiff had had his car repaired by the defendants on three or four occasions over a five-year period. The defendants submitted that the exclusion clause contained in the invoice had been incorporated into the contract as a result of the course of dealing between the parties. The Court of Appeal rejected this submission. It was held that 'not quite one dealing a year' was insufficient to constitute a course of dealing. A greater degree of regularity is required (see, for example, *Henry Kendall & Sons (A Firm)* v. *William Lillico & Sons Ltd* [1969] 2 AC 31, where there were three or four transactions between the parties per month over a three-year period).

The position may, however, be different where the parties to the transaction are in the same trade or industry. In such a case the court may be able to incorporate the term into the contract either on the basis of a course of dealing between the parties or on the basis of the 'common understanding' of the parties derived from the practice of the trade. This point is demonstrated by the following case:

p. 333 ***British Crane Hire Corporation v. Ipswich Plant Hire Ltd***
[1975] QB 303, Court of Appeal

The defendants being in urgent need of a dragline crane agreed to hire one from the plaintiffs. Both parties were in the business of hiring out heavy earth-moving equipment. Given the urgency of the situation, the agreement was reached over the telephone. Agreement was reached on the price but nothing was said about the general conditions of hire. The plaintiffs did send their conditions of hire to the defendants but before the defendants signed it the crane sank into the marshy ground on which the defendants were working (although the accident occurred without negligence on the part of the defendants). The plaintiffs sought to recover from the defendants the cost of recovering the crane from the marshy ground. The defendants denied that they were liable to meet this cost. The Court of Appeal held that the defendants were liable to meet this cost on the basis that the plaintiffs' terms contained a clause which required the defendants to indemnify them against such losses and such a term was, as the defendants knew, in standard use in the trade.

Lord Denning MR

In support of the course of dealing, the plaintiffs relied on two previous transactions in which the defendants had hired cranes from the plaintiffs. One was February 20, 1969; and the other October 6, 1969. Each was on a printed form which set out the hiring of a crane, the price, the site, and so forth; and also setting out the conditions the same as those here. There were thus only two transactions many months before and they were not known to the defendants' manager who ordered this crane. In the circumstances I doubt whether those two would be sufficient to show a course of dealing.

In *Hollier* v. *Rambler Motors (AMC) Ltd* [1972] 2 QB 71, 76 Salmon LJ said he knew of no case

> 'in which it has been decided or even argued that a term could be implied into an oral contract on the strength of a course of dealing (if it can be so called) which consisted at the most of three or four transactions over a period of five years.'

That was a case of a private individual who had had his car repaired by the defendants and had signed forms with conditions on three or four occasions. The plaintiff there was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated.

But here the parties were both in the trade and were of equal bargaining power. Each was a firm of plant hirers who hired out plant. The defendants themselves knew that firms in the plant-hiring trade always imposed conditions in regard to the hiring of plant: and that their conditions were on much the same lines. ...

[He considered the evidence and continued]

> From that evidence it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that if the crane sank in soft ground it was the hirer's job to recover it: and that there was an indemnity clause. In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions.
>
> p. 334 ↵ As Lord Reid said in *McCutcheon* v. *David MacBrayne Ltd* [1964] 1 WLR 125, 128 quoting from the Scottish textbook, Gloag on Contract, 2nd edn (1929), p. 7:
>
> > 'The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other.'
>
> It seems to me that, in view of the relationship of the parties, when the defendants requested this crane urgently and it was supplied at once—before the usual form was received—the plaintiffs were entitled to conclude that the defendants were accepting it on the terms of the plaintiffs' own printed conditions—which would follow in a day or two. It is just as if the plaintiffs had said: 'We will supply it on our usual conditions', and the defendants said 'Of course, that is quite understood'.
>
> Applying the conditions, it is quite clear that nos. 6 and 8 cover the second mishap. The defendants are liable for the cost of recovering the crane from the soft ground.
>
> ***Megaw LJ*** concurred and ***Sir Eric Sachs*** delivered a concurring judgment.

Further Reading

CLARKE, M, 'Notice of Contractual Terms' [1976] *CLJ* 51.

MACDONALD, E, 'Incorporation of Contract Terms by a "Consistent Course of Dealing"' (1988) 8 *Legal Studies* 48.

MACDONALD, E, 'The Duty to Give Notice of Unusual Contract Terms' [1988] *JBL* 375.

SPENCER, JR, 'Signature, Consent, and the Rule in *L'Estrange* v. *Graucob*' [1973] *CLJ* 104.

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