



Hd contracts notes all you will need

Contracts (University of Sydney)

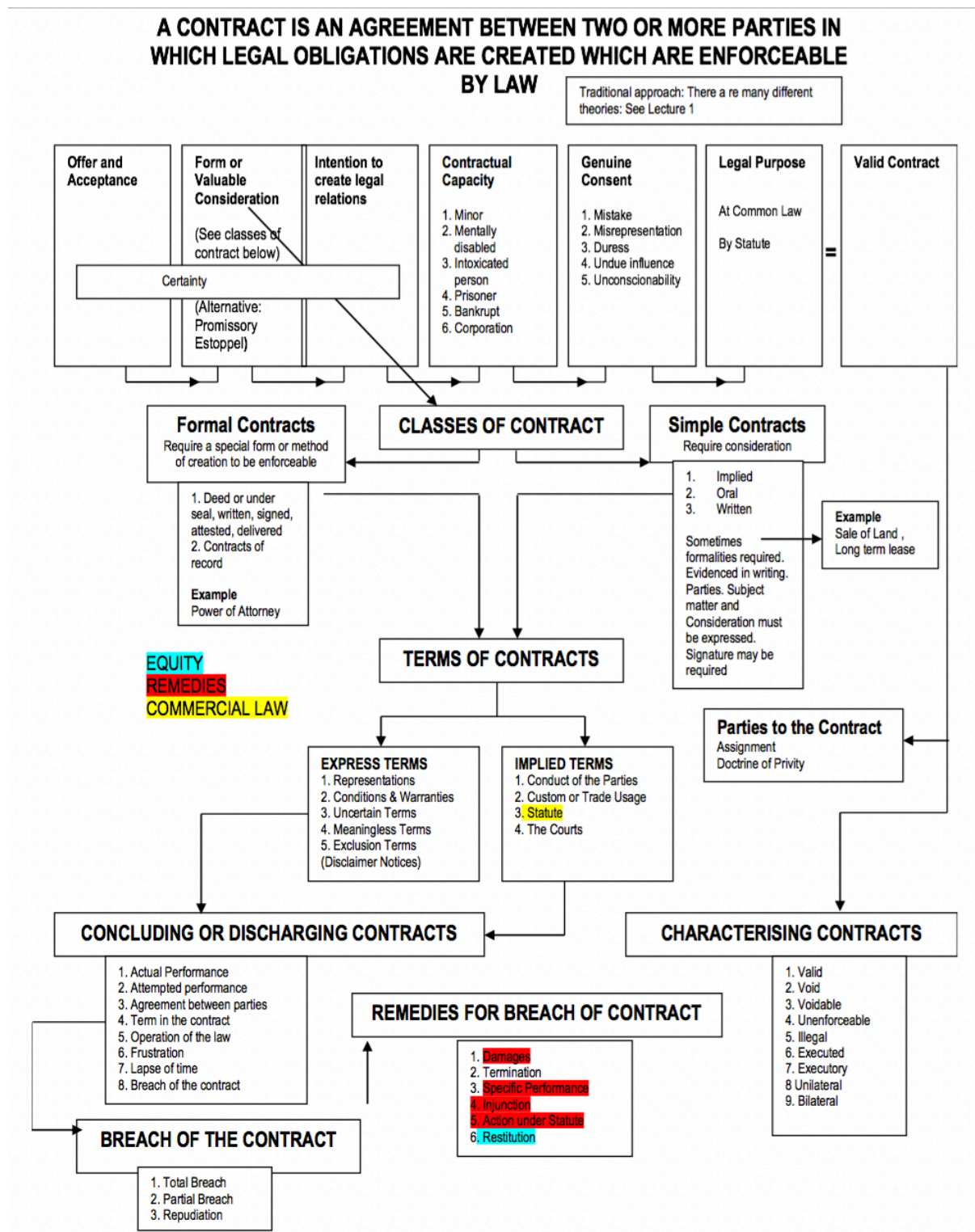


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CONTRACT FORMATION

A valid contract is an agreement between two or more parties whereby legal rights and obligations are created which the law will enforce.

Offer

An offer is a **clear statement of terms** made by the **offeror**, indicating an **intention** to be **contractually bound**. It must consist of a **statement of present intent** to enter a contract, a definite proposal that is **certain** in its **terms**, and it must be **communicated** (*Australian Woolen Mills Pty Ltd v Commonwealth* (1954)). The courts adopt an **objective approach** to determine the **existence** of an offer (*Carlill v Carbolic Smoke Ball Company* [1893]).

Examples that generally **do not amount to offer**:

- Mere supply of information
 - *Harvey v Facey* [1893]
 - A statement of the minimum price at which a seller would sell, is not an offer
- Mere puff
 - *Leonard v Pepsico Supp* (1999)
- Invitations to treat
 - HOWEVER: If clear through explicit terms expressing willingness to be legally bound, may be found as an offer
 - E.g. limiting acceptors amounted to offer to world at large
 - *Lefkowitz v Great Minneapolis Surplus Stores* (1957)
- Advertisements
 - *Partridge v Crittenden* (1968)
- Brochure distribution
 - *Grainger and Son v Gough* (1896)
 - Cannot claim a brochure is an offer
- Shop displays
 - *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* (1953)
 - Consumers considered to be making an offer when they present item to register – not bound until cashier accepts the offer
 - *Fisher v Bell* (1961)
 - Owner of shop displaying flick-knife shop window was not offering the knife for sale
- Airline tickets
 - *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975)
 - Wasn't a contract because so many exclusion clauses, essentially the same as a 'voucher'

Unilateral Contracts v Bilateral Contract

A **unilateral contract** is one where the offeree **accepts the offer by performing** his/her side of the bargain. Made to a single person.

- E.g. receiving a reward for finding a lost dog

The obligations of one party (**offeree**) are **executed at the time of the formation**, while the obligations of the other party (**offeror**) are **executory**.

- *Carlill v Carbolic Smoke Ball Company* [1893]
 - o The plaintiff accepted the offer by using the smoke ball
- *Australian Woollen Mills Pty Ltd v Commonwealth* (1954)
 - o The Australian government announced a wool subsidy scheme and the plaintiff claimed it purchased wool 'in pursuance of the said agreement'
 - o Argued that a contract had been formed by the offer of a subsidy and was accepted by buying the wool
 - o High Court held that, for a unilateral contract to arise, the promise must be made in return for doing the act
 - o There must be a relation *quid pro quo*
 - o Thus, no contract

A **bilateral** contract involves an **exchange of promises**. Can be made to the world at large.

- E.g. Paying money for a product

The obligations of **both parties are executory** at the time of formation

- *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968]

Invitations to treat

An **invitation for others to make offers and enter negotiations**. The issue is the intention to be bound – where the offer is clear, definite, explicit and leaves nothing open to negotiate, it will constitute an offer.

Objective guide

- Merely calling something an offer does not make it an offer
- Distinguished by **terminology**
 - o 'First come, first serve' may amount to an offer
 - o Limiting the number of possible acceptors may be an offer to the world at large
 - *Lefkowitz v Greatm Minneapolis Surplus Store* (1957)
 - o Limiting the offer to 'one per customer'

If an auction

- Holding a public auction will usually be regarded as an invitation to treat, with or without reserved
 - o *AGC (Advances) Ltd v McWhirter* (1977)
- Each bid is an offer, and the auctioneer communicates acceptance of the final bid by the fall of the hammer
 - o *Payne v Cave* (1789)
- If the auction is cancelled there is no contractual claim

- *Harris v Nickerson* (1873)
- However, there may be a claim against the auctioneer for unconscionable conduct
 - *Warlow v Harrison* (1859)
- Bidder is entitled to withdraw a bid before it is accepted
 - *Payne v Cave* (1789)
- The auctioneer is not obliged to sell to the highest bidder
 - *AGC (Advances) Ltd v McWhirter* (1977)
- If the auction is online the listing constitutes an auction and thus is an invitation to treat
 - *Symthe v Thomas* [2007]

If a tender

Each party submits a single bid without knowing what other bids have been made – commonly used by the government

- A call for written tenders will usually be an invitation to treat with each tender constituting an offer
- However, if the wording indicates a promise to accept the highest bid, it may amount to an offer
 - *Harvela Investments Ltd v Royal Trust Co of Canada (Ci) Ltd* [1986]
- The government may owe contractual obligations to tenders under preliminary contracts governing the tender process
 - *Hughes Aircraft Systems International Inc v Airservices Australia* (1997)
 - Implied term to act fairly and in good faith
 - Preliminary contract governing tender process provided 'fairness between tenderers'
 - Court held Airservices was bound to the term as Hughes relied on the representation in deciding to participate in the tender
 - Airservices breached contract and Hughes as awarded damages

If a ticket

A ticket is usually regarded as an offer which can be accepted or rejected by the customer after the customer has had a reasonable opportunity to consider the conditions

- *MacRobertson Miller Airline Services v Commissioner of State Taxation* (WA) (1975)
 - Purchasing airline ticket is offer made to passenger
 - Presenting oneself for travel is acceptance of offer
- If handed out by a person
 - If the customer took the ticket and retained it without objection, his/her act would be regarded as an acceptance of the offer
 - *MacRobertson Miller Airline Services v Commissioner of State Taxation* (WA) (1975)
- If from an automatic machine
 - The offer is made when the proprietor of the machine holds it out as being ready to receive the money while the acceptance takes place when the customer puts his/her money into the slot
 - *Thornton v Shoe Lane Parking Company* [1971]

If a shop sale

Display of goods is an invitation to treat

- *Fisher v Bell* [1961]
- It was held that the owner of a shop who displayed a flick knife had not committed the statutory offence of offering the knife for sale

Offer must be communicated

All offers must be communicated to the offeree before they can be accepted. The offeree cannot intend to accept an offer unless they know of its existence.

- *Fitch v Snedaker* (1868)
- E.g. a person who finds and returns a lost dog to their owner, without having heard of the offer/reward, is not entitled to the reward

The motive of the acceptor is immaterial

- *Williams v Carwardine* (1833)

Knowledge is essential

- *R v Clarke* (1927)

If communication is by electronic transaction

- May raise some difficulties about the technicalities of contract formation, but does not call for a fundamentally different approach
- *Electronic Transaction Act 2000 (NSW)* allows communication by electronic transaction

The Fate of an Offer/Termination of an offer

An offer will cease to be available for acceptance when it is withdrawn by the offeror, lapses, or is rejected.

An offer may be revoked at any time before it is accepted. At common law, a promise to hold an offer open for a specified time is not binding unless the offeree has given consideration for that promise.

The withdrawal of an offer is effective only when it has been actually communicated to the offeree (unless in the case of an option).

If cross-offer

- Occurs where two identical offers cross e.g. A offers to sell to B, and B simultaneously offers to buy from A
- A cross offer does not amount to offer and acceptance, as although two offers are simultaneously made, neither has been accepted
- *Tinn v Hoffman* (1873)

If supervening incapacity

- E.g. companies becoming bankrupt, or an offeror becomes incapable of performing
- A supervening incapacity is a condition to bring the offer to an end
- *Financings Ltd v Stimson* (1962)

If an option

- A promise to keep an offer open for a specific time
- A promise to hold an offer is binding if consideration has been given in return for that promise (e.g. I'll give you \$2 to hold this offer for a week)
- *Goldsborough Mort & Co Ltd v Quinn (1910)*
 - o Agreement for option to purchase land at any time within the week for 5 shillings, could not withdraw offer within that week

If time has lapsed since the offer

- An offer which is expressed to be open for a particular period of time will lapse at the end of that period
 - o *Bartolo v Hancock [2010]*
 - Interpreted as the 'here and now offer'
 - Attempt to accept on 5th day of a 5-day trial unsuccessful
- If there is no period, the offer will lapse after a reasonable time (effluxion of time)
 - o *Balla v Theophilos (1957)*
 - Held 16 months too long to exercise option to purchase deceased partner's business interest

If either party died

- Generally, death of a party will terminate the offer
 - o *Dickinson v Dodds (1876)*
- However, may be unworkable and may not suit the parties
- Will depend on what party has died, whether the death had any bearing on the continuation of the offer, the subject matter of the contract, knowledge, and the existence of an option
 - o *Fong v Cilli (1968)*
 - Offeree couldn't accept offer after offeror's death because they knew of death before acceptance
 - o *Dickinson v Dodds (1876)*
 - Court found parting from property has same effect as death, making performance of any offer impossible

If there is a failure to fulfil condition or circumstances change (offer subject to terms)

- Condition that must be fulfilled before acceptance:
 - o An offer may be made subject to an express or implied condition that must be fulfilled prior to the acceptance of an offer
- Condition stating if a specific event happens, the offer would lapse:
 - o An offer may be made subject to an express or implied condition stating it should lapse upon the happening of a certain event
 - *Financings Ltd v Stimson [1962]*

If offer is withdrawn/revoked (generally, including bilateral contract)

- An offer may be withdrawn at any time before being accepted, effective when it has been communicated to the offeree
 - o *Byrne v Van Tienhoven (1880)*
 - Held revocation not effective until communicated

- If withdrawal is communicated by a third party an offeree must be informed about the withdrawal from a reliable source
 - o *Dickinson v Dodds* (1876)

If it is a unilateral contract and offer is withdrawn/revoked

- Revoked prior to performance:
 - o An offer may be withdrawn prior to performance so long as publicised prominently as the original offer
 - *Shuey v United States* (1875)
- Revoked when partly performed:
 - o It has been held that a unilateral offer cannot be withdrawn once the offeree has partly performed the requested act
 - *Daulia Ltd v Four Millbank Nominees Ltd* [1978]
 - o However there is no general principle to this in Australia, having been rejected by the Full Federal Court in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998)

If offer rejected

- Rejection can be express or implied
- Offers terminate upon rejection and cannot be accepted

If attempt to 'accept later'

- Any attempt to accept later is a new offer and will be treated as a rejection of the original offer
- *Stevenson Jacques & Co v McLean* (1880)

If counter-offer made

- A counter offer is treated as a rejection of the original offer and will extinguish it
 - o *Hyde v Wrench* (1840)
- This must be distinguished from a request for further information
 - o *Stevenson Jacques & Co v McLean* (1880)

Acceptance

Acceptance is a final and unqualified assent to the terms of an offer, made in the manner specified or indicated by the offeror. An agreement occurs at the moment of communicated acceptance of an offer (*Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957)*).

Is a meeting of the minds (*consensus ad idem*).

- *Smith v Hughes (1871)*
- *Dickinson v Dodds (1876)*

Objective approach used to determine acceptance. Assesses whether the reasonable person would believe that a party assented to the offer made by another party through words and/or conduct.

- *Taylor v Johnson (1983)*
- *Toll (FGCT) Pty Ltd c Alphaphram Pty Ltd [2004]*

If conditional acceptance or conditions agreed upon

- Conditional acceptance:
 - o What must be accepted is what was offered without addition, deletion or qualification
 - o Thus conditional acceptance cannot be acceptance
- Conditions agreed upon:
 - o Conditions may be agreed upon
 - o *Masters v Cameron (1954)* identified three classes of contract where conditions have been incurred:
 - o 1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound but wish to have their terms restated in a form that is more full or precise = valid contract
 - o 2. The parties have agreed to all the terms and plan no departure from the terms but have made performance condition upon the execution of a formal contract = valid contract
 - o 3. The intention of the parties is not to make a concluded bargain at all unless they execute a formal contract = no valid contract – no agreement until formal contract has been signed

Who may accept

Generally, an offer may only be accepted by those persons to whom it was made.

If performance is not in response to an offer

- I.e. performing for something else rather than to claim a reward
- Performance of a requested act will not give rise to a unilateral contract if the evidence establishes that the offeree was not in fact acting on the faith of the offer
 - o *R v Clarke (1972)*
 - 1000 pound reward for information regarding murder
 - Tried claiming the reward but admitted that he gave info to clear his charge for murder and not with intent of claiming the reward

If accepted by someone other than the person the offer was made to

- A person cannot accept an offer made to someone else
- *Boulton v Jones (1857)*

If accepted by more than one person

- Offerors need to be careful that they are not committing to obligation they cannot meet
- Where the offer can be accepted by more than one person, even though there can only be one contract, liability will depend on the ways the terms are construed
- *Patterson v Dolman (1908)*

Acceptance must be communicated

Generally, acceptance has effect only when communicated to the offeror

- *Latec Finance Pty v Knight [1969]*

A specific manner/method in which acceptance must be communicated may be prescribed by the offeror

- *Carlill v Carbolic Smoke Ball Company [1893]*

If the offer specifies the method to communicate acceptance

- If an exclusive method for communicating acceptance is prescribed, the only an acceptance communicated in that method will be effective
 - o *George Hudson Holdings Ltd v Rudder (1973)*

Unilateral contract – performance is usually acceptance

- A contract may dispense with the need to communicate
- *Carlill v Carbolic Smoke Ball Company [1893]*

If silence is stipulated

- E.g. if you don't reply, I'll take that as a yes/acceptance to my offer
- A contract cannot be forced on the offeree by stipulating silence as the prescribed method of acceptance
- Silence does not constitute acceptance
- *Felthouse v Brindley (1862)*
 - o "If I hear no more about him, I consider the horse mine at \$30 and 15s"

If acceptance can be inferred from conduct

- In some instances, the courts may accept that an agreement has been formed by conduct after considering whether the reasonable bystander would regard the offeree's conduct as acceptance
 - o *Empirnall Holdings Pty Ltd c Machon Paull Partners Pty Ltd (1988)*
 - o Director engaged architects to work but refused to sign contract with terms and condition
 - o Architects proceeded with work and director continued to pay
 - o Held that director accepted as he took benefit of services provided and had a reasonable time to reject the offer

If a circumstance where it is necessary for the offeree to reject offer explicitly or be bound

- There may be circumstances where it is necessary for the offeree to reject the offer explicitly, or be bound
- *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* [2007]
- *Waldorf Apartment Hotel the Entrance Pty Ltd v Owners Corp SP&1623* [2010]

Acceptance may be waived/stipulated

- An objective test is applied
- Failure to comply with the stipulation may not be fatal especially if it is to the advantage of the vendor
- Thus, acceptance communicated to the offeror by any other mode which is no less advantageous to him/her will conclude the contract
- *Manchester Diocesan Council for Education v Commercial and General Investments* (1970)

EXCEPTION: The Postal Rule

A contract is made when and where acceptance of an offer is posted, even if it is received some time later or is lost in the post. It determines the time of the contract and the place of the formation of the contract. A fictional meeting of the minds exists at that moment (*Adams v Lindsell* (1818)).

This rule has been narrowed

- It will only apply if it can be inferred that the offeror contemplated and intended that his offer might be accepted by post
 - o *Tallerman & Co Pty Ltd v Nathan's Merchandise* (1956)
- The rule can be negated by requiring actual communication instead of constructive (postal) communication
 - o *George Hudson Holdings Ltd v Rudder* (1973)

If telegrams - postal rule applies

- The postal rule extends to telegrams if the response was within contemplation of the parties
- *Leach Nominees v Walter Wright* [1986]

If instantaneous form of communication (telephone and telex communications) – postal rule does not apply

- Instantaneous communication is covered by inter airs, rather than the postal rule
- The postal rule does not apply to telephone
 - o *Aviet v Smith and Searlys Pty Ltd* (1956)
- Does not apply to telex communications
 - o *Express Airways v Port Augusta Air Services* [1980]

If facsimile message – postal rule does not apply unless sent through third party

- A facsimile message should be treated as instantaneous communication, thus the postal rule would not apply
- However, the rule may apply if the message is sent through a third party
- *Reece Bros Plastic Ltd v Hamon-Sobelco Australia Pty Ltd* (1988)

If internet – postal rule does not apply

- It has not been authoritatively determined, however communication via internet has been suggested to be treated like other forms of instantaneous communication
- *Olivaylle Pty Ltd c Flottweg AG (No 4) [2009]*

Emails and other electronic communication – postal rule does not apply

- Governed by the *Electronic Transactions Act 2000 (NSW)*
- Assumes communication is 'capable of being retrieved by the addressee when it reaches the addressee's electronic address' – s 13 A (2)
- If not, then communication is only effective once both the communication 'has become capable of being retrieved by the addressee' and the 'addressee has become aware that the electronic communication has been sent to the address' – s 13 A (1)

If the parties require actual communication – postal rule does not apply

- If a party requires actual communication rather than communication by post, the postal rule may be negated
- In order for the postal rule to have effect, it must be reasonably inferred that the offeror intended for acceptance to come about through the act of posting
- *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994]*

Correspondence Between Offer and Acceptance

Generally, the acceptance must correspond with the offer. An attempt to carry the terms or add additionally terms constitutes a counter-offer.

Commercial reality: if both parties use standard form contracts (reach agreement without deciding whose standard form should prevail) – 'Battle of the Forms'

- *Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) Ltd [1979]*
 - o In deciding which standard form should prevail there are two approaches;
 - Conflict approach: either by party who fires the 'last shot' or the party who is most persistent that their terms should prevail
 - Synthesis approach: build a contract from the two sets of forms

Agreement in absence of apparent offer and acceptance

- Court has to be the best they can
- *Goodman v Cospak [2004]*
 - o Macready M stated that the Court looks to interpret the terms using the 'global approach' in such a manner 'so as to give a "harmonious result" when construed with a "common sense and practical approach" which takes account of the "realities of commerce" and reflects the general trend of modern contract law generally'

If traditional offer and acceptance is absent but there still seems to be an agreement

- The courts may take a more practical approach to the reality of the circumstances and accept that the traditional 'offer and acceptance formulation is neither sufficient to explain all cases nor necessary to explain all cases'
 - o *Brambles Holdings Ltd v Bathurst City Council* (2001)

If circumstances where parties 'drift' into contractual relationship

- The parties may drift into a contractual relationship
- *Husain v O & S Holdings (Vic) Pty Ltd* [2005]

Consideration

A contract must have a bargain – something for something (doctrine of consideration). Valuable consideration may consist either is some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other (*Currie v Misa (1875)*). Consideration must be given *quid pro quo* – this for that (*Australian Woollen Mills Pty Ltd v The Commonwealth (1954)*).

Essentially:

- There needs to be detriment to the promisor
- And a benefit to the promisee
- But it will happen both ways
- E.g. A pays B to mow lawn, B loses money but gets lawn mowed. A has to mow lawn but receives money

Doctrine of Consideration

- A promisor's promise must be paid for to be enforceable and the payment must proceed from that promise
 - o *Australian Woollen Mills Pty Ltd v The Commonwealth (1954)*
- The bargain requirement – as opposed to reliance approach
- *Beaton v McDivvit (1987)*
 - o Beaton moved onto the property and farmed the land appropriately and it was taken away
 - o Reliance upon a promise is not consideration
 - o The Court took the view that simply relying on the promise does not fulfil sufficient consideration

The trinity

- *Australian Woollen Mills Pty Ltd v The Commonwealth (1954)*
- Offer, acceptance and consideration are an invisibly trinity, facets of one identical notion which is that of bargain

Unilateral Contract v Bilateral Contract

Unilateral contract

- Consideration is provided for by the promise of a reward by an act, rather than a promise
- An act is performed, rather than a promise

Bilateral contract

- Involves an exchange of promises which is sufficient

Formal Contract v Simple Contract

Formal contract

- Does not require consideration (e.g. producing a deed)

- However, if the deed is not fully executed, the contract requires consideration

Simple Contract

- Requires consideration to become enforceable
- *Dunlop Pneumatic Tyre Company v Selfridge (1915)*

Forbearance as Consideration

Deliberately not doing something or not exercising some right, usually at the request of another, can constitute good consideration (e.g. promising not to sue)

- *Calisher v Bishcoffsheim (1870)*

The claim must be reasonable with no concealment of facts that could affect its validity. There must be an honest belief or good chance succeeding, and the promise must be bargain for

- *Hercules Motors Pty Ltd v Schubert (1953)*

These factors are important practically as forbearance and compromise is about settling disputes

- *Wigan v Edwards (1973)*

Nine Rules of Consideration

Rule 1: Simple contracts must be consideration

- A simple contract requires consideration to become enforceable
- *Dunlop Pneumatic Tyre Company v Selfridge (1915)*
 - o Privity and Consideration are interrelated

Rule 2: Consideration must move from the promisee, but need not flow to the promisor

- It is fundamental that the consideration moves from the promisee but it need not move to the promisor
- If joint promisees:
 - o When two or more parties to a contract are regarded as joint promisees, consideration may be provided by one of them on behalf of both or all of them
 - *Coulls v Bagot's Executor & Trustee Co Ltd (1967)*
- If consideration is passes to an agent:
 - o Consideration may pass to someone acting for them such as an agent, and need not flow to the promisor
 - *Bolton v Madden (1873)*

Rule 3: Must be sufficient (legally effective), but need not be adequate

- The law must regard the consideration as valuable, however, it need not be something at an 'adequate value'
- Doesn't need to have equal value or proportionality to the promise
 - o *Woolworths Limited v Kelly (1991)*

Rule 4: Must be lawful

- Consideration must be lawful
 - *Parkinson v College of Ambulance (1925)*

Rule 5: Cannot be illusory (discretionary)

- E.g. promises to perform subject to whether or not x feels confident on that day
- A promise will not constitute good consideration if the promisor retains an unfettered discretion as to performance
- If the promisor is not bound to perform, the promise will be illusory
 - *Placer Development Ltd v The Commonwealth (1969)*
 - Commonwealth promised to pay subsidy of 'an amount determined by the commonwealth from time to time' = too vague/illusory

Rule 6: Must be definite

- Consideration must be definite and not too vague
 - *Shiels v Drysdale (1880)*
 - Referenced portion of land, no actual amount specified

Rule 7: May be executed or executory, but cannot be past consideration

- Where the act or forbearance pre-dates the promise, it is past consideration and therefore not sufficient consideration
 - *Roscorla v Thomas (1842)*
 - Promise the horse was sound and free from vice made after the sale = no consideration as payment was past consideration which could not support the promise that horse was sound and free from vice
- EXCEPTION: act done before promise at promisor's request – promise to pay for past services
 - An act done before a promise can be good consideration if the act was done at the promisor's request and the parties understood the act was to be remunerated by the conferring of a benefit such as a payment
 - *Lampleigh v Brathwaite (1616)*
 - *Re Casey's Patents: Stewart v Casey [1892]*
- Once the act that constitutes the consideration has been performed it is **executed**
- If the act or forbearance still has to occur, it is **executory**

Rule 8: Existing obligation is not good consideration

- Neither a promise to perform an existing legal duty nor the performance of an existing legal duty is regarded as sufficient consideration
 - *Stilk v Myrick (1809)*
- EXCEPTIONS:
 - If there is fresh consideration
 - Where additional risks are undertaken or where the promise provides some additional act or forbearance
 - *Hartley v Ponsonby (1857)*
 - If there is a practical benefit (in best interests of modifying party)
 - A promise that confers a practical benefit on the promisee, including avoiding a detriment, may amount to good consideration if the

- beneficiary's performance is capable of being regarded as worth more than any remedy against the beneficiary
 - *Musumeci v Winadell* (1994)
- If promise is made to a third party
 - A promise to perform an existing contractual obligation amounts to good consideration if it is made to a person who was not a party to the original contract
 - *Shadwell v Shadwell* (1860)
 - *Pao On v Lau Yiu Long* [1980]
- Existing duty under law
 - If there is no existing duty under law, it is sufficient consideration
 - *Popiw v Popiw* (1959)
 - Performing a statutory duty is not sufficient consideration, however if the party goes beyond the regular duty, it is sufficient consideration
 - *Glasbrook Bros Ltd v Glamorgan County Council* [1925]
- Compromise and forbearance to sue
 - A promise to perform an existing legal obligation will be good consideration if it is made by the beneficiary as a part of a bona fide compromise of a disputed claim
 - *Wigan v Edwards* (1972)
- Termination and replacement
 - Existing legal duty will have no application where the parties have terminated their original contract and entered into a new contract

Rule 9: Part payment of debt is not good consideration

- Part payment of a debt does not amount to good consideration for an agreement to discharge the debt
 - *Pinnel's Case* (1602)
- EXCEPTIONS:
 - Settlement of a dispute
 - In a genuine dispute, payment of a lesser sum may be adequate, but a party will often receive a deed
 - *HBF Dalgety Ltd v Moreton* (1987)
 - 'Composition' agreements
 - A part payment of debt is good consideration if it is to prevent the creditor from going behind the agreement as this would amount to fraud on other creditors
 - *Bankruptcy Act 1966* (Cth)
 - *Couldery v Bartram* (1881)
 - Third Party Payment
 - If a party owes another party money, but a third party offers a lesser sum as the payment on the promise, that will be sufficient consideration and the party receiving money cannot pursue the original amount
 - *Hirachand Punamchand v Temple* [1911]
 - Something other than money

- If a party owes something other than what is owed, it may be more beneficial to the creditor and may amount to good consideration
- *Pinnel's Case (1602)*
- Material alteration in the mode of payment
 - If the mode of payment is altered to an earlier payment or at a different place, the lesser payment may constitute good consideration
- Deed
 - Deeds do not require consideration
- Practical benefit is NOT an exception to this rule
 - *Re Selectmove Ltd [1995]*

Promissory Estoppel

Promissory estoppel prevents a party from denying the existence of an assumption as to a state of affairs where that assumption is acted upon, in circumstances where the denial would be unconscionable. 'There must be the creation of encouragement by the defendant in the plaintiff of an assumption that a contract will come into existence... and reliance on that by the plaintiff in circumstances where departure from the assumption by the defendant would be unconscionable' – *Austotel* (1989)

E.g. A promises B they will write a deed. B relied on that promise and does something A never writes the deed.

The 6 Probanda Test

The six probanda test provides guidance for determining a rise in promissory estoppel

- *Walton's Stores (Interstate) Ltd v Maher* (1988)

1: P assumed a legal relationship existed or would come to exist between promisee and D:

- Pre-existing legal relationship
 - o There is generally some form
 - *Legione v Hately*
 - o But is not required
 - *Walton's Stores (Interstate) Ltd v Maher* (1988)
 - o Can be an expectation that it would exist
- Representation needs to be sufficiently promissory in nature
 - o E.g. 'may be prepared to grant a further franchise'
 - *Mobil Oil* (1998)
 - o Not sufficiently clear to find estoppel

2: D induced P to adopt the assumption/expectation

- An adopted assumption of a contract will come into existence or a promise fulfilled
 - o *Walton's Stores (Interstate) Ltd v Maher* (1988)
 - o Or a transaction be carried out between the plaintiff and defendant
 - *Austol* (1989)
- Inducement: the defendant induced the plaintiff to adopt the assumption or expectation
 - o *Walton's Stores (Interstate) Ltd v Maher* (1988)

3: P acted/abstained from acting in reliance on assumption/expectation

- An actual reliance by the plaintiff on the assumption
 - o *Walton's Stores (Interstate) Ltd v Maher* (1988)
- Reliance needs to be reasonable
 - o *Austol* (1989)
 - o Wishful thinking is not good enough – mere hope rather than a consequence of words or conduct will not create an estoppel

4: D knew of P's action or intended P to do so

- The defendant knew or ought to have known of the intended reliance

5: P's action/inaction will cause P to suffer detriment if assumption/expectation is not fulfilled

- Detriment need not consist of expenditure of money or other quantifiable financial disadvantage so long as it is something substantial

- *Ahston v Pratt* [2015]

6: D has failed to act to avoid detriment, whether by fulfilling promise or otherwise

- There is a failure to fulfil the assumption

Unconscionable

- Departure from the assumption would be unconscionable
 - o *Austol* (1989)
- The estopped party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it
 - o *Verwayen* (1990)

Remedy for promissory estoppel

- If successful, the relying party is entitled to some equitable relief
 - o *Giumelli v Giumelli* (1999)
- E.g. the deed would exist

Intention

The parties must manifest an intention to create legal relations. The courts adopt an objective approach to determine whether the reasonable person would regard the agreement as intended to be binding (*Merrit v Merrit* [1970]; *Ermogenous v Greek Orthodox Community of SA Inc* [2002]).

However, the court may also consider surrounding circumstances, actions and statements of the parties. Thus, subjective intention may be relevant if known to the other party (*Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985)).

If clear from relationship with consideration

The rules as to consideration supply the answer as to whether parties intend to enter into a legally binding bargain. Thus, if there is good consideration, there is more than likely an intention to be bound.

However, in some cases, consideration and the intention to create legal relations can be distinct

- *Atco Controls Pty Ltd v Newtronic PL* [2009]

If clear exchange of payment for service:

- The proposition that each party intend the promise to be taken seriously and to carry the conventional legal consequences may seem obvious
- *Shahid v Australasian College of Dermatologists* [2008]

If unclear, surrounding circumstances are relevant

The subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances may be taken into account

- *Ermogenous v Greek Orthodox Community of SA Inc* [2002]

The less precise the agreement is, the less likely the reasonable person would determine there was an intention to be legally enforceable

- *Ashton v Pratt* [2015]
- Family arrangement is part of the surrounding circumstances to be considered

Correspondence between the parties may be referred to, as well as their conduct, in order to determine whether intention existed

- *ABC v XIVth Cth Game* (1988)
- Few matters yet to be sorted
- Couldn't find a concluded bargain
- Found no intention to be currently bound

Express Intention

Intention to create legal relations or lack thereof may be expressed.

By written clause (e.g. subject to legal jurisdiction)

Agreement subject to jurisdiction:

- A clause in the written agreement stating 'subject to (e.g. jurisdiction)' may be an express notice of no intention to be legally bound
 - *Rose and Frank Co v J R Crompton and Bros Ltd (1923)*
 - Was technically an 'illegal contract'

Honour clause in agreement – 'conduct...not a legal relationship'

- AN honour clause means there is no intention
- *Jones v Vernon's Pools Ltd (1983)*

Implied Intention

Intention to create legal relations to lack thereof may be implied.

Implied through conduct

- Intention may be implied through conduct
- *Merritt v Merritt (1970)*
 - Husband left wife
 - Property settlement
 - Implied through conduct they intended to be legally bound

'Ex-gratia' term (an act of grace) (commercial setting = strong presumption)

- A contract may be held legally binding, particularly due to the commercial setting, even if the proposal in contention is to make an ex-gratia payment
- *Rose and Frank Co v J R Crompton and Bros Ltd (1923)*

Presumptions

Presumptions are not strict and the circumstances of each case must be carefully considered. The presumptions made by the courts establish the onus of proof in relation to intention (*Ermogenous v Greek Orthodox Community of SA Inc [2002]*).

Factors that may suggest a lack of intention:

- The less certain the entitlement is, the more unlikely there is intention to be bound
- Informality of the arrangement (where commercial contract)
- Uncertainty in identifying the parties who are bound
- Uncertainty as to what the parties are bound to
 - E.g. price, timing, subject matter
 - *ABC v XIVth Cth Games (1988)*
 - Few matters yet to be sorted

If a domestic, social or family agreement = WEAK presumption

- There is a weak presumption of an intention to create legal relations
- The presumption can however be easily displaced
 - *Merritt v Merritt [1970]*
 - Held there was an intention between husband and wife

- When rebutting this presumption, the onus of proof lies on the party trying to prove that there was intention
- The OLD position of the courts provided that domestic agreements generally have no intention to be legally bound
 - o *Balfour v Balfour* [1919]
 - Husband moved
 - Wife too sick to follow
 - Husband agreed to pay her 30 pounds a month until she came back
 - He ended marriage
 - Court held no intention to be bound
- However, the NSW Court of Appeal and the Full Court of the Federal Court have held that this presumption should not stand
 - o *Ashton v Pratt* [2015]
 - o Provisions now within the *Family Law Act 1975 (Cth)* which cover such situation

Cases where someone is old and cannot look after themselves – asks someone to look after them who will be willed the house

- *Wakeling v Ripley* (1951)
 - o Invited younger relatives in exchange for property
 - o Man left job and moved to AUS
 - o Held binding arrangement
- *Todd v Nicol* [1975]
 - o Widow invited her sister and niece to move to Scotland to live in house and promised to give her the house
 - o Sold Scotland house belongings, left job, lived for several years, asked to house
 - o Held legally binding contract with intention
 - o Rebutted presumption – sister and niece breached contract because they didn't behave reasonably so widow had right to break contract

If promise to pay family member money each day/week/month/year

- *Jones v Padavatton* (1969)
 - o Mother's promise to pay \$200 a month to adult daughter
 - o Held no intention
 - o Presumption against legally binding domestic agreements

If commercial agreement between family members

- Commercial agreements have a stronger presumption of legal relations, despite being between family members
- *Roufos v Brewster* (1971)
 - o Arrangement between couple and son in law
 - o R to take B's truck on trip
 - o Truck damages
 - o Court held binding because it was a commercial setting and therefore held legal intention

If commercial agreement = STRONG presumption

There is a strong presumption that intention is present in a commercial agreement. It is difficult to displace the presumption (*Helmos Enterprises Pty Ltd v Jaylor Pty Ltd* [2005]). When rebutting the presumption, the onus of proof will be on the person denying the enforceability of a transaction.

- If letter of intent
 - Letters of intent indicate that a contract will be concluded and terms of reference for future negotiations
 - The language of the document and the standards of industry practice are considered to determine if the letter shows intention to be legally binding
 - *Coogee Esplanade Surf Hotel Pty Ltd v Commonwealth* (1983)
 - Held no intention until formal contract was executed
 - Mere correspondence is not evidence of contract
 - Was just negotiating sale
 - *LMI v Boulderstone* (2001)
 - Wording sufficient to satisfy that the parties intended to be bound
 - *JH Milner and Son v Percy Bilton Ltd* (1966)
 - Solicitor's letter regarding 'our understanding' held not binding
 - *Allens Group Ltd v Arena Meetings Conventions and Exhibitions Pty Ltd* (1977)
 - Holding a deposit is not binding
- If letter of comfort
 - E.g. to the bank saying if subsidiary company can't pay, we will pay
 - A letter of comfort is used by the holding company to satisfy a bank during the process of making a loan to a subsidiary company
 - This is not usually legally binding as there is not usually an intention to enter into a contract
 - The legal status of these letters are often deliberately left unclear so both parties can proceed
 - *Commonwealth Bank of Australia v TLI Management Pty Ltd* [1990]
 - Letter just explained circumstances (knowledge of a bank credit)
 - No binding promises, thus no intention
 - *Banque Brussels Lambert SA v Australian National Industries* (1989)
 - Letter saying it would not reduce contributions to smaller company and would give bank 90 days notice
 - Did not tell bank when it sold its shares
 - Held enforceable contractual promises in the letter
 - *Kleinwort Benson v Malaysian Mining* (1989)
 - Letter said it wouldn't reduce shares would continue support
 - Held not binding
 - Only binding when words can be interpreted as contractual promises
- Non-binding commercial agreements 'honour clauses'

- Parties can enter into a non-binding agreement if they wish, but this must be expressly stipulated
- This is sometimes known as an 'honour clause'
 - *Rose & Frank Co v J R Crompton & Bros Ltd* [1925]
 - Honour clause stated it wasn't a legal agreement
 - However was held it was binding because of commercial setting
- Non-commercial arm's length transactions
 - E.g. private sale of house or car, or agreement to employ person in domestic setting such as a maid
 - There is usually a legal intention in non-commercial arm's length transactions

If a government agreement = WEAK presumption

- Government agreements are usually not contractual
 - *Administration of Papua New Guinea v Leahy* (1961)
 - Government was just doing a tick eradication scheme – not contractual
- However, ordinary government contracts are just contracts in the usual sense
 - *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976)
 - Government buying the motel with letter of intent
- A commercial agreement needs to be distinguished from an implementation of government policy
 - *Australian Woollen Mills Pty Ltd v Commonwealth* (1954)
 - Some government dealings where it is inappropriate to label as a 'contract' on the arrangement – e.g. announcement of subsidy scheme

If voluntary organisation

Rules of voluntary organisations:

- The rules of voluntary organisations are generally not legally binding
 - *Cameron v Hogan* (1934)
 - Former labour person not supported by party, party's rules not contractually binding
- However, the *Associates Incorporation act 1983 (NSW)* and *Corporations Law* now provide that rules of a club can be binding
 - Membership of a club generally does amount to a legal relationship
 - *Baldwin v Everingham* (1993)
 - Equitable remedy to protect member's rights is not for the court to decide
 - No legal right
 - Membership may carry some legal rights
 - *Finlayson v Carr* (1978)
 - Aus jockey club wanted to exclude women as members
 - D and P had no right to challenge in court, however held she was entitled to bring the action

Preliminary Agreements / 'Head of Agreement' / Subject to Contract

If head of agreement

- Heads of Agreement are generally not binding unless specifically expressed to do so
 - o E.g. documents to aid negotiations, summary of what has been said so far, evidence of intention to third party
- If binding head of agreement
 - o Parties may negotiate the principle terms – the 'heads of agreement' – with intention of recording their agreement in a more formal way in the future
 - o Move on to *Masters v Cameron (1954)* categories to determine whether they intended to be bound

If preliminary agreement, but a party wishes to withdraw before executing formal document

- If a party wishes to withdraw, whether this preliminary agreement was intended to be binding must be determined
- *Masters v Cameron (1954)* provides three categories for contract:
 - o The parties have reached finality in arranging all the terms of their bargain and intent to be immediately bound but wish to have their terms restated in a form that is more full or precise = binding
 - o The parties have agreed to all the terms and plan no departure from the terms but have made performance conditional upon the execution of a formal document = binding
 - o The intention of the parties is not to make a concluded bargain at all unless they execute a formal contract = no agreement until formal contract has been signed
- If 'subject to contract' (category 3)
 - o Generally, preliminary agreements with language of 'subject to contract' or 'subject to preparation of a formal document' indicate the parties do not intend to be binding yet

Certainty & Completeness

The agreement between the parties must be sufficiently certain, clear and complete and the promise not illusory, so parties understand their rights and obligation.

Incompleteness

There is no contract unless the parties have reached a final agreement on at least all of the essential terms (which is 'a term without which the contract cannot be enforce' – *Thomson v White* [2006]).

Relevant factors in determining 'essential terms':

- The importance of the term
- Why the term has been left out
 - o Was it deliberate?
 - o Did the parties deliberately agree to agree? Or did they forget?
- If the agreement executory (neither party has performed obligation) or executed (at least one party has performed obligations?)

If agreement for a lease:

- The commencement date is essential in an agreement for a lease
 - o *Harvey v Pratt* [1965]

If sale of house

- The subject matter, the parties, and the price is needed for the sale of a house
 - o *Hall v Busst* (1960)

If sale of goods

- Price is not essential for the sale of goods
- The typical price may be found from external sources
 - o *Sale of Goods Act*

Some contracts where price is essential:

- Sale of a car

Future agreement of an essential term is unenforceable (contract 'subject to changes')

- If there is no agreement on essential terms, including circumstances where a contract is 'subject to changes', the contract will be unenforceable
 - o *ANZ v Frost Holdings Pty Ltd* [1989]
 - It is okay if part of a contract will be settled by a third party because the matters between the parties have been settled

Incomplete Contracts

If complex and less familiar kind of contract (e.g. mining joint venture)

- Where a transaction is of a more complex and less familiar kind (e.g. mining joint venture), the court will not lend their aid to the enforcement of an incomplete agreement
 - o *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd (1991)*

If parties rely on a 'mechanism' to determine an essential term (will be complete)

- Essential terms either need to be agreed on or the parties must agree upon a mechanism to determine an essential term (third party to decide term)
 - o *ASIC v Fortescue Metals Group Ltd [2011]*
 - E.g. If we don't agree, we will follow the consumer price index
- If mechanism is one of the parties ('I will decide at a later date')
 - o The mechanism may be one of the parties
 - *Toyota Motor Corp Australia Ltd v Ken Morgan Motors Pty Ltd [1994]*
 - UNLESS illusory 'unfettered discretion'

Example of factors amounting to incomplete contracts

- Failing to fix a price
- Parties reserving question to essential matters e.g. inconclusive subject matter or price
 - o *ASIC v Fortescue Metals Group Ltd (2011)*
- Failing to specify when debt is to be repaid in a credit contract
- Referring to common or 'standard' terms if such terms cannot be identified e.g. reasonable terms that commonly govern such lease could not be identified
 - o *Whitlock v Brew (1968)*

Example that weren't found incomplete

- 'Your usual hiring agreement' allowed the party to select its own form of agreement thus was not incomplete
 - o *Allcars PL v Tweedle (1937)*
- 'Standard real estate institute terms' not incomplete as such terms did exist
 - o *Trustees Executors and Agency Co Ltd v Peters (1960)*

If agreement to agree

- Agreements to agree on a term in the future will generally be an incomplete agreement
 - o *Booker Industries Pty Ltd v Wilson Parking (QLD) Pty Ltd (1982)*
- A contract will be enforceable if it is 'sufficiently cohesive and coherent to stand as a contract in its own right'
 - o *LMI v Balderstone (2001)*
- If agreement to agree includes a 'Machinery Clause' (mechanism) = will be valid
 - o Parties may make a valid contract that defers agreement on an essential term if they provide an effective mechanism for supplying the term in the event that they fail to reach an agreement
 - *Whitlock v Brew (1968)*
 - o However, if the mechanism refuses to carry out the task, the agreement cannot stand
 - *George v Roach (1942)*

- If agreement to agree includes a 'Formula Clause' (mechanism) = will be valid
 - Parties may agree on a formula to settle a term of their agreement which can be applied by the court in the event of a dispute

If agreement to negotiate

- In Australia, the courts have been willing to recognise enforceability of a contractual duty to negotiate in good faith depending upon its precise terms, so long as the promise is clear and part of an un doubted agreement between the parties
 - *Coal Cliff Collieries v Sijehama Pty Ltd (1991)*
 - Promise to negotiate could be contractual
 - But wasn't in this case
 - *Aiton Australia Pty Ltd v Transfeild (1999)*
 - Promise to negotiate and mediate in good faith was enforceable

Uncertainty

A contract may fail because a particular term is so vague and imprecise that the courts cannot attribute meaning to it. In dealing with uncertainty, the courts will apply

Biotechnology Australia Pty Ltd v Pace (1968):

1. Ascertain the intention of the parties objectively
2. So far as possible, endeavour to uphold the validity of the contract
3. Not get into business of writing the contract for the parties
4. Will only do this if it is possible
5. In dealing with uncertainty or illusory consideration issues, the courts look to:
 - a. Whether a third party has been given power to arbitrate the issues
 - b. Whether the issue can be resolved by one of the parties
 - c. Whether there is an external and sufficiently certain standard which can clarify the problem clause e.g. the price of a good can be worked out
 - d. Whether the contract provides a range of possibilities

If reasonableness is relevant – ‘reasonable price of...’

- If sale of goods ‘at a reasonable price’ = valid
 - o The contract may be valid for the sale of goods at ‘a reasonable price’
 - *Wenning v Robinson (1964)*
- If cost of land or value of depreciation = invalid
 - o In some circumstances, reasonableness will not be sufficiently certain
 - *Hall v Busst (1960)*

If unclear/ambiguous terms, meaningless clauses

- Problems arise from uncertainty where the language of the contract is unclear, ambiguous or meaningless
- The question is whether the term is ‘capable of meaning’
 - o ‘The fact that opinions may differ as to which of the two meanings is given to the words of the clause does not mean the clause is uncertain’
 - *Meehan v Jones (1982)*

Examples of issues with certainty

- ‘Terms of sale are on hire-purchase’
 - o *G Scammell & Newpew Ltd v Outson (1941)*
 - o Held uncertain
- ‘Lease upon such reasonable terms that commonly governs such a lease’
 - o *Whitlock v Brew (1968)*
 - o Held uncertain
- ‘Agree to continue negotiating in good faith’
 - o *Coal Cliff Collieries P/L v Sikehama PL (1991)*
 - o Held uncertain, but possible to agree to negotiate in good faith
- ‘Subject to suitable finance being available’
 - o *Meehan v Jones (1982)*
 - o Held not uncertain
 - o Purchaser required to act honestly and reasonably
- ‘Obligation to pay when financially able’

- *Head v Kelk* (1962)
- Held no uncertain
- 'To be supplied as soon as possible'
- *Bowes v Chayleter* (1923)
- Held not uncertain
- Objective test for resort to commercial reasonableness
- 'Subject to contract'
- Depends on which *Masters v Cameron* (1954) category

If conditional contract

- A conditional contract may be valid
- *Meehan v Jones* (1982)
- Note: it may also be void for uncertainty or illusory consideration
- The preciseness of the language and whether a party retains 'unfettered discretion' must be assessed
- In *Meehan*, it was held that there are many cases where an agreement depends on finance to complete the contract and the contract was not uncertain or illusory

If illusory promise

- If the promisor has an unfettered discretion in relation to performance, the promise will be illusory
- *Placer Developments Ltd v Commonwealth* (1969)
- Clause stating subsidiary rate to be determined by them = illusory
- However, certain matters may be left to discretion
- *Meehan v Jones* (1982)
- 'Subject to finance being available'
- If exemption clause that amounts to illusory promise – effectively deprives promise
- A promise may also be illusory and an exemption clause which is so sweeping in effect that it effectively deprives the promise of any force
- *Biotechnology Australia Pty Ltd v Pace* (1968)
- *MacRobertson Miller Airline Services v Commissioner of Taxation* (1975)
- Exclusion clause to render any implied promise to carry passengers = illusory
- If one party make only illusory promises
- The entire contract will fail for lack of consideration
- If the illusory promise is an essential term
- A contract may be incomplete where the illusory promise is an essential term
- If use of mechanism (machinery clause)
- A contract will not be illusory if important matters are left to be determined by a third party or if subsidiary matters are left to be determined by one of the parties
- *Godecke v Kirwan* (1973)
- Binding agreement even though terms were left to be added by vendor's solicitors, but could only add terms consistent with offer and objectively reasonable

- A party with a choice in which terms shall be carried into effect is not necessarily illusory
 - o *Thorby v Goldberg* (1964)
 - o *Meehan v Jones* (1982)
 - Certain matters may be left to discretion

Result of uncertainty/incompleteness: failure, severance, waiver

The courts are reluctant to strike down a contract on the basis of uncertainty or incompleteness

- *Meehan v Jones* (1982)

Courts are less likely to find an agreement incomplete where it had been partly or wholly executed

- *Foley v Classique Coaches* (1934)

The court may also rectify clear errors in the contract. However, the contract may ultimately fail

- *Whitlock v Brew* (1968)

If severance

The court may be able to sever an uncertain clause and leave the rest of the contract intact if the incomplete/uncertain/illusory term is not essential and the parties intended their agreement to stand without it.

- *Fitzgerald v Master* (1956)
 - o Clause about real estate rules was not essential as it was meaningless, there were no such terms, and parties intended agreement to stand without the term

If the contract is entirely in writing (parole evidence rule does not apply when interpreting evidence)

- Extrinsic evidence may be used to help interpret the document to determine if severance can be made
 - o *Whitlock v Brew* (1968)

If the incomplete/uncertain/illusory provision is an essential term = can't sever it, must fail

- Whether an incomplete/uncertain/illusory provision will invalidate the entire agreement depends on the essentiality of the term and the intention of the parties
 - o *Whitlock v Brew* (1968)
 - Contract for partial lease was essential part to sale of land
 - Couldn't be severed – would turn into a different sort of sale
- If the term is essential, the contract must fail

If waiver or removal or the uncertainty

It may be possible for an uncertain term in a contract to be waived – i.e. refrain from using – by the party whose benefit the clause was inserted, unless the term would be essential

- *Grime v Bartholomew* [1972]

- Could not waive uncertain clause because it was essential
- Uncertainty means parties failed to reach agreement at all
- *Macaulay v Greater Paramount Theatre Limited (1922)*
 - Could waive condition because it was not essential

If executory or completely performed

The courts are less likely to find an agreement incomplete if it has been wholly or partly performed

- *Husain v O&S Holdings (Vic) Pty Ltd [2005]*

If commercial agreement the courts will do their best to destroy the bargain. The further the parties have gone with their contract, the readier the courts are to imply any reasonable term so as to give effect to their intention

- *F &G Sykes (Wessex) Ltd v Fine Fare Ltd [1967]*

PARTIES TO THE CONTRACT

Privity

The Doctrine of Privity

The Doctrine of Privity provides that only an original party to a contract may sue or be sued. It does not prevent a contract from conferring a benefit on a third party, but simply prevents the party from enforcing the contract.

- *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd (1988)*

NOTE: when answering problem questions, a party would unlikely be held as party to contract, still no separate analysis for the unlikely even that it does for more marks unless it is super obvious that they aren't a party

Justifications for Privity and consideration rules (not relevant to problem questions)

- *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd (1988)*
 - 1: To prevent double recovery
 - E.g. both promisee and third party seeking damages and/or specific performance
 - To prevent liability on the part of a contracting party to a cast range of potential plaintiffs
 - E.g. in the case of government contracts
 - To provide freedom in contracts
 - Without the Privity rule, third parties may be simply left out of contracts

Remedies available to promisee (not relevant to problem questions)

- If a promisee is willing to sue a promisor to enforce a contractual promise to confer a benefit on a third party, the remedies available may not be sufficient to ensure the third party obtains the promised benefit
 - Sometimes substantial damages, sometimes specific performance
- Traditional view is that they cannot claim substantial damages, just nominal damages, because the loss is to the beneficiary, not to the party
- Specific performance is a remedy that can be sought by the promisee, and if granted will result in the third party giving the benefit
- Not however often available – e.g. not for personal services or where it would be futile

Exceptions to Privity

There are no true exceptions but only applications of other rules

- *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd (1988)*

If agency

- The Privity rule does not apply if the principle can prove that one of the parties involved in the negotiations entered in as their agent
- The principle and contracting party can enforce the contract against another
 - o *International Harvester Co of Australia Pty Ltd v Camgan's Hazeldene Pastoral Co* (1958)
- If principal not disclosed, provided the agent has actual authority, the undisclosed principal can confirm (ratify) the actions of the agent and sue and be sued upon the contract
 - o *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* (1968)
- Agency relations can be expressly or impliedly created
- There are no formalities required, just consent to the relationship between the principal and the agent
 - o *Pole v Commonwealth Bank of Australia* (1997)

If trust exists with trustee (e.g. party B and party C – the beneficiary)

- If a trust exists with the trustee entering into a contract on behalf of the third party beneficiary, the beneficiary acquires an equitable interest in the subject matter of the contract
- The beneficiary may indirectly enforce the promise by making the trustee sue on its behalf (by joining the trustee as a defendant) if they can prove an intention by the contracting parties to create a trust
 - o *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1988)
- If express trust, the intention of the contracting parties to create a trust is expressly manifested by facts, it is easy to prove
 - o *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1988)
- If implied trust, the intention to create a trust should be inferred if it clearly appears that it was the intention of the promisee that the third party should be entitled to insist upon performance of the promise and receipt of the benefit, and that trust is the appropriate legal mechanism for giving effect to that intention
 - o *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd* (1988)
- E.g. where A (the promisor – person making a contractual promise to benefit a third party) in a contract with B (the promisee) makes a promise to confer a benefit on C (the beneficiary) the court may find an intention on the part of B to hold on trust for C, the contractual right to enforce that promise. C isn't made a party to the contract, but it creates an obligation on part of B to enforce the promise on behalf of C (C joins B as defendant)

If exclusions clause/contracts for carriage (e.g. clause saying company won't be liable for damages to product occurring in shipping – 'Himalaya clause')

- No servant or agent of the carrier shall be under any liability whatsoever to the shipper, consignee (usually the buyer) or owner of the goods or goods for negligence or anything else
 - o *Alder v Dickon (The Himalaya)* [1955]
- However, in *Wilson v Darling Island Stevedoring* (1956) the clause did not get around the Privity rule
- Criteria to be applied in this situations (*Scruton Ltd v Midlands Silicones Ltd* [1962])

- The exclusion/limitation clause is intended to protect the stevedore (person employed to load and dock ships)
- The primary contracting party (carrier) contracts on its own behalf and is 'also contracting as an agent for the stevedore'
- The carrier must have authority to do this from the stevedore (later ratification is sufficient)
- The stevedore provided consideration to the promisor

NZ Shipping Co Ltd v Sattergwaite and Co Ltd (The Eurymedon)

- Shipper acting as agent was included in clause

Life-Savers (Australasia) Pty Ltd v Frigmobile Pty Ltd

- NSW Case – subcontractor included was in clause when subcontractor ruined chocolate)

Other exceptions to Privity

- Insurance contracts
 - *Trident (1988)* would fit into the exceptions above
- Promissory estoppel
- Unjust enrichment
- Tort
 - *Hill v Van Erp (1997)*
- Misleading and deceptive conduct
- Assignment/novation
 - Where contractual rights have been transferred to a third party
 - A third party may be substituted for one of the original contracting parties through novation
 - Terminate original contract with new one taking place
 - *Conveyancing Act 1919 (NSW) s 12*

Later cases applying Trident

- *Barroora Pty Ltd v Provincial Insurance Limited (1992)*
 - Property insurance
 - Held an exception
- *Co-operative Bulk Handling Ltd v Jennings Industries Ltd (1996)*
 - Trident extended to other types of insurance, not just liability insurance
- *Winterton v Hambros (1991)*
 - Trident does not extend beyond insurance
 - Not to be used in general
- *Hickey v Australian Rope Works Pty Ltd (1998)*
 - Trident successfully used for insurance policy
- *Rail Corporation of NSW v Fluor Australia Pty Ltd [2008]*
 - Trident inapplicable for a wider proposition that a stranger to any contract may sue at law to enforce a promise in the contract given for its benefit
 - Use for scope

Approach in problem questions

- The party is not exempt to Privity and therefore not a party to contract
- (Name) would likely be held a mere beneficiary, rather than a party to the contract, thus has no rights to X
- However, if the court was to find that (Name) was a party to the contract ... do separate analysis for their rights but keep it brief

Capacity

A contract that is otherwise properly made will generally be **voidable** at the option of the party that lacks contractual capacity. There are, however, some circumstances where the law will automatically disallow the party from continuing to make the contract valid, e.g. undue delay in making a decision, third party involvements etc. Otherwise, the contract may still be valid if the person who lacks capacity chooses to proceed.

Minority

The *Minors (Property and Contracts) Act 1970 (NSW)* broadens the narrow common law categories wherein a minor may be contractually bound. For the Act to apply, as discerned in *Homestake Gold of Australia v Peninsula Gold (1996)*;

- The transaction must be a 'civil' act (includes a contract) – s 6
- The minor must have been under 18 years old at the time they entered the contract – s 8
- The minor must have an understanding of the transaction – s 18
 - o The closer to minor is to 18, the easier it is to prove the minor understood

IF ACT APPLIES:

- Determine whether contract is presumptively binding
- If not, whether it becomes binding due to ratification/affirmation or lack of repudiation
- Finally, determine whether there needs to be an adjustment of rights in the contract is not valid

Presumptively binding contracts

If the Act applies, then the minor may be presumptively bound, whether the defence (disability) of the minority is removed and the contract may be enforced by or against the minor. The minor may still however argue other means available to an adult to defeat the contract (e.g. mistake, misrepresentation, unconscionability).

Presumptively binding categories

- The contract is for the minor's benefit – s 19
 - o Other sections of the Act and common law can guide benefit interpretation (undefined in the section)
 - Ss 20, 28, 19 mention adequacy of consideration and the concept of fairness and reference to parent for advice
 - Common Law cases where minors have been held to be bound by their contract e.g. contracts for necessities such as food and drink, a lawyer (*Helps v Clayton (1964)*), medical services, instruction in carrier, employment contracts (*Bromley v Smith [1909]*)
 - S 19 means **net benefit** – to weigh up disadvantage against the advantages of entering the contract
- Where a minor buys or sells property (both real or personal) for a price that is not excessive, and consideration is okay – s 20

- When a minor makes a reasonably gift (would be by way of deed) – s 21
- The contract is to invest in governmental securities – s 23
- The Supreme Court approves the contract for the minor's benefit – s 26
- The Local Court approves the contract and is less than \$10 000 for the minor's benefit – s 27
- The contract is for a sale of property that was signed before an independent solicitor or public trustee no more than 7 days before the contract and who is convinced the minor is receiving adequate compensations – ss 28, 29
- The Court affirms the contract – s 36

Non-presumptively binding categories

If the contract does not fit into any of the categories from s 19 to s 29, then prima facie, the contract is not binding to the minor (s 17). The contract then becomes voidable at the option of the minor. The other party must treat the contract as still valid and enforceable against the other party.

If the minor wishes to proceed

- The minor may ratify the contract upon reaching 18 years old, through conduct or writing, or ask the court to affirm on his/her behalf – s 30

If the minor wishes to get out of the contract

- The minor must repudiate the contract (s 31) by notice in writing (s 33) while a minor or before their 19th birthday (s 31)
- Alternatively, the court may repudiate a contract while the minor is under 18 (s 34)
- If the minor fails to repudiate the contract, it will automatically become binding when the minor turns 19 (s 38)

Other relevant sections

Adjustment of rights following repudiation

- The court has the power to adjust rights following repudiation – s 37
- E.g. court may require the minor to return property if it would be grossly unfair for the minor to keep that property at the other party's expense

Adults connected with the contract

- An adult guarantor is legally bound despite the minor being able to get out of the contract – s 47

Minor may be liable for tort action connected with the contract – s 48

- E.g. committing fraud by lying about his/her age to convince the other party to contract with them

Protection for innocent third parties

- Protection will be given to a third party who acquired the subject matter of the contract in good faith and without notice of the problem of minority – s 24

Mental Incapacity

A contract made with a party with impaired mental capacity (e.g. intellectual disability, dementia, brain injury, mental illness) may be voidable at the option of that party. **The party pleading incapacity bears the onus of proof.**

A contract is voidable if the party claiming incapacity can show that (as per *Molton v Camroux* (1848))

- They were incapable of understanding the contract at the time it was made, and
- That the other party knew or ought to have known of the incapacity

Example where plea **failed**

- *Imperial Loan Co v Stone* [1892]
 - o Insanity claim
 - o Signed as a surety, claimed he was insane/incapable, held he was liable because other party believed he was of sound mind
 - o Not known he was claiming insanity at the time

Example where plea **successful**

- *Gibbons v Wright* (1954)
 - o Three sisters as joint tenants, two sisters changed to tenants in common (if one died, beneficiaries in the will inherits)
 - o They died, surviving sisters tried changing back and argued sisters were incapacitated at the time, held evidence of incapacity thus voidable
 - o So unless sisters in their lifetime sought to avoid contract it remained valid and enforceable

There is no 'fixed standard of sanity'. The requirement is that each party was of "such soundness of mind to be capable of understanding the general nature of what he/she is doing by his/her participation"

Dementia claim

- *Lampropoulos v Kolnik* [2010]
- Elderly man selling land with dementia, contract set aside due to his lack of mental capacity and other party ought to have known

If resupply of necessaries

- *S 7 of the Sale of Goods Act 1923 (NSW)* provides that a person lacking mental capacity will be obliged to pay for the necessities supplied to them, but will only be required to pay a reasonable price rather than the contracted price.

If it succeeds

The contract becomes voidable at the option of the plaintiff

If mental incapacity fails

If the party fails to prove mental incapacity or incapacity through intoxication, the facts may still give rise to a remedy if unconscionability exists

Intoxication

A contract made with an intoxicated party may be voidable at the option of that party. The party pleading intoxication bears of the onus of proof.

The party claiming intoxication must prove that (per *Gibbons v Wright (1954)*);

- They were so intoxicated by alcohol or drugs that they were incapable of understanding the contract at the time it was made, and
- That the other party knew or ought to have known of the intoxication

If it succeeds

The contract becomes merely voidable at the option of the plaintiff, therefore

- The party must take steps to repudiate the contract after sobering up (or it will fail)
 - o However, it may be defeated if the person was not intoxicated anymore but still ratifying the contract
 - o If the party does not take steps to repudiate the contract after sobering up and clearing the mind, the contract would not be invalidated by their incapacity and could still be enforceable
 - *Gibbons v Wright (1954)*
 - *Blomley v Ryan (1956)*

If intoxication fails

If the party fails to prove mental incapacity or incapacity through intoxication, the facts may still give rise to a remedy if unconscionability exists (contract may be set aside)

- Although the party had the ability to understand the nature of the contract, the other party may have known of the party's inferiority in the decision making process and acted in an unconscionable way by taking advantage of their superior bargaining power
- The courts approach such claims of intoxication with caution
 - o *Blomley v Ryan (1956)*

IF SO, move onto unconscionability

- E.g. the other party had given you lots of alcohol which impacted decision making process
 - o Other party should have known you were inferior in the decision making process and taken advantage of superior bargaining power

Blomley v Ryan (1956)

B entered contract to purchase farm from R who was 78 and suffering effect of prolong/excessive effects of alcohol. R sought to turn back from sale, B sought specific performance – issue was whether R had requisite capacity to contract.

TERMS

In simple cases, the terms of a contract will be those proposed by the offeror and accepted by the offeree.

Express terms

Are **pre-contractual statements**. May be given orally, by conduct or written (e.g. drafts) prior to entering the contract and can be classified/categorised as:

- i. Puffs: e.g. 'red bull gives you wings'
 - a. probably no consequence if a statement is incorrect
- ii. Representations: e.g. 'can't see why the float can't carry two large horses?' – intended to induce, but not guaranteeing the truth of the statement
 - a. may be an actionable misrepresentation if a statement is incorrect
- iii. Terms: part of the contract
 - a. may lead to a remedy for breach if the statement is incorrect

Objective test:

- *Oscar Chess v Williams (1956)*
 - o 'Would an intelligent bystander reasonably infer that a warranty/promise was intended'
- *Ellul & Ellul v Oakes (1972)*
 - o It is for the court to ascertain 'whether there is evidence of an intention by one or both of the parties that there should be contractual liability in respect of the accuracy of the statement'
- *Hospital Products Ltd v United States Surgical Corporation (1984)*
 - o The intention is to be determined by an objective analysis of the facts
 - o Secret of uncommunicated thoughts in respect are irrelevant

Factors relevant to identifying the intention of the parties

Language of the statement

- The court may consider the language of the statement, such as whether the nature of the words used suggested a promise or a guarantee
 - o *Oscar Chess v Williams (1956)*
 - Sold mother's car to a car dealer
 - Described the model as 1948 model, but it was 1939 model
 - Car yard claimed damages for a breach of contract
 - Merely an expression of an opinion or hypothesis is merely a term
 - o *J J Savage and Sons Pty Ltd v Blakney (1970)*
 - Purchase of an outdoor motor, choice of 3 models
 - Estimated one model would do 15 mph but only did 12 mph
 - Court held was not a term because language was not promissory
- A hypothesis/guess/estimation will likely be a representation

- E.g. I think this will do ... I guess it might do this ... I don't see why not

Relative knowledge and expertise of the parties

- The court may consider the relative knowledge and expertise of the parties
- Whether the seller did not know, or buyer should have known
 - *Oscar Chess v Williams (1956)*
 - Car dealer should have known the model because he was an experienced car dealer
 - Williams was just relying on the registration book
 - *Symthe v Thomas (2007)*
 - eBay auction case

Content and importance of the statement

- The court may consider the content and importance of the statement
 - *Van Den Esschert v Chappell (1960)*
 - Contract to sell a house
 - Asked if property was affected by termites right before signing the contract
 - Vendor said no, but it was
 - Held it was a significant term and that the buyer wouldn't have signed otherwise

Time of the statement

- The court may consider the time of the statement
- The statement is more likely to be a term if it was made close to the contract
 - *Harling v Eddy (1951)*
 - Cow up for auction
 - Said nothing wrong with it and made guarantee
 - It died of tuberculosis
 - Court found it was a term, due to the close proximity of purchase
 - *Van Den Esschert v Chappell (1960)*
 - Asked about termites right before signing the contract
 - Considered a promise due to timing
- If 'time is of the essence' – normally a warranty

Whole of circumstances approach

- The 'whole of circumstances' approach provides that the intention of the parties is ascertained objectively and deduced from the totality of the evidence
 - *Hospital Products Ltd v United States Surgical Corporation (1984)*
 - Secret or uncommunicated thoughts are irrelevant

Signature of the party on a document

- A part is bound to a contract that he/she signed
- Objectively, if the statement was in the contract, it was read and understood
 - *L'Estrange v F Graucob (1934)*

The existence of a written memo

- Where there is a written memorandum, then any pre-contractual statements left out of it will unlikely be ascertained that the parties intended to be a term
 - o *Routledge v McKay (1954)*
 - Sale of motorbike
 - Told it was later model but written memo didn't include it
 - Held it was not a term

Incorporation of Terms: Notice requirement

A party is required to provide sufficient notice of terms.

If signed document (the signature rule)

- Generally, a person who signs a contractual document will be bound by its terms, regardless of whether the person has read or understood the terms
 - o *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)*
 - The HC held that it accords with the general test of objectivity that is or pervasive influence in the law of contracts
- *L'Estrange v F Graucob (1934)*
 - o Actioned on the basis that the machine was not fit for purpose, but there was an exclusion clause
 - o L'Estrange signed a form headed 'Sales Agreement', but it contained an exclusion clause in small print; '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'
 - o Claimed: machine was not fit for purchase
 - o Defence: any warranties for fitness were expressly excluded by the contractual agreement she signed
 - o Held: bound by the clause (even if you only glance at it)
 - o Scrutton J (quoting Mellish LJ in *Parker v South-Eastern Ry Co*); 'in an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its content'

Exceptions:

- Misrepresentation (e.g. party was misled into signing) or mistake (*non est factum*)
 - o The signature rule does not apply where the contents of the document have been misrepresented, there is a plea of non est factum, or where there are equitable grounds for setting aside the contract
 - *Curtis v Chemical Cleaning & Dyeing Co [1951]*
 - Wedding dress taken to dry cleaner
 - Docket signed which was referred to as 'receipt' afterwards with exclusion clause negating liability for any damage
 - Was told before signing it was just beads and details on dress
 - When dress returned, there was a stain on it
 - Held exclusion clause misrepresented and not effective even though she signed

- *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)*
 - Unusual terms may amount to misrepresentation if there is an element of concealment – but would only happen in extraordinary circumstances
 - Did not occur in this case
- If the signed document is not contractual in nature
 - The signature rule does not apply where the document in question cannot be reasonably considered as a contractual document
 - *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)*
 - *Grogan v Robin Meredith Plant Hire [1996]*
 - Document was a mere timesheet
 - *Chapleton v Barry Urban District Council [1940]*
 - Was a receipt or voucher
 - *Curtis v Chemical Cleaning & Dyeing Co [1951]*
 - Receipt not implied to have contractual terms
 - *DJ Hill and Co Pty Ltd v Walter H Wright Pty Ltd [1971]*
 - P ordered by phone delivery
 - Signed document on arrival
 - Had exclusion clauses
 - Machines damaged during delivery
 - Relied on exclusion clause
 - Held document were thought of as dockets that are not contractual, and signature came after formation of contract, which is not allowed unless prior dealing

If unsigned document

- E.g. car park or train ticket, receipt, notice (signs at railway stations/websites/sporting events), delivery slips
- If an unsigned document is present, the courts will objectively assess whether the reasonable person would assume the document is of a kind that would normally be expected to be contractual in nature
- In order for the displayed or delivered terms to be incorporated into the contract, **the terms must have been made available to the party before the contract was formed**
 - *Oceanic Sun Line Special Shipping Co Inc v Fay (1988)*
 - On paying fare in NSW, passenger from QLD given exchange order stating it would be exchanged for ticket when boarding
 - When issues the ticket it had a condition saying Greece would have jurisdiction
 - Passenger was injured and sued in NSW
 - Held condition was not part of the contract because it was issued after the contract was formed and the parties must have been given reasonable notice to those terms
 - *Thornton v Shoe Lane Parking Ltd [1971]*
 - Ticket from machine said 'ticket subject to conditions displayed on premises'
 - Not visible from entrance of ticket machine

- One term was an exclusion clause
 - Held no reasonable steps were taken to bring awareness
- If party knows that a document or signed display contains contractual terms (**knowledge**)
 - If a party has knowledge, then it is bound
 - A party aware that a delivered document or a signed display before or at the time of the contract was made contains contractual terms, then it will be bound by such terms, regardless if they read or understood it
 - *Parker v South Eastern Railway Co (18770)*
 - If P is unaware of writing containing 'condition' and no reasonable effort was made to ensure P was aware then P is not bound by terms
 - BUT if P is aware of it, and either does not read it or does not think it contains condition, he will be bound as long as D delivered it in a manner that gave P reasonable notice that conditions were on the ticket
 - Respondent given tickets with small print with exclusion clause
 - Respondent received ticket before, but never read small print, thus was still bound to the clause
- If terms should be **expected** from a document
 - If the delivered or displayed document is one that a reasonable person would expect to contain the terms of the contract, the mere presentation of the document will be sufficient notice
 - E.g. for carriage of goods by sea, there is always a bill of lading
- If terms are **not in an obvious or well-understood contractual document**
 - Where delivered or displayed terms are not in an obvious or well-understood contractual document, the party seeking to incorporate the terms must take reasonable steps to bring the terms to the notice of the party
 - *Causser v Brown [1952]*
 - Dry cleaner sought to escape liability by clause with document handed after
 - Held the docket not traditionally contractual and not considered term as was not brought to attention
- If terms are **unusual or unexpected** in the context
 - Where the terms are unusual or unexpected in the context, the party seeking to incorporate the terms must take extra efforts to give notice
 - *J Spurling Ltd v Bradshaw [1956]*
 - Need more attention e.g. red ink with red hand pointing
 - *Interfoto Picture Library v Stiletto Visual Programmes Ltd [1989]*
 - Extremely large and unusual late fees
 - Steps weren't reasonable enough as fees were severely high
 - Need extra efforts
 - PROVIDES THE OBJECTIVE TEST FOR WHETHER THE CLAUSE IS HARSH OR ONEROUS
 - *Baltic Shipping Co v Dillon (1991)*
 - Ticket available 2 weeks before cruise with conditions printing including exclusion clause for any personal injury

- Ship sank
- Held clause was harsh and onerous and gave no reasonable notice
- Passenger needed to have been given notice of terms

If electronic contract

- The act of clicking 'I accept' to the terms usually has the same effect as a signature ('click wrap')
 - *Electronic Transactions Act 2000 (NSW) s 4(2)(a)(ii)*
 - *Goldstein v Jumbo Corporation Limited (Civil Claims) [2006]*
- However, it may not be sufficient if the purchaser would reasonably have understood that act to be performing a different function
- Reasonable notice and implied consent is still required
- If 'browse wrap' – (notice of terms through hypertext) – not reasonable notice
 - Merely clicking on a download button does not show assent to terms if they were not conspicuous and if it was not explicit to the consumer that clicking meant agreeing to the terms
 - A hyperlink to the terms is not reasonable notice
 - *Specht v Netscape Communication Corporation (2002)*
- If 'click wrap' - (purchaser clicks on a box stating that they agree to the terms of the contract_)
 - Requiring the offeree to click 'I agree' is sufficient
 - *Goldstein v Jumbo Corporation Limited (Civil Claims) [2006]*
- If misleading term (e.g. reselling concert ticket on eBay but there was a term saying you can't resell – not properly incorporated thus misleading)
 - The term may be misleading where it conveyed the impression of being bound, when in fact it was never incorporated into the contract
 - *eBay International AG v Creative Festival Entertainment Pty Limited [2006]*
 - Tickets issued after contract concluded contained term 'ticket can't be resold' but not displayed on the webpage
 - Held it was misleading
 - Conveyed impression of binding consumers when not in fact incorporated into the contract
 - Thus, could be resold

If course of dealings (e.g. past dealings)

- Contractual terms from past dealings may be introduced into a subsequent contract even though the ordinary requirements for incorporating the terms had not been met in the subsequent contract
- The past dealings must have been regular and uniform
 - *Henry Kendall & Sons v William Lillico & Sons Ltd [1969]*
- There needed to be sufficient notice given
 - *DJ Hill and Co Pty Ltd v Walter H Wright Pty Ltd (1979)*
- Examples where past dealing is sufficient:
 - 3-4 contracts per months over 3 year period in relation to sale of meal held sufficient

- *Henry Kendall & Sons v William Lillico Sons Ltd* [1969]
- Renewal of gym membership
- *Balmain New Ferry Co Ltd v Robertson* (1906)
 - Knew of terms from past dealings, sign near turnstiles with condition of feed when entering ferry wharf
 - Held sufficient
- Examples where past dealings is insufficient
 - *Hollier v Rambler Motors (AMC) Ltd* [1971]
 - 3 or 4 contracts over 5 years in relation to repair of a car
 - Held insufficient
- Test:
 1. The proferens had done enough to bring it to their attention in the first place
 2. The clause was actually intended to be part of the contract in the first place

If incorporation by reference to other documents

- E.g. refer to this document to see full terms
- Typically, references to other documents has not been sufficient to satisfy reasonable notice
 - *Baltic Shipping Co v Dillon* (1991)
 - Terms only available to passengers at office of cruise company
 - Held no reasonable notice to bring unusual terms to attention
- If terms were general and incorporated and implied anyway
 - E.g. general conditions obtainable on request = sufficient
 - There may be instances where it will satisfy reasonable notice
 - *Smith v South Wales Switchgear* (1978)
 - Supply order
 - 'General conditions obtainable on request' later sent to purchaser
 - Held general terms were incorporated and implied

Extrinsic Evidence: The Parol Evidence Rule

The Parol Evidence Rule provides that where a contract is wholly in writing, evidence is not admissible to add, vary or contradict the written document (*Mercantile Bank of Sydney v Taylor* (1891); *Masterton Homes Pty Ltd v Palm Assents Pty Ltd* [2009])

Two Contexts of Analysis:

1. To aid in identifying the terms of the contract
2. To prohibit the use of extrinsic evidence to interpret the meaning of the terms of the contract

This excludes extrinsic evidence to explain the meaning of a contract:

- Oral variation
- Subjective intentions
- Prior negotiation
- Subsequent conduct
- Written correspondence
- Earlier drafts of the contract

Determining whether the contract is entirely in writing

In Australia, the courts will likely take the flexible approach and allow extrinsic evidence to determine if the contract was intended to be entirely in writing.

- *Masterton Homes Pty Ltd v Palm Assents Pty Ltd* [2009]

However, it has not been concluded which approach to use, thus the courts may take the narrow approach, giving primacy to a written document that appears on its face to be the complete record, with no admission to add, vary or contradict the terms found.

If entire agreement clause

- Contract is entirely written – parol evidence rule will apply
- E.g. ‘this document is the entire agreement’
- Entire agreement clauses ‘constitute a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere’
 - o *Intreprenur Pub Co v East Crown* [2000]
- They may also be effective to exclude any other terms
 - o *Hope v RCA Photophone of Australia Pty Ltd* (1937)

If terms recorded electronically but capable of being retrieved and converted to a readable form (contract is entirely written)

- Where the terms of the contract are recorded electronically but is capable of being retrieved and converted into a readable form, the terms should be treated as in writing for the purpose of the parol evidence rule
 - o *Electronic Transactions Act 2000* (NSW) s 4

If the contract is NOT entirely in writing

- The parol evidence rule does not apply to contracts only **partly** in writing
 - o *Masterton Homes Pty Ltd v Palm Assents Pty Ltd* [2009]

Exceptions to the Parole Evidence Rule

Misrepresentation

- Parties are allowed to produce extrinsic evidence during an action on misrepresentation

Construing (interpreting) a contract (also when ambiguity present)

- *Electricity Generation Corporation v Woodside Energy Ltd* [2014]
- 'The meaning of the terms of a commercial contract is to be determined by what a reasonable business person would have understood those terms to mean'
- Requires 'the consideration of the language used by the parties, the surrounding circumstances known to the, and the commercial purpose or objects to be secured by the contract'
- Thus, the courts will allow extrinsic evidence when construing/interpreting a contract
- Surrounding circumstances:
 - o Subjective intentions (not included, only objectively known facts)
 - Evidence of surrounding circumstances does not include evidence of the parties' subjective intention, only objectively known facts
 - *Pacific Carriers Ltd v NPN Paribas* [2004]
 - o Pre-contractual negotiations
 - Evidence of negotiations leading up to the contract is not admissible for subjective intentions
 - However, evidence of prior negotiations may be admitted as a party of the surrounding circumstances in an objective sense
 - *Codelda Construction Pty Ltd v State Rail Authority NSW* (1982)
 - o Evidence of subsequent conduct is NOT an exception
 - The parties cannot use what the parties said or did after the contract was made to aid construction
 - *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970]

Identifying the subject matter of a contract and ascertaining whether contract is entirely in writing

- Extrinsic evidence may be used in deciding whether a contract has been entered into, to identifying the subject matter of the contract, and in ascertaining the terms of a contract not wholly in writing
- *Masterton Homes Pty Ltd v Palm Assents Pty Ltd* [2009]

Identifying the parties or subject matter of a contract where it is not revealed in the written contract

- Extrinsic evidence may be used to identify the parties or subject matter of a contract when it is not identified in the written contract
- *Edwards v Edwards* (1918)

When rectifying a mistake

- E.g. both parties knew the house was for \$1M, not \$100K – mistake in the contract

- The courts have an equitable power to rectify a contract where parties can produce evidence to prove a mistake occurred
- *Bacchus March Concentrated Milk Co. Ltd v Joseph Nathan and Co* [1919]

Promissory Estoppel

- 'Promissory estoppel "trumps" legal rights including those protected by the parole evidence rule'
- *Saleh v Romanous* [2010]

Condition precedents

- Extrinsic evidence is admitted for the purpose of establishing that a written contract is subject to a contingent condition that must be satisfied before the contract will become effective
- *Pym v Campbell* (1856)
 - o Agreement held to be precedent before contract signed

Oral variation or termination of contract (after entered into)

- A party may orally terminate(?)
 - o *Narich Pty Ltd v Commissioner of Payroll Tax* (1983)

Sham (to prove true consideration)

- Extrinsic evidence is admissible to prove that real consideration exists
- *Pao On v Lau Tiu Long* [1980]

Contracts not entirely in writing

- The parole evidence rule does not apply to contracts not entirely in writing
- *Masterton Homes Pty Ltd v Palm Assents Pty Ltd* [2009]

Implied term: custom/trade usage

- The parole evidence rule will not apply where parties have used language in their written contract which has special meaning in the parties' industry if it is well known, uniform and certain
- *Appleby v Purcell* [1973]
 - o 'Push and stack' – held evidence admissible in circumstances where there is a particular industry meaning

Collateral Contracts

- E.g. a party buys a house in written agreement (contract for sale), but only entered contract due to promise that drains were working properly (collateral contract)
- A collateral contract exists where one party makes a promise connected to, but independent of, the main contract, in response to the consideration of a promise made by the other party' to enter into the main contract
 - o *Heilbut Symonds v Buckleton* [1913]
 - Purchased shares (main contract)
 - Based on statement that company owned large plantations of rubber tree (collateral contract)
- It must:

- Be intended as a promise, a term rather than 'mere' representation
 - *JJ Savage and Sons Pty Ltd v Blakney (1970)*
 - E.g. estimate that a motor would go 15mph, but it didn't
 - Held a 'mere' representation rather than a promise
 - No collateral contract
- Be intended to induce entry into the main contract
 - *JJ Savage and Sons Pty Ltd v Blakney (1970)*
 - Entered contract because of the statement about the motor
- Have separate consideration than the consideration for the main contract
 - *De Lasselle v Guilford [1901]*
 - E.g. lease of a house separate to collateral contract for drains being in order
 - Entrance into main contract IS sufficient consideration
- Be concluded at the same time or before the main contract
 - E.g. generally needs to be at the same time because it needs to have induced entry into main contract
 - Can be too long before – such as 2 weeks
 - *Hercules Motors v Scubert (1953)*
- Not be inconsistent with the main contract
 - *Hoty's Pty Ltd v Spencer (1919)*
 - E.g. letting of a building and sublease required termination within 4 weeks notice
 - Held inconsistent with main contract
- Be relied upon in entering into the contract
- If successfully found to be a collateral contract which has been breached it gives rise to damages, however the main contract remains on foot

Implied terms

Implied terms are not mentioned or referred to by the parties when writing the contract. They can be both written and oral. Terms will not be implied where they are expressly excluded by the parties, or are inconsistent with the express terms of the party. An implied term won't necessarily be excused by an entire contract clause.

Byrne v Australian Airlines Ltd (1995) – express terms generally overrule implied terms.

A term may be implied in 4 circumstances

Prior Court of Dealing/Past dealings

- Implication in 'fact' or 'ad hoc'
- A term may be implied where there have been past dealings between the parties
- It is necessary to show that it is reasonable in the circumstances to imply a term based on past dealings
- Reasonableness will be based on regularity and uniformity of past dealings
- *Henry Kendall & Sons v William Lillico & Sons Ltd [1969]*

Custom trade or usage ('fact')

- A term may be implied but a custom or trade usage
- A term will be a custom or trade usage if the party claiming it can prove that the custom is 'so well known' that the reasonable person in their situation can reasonably presume the term to be imported into the contract (e.g. baker's dozen = 13)
 - o *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance Australia Ltd (1986)*
 - Found insufficient evidence to imply a custom
- A term will not be implied if it is contrary to the express terms of the agreement
- A person may also be bound even if they have no knowledge of it

Business efficacy ('fact')

FORMAL CONTRACTS

- Stricter test compared to test for informal contracts
- For formal contracts where the parties have comprehensively specified terms in writing (not including deeds), in order for a term to be implied by business efficacy it must:
 - o Be reasonable and equitable
 - o Be necessary to give the business efficacy to the contract so that no term will be implied if the contract is effective without it
 - o It must be capable of clear expression
 - o Be so obvious that 'it goes without saying' ('what a reasonable person would understand' – *Attorney general of Belize v Belize Telecom Ltd [2009]*)
 - o Must not contradict any express terms of the contract
- *BP Refinery Pty Ltd v Shire of Hastings (1977)*
 - o BP agreement with shire to lease property with 40-year term
 - o Shire would offer substantially reduced rates

- Shire tired to levy general rate on new occupier claiming rate agreement only operated when BP was in occupation
- Held implied term that could pass on to any other company in group
- *The Moorcock (1889)*
 - Leading Authority
 - Discharge and load vessel at wharf near
 - During low tide it rested on mud and vessel was damaged
 - Held jetty owners liable for damage
 - Implied term requiring them to take reasonable care to ascertain the condition of the berth and either have it fit or tell P it wasn't it
- Example where it was 'so obvious it goes without saying'
 - *Gwam Investments Pty Ltd v outback Health Screening Pty Ltd [2010]*
 - Contract to construct mobile health unit on truck
 - Once it was built it exceeded maximum weight allowed and could not be driven
 - Held implied term that the vehicle should be able to be driven on road
- Example where it was NOT so obvious
 - *Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982)*
 - Contracted on the assumption that construction work could proceed on basis of 3 shifts per day
 - Due to noise, dirt and disruption, local residents obtained injunction preventing them to work Sundays 10pm-6am
 - Increased sale costs, rail authority refused to pay costs because not in contract
 - Argued that it was implied they would pay to give business efficacy
 - Held parties made no provision for case and both risked in omitting presumption
 - Term was not so obvious

INFORMAL CONTRACTS

- E.g. doctor and patient
- NARROW TEST
 - For a term to be implied by business efficacy in an informal contract, the court must assess 'whether the implication of that particular term is necessary for the reasonable or effective operation of the contract in the circumstances of the case' – *Byrne v Australian Airlines Ltd (1995)*
 - Appellant employed by airlines as baggage handler
 - Dismissed for stealing from luggage
 - Claimed dismissal was unjust and breach of clause in industrial award
 - Tried to imply term of award in their contract
 - Held it wasn't necessary to imply the term to make contract operational
- OR
 - 'The court should imply a term by reference to the imputed intention of the parties if it can be seen that the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature'
 - *Hawkins v Clayton (1988)*

- Example where NOT necessary for reasonable or effective operation:
 - *Breen v Williams (1966)*
 - Court held there is no implied term in doctor/patient relationship that the patient would have access to medical records as the contract could proceed without the term and is therefore not needed
- WIDER TEST
 - The court may imply a term of acting in good faith
 - *Hughes Aircraft Systems International v Airservices Australia [1977]*

Terms implied by law ('implication of law')

- E.g. reasonable fitness and merchantable quality, sea worthiness, duty of care for passengers, etc.
- Terms implied by law are usually implied in all contracts of a particular class or which answer a given description
 - *BP Refinery Pty Ltd v Shire of Hastings (1977)*
- Such terms are not based on the intention of the parties, rather, by considerations of policy
 - *Breen v Williams (1996)*
- For a term to be implied by law, it must be applicable to a defined category of contracts and suitable in a way which allow it to be implied in all contracts in that category
- A test of necessity is often used (*Byrne*)
- ELEMENTS:
 - Identity the class of the contract (public policy decision)
 - E.g. employment contract = implied term that employer will provide safe system of work for employee
 - Identify whether it is necessary for this particular contract
 - 'Whether the implication of that particular term is necessary for the reasonable or effective operation of the contract in the circumstances of the case'
 - *Byrne v Australian Airlines Ltd (1995)*
- Certain terms that are implied in certain categories of contracts considered by common law:
 - There is an implied term for employment contracts that the employer will provide a safe system of work for the employee
 - However, there is no implied term of 'trust and confidence' implied in the employment contracts stating categorically that implying such a term in all employment contracts would be a 'step beyond the legitimate law-making function of the courts'
 - *Commonwealth Bank of Australia v Barker [2014]*
 - There is an implied term for professional services to be rendered with reasonable care
 - There is an implied term for the sale of goods that they are fit of their intended purpose
 -

Construction

Construction is the process through which the courts determine the meaning and legal effect of the terms in the contract (*Life Insurance Co of Australia Ltd v Phillips (1925)*). There are two aspects of construction:

1. Interpretation: interpreting the meaning of the words in each term
2. Classification: determining the legal effect of these words

Interpretation

In construing a contract, the courts aim to identify the intention of the parties determined objectively by what is in the contract, and not by subjective reference.

- *Pacific Carriers Ltd v BNP Paribas [2004]*

The courts consider what the words in each term would convey to a reasonable person in the position of the parties.

- *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)*

Objective Test

- *Electricity Generation Corporation v Woodside Energy Ltd [2014]*
- 'The meaning of the terms of a commercial contract is to be determined by what a reasonable (business) person would have understood those terms to mean'
- Requires the 'consideration of the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or object to be secured by the contract'

Other guidelines

- *Electricity Generation Corporation v Woodside Energy Ltd [2014]*
- If the natural or ordinary meaning of the words is possible
 - o The courts will use the natural or ordinary meaning of the words wherever possible
 - o Can refer to dictionary
- If inconsistencies arise (natural/ordinary meaning not possible)
 - o Where internal inconsistencies arise, the court will depart from the ordinary meaning of the words to avoid any inconsistencies between a term and the rest of the contract
- If two terms are inconsistent
 - o Generally, the first prevails over the second
- The words in a term are interpreted with the entirety of the contract
 - o The words in a particular term are interpreted within the context of the whole contract, not in isolation
- The words are interpreted so that the contract will work
 - o That is, give the intended benefit of the bargain to the parties
- The words are given meaning that will allow them to make sense commercially
 - o Especially with ambiguity
- If there is ambiguity
 - o If a viable alternative argument as to what the clause might mean exists, it is sufficient to be ambiguous

- *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002]
 - The courts will also consider the surrounding circumstances to the making of the contract if there is ambiguity
 - However surrounding circumstances cannot be used to depart from the from the ordinary meaning of the words used by parties
- If the language is open to two constructions (commercial setting)
 - Is the language is open to two constructions, an interpretation that avoids capricious, unreasonable, inconvenient or unjust (commercial) consequences will be preferred, even though it is not the most obvious or most grammatically correct
 - *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973)
- If a contract operates by reference to legislation
 - A contract that operated by reference to legislation will be interpreted so as to give effect to the purpose of the contract in light of the legislation
- If the term is absurd
 - If the term is absurd or appears something has gone wrong, the courts may change to fix this
 - *Jireh International Pty Ltd v Western Exports Services Inc* [2011]

Classification

There are three categories of promissory terms with different legal effects.

Categories of promissory terms

Conditions (e.g. horse float to be delivered)

- A condition is an essential term to the contract
- Definition: 'goes to the root of the matter so that a failure to perform it would render the performance of the rest of the contract a thing of different substance' – *Bettini v Guy* (1876)
 - Opera singer promised not to sing within 50 miles of London unless at opera house for certain specified time
 - Also had to be for rehearsals
 - Was 6 days late for rehearsals
 - Held being on time for rehearsals not condition
- Test for the essentiality of the term (condition):
 - 'The test for essentiality is whether it appears that the promise is of such importance to the promisee that he/she would not have entered into the contract unless he/she had been assured of a strict or substantial performance of the promise'
 - *Tramways Advertising v Luna Park* (1938)
 - 'We guarantee that these boards will be on the tracks at least 8 hours per day throughout your season'
 - Not fulfilled

- Held it was condition because they wouldn't have entered the contract otherwise
- Legal significance of the condition if breached
 - If performance of a condition is defective in any way, then the innocent party can choose to terminate the contract AND sue for compensation (damages)

Warranties (e.g. the horse float to be delivered must be pink)

- A warranty is a non-essential term to the contract
- It is subsidiary to the main purpose of the contract
- Classifying a term as either a condition or a warranty – OBJECTIVE TEST – intention at the time the contract was made (*Heilbut, Symons and Co v Buckleton* [1912])
 1. Designation of the parties (e.g. is it labelled as a condition)
 - a. 'Time is of the essence' makes it a condition
 - b. 'Terms and conditions' are used interchangeably, so not always a condition
 2. Previous decisions on a similar term
 - a. Price is generally a condition
 3. Need for certainty
 - a. Contracts for sale of goods are more likely conditions
 4. Language (*Tramways Advertising v Luna Park* (1938))
 - a. If the language is clear, it is a condition
 - b. If the language is ambiguous/vague, it is a warranty
 5. Context of a term within the contract as a whole
 6. Likely consequences of the breach
 7. Whether damages are an adequate remedy
 - a. *Associated Newspapers Ltd v Bancks* [1951]
 - i. Cartoonist who dealt with newspaper
 - ii. Contract to place cartoon on front page of comics
 - iii. Changed method of making newspaper
 - iv. Comics changed to book format, so cartoon was on the second page
 - v. Held condition breached, and money was not adequate remedy as it wouldn't solve the issue, he needed the publicity on front page
- Legal significance if warranty if breached
 - If performance of a warranty is defective in any way, then the innocent party can only choose damages as a remedy but must continue on with their performance of the contract

Intermediate terms

- An intermediate term cannot be classified as a condition or a warranty
 - It may operate as either depending on the effect of the breach
- If very serious breach, would likely be a condition
 - If breaches go to the root of the contract or the party loses substantial benefit, it would be treated as a condition
 - *Koomphatoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007]
- Examples where breach held as warranty:
 - *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962)

- Contract required ship to be seaworthy and 'in every way fitted for ordinary cargo service'
- Crew insufficient and incompetent to deal with old fashioned machinery
- Engines suffered several breakdowns
- Held breach but not condition, warranty only because they still had substantial use of ship and major time left
- *Maple Flock Co Ltd v Universal Furniture Products (1934)*
 - Instalment contract
 - Breach held not serious enough to justify termination
 - Problem was unlikely to happen again
- Legal significance of intermediate term if breached
 - If performance of an intermediate term is defective in any way, the innocent party will be allowed a choice of remedies depending on the severity of the breach
 - If the breach is serious, the party may terminate the contract and sue for compensation
 - If the breach is not serious, the party may only sue for compensation

Promise v Contingency

Promise: the promisee undertakes that an event will occur (or not occur) or that a fact is true

Contingency: a statement that qualifies what a party must do, e.g. "subject to the issue of an export license"

Promise + contingency: E.g. "the contract is subject to the vendor obtaining an export licence, the vendor having made such application for a license before x date"

- *Meehan v Jones (1982)*

Contingencies and other classifications

- A condition precedent is an external event that must occur before either:
 - A contract comes into existence, or
 - Performance under an existing contract is required

A condition subsequent is an external event which, when it occurs, brings the contract to an end

- E.g. local government rezones land up for sale

Boilerplate terms

- Definitional terms – e.g. month = calendar month
- Procedural terms – e.g. dispute resolution month

Exclusion Clauses

Exclusion clauses aim to reduce or exclude a party's liability for conduct that would otherwise be in breach of a contract, or constitute a tort such as negligence. They may either:

- Exclude a right to the other party
- Limit liability to a specified amount
 - o E.g. company will not be liable for loss or damage
- Place conditions on the exercise of a right
 - o E.g. must be put in writing

Commercial cause of an exclusion clause: to allocate risk

Limitations clause = limits liability up to a certain amount

Modern approach: the meaning and effect of an exclusion clause is a *question of construction*

- *Darlington Futures Ltd v Delco Australia Pty Ltd (1986)*
 - o 'The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole, thereby giving weight to the context in which the clause appears'
- Example of clause that limited liability:
 - o *Darlington Futures Ltd v Delco Australia Pty Ltd (1986)*
 - Clause limited liability to \$100 for 'any claim arising out of or in connection with the relationship established by the agreement'
 - Held clause effectively limited liability as transaction was in connection with the relationship
- Example of clause that did NOT limit liability
 - o *Darlington Futures Ltd v Delco Australia Pty Ltd (1986)*
 - Exclusion clause said broker was 'excluded from loss arising in any way out of trading activity undertaken on behalf of client whether pursuant to agreement or not'
 - Held clause did not protect broker as it referred to an activity undertaken with client authority, and it was done without it

Principles that may assist the court in construing an exclusion clause

Contra Proferentum Rule

- Where there is ambiguity – e.g. more than one meaning
- Where there is ambiguity, an exclusion clause will be construed contra proferentum – i.e. strictly against the interest of the party seeking to rely on the clause
 - o *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd (1966)*
 - o Also *Darlington*
- E.g. a clause excluding 'all warranties, express or implied' will not be effective to exclude liability for breaching conditions

Four corners rule

- If act causing breach was outside of the contract – neither authorised nor permitted by the contract
- An exclusion clause will not protect a party from damaged for loss caused by conduct (breach) occurring outside of the four corners of the contract as contemplated by the parties
- *Council of the City of Sydney v West (1965)*
 - o Parked car at parking station
 - o Got ticket with parking conditions that excluded liability for any damage to car/person/thing
 - o Couldn't find car because another person tricked employee for another ticket
 - o Car found damaged later
 - o Held employee constituted unauthorised act that was outside the four corners of the contract by handing car to thief
- However, a clearly worded exclusion clause may still apply to exclude liability even for events occurring in circumstances which would defeat the main objective of the contract (still use *Darlington*)
 - o *Nissho Iwai Aust Ltd v Malaysian International Shipping Corp (1989)*

Deviation rule

- Deliberate breach
- If act causing breach deviated from performance in compliance of the contract
- An exclusion clause will not protect a party from damages for loss caused by a breach if the conduct causing the breach deviated from the performance as contemplated by the parties
 - o *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd (1966)*
 - TNT to transport goods from Melbourne to Sydney
 - Sub-contractor not able to store overnight in TNT because its locked up
 - Stored them in his own garage
 - Destroyed by a fire that night
 - Held exclusion clause did not protect TNT because storing goods in garage was unauthorised deviating from storing in TNT
- However, this rule is not absolute
 - o A clearly worded exclusion clause may be able to exclude liability for a deliberate breach of contract
 - o Still apply *Darlington*
 - o *Photo Production Ltd v Securicor Transport Ltd [1980]*

Exclusion clauses excluding negligence

- E.g. exclusion from liability 'howsoever caused' may exclude negligence
- A clause expressed generally, but expansive in language (e.g. exclusion from liability 'howsoever caused') may be sufficient to exclude negligence
- ADD DAVIS V PEARCE PARKING STATION
- Apply *Darlington Futures Ltd v Delco Australia Pty Ltd (1986)*

Approach in Problem Questions

1. First determine whether the term has been properly incorporated into the contract
2. Then go through construction/interpretation
 - a. How is the court going to interpret the exclusion clause?
 - b. What is the legal effect of the exclusion clause?
 - i. Does it limit or exclude the party's liability for breach?
 - c. Go through modern approach then any relevant principles

ENFORCEABILITY

Formalities

Contracts may be written, oral, or both.

Some kinds of contracts need to be in writing due to statutory requirements, including:

- Credit contracts – *National Credit Code Pt 2 Div 1*
- Home building contracts – *Home Building Act 1989 (NSW) ss 7, 7AAA, 10*
- Contracts that create or transfer an interest in land including leases and mortgages – *Conveyancing Act 1919 (NSW) ss 23C, 54A*

Variation of a contract must be in writing

- Variations must be evidenced in writing in order to be enforceable

Terminating a contract can be oral

- Agreements to terminate a contract required to be in writing can be oral
- *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957)*

Contracts for creating or transferring an interest in land

- In the exam, it will only ever be either a sale or a lease

No actions or proceedings may be brought upon contracts for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged – *Conveyancing Act 1919 (NSW) s 54A*

‘No actions or proceedings may be brought’ for ‘the sale or disposition of land or any interest in land’ unless

- ‘No actions or proceedings may be brought’ provides that if a contract does not satisfy the limbs of s54A (fails the following elements), the contract will be unenforceable
- ‘Land’ refers to ‘real property’ which includes
 - o Undeveloped land
 - o Developed land
 - o Apartments in strata titles
 - o Old system title
 - o Torrens title
- ‘Sale or other disposition of land’ suggests that the relevant interest must be pre-existing, but may also include a creation of new interest in land
 - o ‘Disposition’ is defined in s7
 - o ‘Disposition of land’ is less than an outright ownership and sale (such as a lease)
- ‘Interest in land’ includes
 - o Ownership
 - o Leasehold
 - o Options
 - o Mortgages
 - o Easements

Element 1: The Agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing

If formal contract

- A formal contract is used in most cases which will suffice

If NOT formal contract (‘memorandum or note thereof’)

- A memorandum or note therefor includes:
 - o Unsigned contracts
 - o Correspondence between parties discussing the agreement
 - o Cheques, forms, etc. filled out by both parties
 - o Any combination of the above
 - o Contract may be sufficiently evidenced in writing if the communication took place by email

Memorandum or note may be a joinder of documents

- Where there are multiple documents, a connection between the documents must be proved to constitute a joinder
- The link between them may be **physical, temporal** or **textual**

If physical connection (e.g. physically attached by glue, tape or staple)

- Where the documents are physically joined, they must be read and construed as a whole
 - *Pang v Bydand Holdings Pty* [2010]
 - *Pearce v Gardner* (1897)
 - Envelope had name but letter didn't – held physically connected at some point

If temporal connection (signed and brought into consideration at same time)

- When the same parties execute contemporaneously several instrumentals relating to different parts of the same transaction, all must be considered together
 - *Pang v Bydand Holdings Pty Ltd* [2010]
 - *Toohy v Gunther* [1928]

If textual reference e.g. a document refers to another document

- The law is prepared to join documents with a textual link, where one document provides a reference to another
- The HC has provided two tests:
 - References to another document (narrow view)
 - The reference in the document signed must be to some other document and not merely to some transaction or event
 - *Thomson v McInnes* (1911)
 - Reference to another transaction (wide view)
 - The document will be sufficiently connected if they refer to one another
 - It is also sufficient if the document containing some of the terms refers to another transaction which can be identified by evidence, and all the terms of that transaction is in writing
 - *Harvey v Edwards Dunlop & Co Ltd* (1927)

Problem Question: Textual link

The courts will likely endorse the wide view (*Pang v Bydand Holdings Pty Ltd* [2010]), thus the document will be joined by their textual link. However, if the court was to take the narrow approach, the documents may not be joined and the court will only consider the relevant document. As a result the one document may not contain all essential terms thus no actions or proceedings can be brought, rendering the contract unenforceable.

If a document is an email – it is a document – *Electronic Transactions Act 2000* (NSW) s 4(2)(a)(iii)

The **memo or note must contain the essential elements** of the contract which must be identified **in writing with sufficient certainty**

- *Taynam Pastoral Co Pty Ltd v Anburn Ltd (1989)*
- Essential terms for a sale
 - Parties
 - Property (subject matter)
 - Price (consideration)
 - Promises (other key promises e.g. deposit amount, settlement date)
- Essential terms for a lease
 - Parties
 - Property
 - Rent
 - Terms
 - Promises
- Evidenced in writing with sufficient certainty
 - A description may suffice when identifying the parties and property
 - *Rosser v Austral Wine & Spirit Co Pty Ltd [1980]*
 - Parol extrinsic evidence rule may be used to identify the parties/property so long as the person providing the evidence does not have to clarify their intention
- Parties
 - E.g. 'the owner of Lot 1/D'
 - If there is one owner, then parol evidence can be led to identify who the registered owner is which will be undisputed
 - A party may be described rather than named as long as the description is enough to identify the party
 - *Tooth & Co Ltd v Bryen (no 2) (1922)*
 - If there is more than one owner, parol evidence will be inadmissible to identify who the party intended to refer to, thus a description may likely be too uncertain
 - *Rosser v Austral Wine & Spirit Co Pty Ltd [1980]*
 - "Each and every member of the Wholesale Spirit Merchants" was sufficiently certain
- Property
 - E.g. 'comstock in rural Columbia, NSW'
 - Property may be described if the description is enough to identify the property
 - *Pirie v Saunders (1961)*
 - Part of Lot B Princes Highway was **uncertain** because it didn't identify what part
 - 'Josh's place' may be sufficient if
 - Josh is already adequately identified in the contract and
 - Josh only owns one property

If the memorandum/note involves

- An oral agreement
 - o The parties may have an oral agreement, however it may be corresponded by writing or draft
 - o If the agreement is only oral, no actions or proceedings may be brought
- If the document excluded a reference to a particular term
 - o A document that omits a reference to a particular term may be okay if the term is exclusively for the benefit of the plaintiff as the plaintiff can waive it
 - *Bastard v McCallum* [1924]
- If memorandum came into existence before contract was made
 - o It can only indicate a probability that a contract was made
 - *Haydon v McLeod* (1901)

Element 2: Signed by the party to be charged or some other person thereunto lawfully authorised by the party to be charged

‘Party to be charged’ refers to the party against whom the contract is being enforced

- The ‘defendant’
- The only signature needed is theirs
- Both signatures not necessary
- May be signed by the party’s agent

The courts look for an objective indication by the party to be charged that they recognise the agreement and intend to be bound by it

- *Konstantinidis v Baloglow* [2000]
- A wide approach is taken when finding the party’s signature

If it is just the party’s name on the document

- The court may accept the bare fact that the party’s name on a particular document is a signature under the authenticated signature fiction if the party had authenticated the document
- *Pririe v Saunders* (1961)
 - o Name of purchaser on document but was not signed
 - o However he asked for correction so this authenticated the document
 - o If just name without authentication or signature it may not be held as adequately signed

May be in any part of the document

- The signature may be at any part of the document - if the parties meant the writing to be a memorandum of their contract, it is binding on them
 - o *Durell v Evans* (1862)

Does **not** apply to printed names on document where parties intended handwritten signatures

- *Farrelly v Hircock* [1971]

Electronic signature allowed – *Electronic Transactions Act 2000* (NSW) S 4(2)(a)(ii)

Legal consequences

If s 54 **can** be complied with the contract is enforceable at law

If it **cannot** be complied with it becomes unenforceable – **not void**

- *Leroux v Brown* (1852)

Then move onto part performance

Part Performance

Where one of the parties has wholly or partly performed his or her obligation under a contract, it may be fraudulent or unconscionable for the other party to rely on the *Conveyancing Act*. Equity will therefore grant specific performance of verbal contracts falling within the statute if they have been partly performed (*McBride v Sandland (1918)*). Part performance will allow a party to enforce a contract that is not sufficiently evidenced in writing when:

- There is a proved contract that creates or transfer an interest in land, but which is enforceable under s54A
- The plaintiff relied on the contract and take positive steps to perform it
- Where the defendant stands by and encourages or allows the plaintiff to act in reliance on the unenforceable contract
- The defendant relies on his/her strict legal rights and insists that the contract is unenforceable under s54A

Establishing Past Performance

Elements

- *McBride v Sandland (1918)* provides the elements for establishing past performance
- Parole evidence and evidence of any oral agreement is inadmissible
- The acts of the plaintiff must speak for themselves

1: The act relied on must be unequivocally and in its own nature referable to "some such agreement as that alleged"

- That is, it must be such as could be done with no other view than to perform such an agreement
- The courts approach this with a narrow view
 - o *Maddison v Alderson (1888)*
 - Contract for woman to work as housekeeper without wages on condition that he would make a will leaving property to her
 - He signed will but wasn't properly attested and was invalid
 - Held her performance was insufficient to establish part performance
 - o *Regent v Millett (1976)*

2: By "some such agreement as that alleged" is meant some contract of the general nature of that alleged

3: The provides circumstances in which the "act" was done must be considered in order to judge whether it refers unequivocally to such an agreement as is alleged

4: It must have been in fact done by the party relying on it on the faith of the agreement, and further the other party must have permitted it to be done on that footing

- Otherwise, there would not be "fraud" in refusing to carry out the agreement, and fraud, that is moral turpitude, is the ground of jurisdiction

5: It must be done by a party to the agreement

6: That there was a completed agreement

- *Thynne v Glengall*

Courts Approach

- Identify the general agreement alleged (e.g. sale or lease)
- Look at the proved actions of the plaintiff
- Decide whether those actions could only be explained by an agreement as alleged existing between the parties
- If the actions of the plaintiff could reasonably be explained due to reasons other than the alleged agreement, part performance is not made out

Acts that typically do not show past performance

- Preparatory acts
 - o *Cooney v Burns (1922)*
 - Preparation of assignment lease and application for transfer of license insufficient
- Payment of money without doing anymore more
 - o E.g. making a deposit or paying full purchase price
 - o Could've given the money for other reasons
 - o *Khoury v Khouri (2006)*
- NOTE: It is insufficient to prove past performance – must prove that the party was exhibiting rights of ownership over the land

Acts that typically do show part performance

- Taking possession of the land
 - o *Regent v Millett (1976)*
 - o Giving and taking of possession is itself sufficient
- Making improvements to the land
 - o *Khoury v Khouri (2006)*
- Making mortgage payments
- NOTE: the acts do not have to be required by the contract, they only have to be pursuant to the contract
 - o *Regent v Millett (1976)*

Legal consequences

If enough to constitute past performance

- The only remedies available for the party are specific performance or equitable damages in lieu of specific performance

If not enough to constitute past performance

- No equitable remedies are available to the party

The party cannot pursue promissory estoppel for non-compliance with s54, only part performance

- The courts require more than the bare unenforceable contract to provide alternative relief in estoppel
- *Powercell Pty Ltd v Cuzeno Pty Ltd* [2004]

Illegality



How Illegality Impacts Contracts

Category	Effect on contract
A: A contract to do something illegal	The contract itself is illegal. Will not be enforced by the court.
B: A contract that is lawful but requires an illegal act to be done during performance	While the contract itself may not be illegal, if the illegality during performance is unavoidable it is unlikely to be enforced
C: A lawful contract that can be performed lawfully, where something illegal is done during performance	The contract itself is not illegal. Nor did the contract require something illegal to be done. Greatest scope for enforcement.
D: A lawful contract that is performed lawfully, but where the parties intend to further a criminal or other immoral objective	If the intent to break the law is positively proved, the contract will not be enforced in favour of party/ies who had the criminal intent.

Statutory illegality (as a matter of Construction)

If legislation is involved, the terms of the legislation itself can directly make a contract illegal and unenforceable. There is no discretion of the court to decide otherwise. The legislation must be construed according to the ordinary principles of statutory construction to work out what Parliament intended.

The construction questions

To determine whether, as a matter of construction, the contract is illegal, the questions to be asked are (as taken from *Fitzgerald v F J Leonhardt Pty Limited* (1997)):

1: Whether the Act invoked to taint the contract with illegality expressly prohibits the contract as formed?

- Express Illegality (express prohibition)
 - o Where words in the legislation clearly forbid the formation of or performance of the contract
 - o For example:
 - 'Any contract, agreement or other arrangement entered into in contravention of this section is void'
 - 'No person shall agree to...'
 - 'It is an offence of this section to offer to...'
 - 'A person shall not... buy or sell or otherwise deal in... any of the articles specified in this schedule'
 - *Re Mahmoud and Isphani* [1921]
 - o Statute said no person permitted to sell linseed oil except under licence
 - o P had license and could only sell to people with license
 - o Sold to D who said he had a license but didn't
 - o D refused to accept delivery, P sued for breach
 - o D successfully pleaded illegality showed principles of the maxim 'in pari delicto portior est condition defendentis' (where there is equal fault, D is in stronger position), and 'ex dolo malo non oritur actio' (no court will lend aid to a man who founds his cause of action upon an immoral or illegal act))
- Factors to be considered in determining this include (*Yango Pastoral Company v First Chicago Australia Ltd* (1978))
 - o The purpose of the Act and consequences for finding the contract illegal
 - The courts will consider whether the enforcement of the contract further will frustrate the Parliaments' intention, and look at the consequences of enforcing/refusing to enforce the contract
 - If the Act does not seem to be concerned with private legal rights, then it is unlikely that contracts are intended to be illegal
 - o The presence of a penalty
 - If the Parliament has provided a penalty and is otherwise silent on the fate of contracts, it is likely that the Parliament has intended the express penalty to be the punishment for engaging in the impugned conduct
 - In that case, the court's role in punishing illegal conduct is lessened
 - Would less likely be found illegal
 - o Modern reluctance
 - *Fitzgerald v F J Leonhardt Pty Limited* (1997)

- The courts have exhibited an increased reluctance to find a contract void on the basis that it is expressly or impliedly prohibited by statute
- If the Parliament has not expressly indicated that valuable private rights are unenforceable, the court will be reluctant to find the contract to be unenforceable as usually most aspects of commercial life is regulated

If yes, then the contract is illegal

If not, the subordinate question is:

2: Whether the Act, by necessary inference, prohibits the contract as formed or because of the way it was performed (tainted with illegality)?

- Implied Illegality (implied prohibition) – e.g. legislation provides offence to operate bank without permit, bank makes contract with customer about permit, contract may be impliedly illegal
- Where legislation prohibits certain conduct, but does not in express terms declare a contract involving the impugned conduct illegal, the question to be determined is whether or not the Parliament intended that both the prohibited conduct AND any contracts made in respect of that conduct be illegal
- Factors to be considered in determining this include (*Yango Pastoral Company v First Chicago Australia Ltd (1978)*):
 - The purpose of the Act and consequences for finding the contract illegal
 - The courts will consider whether the enforcement of the contract further will frustrate the Parliaments' intention, and look at the consequences of enforcing/refusing to enforce the contract
 - If the Act does not seem to be concerned with private legal rights, then it is unlikely that contracts are intended to be illegal
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 - E.g. *Yango Pastoral Company v First Chicago Australia Ltd (1978)*
 - Banking act said bank needed license and if not, liable to pay penalty
 - D didn't have license and went into contract with P
 - P defaulted, D moved against P, P said bank can't operate without license and impliedly all contracts with bank is illegal

- Illegality rejected – looked at consequences

If both answers are NO move onto Common Law Illegality

- Only if the answers to these questions are no does the further question arise whether, as a matter of public policy, the court will allow the plaintiff to invoke its process to enforce the contract

Common law illegality (as a matter of Public policy)

The words themselves don't make it illegal, but common law does because it would be against public policy. The court has the capacity to refuse to enforce contractual rights when to do so would be against public policy. Heads of public policy refer to certain types of contract that will not be enforced.

Head	Category
Contracts involving a crime, tort or statutory offence	<i>Ex Turpi</i>
Restraint of Trade	Merely void
Ex Turpi Illegality Derive from <i>ex turpi causa non oritur actio</i> meaning "no cause of action on a base/immoral act". It involves criminal, tortious or other offensive conduct that requires condemnation. Contracts Examples: contracts connected with crime, tort or statutory offence.	
Merely Void Contracts that courts do no enforce because it is considered in the public interest to do so, but are not considered offence like ex turpi illegality. Examples: contracts in restraint of trade (will be void), contracts that oust the jurisdiction of the courts	

Contracts involving a crime, tort or statutory offence

The underlying question to be determined is whether the court will be promoting anti-social conduct if it enforced the contract – *Hardy v Motors Insurers' Bureau* [1964]

Approach: whether the court will refuse to enforce a contract involving a crime, tort of statutory offence will depend on several factors (*Fitzgerald v F J Leonhardt Pty Limited* (1997)).

1: The location of the illegality (*Fitzgerald v F J Leonhardt Pty Limited* (1997)).

The court is to consider the relationship between the prohibited conduct and the impugned contract. The more central the illegality is to the contract, the less likely it will be enforced.

- Example of central (unenforceable)
 - *Allen v Rescous* (1676)
 - Person had hired another person to beat someone up, wanted payment, contract unenforceable because contract itself is illegal
- Example of NOT central (enforceable)

○ *Neal v Ayers* (1940)

- Contract for P to purchase D's hotel
- P told D takings were 100 pounds a week - said 15 pounds came from illegal trading
- D knew
- Once completed, D found out 40 pounds were from unlawful trading
- D went to court saying she wanted to get it back to lawful, D sued for misrepresentation and P sued for illegality
- Court held illegality was extrinsic to the contract so it was enforceable

2: Intent/knowledge (*Fitzgerald v F J Leonhardt Pty Limited* (1997)).

The court is to consider whether the parties intended to break the law or if the conduct was innocent/had no knowledge of the illegality.

- If provable that parties saw illegality as a serious possibility = may be unenforceable
 - The contract may be unenforceable where both parties foresaw illegality from carrying out the contract
 - *North v Marra Developments Ltd* (1981)
 - N helped M merge with other firm, had to create a mark, N to inflate shares, bought shares at higher price, direct offence of *Securities Industry Act 1970 (NSW)*, M refused to pay and pleaded illegality, successful on basis of statutory offence committing and foresaw illegality
 - Held contract must fail because contemplated possibility of breaching Act by carrying out scheme
- If both parties have no knowledge of illegality (may still be unenforceable)
 - However, the court may be prepared to find a contract void for illegality even when both parties had no knowledge of the illegality
 - *JM Allen (Merchandising) Ltd v Cloke* [1963]
- If one party is innocent
 - The innocent party may raise the defence of illegality, arguing against the enforceability of the contract due to an illegal act
 - The innocent party must prove that the other party had a clear intention to pursue an illegal purpose
 - *Hutchinson v Scott* (1905)
- If a contract can be performed either legally or illegally, 'it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegal' – *Archbalds (Freightage) Ltd v S Spanflett Ltd* [1961] (e.g. taxi driver, no obligation to speed, because he sped unlawfully he can't enforce illegality but passenger can)

3: Fault

The court is to consider who was at fault of the offensive conduct by assessing both parties, and whether there was trickery or unconscionable conduct involved.

4: Seriousness of the offence (*Fitzgerald v F J Leonhardt Pty Limited* (1997)).

The court is to consider whether, by enforcing the contract, the court would be promoting or encouraging anti-social behaviour.

- If minor offence

- If the crime is minor in nature, the contract involving its commission may not be held against public policy
- E.g. contract with driver of a vehicle to park illegally is not as anti-social as a contract with driver to run someone over

5: Consequences (unjust outcomes) – Nelson v Nelson (1995); Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978)

The court is to consider whether one party be unjustly enriched at the expense of the other, and whether the outcome would be disproportionately unjust.

- *Nelson v Nelson* (1995)
 - Mum gave daughter money to contribute to house
 - House bought and registered in mum's name
 - Later daughter sells house and mum wants proceeds
 - Equitable right
 - Daughter pleaded illegality because mum lied to government for low interest loan to get money
 - Noted daughter will have been enriched at expense of mother, outweighed illegality

IF THE CONDUCT CONCERNS A STATUTORY OFFENCE

6: The purpose of the act - Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978)

The court is to consider whether the enforcement of the contract further would frustrate the Parliament's intention. The public policy decision must be consistent with the Parliament's intent.

7: The presence of a penalty - Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978)

If the Parliament has provided a penalty and is otherwise silent on the fate of contracts, it is likely that the Parliament intended the express penalty to be the punishment for engaging in the impugned conduct. In that case, the court's role in punishing illegal conduct is lessened – less likely to be illegal.

'MODERN APPROACH' – alternative approach, briefly mention when answering problem questions

Nelson v Nelson (1995) McHugh J – 'courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:

- a) The statute discloses an intention that those rights should be unenforceable in all circumstances, or
- b) (i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct;
(ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and
(iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies'

Restraints of Trade

'A contract in restraint of trade is one in which the party (the covenantor – the party who promises not to trade) agrees with any other party (the covenantee – party to whom the covenantor makes promise not to trade) to restrict his liberty in future to carry on trade with other persons not parties to the contract in such manner as he chooses' – *Petrofine (Great Britain) Ltd v Martin* [1996].

They are void because 'they tend to deprive the individual who agrees to the restraint from earning a livelihood; the public loses the skills of a useful citizen' and competition is reduced by those in a position to pay to eliminate competition' – *Mitchell v Reynolds* (1711); *Nordenfelt v Maxin Nordenfelt Guns and Ammunition Co Ltd* [1894]

E.g. X cannot work in gun trade or engage in competing business for 25 years' – *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]

- N had machine gun manufacturing business
- Sold business to M for A LOT of money
- Term of sale – N couldn't engage in gun trade or engage in competing business for 25 years, global restraint
- N later breached by entering in agreement with another gun company
- Court found restraint was reasonable so even though restraint of trade usually void, was justifying because restraint was reasonable to parties and reasonable to interests of public

Recognised categories (doctrine automatically applies) (only the following are examinable)

- Contracts for the sale of a business
- Contracts of employment
- Solus/exclusive dealing agreements
- Partnerships
- Franchise agreements

Exceptions to the principle:

Restraints of trade are prima facie void, however, they may be enforced if they are reasonable. A restraint is reasonable when (burden on covenantee to prove), as per *Nordenfelt v Maxin Nordenfelt Guns and Ammunition Co Ltd* [1894]

1: The covenantee has a legitimate interest

- The covenantee has an interest that the law recognises the covenantee can protect by restraining the covenantor from trading in a way that negatively impacts on that interest
- Recognised legitimate interests:
 - o Goodwill ('the benefit and advantage of the good name, reputation and connection of a business' – *Inland Revenue Commissioners v Muller & Co's Margarine Limited* [1901])
 - o Trade secrets and confidential information
 - o Client contracts
- If sale of business (wider restrictions) (legitimate interests)
 - o A portion of the purchase price will be for the 'goodwill' associated with the business being sold

- It is legitimate for a purchase to restrain the seller from acting in a way that diminishes the value of that purchase
- E.g. requiring café shop owner not to open a new competing business in the local area – keeps goodwill value
- If employment (quite restricted) (legitimate interests)
 - A party cannot stop competition per se after employment aside from divulging trade secrets or putting them to use, or taking old clients/customers away – *Herbert Morris Ltd v Saxelby* [1916]
 - As per *Stenhouse Australia Ltd v Phillips* [1974] essentially, employees can be required not to (both during and after employment);
 - Compete with their employer
 - Use client lists/solicit clients
 - Divulge or use trade secrets
 - MAYBE required not to work in competing business for a certain time in certain locations (see *Lidner*)
 - E.g. *Lidner v Murdock's Garage* (1959)
 - L (mechanic) employed by M, contract covered two towns: CB and W which were 10 miles apart
 - L worked in CB for years, when left M tried to restrain him from working in competing business in CB
 - Court held unenforceable as beyond what was reasonable for protecting of business
 - Clause covered two towns which was unnecessary as he only worked in one, so restraint should have been limited to just CB
- If franchise agreement (legitimate interests)
 - Generally, franchise agreements will be similar to the sale of business and employment contracts
 - The franchisee might have knowledge of trade secrets and capacity to entice customers away which may be a legitimate interest to restrain – also to protect good will
- If exclusive dealing contracts (legitimate interests)
 - This applies where a trader agrees to buy all the goods of a particular kind that the trader needs for purposes of trade, exclusively from one supplier, or where a trader sells good exclusively to one buyer
 - *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973)
 - R leased service station to A for 15 years
 - A granted R under-lease for the same term less one day
 - R covenanted with A to carry on business of petrol station on premises for term of lease and to purchase petrol – 8000 gallons a month exclusively from A
 - A agreed to supply petrol at usual list price to pay for certain works at service station and to lend R equipment
 - Few years later R wanted to buy petrol from different company, argued no bound because under-lease was unreasonable restraint of trade
 - Held not bound because tie period of 15 years not reasonable

2: The restraint must not go beyond what is reasonable for the protection:

- a) As between the parties
 - The covenantee bears the onus of showing that the restraint is reasonable between the parties
 - Reasonableness is assessed at the time the contract was entered into
 - *Linder v Murdock's Garage* (1950)
 - The restraint is reasonable if it goes no further than to protect the legitimate interests of the covenantee
 - *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973)
- b) In the public interest
 - If 'between parties' proved, usually 'public interest' will be satisfied
 - *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973)
 - The onus shifts to the covenantor to try and argue that, even if the restraint is reasonable between the parties, it might still be against the public interest to enforce the restraint
 - The restraint may be reasonable in the public interest if it is 'no way injurious to the public'
 - *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]
 - Example: *Lindner v Murdock's Garage* (1959)
 - Due to the notorious labour shortage and economic situation, it was detrimental to the interests of the public to restrain L from working for 12 months in those 2 towns
- Factors that may be considered (for both between parties and public interest)
 - Specific wording or activities forbidden by the restraint
 - *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]
 - Geographic extent of restraint has to be reasonable
 - *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]
 - Business was global
 - *Lindner v Murdock's Garage* (1950)
 - The garage issue with which towns operating in, court said it wasn't reasonable to restrain both towns, would be reasonable if just the town he worked in
 - Has to relate to the goodwill, e.g. café outside 10km is probably unreasonable unless it is a well known, nationally renowned business
 - Duration of restraint must be reasonable
 - *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]
 - *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973)
 - 15 years was unreasonable for service station and to not buy petrol from other company
 - Benefits received
 - *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]
 - Was paid so much money, didn't need work
 - Whether the covenantor would be able to support himself/herself with the restraint

- Context
 - *Lindner v Murdock's Garage (1950)*
 - Where there is unequal bargaining power, the court will be more protective of employee

After this, move on to statutory approach

- Statutory approach: *Restraints of Trade Act 1976 (NSW) s4*

- . **1) A restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not.**
- . (2) Subsection (1) does not affect the invalidity of a restraint of trade by reason of any matter other than public policy.
- . (3) Where, on application by a person subject to the restraint, it appears to the Supreme Court that a restraint of trade is, as regards its application to the applicant, against public policy to any extent by reason of, or partly by reason of, a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint, the Court, having regard to the circumstances in which the restraint was created, may, on such terms as the Court thinks fit, order that the restraint be, as regards its application to the applicant, altogether invalid or valid to such extent only (not exceeding the extent to which the restraint is not against public policy) as the Court thinks fit and any such order shall, notwithstanding sub-section (1), have effect on and from such date (not being a date earlier than the date on which the order was made) as is specified in the order.

- Statutory approach: looks at the actual breach of the covenant and asks whether it would be reasonable to restrain the covenanter from restraining him or her from that actual breach
- *Orton v Melman [1981]*
 - GP practice, terms of partnership
 - If one was to leave they couldn't practice within 8 miles for 3 years
 - One did within that time frame
 - Need to look at extent of breach, don't look at whether the terms unreasonable
 - Court held legitimate
 - Provides:
 - Construe the relevant term according to the ordinary principles of construction, and without regard to the restraint of trade doctrine, to work out if, in fact, the covenanter is in breach, then
 - Ask whether the restraint in its application to that particular breach is contrary to public policy

Other helpful info (may not be relevant in problem question)

- Principles that apply to restraints of trade – *Testel Australia Pty Ltd v KRG Electrics Pty Ltd* [2013]
 - A covenant in restraint of trade is prima facie unlawful and void at common law as being contrary to public policy
 - There are 'some species of restraint of trade which do not attach the operation of the common law doctrine'
 - The general rule is subject to the exception that restraints which are reasonable in reference to the interests of the parties and in reference to the interest of the public are valid
 - The onus of proof on the issue whether the covenant is reasonable in reference to the interest of the parties lies on the covenantee
 - For a covenant to be reasonable in reference to the interests of the parties, the covenantee must have a legitimate interest in restraining the covenanter from trading
 - The protection of the goodwill of the covenantee is frequently regarded as a legitimate interest for this purpose
 - Assessing whether a covenant in restraint of trade is reasonable in reference to the interests of the parties involves weighting the legitimate interests of the covenantee against the legitimate interests of the covenanter in being free to trade and earn revenue
 - To be reasonable in reference to the interests of the parties, the covenant 'must afford no more than adequate protection to the party in whose favour it is imposed', i.e. it must not exceed 'what is reasonably necessary for the protection of the covenantee'
 - A covenantee may have a legitimate interest in the protection of its goodwill in the context of various relationships, including that of employer and employee, contractor and subcontractor, franchiser and franchisee, partnership and vendor and purchaser
 - While the ultimate test and required approach is the same, different considerations apply to assessing reasonableness in a contract such as a relationship of employer and employee, compared to a transaction such as the sale of a business as between vendor and purchaser
 - The reasonableness of the restraint is determined as at the date of the contract is light of the provisions of the contract, the objective circumstances at the time of the contract, and the objectively foreseeable circumstances

Consequences of Illegality

Usually, the consequences of an illegal contract is it will become **unenforceable** at common law

- Debts for payment due to unenforceable
- No damages for breach
- No injunctions or orders for specific performance
- No rectification or other equitable remedies

However, it is possible to argue that only part of the contract is unenforceable. The plaintiff may:

Element 1: Argue that the illegal part should be **severed** and the rest of the contract enforced

The court may sever part of a term, or whole terms

- *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894]

Severance is limited to deletion – it will not add or change words to make sense of what is left, thus the meaning of what is left needs to make sense independently.

Severance is only possible when

- The illegal part is truly discrete and severable and not so inextricably linked with the rest of the contract that the rest of the contract would not work without the illegal part
- The severance changes only the **extent** and not the nature of the contract
 - o *McFarlane v Daniel* (1938)
- The illegality itself is not too serious

If severance in restraints of trade (common law -> statutory approach)

- Common law approach
 - o It is possible to sever illegal parts from a contract, often allowed in restraint of trade cases as the illegality is not *ex turpi*
 - o As such, restraint of trade clauses are often found void rather than unlawful
 - o However, the restraint of trade clause must not be so fundamental to the arrangement that its unenforceability renders the entire contract unenforceable
 - *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* (1973)
 - o Severance is only possible if the offending terms are truly severable and not inextricably linked to the rest of the contract
 - o Reasonableness of the term is assessed by considering the widest application of it without regard to the nature of the actual breach by the covenantor
- Statutory approach – *Restraints of Trade Act 1976 (NSW) S 4*
 - o “(1) a restraint of trade is valid to the extent to which it is not against public policy, whether it is in severable terms or not”

- Looks at the actual breach of the covenant and asks whether it would be reasonable to restrain the covenanter from restraining him or her from that actual breach
- *Orton v Melman* [1981]
 - GP practice, terms of partnership – if one was to leave they couldn't practice within 8 miles for 3 years
 - One did within time frame – need to look at extent of breach – don't look at whether terms unreasonable
 - Court held legitimate, provides:
 - Construe the relevant term according to the ordinary principles of construction, and without regard to the restraint of trade doctrine – to work out if, in fact, the covenanter is in breach, then
 - Ask whether the restraint in its application to that particular breach is contrary to public policy

Problem Questions; first apply common law approach and discuss severance, THEN consider *Restraints of Trade Act*

If severance when illegality is ex turpi

- Whether severance is available in these cases is a matter for statutory interpretation
- *Thomas Brown & Sons Ltd v Fazal Dean* (1962)
 - F deposited fold and gems to look after – missing years later – sued for damages, at time of contract law was couldn't deposit gold bars in that way
 - T pleaded illegality as a defence, court prepared to sever 19 gold bars but keep gems
 - Severing would change the extent of the contract but not the type/nature

Element 2: If the contract is illegal under statute – the Parliament may have intended that the contract is enforceable despite the illegality

- The court may find that although the contract under statute is illegal, it will nonetheless be enforceable as the parliament has not intended such consequences to be held on an innocent party
 - *Yango Pastoral Company v First Chicago Australia Ltd* (1978)
 - If contract unenforceable then bankers (innocent party) would be at a loss
- The court may also find that only the party responsible for the illegality loses their right to enforce the contract
 - *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* [2007]

Element 3: Rely on a **cause of action** which does not require reliance on the illegal contract

It may be possible for the plaintiff to plead an action that does not depend upon the illegal contract. The plaintiff may get substantially the same outcome as if the contract had been enforced (e.g. damages in tort, payment for services rendered in *quantum merit*) or get a

refund of money or property transferred under the unenforceable contract. However, the illegality may also taint alternative causes of action, rendering those rights also unenforceable.

- *Bowmakers Ltd v Barnet Instruments Ltd* [1945]

Idea criticised in *Nelson v Nelson* (1995)

Element 4: Seek restitution of money/property transferred

Restitution may be pleaded to return a benefit unfairly obtained from a plaintiff (total failure of consideration – money had and received) where typically, the plaintiff will request any money paid or property transferred be restored to them, OR to pay a reasonable amount for any goods or services freely accepted (quantum meruit).

If contract is *ex turpi* illegal

- Generally courts will refuse restitutionary remedies unless the claimant can show that they are not equally at fault
- “*In Pari Delicto*” – when the parties are equally at fault, D is in the better position

Four recognised categories showing the parties were not equally at fault (as per *Nelson v Nelson* (1995)):

- Claimant is ignorant or mistaken as to the factual circumstances which render an agreement or arrangement illegal.
 - o *Marles v Philip Trant and Sons* [1954] – P farmer D seed merchants, P ordered spring wheat seeds but D delivered winter wheat seeds, when D delivered they did not comply with statutory requirements relating to provision of invoice – court held P could sue
- The statutory scheme rendering a contract or arrangement illegal was enacted for the benefit of a class of which the claimant is a member (statutory illegality only) (e.g. landlord and tenant)
 - o *Kiriri Cotton Co Ltd v Dewani* [1960] – legislation made it offence to demand tenant to pay premium upfront, enacted to protect tenants – thus weren’t equally at fault, and tenant could have premium back
- Where an illegal agreement was induced by the defendant's fraud, oppression or undue influence; and
- Where the illegal purpose has not been carried into effect
 - o where claimant repented before illegal purpose carried into effect – due notice must have been given
 - o *Clegg v Wilson* (1932)

If statutory illegality:

- Any restitutionary claim made subsequent to the unenforceability of a contract due to statutory illegality must not be inconsistent with the purpose of the statute
 - o *Equescorop Pty Ltd v Haxton* (2012)
 - A sought to enforce loan agreements against R – R purchased interests as part of tax minimisations scheme in farming business – held loan moneys not recoverable in restitution as would have been inconsistent with statutory purpose of legislation

Consequences for common law illegality

- Unenforceable at common law
- Severance
- If full performance the court will not get involved
 - o *Singh v Ali* [1960]

Consequences for statutory illegality

Generally unenforceable

- *Yango Pastoral Company v First Chicago Australia Ltd* (1978)

If the legislation expressly provides for the fate of the contract, apply the express words

- If not, the effect of the illegality in the contract is a matter of statutory construction

Possible outcomes

- Illegal and totally unenforceable
- Illegal and yet totally enforceable
- Illegal and partly enforceable
- Illegal and enforceable by one party only
 - o *Barker v Midstyle Nominees Pty Ltd* [2014]

PROPER CONSENT

A vitiating factor is something that occurs at formation that vitiates (undoes, voids) the consent of one party. It allows a plaintiff to rescind a contract even though all formal elements of formation were present.

Recognised vitiating factors:

- Misrepresentation
- Duress
- Undue influence
- Unconscionable conduct
- Mistake (only *non est factum* assessed)

NOTE: there may be more than one vitiating factor that applies to a case. Misrepresentation is an exception to the parole evidence rule – so if entirely written document, you can still do analysis for misrepresentation.

Misrepresentation

NOTE: representee and plaintiff used interchangeably

A misrepresentation is a false statement made expressly or impliedly by one party (the representor) to another (the representee) that acts as an inducement for the latter to enter into the contract with the former.

The representee will generally have to show the party was misled by, and relied on a positive misrepresentation of fact, in order to obtain relief or most likely rescission.

- If relief will be either damages
- If statement is both a term and misrepresentation, can sue for breach
- Or most likely rescission
 - o Contract is set aside *ab initio* (from the beginning)
 - o However, cannot apply if a third party is involved
 - *Alati v Kruger* (1955)
 - Dependant on which relief is more advantageous to the representee

The representee may also elect to do nothing and 'affirm' the contract

- Unlikely to happen as it is not advantageous

Elements of Misrepresentation

1: Statement of Past or Present Fact

- Key issue: did the plaintiff agree to a contract on the basis of false information provided by the defendant?
- Only representations made before the contract is actionable
- If false statement made after formation
 - o Post-contractual statement
 - o False statements made after formation are irrelevant

- If statement becomes false after formation
 - Statements which become false after the contract is made, are irrelevant
- Representations of past/present facts must be distinguished from:*
- If mere puff = not actionable
 - A statement that the reasonable person would not believe to be true would not be actionable
 - *Mitchell v Valherie* [2005]
 - 'Immaculate style'
 - 'Nothing to spend – perfect presentation'
 - Held puffery
 - *Everready Australia Pty Ltd v Gillette Australia Pty Ltd (no 4)* [1999]
 - The more specific the words are, the less likely they would be mere puffery
 - If promise/prediction/representation to do something or that something will occur = not actionable
 - A statement or promise to do something or that something will happen in the future would usually not be actionable
 - *Beattie v Lord Edbury* (1872)
 - *Civil Service Co-op Society Victoria v Blyth & Ors* (1914)
 - C allowed people to deposit money with it
 - Power under own constitute it allowing it to forbid from withdrawing for deposits
 - Society said they would never execute that power
 - Clients disposed on that basis
 - C exercised power and said clients can't have their money
 - Clients sued for misrepresentation
 - HC held it was not actionable as at the time the statement was made, they were statements of intent and not false acts, and at the time statement was made C honestly believed they would not exercise the power
 - EXCEPTION: If there was no honest intention to fulfil the promise from the beginning
 - Actionable
 - Implied representations of past/present fact – no reasonable grounds for making the statement
 - However, promises imply a representation of fact and that there is a present intention to fulfil the promise
 - Only if there is no such intention from the start will misrepresentation be actionable
 - *Edgington v Fitzmaurice* (1885)
 - Company needed money and looked for loans and funds with interest
 - Said funds would be used to purchase vans and building to sell fish, but actually used it to retire debt
 - Company had to borrow money to pay off debts and said that they only intended to do that

- Since company said they had intention, but did not intend to carry out that intention, it was a lie
 - Company argued not liable because it was statement of intention
 - Court held it was a fact in the prospectus and if they knew it was not true they were liable
 - 'A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact'
- If opinion = not actionable
 - Representations of past/present facts must be distinguished from statements that the reasonable person would see as mere expressions of personal belief which would not be actionable, rather than statements of fact
 - *Bisset v Wilkinson [1927]*
 - B selling holding in NZ to W
 - W knew it had not been used as a sheep farm
 - B said land would support 2000 sheep
 - Court held it was merely a statement of opinion
 - EXCEPTION: behind the literal statement of opinion may be the implied statements of past/present fact – no reasonable grounds for offering opinion:
 - Representor never held an opinion
 - No reasonable person would have held that opinion
 - Representor implied that he/she knew facts justifying his/her opinion
 - Representor was in a stronger position to know the facts
 - *Smith v Land & House Property Corp (1884)*
 - H selling property and said lease was currently was the 'most desirable tenant' who actually had been missing payment
 - Tenant went bankrupt, and S claimed misrepresentation
 - H claimed that they just meant the tenant was a good guy
 - Court held misrepresentation as it denied existence of unsatisfactory rental issues and asserted nothing had occurred between landlord and tenant
 - Thus must legitimately hold the opinion
 - H's statement implied he had grounds that justified his opinion which H didn't thus misrepresent
- If representation of law = not actionable, however, rule questioned
 - Traditionally ignorance of the law was not a ground for misrepresentation as all people were presumed to know the law
 - However, this rule has been questioned
 - *David Securities Pty Ltd v CBA (1992)*
 - 'It would be logical to treat mistakes of law in the same way as mistakes of fact so that there would be a prima facie entitlement to recover moneys paid when a mistake of law or a mistake of fact has caused the payment'
 - If fraud is involved = actionable
 - A fraudulent misrepresentation of law provides a basis for relief as it implied a representation of fact

- *Public Trustee v Taylor (1978)*
 - 'It would be unconscionable to permit the wrongdoer to gain from a fraudulent misrepresentation of law'

2: False

- The representation must have been false
 - *Krakowski v Eurolynx Properties Ltd (1995)*
 - E selling shop
 - K said would only buy if could get tenant to pay 10% of what K pays
 - Tenant went bankrupt
 - Turns out, in order to induce K to buy shop, E gave him three months rent free and then required money to fit out shop
 - K said representation because needed to know entirety of the deal
 - Court said misrepresentation because implied that if you take over lease, you would be informed of entire agreement
 - Representation was that the lease contained entire agreement and was uninfluenced by any side agreement
 - Subjective test for fraudulence: what did the person intend?

3: Made by the representor to the representee

The representation must have been communicated from the representor to the representee

- If silence (generally not a representation)
 - Generally, mere silence is not a representation
 - *Spooner v Eustace [1963]*
 - 'Caveat emptor'
 - E owned 2 story house, short on money, decided to seal off indoor door and rent out upstairs, required building external stairway, stairway encroached on neighbours but did not worry them
 - Few years later house sold to S who didn't get on with neighbour, neighbour said stairs must be ripped down, S sued E saying he should have told him because he would not have bought it if he knew
 - Court held mere silence, though morally wrong will not support action in deceit
 - No obligation to volunteer information that may assist the other, there is only an obligation not to mislead with false statements
 - EXCEPTIONS
 - If false impression by conduct (e.g. nod, shake of head, smiling)
 - A false impression may be created by conduct e.g. singing a cheque implied the cheque is good for the amount stated
 - A single word, nod, wink, shake of head or smile may be sufficient to convey a falsehood and will be a misrepresentation
 - *Walter v Morgan (1861)*
 - If false impression by half truth
 - There is a duty to disclose where a false impression may be made by only telling half the truth, implying there are no other necessary facts

- *Jennings v Zilahi-Kiss (1972)*
 - Couple J wanted investment to earn money when they retire, ad in paper by Z described house and 5 self-contained flats for sale, stove self-contained, worth much more
 - J took tour and saw stoves, J bought, but was not revealed that there was no council approval for stoves to be in the room
 - Court held stoves being there was a representation by conduct that they were there lawfully
- *Dimmock v Hallett (1866)*
 - Seller did not disclose that tenants had given notice to quit
 - Court held purchaser was led to believe that he was purchasing with continuing tenancies
 - Thus material misrepresentation
- If original intention changes (if statement becomes untrue before contract is formed)
 - A duty to disclose exists if an original intention then changes (or if a statement becomes untrue before the contract is formed)
 - *Jones v Dumbrell [1981]*
 - *With v Flanagan [1936]*
 - Dr O'F wanted to sell medical practice, W wanted to buy, attended negotiations, Dr said it brought in 2000 annually with 1400 patients
 - Since statement, Dr became ill, locums (temps) fulfilled his duties and patients stopped attending
 - Person under obligation to disclose changes in validity of statement
- If active concealment
 - When a representor actively takes steps to conceal facts from the representee, it is a fraudulent misrepresentation
 - *Schneider v Health (1813)*
 - Owner of ship wanted to sell, going to do work on it on slipway, once out of water he sees hull is rotten and cannot be fixed and is not sea worth, essentially worthless
 - Ship put back into water to hide it, in ad he said the hull was nearly as good as launch and disclaimer said it had to be taken in quality it is fond
 - Court held words exclude seller liable for exterior, ad was false as it was not seaworthy, means were taken to fraudulent conceal the ships damage
- If special relationship
 - Certain legal relationships impose an obligation to volunteer information and look after the best interests of the other party

- E.g. contracts *uberrimae fidei* requires full disclosure of relevant facts (i.e. contract of insurance)
- The duty imposed on fiduciary relationships in favour of the beneficiary and contracts of guarantee
- If contract for sale of land (deliberate silence about something essential)
 - Contracts for the sale of land are not covered under *uberrimae fidei* thus the vendor has no general duty of disclosure
 - *Caveat emptor* seems to prevail (see silence subheading)
 - However, there are circumstances where the representor's deliberate silence is a misrepresentation
 - *Noor Al Houda Islamic College v Bankstown Airport [2005]*
 - College built primary school on grounds of Bankstown airport, had signed lease for 25 years, prior to building found out land was contaminated with night soil/sewerage, was dumped at airport, soil analysis revealed presence of heavy metals, airport didn't disclose contamination which they knew about
 - Court held airport had a duty to disclose and that the school was entitled to assume from the silence that no danger existed

4: Intended to induce

The representation must have been made with the intention to induce the representee into entering the contract

- *Peek v Gurney (1873)*
 - Investment to buy into finance company, owed 4M pounds, designed to dump company, formed new company and didn't mention owed money, P bought millions worth of shares in useless company and sued
 - Court held representation not made to him/not intended to induce him
- Exceptions:
 - The representee is a member of a class
 - *Commercial Bank of Sydney v RH Brown (1972)*
 - The representor knows that the representation is likely to be passed onto the ultimate representee
 - *Pilmore v Hood (1983)*

5: Induces the representee into the contract

The representation must have, in fact, induced the representee into entering the contract. A representation made with the intention to induce the contract raises a fair inference that the representee was in fact induced by the representation. This inference may however be rebutted – *Gould v Vaggelas (1985)*

- If representee did not check the accuracy of the representation
 - The representee is under no obligation to search out the truth
 - *Redgrave v Hurd (1881)*

- Solicitor (R) wanted to sell part of practice, young solicitor (H) wanted to buy, R said it brings \$400 a year, H asks to look at books and discovers it only brings \$200 pounds, R showed books with other info, H didn't bother to look, documents only have 5 or 6 pounds,
- When bought H sought to rescind, R said he didn't induce and that it was a failure to check on H's part
- Court held H not required to check the accuracy of R's representation
- If inducement is partial
 - The inducement may be partial 'so long as it plays some part even if only a minor part in contributing to the formation of the contract'
 - *Gould v Vaggelas (1985)*
- If representee merely suspected the representation to be false (still inducement)
 - Only actual knowledge of the falsity in the representation can bar the inducement
 - *Gould v Vaggelas (1985)*
 - Sale of tourist resort
 - V making statements that G did not fully believe, when G purchased she discovered she had been lied to and claimed misrepresentation
 - V claimed G knew he was lying – difference between believing or suspecting – court held misrepresentation although it wasn't believed to be entirely true, V still induced decision to buy
 - Representee needs to have actual knowledge representation is false in order for argument to hold
- Ways to disprove the reliance (rebut the inducement) – *Gould v Vaggelas (1985)*; *Holmes v Jones (1907)*
 - Representee ignored the representation
 - Representee knew of the truth prior to the contract
 - Representee relied on his/her own inquiries

6: SEE 'TYPES OF MISREPRESENTATION' BELOW FOR LAST 3 ELEMENTS IN FINDING INNOCENT/FRAUDULENT MISREPRESENTATION

Types of Misrepresentation

1: Innocent misrepresentation

- A finding of innocent misrepresentation will occur where the general elements of misrepresentation are satisfied (see general elements above), and the representor honestly believed the statement was correct or was not aware that it was false (last element).
- Innocent misrepresentation is the 'default finding'
- The plaintiff has the onus of proving any fraud or negligence
- If finding of innocent misrepresentation:
 - Rescission is the only remedy available (no damages) for a finding of innocent misrepresentation
 - Thus, the representee may choose to either rescind (contract set aside *ab initio* – from the beginning) or affirm (do nothing – unlikely) the contract

2: Fraudulent Misrepresentation

- A finding of fraudulent misrepresentation will occur where the general elements of misrepresentation are satisfied (see general elements above), and the representor knows that the representation is false, or is recklessly indifferent to the truth (forms basis of tort of deceit)
 - o *Magill v Magill* (2006)
 - o *Derry v Peek* (1889)
- Test is subjective
- The representation is judged according to how the representor believed the representation would be understood by the representee
 - o *John McGrath Motors (Canberra) Pty Ltd v Applebee* (1964)
- If the representor intended to induce the representee into the contract by the representation and the representee does so, it should not matter that a reasonable person would not have acted
 - o *Nicholas v Thompson* [1924]
- Example where fraudulent misrepresentation failed
 - o *Derry v Peek* (1889)
 - o Derry on board of directors for company, released ad saying they had permission to run steam trams in city, honestly believed they had permission of government but only had permission for certain areas
 - o Peek purchased stakes in reliance of ad
 - o Court held fraud needs to be proven for an action in deceit and that Derry did not know it was false so no fraud
- Example of fraudulent misrepresentation
 - o *Re Hoffman; Ex Parte Worrell v Schilling* (1989)
 - H wanted to sell business, S wanted to buy, H says he was experiencing financial difficulty but was actually bankrupt
 - S wanted to rescind contract – could held fraudulent misrepresentation because H should have said he was bankrupt
 - o See also *Wood v Balfour* [2011]
- If finding of fraudulent misrepresentation
 - o Recession and damages (tort of the deceit) are the remedies available for a finding of fraudulent misrepresentation
 - o Thus, the representee may choose to either rescind the contract, claim damages or affirm the contract
 - o Affirmation does not exclude the representee from the awarding of damages
 - o *Sibley v Grosvenor* (1916)
 - o However, rescission excludes the representee from the awarding of damages as the contract is set aside ab initio (from the beginning) (no contract to sue for)

3: Negligent misrepresentation (not assessable – covered in torts)

Duress

Duress occurs where illegitimate pressure is applied by one party (the defendant) to induce the other party (the plaintiff) to enter into a contract or to modify an existing contract.

Definition – ‘threatened or unlawful conduct’ – *ANZ Banking Group v Karam* [2005]

Elements of Duress

1: Illegitimate pressure is applied to compel an innocent part to assent to the contract

Courts often distinguish between unlawful and lawful pressure.

- If unlawful pressure (generally treated as duress)
 - Unlawful threats are generally treated as duress
 - But not always, e.g. valid renegotiation of a contract is often accompanied by a threat to break the current contract
 - *ANZ Banking Group v Karam* [2005]
 - Court limits duress to ‘threatened or unlawful conduct’
 - If the threat was not ‘unlawful’, then the weaker party may still be able to argue that it is unconscionable at common law, however, a mere difference in the comparative bargaining strength of the parties will not be enough
 - Things to consider in determining whether or not there was illegitimate pressure
 - The proportion between the threat and demand is to be assessed
 - Also, the state of mind or ‘good faith’ of the person making the demand may be relevant
 - If threat is offer or request
 - The threat must be distinguished from an offer or a request
 - If person making the threat believed they were lawfully entitled to it
 - A threat to do something unlawful may be duress even when the person making the threat believed they were lawfully entitled to do it
 - *Beerens v Bluescope Distribution Pty Ltd* [2012]
 - If threat lawful
 - Lawful threats may also give rise to duress as it is not fair to allow people who come up with outrageous but lawful threats to escape restitution
- Economic duress
 - ‘Illegitimate pressure’ must be distinguished from ‘hard bargaining’
 - Common issue: where is the boundary between those two
 - *Barton v Armstrong* [1976]
 - Absence of choice does not negate consent in law
 - The pressure must be one of a kind which the law does not regard as legitimate

- Thus, out of the various means by which consent may be obtained, (advice, persuasion, influence, inducement, representation, commercial pressure), the law has come to select some which it will not accept as a reason for voluntary action:
 - Fraud
 - Abuse of relation of confidence
 - Undue influence
 - Duress
 - Coercion
- If mere pressure (even over whelming pressure) (**not sufficient to amount to duress**)
 - The mere fact that pressure is applied – even over whelming pressure – or that parties bargain from unequal bargaining positions, is not sufficient to amount to duress
 - The pressure must go beyond what the law is prepared to countenance as legitimate (unlawful)
 - *Crescendo Management v Westpac* (1988)
- If threat to break contract
 - A threat to break contract is usually illegitimate pressure
 - *North Ocean Shipping v Hyundai Construction* [1979]

2: The pressure caused the innocent party to assent to the contract

Once evidence is established that the pressure was illegitimate, the onus lies on the person who applied the pressure to show that it made no contribution to the plaintiff entering the contract

- *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988)

The plaintiff cannot claim duress unless the illegitimate pressure was at least a factor influencing the plaintiff's decision to enter into the contract. It does not have to be the sole reason

- *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988)

If third party caused duress

- If the party does not cause the duress they may contract without concerns that the contract will be rescinded
- *Magnacrete Ltd v Douglas Hill* (1988)

Economic Duress

- Causation considerations
 - *Equiticorp Finance Ltd v Bank of New Zealand* (1993)
 - Size of business a factor to take into account
 - Difficult for large corporations to claim duress as generally they deal on equal terms

3: The innocent party in the circumstances had no 'practical' alternative but to assents

The more serious the threat the less the plaintiff will be expected to protest

- E.g. threatened with a gun or knife, would have no practical alternatives

Things to consider to determine whether there was any alternative (economic duress)

- It is material to inquire whether:
 - o The innocent party did or did not protest,
 - o Whether the innocent party did or did not have an alternative course available
 - o Whether the innocent party was independently advised
 - o And whether after entering the contract the innocent party took steps to avoid it
 - o *Pao On v Lau Yiu Long* [1980]
- If the plaintiff did not protest
 - o 'The victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved' – *The Universe Sentinel* [1983]

4: There was or was a threat of conduct that was UNLAWFUL

Alternative approach

The Universe Sentinel [1983]

- The authorities reveal two elements in the wrong of duress
 - o Pressure amounting to compulsion of the will of the victim, and
 - o The illegitimacy of the pressure exerted
- There must be pressure, the practical effect of which is compulsion or the absence of choice
 - o Compulsion is variously described in the authorities as coercion or the vitiation of consent
- The classic case of duress is, however, not the lack of will to submit but the victim's intention submission arising from the realisation that there is no other practical choice open to him
- 'In determining what is legitimate two matters may have to be considered
 - o The first is as to the nature of the pressure
 - In many cases this will be decisive, though not in every case
 - o And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support
- The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand'

Types of Duress

1: Duress of person

Duress of person encompasses threatened assaults, false imprisonment, and anything involving wrongful interference with the person

- *Barton v Armstrong* [1973]
- 'If A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document, It can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document'

Duress may only be the only motivation for entering the contract

- However, it does not have to be the only reason

If threat to friend/family

- Duress may apply where the threat is made to the wellbeing of friends or family
 - o *Scolio Pty Ltd v Cote* (1992)

2: Duress of goods

Duress of goods encompasses any threatened interference with the plaintiff's intangible property, including damage or destruction of property or unlawful seizing and detaining, or unlawful refusal to return

- *Hawker Pacific v Helicopter Charter* (1991)

There may be a threatened detention or seizure of goods, or threatened damages to goods that allows the defence of duress (threat need not be verbal)

- *Hawker Pacific v Helicopter Charter* (1991)
 - o HC were going to charter helicopter, HP to service and paint job, paint terribly done, refused to accept delivery, done poorly again, third time before charter HC was confronted
 - Helicopter in hanger, document saying paint job had no liability
 - Chear to him if they didn't sign and pay they wouldn't get the helicopter back
 - HP kept asking for payment but no payment
 - o HP sued, HC claimed duress
 - o Court held conduct showed HC thought helicopter would be taken back unless the document was signed
 - HP knew HC needed urgently that day thus duress of goods

3: Economic duress

Economic duress encompasses threatened unlawful interference with the plaintiff's financial or other economic interests

- It often arises where the defendant threatens to breach a contract unless the plaintiff enters into a modified or new contract on terms more favourable to the defendant

- *North Ocean Shipping v Hyundai Construction* [1979]
 - N entered contract for H to build ship in Korea with price in UDG
 - H were 10% worse off when US devalued currency by 10%
 - H threatened N by saying they wanted 10% more which was about \$3M extra to have ship done on time and if N doesn't pay then they won't get the ship and the ship would be given to someone else
 - H paid money then sought to claim money back due to duress after 9 months
 - Court held agreement was economic duress however H affirmed contract by failing to protest when final payment was made and took 8 months to raise claim

Remedy

The finding of duress will allow the plaintiff to rescind the contract

The plaintiff may still decide to affirm the contract (very unlikely)

Undue Influence

A party (the complainant/plaintiff) may be allowed to rescind a contract on the basis of undue influence where common law duress cannot. The equitable doctrine of undue influence has been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud, to protect people from being forced, tricked or misled in anyway by others into parting with their property.

- *Allcard v Skinner* (1887)

Difference between undue influence and duress

Undue influence operates in fact situations far wider than duress

- Duress is sometimes seen as an extreme for undue influence
- Whereas:
 - o A victim of duress will be consciously coerced into a contract
 - o A victim of undue influence may be unaware of the influence
- Undue influence need not be overtly coercive or threatening or fraudulent
 - o It can be subtle and well-intended
- Both doctrines look to the quality of the consent of the victim

There are two forms of undue influence

- *Johnson v Buttress* (1936)
- Actual Undue Influence
- Presumed Undue Influence

Actual Undue Influence

Facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act

- *Johnson v Buttress* (1936)

Elements

- *Credit and Commerce International SA v Aboody* [1990]

A person relying on a plea of undue influence must show that

1: The other party to the transaction (or someone who induced the transaction for his own benefit) had the **capacity** to influence the complainant

- Influential relationships are very common, thus the capacity to influence is rarely difficult to establish
- Influential relationships can take infinite forms
- Often there will be unequal bargaining power

- Typically, the relationships involve close, personal relationship of trust, confidence or reliance
 - o *E.g. close friend and trust confident, spouse who is the one 'calling the shots' in the marriage, etc.*

2: The influence was exercised

- 'Influence' can take any form
 - o Persistent persuasion
 - o Overt threats
 - o Taking advantage of someone at an unusual time or place
 - Especially if they're distracted or vulnerable
 - o Taking advantage of being in a position of authority
 - o Merely being a silent, but forceful, presence in the room
 - o Having others apply pressure or persuasion
 - o What matters is the quality of the consent of the plaintiff

There is actual undue influence if the exercise of influence took place where the actors were unable to form a proper judgement

- *Micarone v Perpetual Trustees (1999)*

If context of domestic violence

- *Farmers Co-op Executors & Trustees Ltd v Perks (1989)*
 - o Mr Perks violent alcoholic, lived on farm in country
 - o Mrs Perks subject to Mr Perks violence separate from the rest of society, was in constant fear of Mr Perks
 - o She owned land in her name (inherited)
 - o Evidence said Mr Perks would insist her to transfer it to him e.g. 'need to sign on dotted line'
 - o One day she signed it over to him for nothing, then she died (believed to be murdered)
 - o Her son saw land had been transferred and he moved to rescind the transfer on the basis of undue influence
 - o Found she had been actually unduly influenced which is why she gave away her only property
 - o May have been duress but there was not evidence for that

If misinformation (e.g. concealing essential matters when getting your partner to sign something)

- *Credit and Commerce International SA v Aboody [1990]*
 - o Wife signed 3 guarantees and changed grant in home on debts owed by company in which husband and wife were directors
 - o Company collapsed, could not repay mortgage, bank sought to enforce guarantees and to repossess home
 - o Wife sought mortgage to be set aside because it was procured by actual undue influence of husband

- HELD: actual undue influence by deliberately concealing key matters about the risk of signing guarantees and mortgage
 - There were no threats, bullying, harassments nor insistent pressure
 - Was a normal relationship of love and confidence
- Undue influence was that she relied on husband to take care of business matters and he deliberately withheld information on risks of guarantee, thus she was unable to form proper judgement when signing
 - Even though undue influence made out, it failed on causation because she would have signed it anyway irrespective of the undue influence
- Also transactions wasn't to manifest disadvantage, court was to regard benefits received in addition to risks undertaken
 - Thus bank was able to enforce guarantees and repossession

3: Its exercise was undue

The influence exercises must not have been in due proportion to the surrounding circumstances, and the strength of the person submitted to it (the influence of the stronger party on the weaker party)

- *Allcard v Skinner* (1887)

More than mere influence must be proved. It must be established that the person has used their dominant position to obtain an unfair advantage

- *Poosathurdi v Kanappa Chettiar* (1919)

Ultimately, there is no substitute in this branch of the law for a meticulous (precise) examination of the facts

- *National Westminster Bank Plc v Morgan* [1985]

4: Its exercise brought about the transaction

It must be proved that the undue influence was a cause of the complainant agreeing to the contract (to the extent that it cannot be considered the complainant's free act)

- *Johnson v Buttress* (1936)

If the complainant independently agreed despite the influence (cannot void the contract)

- A complainant cannot avoid a contract if they independently agreed, despite the influence
 - *Credit and Commerce International SA v Aboody* [1990]
 - She was always going to sign the guarantee irrespective of the undue influence

If the complainant would have agreed irrespective of the influence (cannot avoid the contract)

- A complainant cannot avoid a contract if they would have agreed irrespective of the influence
 - *Credit and Commerce International SA v Aboody* [1990]

Presumed Undue Influence

- No need to prove that the influence in fact caused the transaction
- Complainant proves instead the context of the transaction and raises a presumption that the transaction was procured by undue influence
- Onus then shifts to defendant to disprove undue influence caused the transaction
- BUT, if onus discharged then transaction stands

The doctrine is most useful when legal representatives are suing on behalf of an estate, where the deceased gave away valuable property prior to death (e.g. you're a beneficiary to estate of parent, you live far away, when parent dies you find out they gave property or sold property for an incredibly undervalued price)

Establishing presumed undue influence

- Can be actual undue influence or presumed undue influence (either, or)
- *Farmers' Co-op Executors & Trustees Ltd v Perks (1989)*
 - o Found on actual undue influence
 - o Could easily have been argued on the basis of presumed undue influence

Two classes of presumed undue influence

1: If the relationship between the parties is fiduciary (presumption in law)

- Presumed undue influence - relationship as a matter of law gives rise to presumption that influence was exerted
 - o *Credit and Commerce International SA v Aboody [1990]*
- Established categories
 - o Solicitor to client
 - *Westmelton (Vic) Pty Ltd (Receiver and Manager Appointed) v Archer and Schulman [1982]*
 - o Doctor to patient
 - o Religious advisor to disciple
 - *Allcard v Skinner (1887)*
 - o Parent (or person in *loco parentis*) to child
 - o Guardian to ward
 - o Trustee to beneficiary
 - o DOES NOT INCLUDE
 - Siblings
 - Child to Parent
 - Husband Wife
 - Employer/employee
 - Banker/customer
- The relationship between the parties is on which gives the fiduciary a special opportunity to exercise the power to the detriment of that other person who is vulnerable to abuse by the fiduciary of their position
 - o *Hospital Products Ltd v United States Surgical Corporation (1984)*
- *Allcard v Skinner (1887)*

- 'At the time of the gift the plaintiff was a professed sister, and, as such, bound to render absolute submission to the defendant as superior to the sisterhood. She had no power to obtain independent advice, she was in such a position that she could not freely exercise her own will as to the disposal of her property, and she must be considered as being Not in the largest and amplest sense of the term an entirely free agent'
- **If presumption in law, move straight to 'rebutting the presumption'**

2: If relationship is a presumption of fact

- Presumed undue influence requires proof of relationship of trust and confidence if established the presumption arises
 - *Credit and Commerce International SA v Aboody* [1990]
- Wherever the relation between donor and donee is such that the latter is in a position to exercise dominion over the former by reason of the trust and confidence reposed in the latter, the presumption of undue influence is raised
 - *Johnson v Buttress* (1936)
 - Mr Buttress was able to show relationship with Mrs Johnson was highly influential in fact, thus presumed undue influence
 - B deceased at time of action, illiterate with less than average capacity and no capacity for business, he owned land, he knew J as she was blood relative of his deceased wife, he agreed to give away property to J
 - Court found relationship of trust and confidence as J took good care of B before he passed, arrangement where he would give land to J if J took care of him, before he died he transferred property to J
 - B's son found out property was transferred after B died
 - Argued undue influence to rescind transfer of property, said relationship between B and J was trust and confidence and B was stupid
 - HELD: presumed undue influence due to the off transfer of property and said onus on J to rebut presumption
- For there to be a special relationship where undue influence will be presumed unless rebutted, the relationship must go beyond one of mere confidence and influence, to one involving dominion or ascendancy by one over the will of the other, and correlatively dependence and subjection on the part of the other
 - *Tulloch (deceased) v Braybon (no 2)* [2010]
- If a gift is made
 - If the gift is a small amount
 - The mere existence of a gift of a small amount will not be set aside simply on the ground that the donor had no independent advice
 - Some proof of the existence of the influence of the donor must be given
 - The mere existence of such influence is not enough in such a case
 - *Allcard v Skinner* (1887)
 - If a gift of a large amount
 - Presumption exists that must be rebutted

- If the gift is so large as not to be reasonably account for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee (person who received the gift) to support the gift
 - *Allcard v Skinner* (1887)
- Disadvantage
 - It is not clear if Australian law requires that the influenced party was disadvantaged before the presumption will arise
 - Until court hold disadvantage necessary, we assume it is not

If any presumed undue influence, move on to 'rebutting the presumption'

Rebutting the presumption

The donee must establish that the donor knew and understood what he/she was doing, and that he/she was acting independently of their influence (the dominant party's influence)

- *Tulloch (deceased) v Braybon (no 2)* [2010]

The donee must show that the gift was the pure, voluntary, well-understood act of the donor's mind

- *Tulloch (deceased) v Braybon (no 2)* [2010]

If the donor is illiterate/weak-minded

- Will be more difficult for the donee to discharge/rebut the presumption

If donor gives all/practically all of their property

- The burden will especially be heavier
- Presumption likely not rebutted

If transaction is a purchase or anything other than a gift

- When the transaction is not a gift, but a purchase or other contract, the matters affecting its validity are different
- Adequacy of consideration becomes a material question
 - E.g. if donee gives a substantially lower amount than the value of what is being purchased, the presumption will likely not be discharged/rebutted
 - *Johnson v Buttress* (1936)

If confidential relationship (e.g. solicitor/client)

- In cases involving a confidential relationship, the extend and weight of the burden for the donee to rebut the assumption will vary enormously with all the circumstances of the case
 - *Westmerton (Vic) Pty Ltd (Receiver and Manager appointed) v Archer and Schulman* [1982]

If there was independent advice given

- A donee may prove that the gift was a result of the free exercise of the donor's independent will by establishing that it was made after the nature of effect of the transaction had been fully explained by an independent and qualified person
 - o *Inche Noriah v Shaik Allie Bin Omar* [1929]
- It does not need to be shown that the advice was taken
- The independent advice must have been given with the knowledge of all relevant circumstances and must be given by a competent and honest advisor acting solely in the interests of the donor
- Will likely rebut the presumption
- It may in some circumstances be the only means to rebut the presumption, but it is not the only way the presumption may be rebutted

Remedy

If any type of undue influence the plaintiff will be allowed to rescind the contract due to undue influence

Unconscionable conduct

Two meanings

- Broad sense
 - Equity – ‘the court of conscience’ – provides many principles directed to preventing unconscionable conduct
 - To obtain relief the plaintiff must show that the defendant’s conduct is ‘unconscionable’
 - E.g. promissory estoppel, part performance, undue influence
- Narrow sense
 - *Commercial Bank of Australia v Amadio (1983)*
 - A specific equitable doctrine applying to specific factual circumstances different from the vitiating factors considered so far
 - Sometimes also called ‘unconscionability’

Elements

Commercial Bank of Australia v Amadio (1983)

1: One person (P) is at a special disadvantage vis-à-vis another (D), such that P cannot look after their own interests, or their capacity to do so is diminished

The plaintiff must have been under a special disability in dealing with the other party where there was no reasonable degree of equality between them. However, it must not be just mere inequality of bargaining power – the disabling condition or circumstance must seriously affect the plaintiff’s ability to make a judgement to his/her own best interests, or their capacity to do so is diminished

- *Commercial Bank of Australia v Amadio (1983)*

If special disadvantage constitutional

- The special disadvantage may be constitutional
 - Deriving from age, illness, poverty, inexperience, or lack of education
- *ACCC v Samton Holdings Pty Ltd (2002)*
- *Commercial Bank of Australia v Amadio (1983)*

If special disadvantage is situational

- *ACCC v Samton Holdings Pty Ltd (2002)*
- The special disadvantage may be situational
 - Deriving from particular features of a relationship between parties in the transaction, such as the emotional dependence of one on the other
 - *Louth v Diprose (1992)*
 - Respondent was completely in love with appellant, he was so emotionally dependant upon and influenced by the appellant

If consideration is inadequate

- E.g. house for \$100

- It is not essential for the party at a disadvantage to suffer loss or detriment by the bargain, but inadequacy of consideration will be an important element to support the interference that a position of disadvantage existed and to show that an unfair use was made in the occasion
 - o *Blomley v Ryan (1956)*

2: D is aware of P's special disadvantage

The defendant need only to be aware of the possibility that the situation may exist or is aware of the facts that would raise possibility in the mind of any reasonable person to make it prima facie unfair if the defendant were to procure or accept the plaintiffs' assent to the impugned transaction in the circumstances in which he/she procured or accepted it

- *Commercial Bank of Australia v Amadio (1983)*
 - o Was prima facie unfair of bank to proceed to procure signature on guarantee/mortgage as Mr and Mrs Amadio's disability and inequality between them was evident to the bank (plain to any reasonable person)
 - o Bank can't shelter behind failure to make inquiry to whether transaction had been properly explained to Mr and Mrs Amadio

However, a predatory state of mind is required. Mere inadvertence or indifference falls short of the victimisation or exploitation the principle is concerned with

- *Kakavas v Crown Melbourne Limited (2013)*
 - o Held that even though a gambler may be evidently intoxicated, adolescent, senescent (old), or incompetent, it is difficult to ascertain it as a case of victimisation by the casino because if the gambler were to go on a win streak, that would hurt the casino
 - o No predatory state of mind by casino to victimise a widowed pensioner and he/she voluntarily engaged in the risky business
 - Victimisation must be beyond the ordinary conduct of the business

If wilful blindness

- Wilful blindness to someone's situation is also captured by this

3: D exploits P's special disadvantage to obtain a benefit

The defendant must have entered into a contract with the plaintiff, and consciously exploited the plaintiff

If unfair advantage of superior bargaining power

- If the defendant takes an unfair advantage of his/her superior bargaining power or position by entering into the transaction, his/her conduct in doing so is unconscionable
 - o *Commercial Bank of Australia v Amadio (1983)*

If dishonest conduct intended to induce so that he/she can obtain benefit

- If the defendant exhibits dishonest conduct intended to induce the plaintiff to obtain a benefit, it is unconscionable

○ *Louth v Disprose* (1992)

- Appellant's conduct dishonest and intended to induce
- Dishonesty create atmosphere of crisis where she was going to face eviction from home and commit suicide unless he provided her with money to purchase house
- And in fact induced respondent's entry into transaction which was improvident (thoughtless) and conferred a great benefit upon her (a house)

Once established, onus on D to show transaction was nonetheless 'fair, just and reasonable'

- *Commercial Bank of Australia v Amadio* (1983)

If proof of adequate consideration

- Proof of adequate consideration may show that it was fair
- But that itself may not meet the onus as the transaction may be unfair, unreasonable and unjust from the point of view of the plaintiff
- *Commercial Bank of Australia v Amadio* (1983)

If proof of independent advice

- Proof of independent advice may demonstrate that the plaintiff was not at a disadvantage because someone else was looking after their interests

Remedy

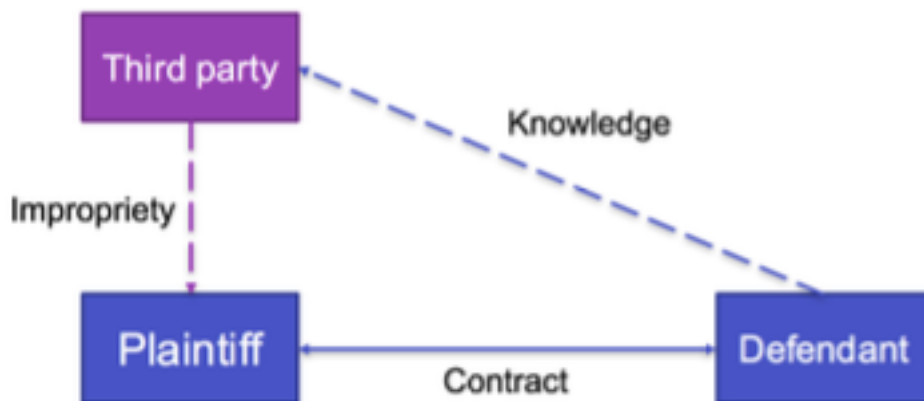
Unconscionable conduct will allow the plaintiff to rescind the contract

- *Commercial Bank of Australia v Amadio* (1983)

Can be both unconscionable conduct and undue influence

- They are not mutually exclusive
- *Commercial Bank of Australia v Amadio* (1983)

Third Party Impropriety



‘The interference of undue influence operates not only ‘against the person who is able to exercise the influence’ but ‘against ... every person who claimed under him with notice of the equity thereby created, or with notice of the circumstances from which the court infers the equity’

- *Bainbrigge v Browne* (1881)

Third Party Actual Undue Influence

Elements

- *Khan v Khan* (2004)

1: The third party had influence over the plaintiff (the influenced party: a party to the relevant contract)

2: That the third party exercised that influence so that what the plaintiff did was the result of the influence rather than the plaintiff’s will, and that

3: The defendant (a party relevant to the contract) unconscientiously derived a benefit from the conduct of the plaintiff **knowing** that the conduct was a result of the influence of the party rather than the plaintiff’s will

Example of successful third party actual undue influence

- *Khan v Khan* (2004)
 - Court held reluctant vendor advised by a Muslim clerk to sell a property because she would be rewarded in the afterlife was an automatic presumed relationship of influence
 - Since purchaser had notice of relationship and third party influence and fact that vendor would work on influence, the court set aside the transaction

Third Party Presumed Undue Influence

If the defendant (a party to the relevant contract) has **notice** of a relationship between the plaintiff (the influenced party) and the third party raises a presumption that the plaintiff is unduly influenced by the third party, then the defendant will be obliged to ensure that the plaintiff has freely and independently agreed to the contract

- *Bank of NSW v Rogers (1941)*
 - o Uncle procured niece to provide security for his overdraft
 - o Niece had close relationship with uncle
 - o Court held bank must have been aware of special relationship and therefore had notice which led to setting aside transaction

If special wives equity

Note: MUST be a wife = cannot be de facto relationship – to seek the principle

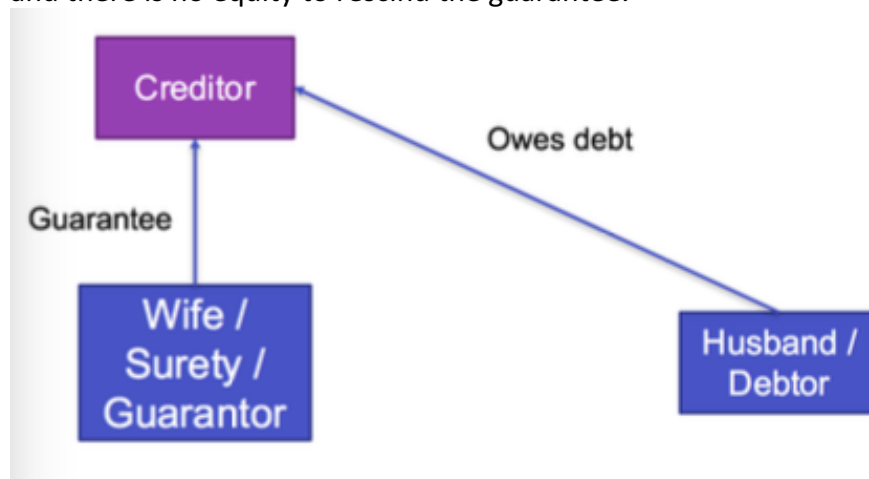
Garcia v National Australia Bank (1998)

- Notice of the husband/wife relationship is sufficient to ground the claim
- There is no need for notice of undue influence or other impropriety
- The wife must be a volunteer
 - o A person who obtains no financial benefit from the transaction or performance of the obligations which she agreed to guarantee

It will be unconscionable to enforce the contract if the wife (surety) did not understand the purport and effect of the transaction (general nature and effect) and the transaction was voluntary (in the sense that the surety obtained no gain from the contract)

The lender/creditor is assumed to have (notice) understood that the wife/surety may repose trust and confidence in her husband for matters in business and therefore understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife. The lender must (e.g. the bank) take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

If wife understands transaction despite the lack of explanation the principle does not apply and there is no equity to rescind the guarantee.



Third Party Unconscionable Conduct

Refer to elements of *Amadio* for unconscionable conduct

Whether or not the contract was tainted by third party impropriety depends on whether the defendant had **notice** (known or should have known) of the impropriety

- *Bank of NSW v Rogers* (1941)

Deceptive and Misleading conduct - Section 18 of Australian Common Law

- Previously known as the *Trade Practices Act 1974*
- Now known as the *Competition and Consumer Act 2010 (Cth) schedule 2*
- Section 18;
 - “A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive”
- Section 18 imposes a statutory norm of conduct on any entity which engages in ‘trade or commerce’
 - Applies in contexts far wider than contract law
 - Routinely used in place of misrepresentation to avoid the contract

Establishing Liability

The plaintiff must prove

- The defendant engaging in ‘misleading or deceptive conduct’
- While in ‘trade and commerce’
- To obtain a remedy must prove the plaintiff relied on the conduct

The simplicity of the cause of action has made misrepresentation, negligent misstatement, deceit and contractual mistake redundant. (IN THIS SUBJECT – FOCUS IS ON COMMON LAW NOT STATUTE LAW)

Misrepresentation	Section 18
<ol style="list-style-type: none"> False, precontractual statement of past/present fact. Made by defendant to induce the plaintiff into the contract. Which in fact induces the plaintiff into the contract. 	<ol style="list-style-type: none"> Defendant engaged in ‘misleading or deceptive conduct’; While in ‘trade or commerce’.
Negligent misstatement <ol style="list-style-type: none"> Duty of care Breach of duty (fault) 	<ul style="list-style-type: none"> No need to prove a representation of past/present fact: just misleading or deceptive ‘conduct’. No need to prove inducement. No need to prove fault.
Deceit (Fraud) Making a statement: <ol style="list-style-type: none"> Knowing to be false; or Being recklessly indifferent to the truth. 	<ul style="list-style-type: none"> Damages and other remedies available in all cases, if the plaintiff suffered loss. See range of remedies in ss 236 and 237

Conduct

Australian Consumer Law, s 2

(2) In this Schedule:

- (a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:
 - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
 - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant; and
- (b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:
 - (i) the making of, or the giving effect to a provision of, a contract or arrangement; or
 - (ii) the arriving at, or the giving effect to a provision of, an understanding; or
 - (iii) the requiring of the giving of, or the giving of, a covenant; and
- (c) a reference to refusing to do an act includes a reference to:
 - (i) refraining (otherwise than inadvertently) from doing that act; or
 - (ii) making it known that that act will not be done; and

In Trade or Commerce

Concrete Constructions (NSW) Pty Ltd v Nelson (1990)

- The question is not whether the conduct engaged in was in *connection* with trade or commerce, or *in relation to* it
 - o It must have been **in** trade or commerce
- “What the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those who interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character”
 - o “Internal communication by one employee to another employee in the course of their ordinary activities in and about the construction of a building ... was not ... conduct in trade or commerce”
- Pre-contractual negotiations will be ‘in trade and commerce’ if the defendant is contract in its ‘usual’ course of business
- Is ultimately a question of fact

Exception

- “Private” sales of land not in the course of a business or money-making activity
 - o E.g. sale of a family home
 - o *O’Brien v Smolonogov* (1983)
- *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990)
 - o Owner/sell of house – not acting in trade and commerce

- Blunts & Lane Cove Real Estate – acting in trade or commerce
- If the defendant was not acting in 'trade and commerce', then the plaintiff will need to prove common law misrepresentation

Misleading or Deceptive

Butcher v Lachlan Elder Realty Pty Ltd (2004)

- "Conduct is misleading or deceptive if it induces or is capable of inducing error"
- "Conduct that objectively leads on into error is misleading"
- "The plaintiff must establish a causal link between the impugned conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone"

Campbell v Back Office Investments Pty Ltd (2009)

- "Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error"
- "It involves a consideration of notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective"

In dealings between identified individuals, the court will look at all the circumstances of the case:

- The nature of the parties
 - Sophisticated business people dealing at arm's length? A consumer dealing with a corporation? Age, education, experience etc.
- The nature of the transaction
 - Sale of valuable property? Provision of a highly technical service? Purchase of a toilet brush?
- What was said/communicated in writing and how it was communicated
- What the parties knew about each other / how they presented themselves
- Industry context: prevailing norms or practices within the industry

Opinions/statement of future actions

- E.g. promises, predictions etc.
- Common law reasoning can apply
- I.e. it can be misleading or deceptive if a defendant gives an opinion or makes a statement of future action when
 - They do not honestly believe the statement, or
 - Do not have reasonable grounds for making the statement
- *Campbell v Backoffice Investments Pty Ltd (2009)*
 - "Opinions may carry with them one or more implied representations according to the circumstances of the case. There will ordinarily be an implied representation that the person offering the opinion actually holds it. Other implied representations may be that the opinion is based upon reasonable grounds, which may include the representation that it was formed on the basis of reasonable enquires"

Australian Consumer Law

Section 4 – Misleading representations with respect to future matters

(1) If:

(a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken, for the purposes of this Schedule, to be misleading.

(2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:

(a) a party to the proceeding; or

(b) any other person;

the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.

(3) To avoid doubt, subsection (2) does not:

(a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or

(b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.

(4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:

(a) a misleading representation; or

(b) a representation that is misleading in a material particular; or

(c) conduct that is misleading or is likely or liable to mislead;

and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.

Silence

Demagogue Pty Ltd v Ramensky (1992)

- Silence to be assessed as circumstances like any other
 - o Must ask whether, having regard to all the relevant circumstances, there has been conduct that is misleading/deceptive/likely to be such

Exclusion clauses, disclaimers and acknowledgements

- Exclusion clauses attempt to either exclude the obligation imposed by s 18, or exclude liability for breach of it
 - o Neither is permitted
- Disclaimers disclaim endorsement of and responsibility for the accuracy of a statement
 - o They typically put the onus on the plaintiff to make their own enquires
 - o *Butcher v Lachlan Elder Realty Pty Ltd (2004)*

- “If a disclaimer clause has the effect of erasing whatever is misleading in the conduct, the clause will be effective, not by any independent force of its own, but by actually modifying the conduct.”
- Acknowledgements are a form of disclaimer where a plaintiff declares that they did not rely on any representations or conduct of the defendant
 - *Campbell v Backoffice Investments Pty Ltd (2009)*
 - “A subsequent declaration of non-reliance by a person said to have been affected by the conduct is more likely to be relevant to the question of causation”

Remedies

Damages available to compensate for loss caused by the defendant’s misleading or deceptive conduct, even if the defendant’s conduct was innocent

- Causation is proved by reliance on the conduct
- The conduct need not be the only cause of the loss

Australian Consumer Law

Section 236 – Actions for damages

(1) If:

(a) a person (the claimant) suffers loss or damage **because of** the conduct of another person; and

(b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

Australian Consumer Law

Section 237 – Compensation orders etc. on application by an injured person or the regulator

(1) A court may:

(a) on application of a person (the injured person) who has suffered, or is likely to suffer, loss or damage because of the conduct of another person that:

(i) was engaged in a contravention of a provision of Chapter 2, 3 or 4; or

...

make such order or orders as the court thinks appropriate against the person who engaged in the conduct, or a person involved in that conduct.

(2) The order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

Rescission

When a contract is voidable due to vitiating conduct, the plaintiff must elect to either rescind the contract or affirm (and continue to be bound by) the contract. Once the choice is made, the plaintiff cannot change their mind.

A voidable contract is valid and effective unless and until it is rescinded.

NOTE: The same principles apply to a decision to **terminate for breach**

Legal effect

The contract is made *void ab initio* (void from the beginning)

All legal acts are undone:

- Title to property transferred re-vests in original owner
- Parties who received money obliged to account
- Parties cannot sue for breach
- Parties must be restored to their pre-contractual positions

Rescission at Common Law and Equity

At **common law**, rescission is available for

- Fraudulent misrepresentation
- Duress

Requires precise *restitutio in integrum* (reinstitution to the original/pre-contractual position)

If **precise** restitutio in integrum is not possible, equity will provide relief if **substantial** restitutio in integrum is possible

- *Alati v Kruger* (1955)

In **equity** rescission is available for

- Fraudulent misrepresentation
- Duress
- Innocent and negligent misrepresentation
- Undue influence
- Unconscionable conduct
- Breach of fiduciary duty

Requires only **substantial** restitutio in integrum

Equity has the power to make consequential orders to do what is 'practically just' between the parties, whether:

- Taking account of diminution (decrease) of value
- Ordering pecuniary (financial) restitution of disposed items, or
- Ordering rescission 'on terms'

Example of remedy – breach of fiduciary duty

- *Maguire v Makaronis* (1997)

- Maguire solicitor of Makaronis and ended up being mortgagee (lender in mortgage) as well as when trying to secure him finances, when Maguire tried to sue Makaronis for monies, Makaronis counter-claimed Maguire was in a position of conflict due to his dual roles
- Held breach of fiduciary duties and best thing to do in case was to completely rescind mortgage as far as possible
- However, rescission made available on condition that Makaronis repaid loan plus interest as stipulated by court

Transaction may be only partly set aside (not entirely)

- The transaction may only partly be set aside (e.g. adding conditions) to prevent one party from obtaining an unwarranted benefit at the expense of the other
 - *Commercial Bank of Australia Ltd v Amadio (1983)*
 - *Vadasz v Pioneer Concrete (SA) Pty Ltd (1995)*

Bars to Rescission

Where there is a bar to rescission, restitution will not be possible.

If contract is executory (where all parties have done is exchange promises) then restitution is not an issue

If intervening third party (bar to rescission) (e.g. if third party buys the shares from D before P rescinds)

- Property cannot be restored if an innocent third party has obtained rights to it *before* the rescission
- A defendant who becomes the owner of property under a voidable contract will be able to transfer title to third parties until the contract is rescinded
 - *Car & Universal Finance Co Ltd v Caldwell [1965]*
 - Rescission effective before an innocent third party bought the plaintiff's car, therefore plaintiff could claim car from innocent third party

If plaintiff affirms contract (bar to rescissions) (e.g. failing to take steps to repudiate contract)

- If a plaintiff has election to affirm the contract, then rescission is barred

If lapse of time (bar to rescission)

- The plaintiff must rescind the contract in a timely matter

Election (how to rescind)

NOTE: Also relevant to breach of contract

A binding election requires:

1: Full knowledge of the 'material facts'

- I.e. at least knowledge of the vitiating conduct
- Maybe also knowledge of the right to rescind

2: Unequivocal conduct indicating affirmation or rescission/termination

- Conduct is judged objectively, and there is no need for the plaintiff to subjectively intended to elect
- *Sargent v ASL Developments Ltd (1974)*

Examples of election by conduct

- Sending item back to defendant (rescission/termination)
- Continuing to perform after knowledge of vitiating conduct/breach (affirmation)
- Taking no action after knowledge of vitiating conduct/breach (affirmation)
- Failing to take steps to repudiate the contract (affirmation)

If defendant cannot be found

- *Car & Universal Finance Co Ltd v Caldwell [1965]*
 - o Caldwell owned jaguar
 - o Norris convinced him to sell for 965 pound cheque and 10 pound deposit
 - o When he tried cashing cheque it was dishonoured
 - o Norris sold car to dealers who sold it on and was sold on and on to Car & Universal Finance who bought car with good faith
 - o Issue whether Caldwell validly rescinded before car acquired by bona fide purchaser without notice
 - o Held valid rescission and Caldwell could claim from innocent third party

Mistake: Non Est Factum

“This is not my deed” **extremely hard to establish**

Non Est Factum allows a plaintiff to avoid a **signed** legal instrument which is radically different to what the plaintiff thought they had signed

- *Petelin v Cullen* (1975)

Elements

1: Legal instrument (contract, deed, etc.) signed by the plaintiff

2: Plaintiff unable to read/understand the instrument

This defence is available to those who are unable to read owing to blindness or illiteracy and who **MUST** rely on others for advice as to what they are signing

- The plaintiff must have **no fault of their own inability** to understand the purport of a particular document
 - o E.g. not due to his/her carelessness
- The party must show that they signed the document with the belief that it was radically different from what it was
 - o *Petelin v Cullen* (1975)
 - o Radically different = ‘very substantial’ – *Saunders v Anglia Building Society* [1969]

Blindness (can be temporary blindness)

- *Saunders v Anglia Building Society* [1969]
 - o G was 78 and broke her spectacles, signed a document without understanding the content
 - o L lied to her saying the documents were to confirm a gift of her house to her nephew
 - o But the document actually allowed L to grant mortgage over property in favour of A
 - o When L defaulted on mortgage, A claimed to repossess house
 - o G died before litigation, was represented by S
 - o Founding against G/S plea of non est factum because it was G’s fault she didn’t understand the content and that ‘radical difference’ between what was signed and what was thought to be signed must be ‘very substantial’ which wasn’t in this case

Illiteracy

- *Petelin v Cullen* (1975)
 - o C sought to buy land from P who was an Italian immigrant who spoke little English
 - o C purchased option from P exercisable in 6 months with consideration of \$50

- After expiration period C sent P letter with another \$50 to buy option for another 6 months
- C's agent asked P to sign document specifying he agrees to sell another option
- P signed under belief that it was receipt for original option
- C sought to exercise new option but P refused
- P argued non est factum
- Court held for P and contract was set aside

Incapacity (can be caused by intoxication)

- *Ford v Perpetual Trustees Victoria Limited (2009)*
 - F had congenital intellectual impairment and was illiterate
 - Signed loan agreement and mortgage with P for \$200K loan secured by F's residential property
 - Loan was used to purchase cleaning business to benefit F's son who manipulated F to enter into transaction
 - Business failed and F defaulted on loan agreement
 - P commenced proceedings for F's property
 - Held F didn't understand what he was signing and was manipulated by son and he didn't fail to take precautions that a person in his position would have
 - Thus non est factum

3: The plaintiff is:

a: Subjectively mistaken about the legal effect of the instrument; or

- Refer to element about
- Problem question: as analysed above, P was clearly subjectively mistaken about the legal effect of the instrument

b: Unable to comprehend the legal effect of the instrument

- Refer to element about
- Problem question: as analysed above, P was unable to comprehend the legal effect of the instrument

4: When claiming against innocent third parties (e.g. if shares were subsequently sold to an innocent third party before claim) the plaintiff was not careless

The plaintiff must not have merely failed to take reasonable precautions in ascertaining the character of a document before signing it

- Must not have been careless
- *Petelin v Cullen (1975)*

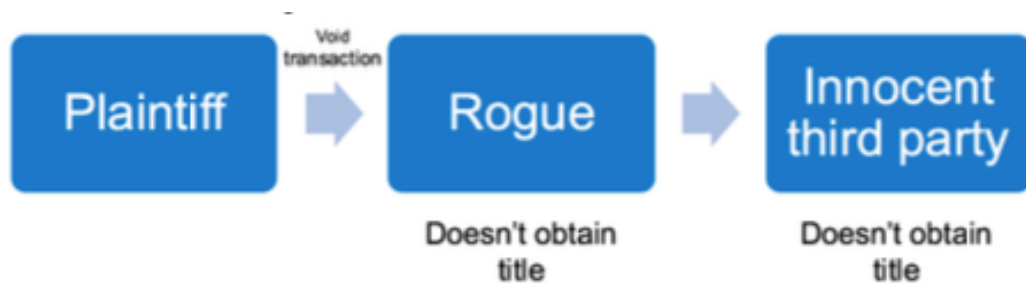
'Reasonable precautions' will depend upon the facts of the case, for example:

- Take reasonable steps to verify the contents of an instrument being signed
- Having a trusted person read/translate the instrument

- Wearing glasses or other aid if reasonably available

If established – TRANSACTION VOID

If non est factum is established, then the transaction is *void ab initio* (don't say it is *voidable*)
A void transaction is of no legal effect



If innocent third party obtained title prior to claim (e.g. party buys shares off D but P successfully claims non est factum)

- The innocent third party must return the shares/property/etc. back to the plaintiff

DISCHARGE/TERMINATION OF CONTRACT

Breach

Breach and Effect of Termination for Breach

Breach can occur when a party does not perform in accordance with the terms of the agreement (including failing to perform on time), or does not perform at all.

Breach of contract *may* give the non-breaching party a right to terminate a contract if:

- A provision of the contract permits discharge for breach in the circumstances
 - o E.g. might provide that in the event of failure to perform by a specific date the other party may terminate the contract
- If the other party repudiates the contract – renounces their obligations under it
 - o E.g. by an indication they will not perform their obligation
- The breach is sufficiently serious
 - o Remember distinction between condition and warranty

When a party to a simple contract elects to terminate the contract, it is not rescinded from the beginning. Both parties are discharged from further performance by the rights which have already been unconditionally acquiring are not discharged. Rights and obligations arising from partial execution and causes of actions accrued from the breach alike continue unaffected

- *McDonald v Denny's Lascelles Ltd (1933)*
 - o Contract for sale of land
 - o Terminated because vendor unable to complete
 - o Purchaser been making instalment payments, missed on before it was terminated
 - o Argued they were owed third party instalment payment
 - o Held vendor entitled to sue for payment unless there was a 'total failure of consideration' which there was, thus wasn't entitled

Termination for breach

Express right to Terminate for Breach

Express rights given by contract to terminate breach. Whether a contract gives rights to terminate for the other party's breach depends upon construction of the terms.

Must ask:

- Has the breach occurred?
- Has the innocent party exercised its right to terminate in accordance with the requirements of the express right in the contract?

The express right to terminate is generally construed strictly

- *Shevill v Builders Licensing Board (1982)*
 - Commercial lease (language of termination in lease contracts 'right to re-enter premise' and 'forfeiture' of the lease)
 - Tenant experiencing financial difficulties and constantly late paying rent, many instances where tenant paid up outstanding rent but then fell in arrears against, wasn't meeting obligations
 - Landlord terminated
 - Issue was whether landlord could claim usual measure of contract damages following termination
 - One entitlement when contract terminated for breach is claim for loss of future profits aka damages for loss of bargain, e.g. loss of future rent
 - Landlord claimed for rent in arrears and also expected rent
 - HC only allowed damages for arrears, not able to claim expected rent under express right to terminate which didn't allow payment to innocent party for unpaid expectation
 - Would've been entitled to expected rent if landlord able to terminate for breach under implied right
 - Court won't award damages for loss of bargain unless contract very clearly says so
 - Since then, industry redrafted standard express term to allow for payment of expectation damages called a *Shevill's clause*

The express right to terminate must follow the contractual provision

- *Commonwealth v Amann (1991)*
 - A won tender to provide coastal surveillance flights over north of AUS
 - Required (inter alia) the purchase and special fitting out of airplanes
 - Deadline extended by C to 12 September 1987
 - Apparent that A wasn't going to be ready to start operations by then, C waited until 12th to terminate the contract
 - Clause provided for show cause procedure which was the *exclusive procedure for terminating contract*
 - C had not asked A to show cause but simply terminated contract immediately
 - Held C wrongfully terminated contract and C in breach

Implied (Common Law) Right to Terminate for Breach

(If express rights exists = generally no need to consider implied right)

Common law right is important when there is no express right and where the aggrieved party is claiming loss of bargain damages (covered in remedies). The rule that one may terminate the contract for a sufficiently serious breach by the other party is implied into every contract.

The rule may be supplied, modified, or replaced by express terms. A question of construction, i.e. what did the parties intend?

Implied right under common law to terminate if:

- Breach of essential term (breach of condition)
- Serious breach of an intermediate term
- Repudiation – showing an unwillingness/incapacity to continue with the contract

TO ESTABLISH – move onto types of breach below

Types of Breach

Actual breach

Breach of a Condition

(See classification of terms to determine whether it is a condition/intermediate term/warranty)

Innocent party has right to elect to:

- Affirm and sue for damages, or
- Terminate and sue for damages for lost benefit due to non-completion

Examples where breach of condition contracts that were terminated

- *Tramways v Luna Park (1938)*
 - o T entered into agreement with L to advertise it for 3 seasons
 - o Express term of agreement said advertisements to be on for at least 8 hours a day every season
 - o L found out during season 2 T didn't advertise for minimum 8 hours a day
 - o T admitted to it but argued they were displayed on average 8 hours a day
 - o L said was breach of condition and argued no longer bound by contract
 - o T continued to display ads anyway
 - o When L didn't pay T sued
 - o L argued breach of contract and was terminated
 - o Court held 'minimum of 8 hours a day' was a condition due to wording ('we guarantee' and circumstances (paying only to begin after every single ad board goes up thus completeness of display contracted for was essential element in contract) thus condition breached and L had right to terminate and that L had repudiated contract
- *Associated Newspapers v Bancks (1951)*
 - o A hired B to draw comics for newspaper, term in contract specified B's drawings to be displayed on full page each week on the front page
 - o A displayed on third page for 3 days
 - o B notified A he considered contract breached and that he was terminating it
 - o A sought injunction
 - o Court held clearly was a condition and was breached (followed *Tramways* case) and B was entitled to terminate contract which he did imply repudiate

Breach of a warranty

The innocent party was only seek damages, only of an amount to fix the breach

Breach of an intermediate term

Consequences will depend on the seriousness of the breach. It may allow for terminate as well as damages.

Examples where intermediate term not enough to be a condition

- *Hong Kong Fir Shipping Co Ltd v Kawasaki Kishen Kaisha Ltd [1962] (English case)*
 - H owned ship and chartered it to K, clause in agreement guaranteed ship would be in good condition, ship was not in good condition and repairs caused a lot of delays for K, K notified H that good condition was breached and elected to terminate contract, H sued for wrongful termination
 - Court held not condition because was not a serious breach because delays not great enough to deprive J of substantial benefit
 - K was still able to get benefit from contract – would have been breach of condition if ship didn't function at all

Example where contract terminated for breach of intermediate term

- *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007)*
 - For an aggrieved party to be entitled to terminate contract for breach, the breach must be considered **serious** or breach must deprive aggrieved party of substantial benefit

Breach of time term

E.g. failure to deliver on time

If time not specified

- Then it must be completed in a reasonable time (which will depend on the circumstances of the case)
- It is highly unlikely that time will be viewed as being a condition
 - *Perri v Coolangatta (1982)*

If time is expressly specified

- At common law time was usually classified as a **condition** (treated as time is of the essence)
 - *Bunge Corp v Tradex [1981]*
- However, at equity the contract cannot be terminated if late performance is only a minor breach that did not deprive the other party of the benefit of the contract and it was clear that both parties did not intend for time to be of the essence
 - *Legione v Hateley (1983)*
- Equity's approach is now found in **section 13 of the Conveyance Act 1919 (NSW)**
 - Provides that if the court of equity would not regard a particular time stipulation as a condition, then the term is to be treated that way by the law

A time stipulation will be a condition where:

- The contract expressly says so
 - o "Settlement on or before 25/1/2017 and in this respect time is of the essence"
- As a matter of construction it is what the parties intended
 - o If the type of transaction indicates parties intended time to be strictly complied with
 - o E.g. buying shares on stock exchange
- *Stickney v Keeble* [1915]
- Example where treated as condition
 - o Mercantile or similar contracts such as commercial contracts are often treated as conditions due to context
 - *Bunge Corp v Tradex* [1981]
- Example where **not** treated as condition
 - o Equity often views the date of completion for sale of land to be a warranty if there is no indication that time is of the essence

'Notice to complete' was given

- Where the contract stipulates a time for performance, however time is not of the essence and there is a failure by one party to perform their obligations under the contract by the appropriate time, the innocent party may still gain a right to terminate making time of the essence through giving defaulting party a 'notice to complete'
 - o *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989)
 - Lease register - L sent letter of demand asking compliance within 14 days, left when no compliance, normally notice would create time is of essence but didn't give shopping centre sufficient time – time specified unreasonable as registration of lease can take longer than 14 days and notice didn't communicate consequences – lessor's failure to comply with notice didn't give lessee right to terminate – court held however lessor's conduct as a whole sustained inference of repudiation

An effective notice must (per *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989))

- Identify breached time provision
- Advise action now required to comply
- Stipulate a reasonable time period to comply
 - o As per *Louinder v Leis* (1982) a reasonable time period will depend on:
 - Subject matter of contract duty
 - What remains to be done at date of notice
 - Expert advice about time required to perform

- Whether aggrieved party has been continually pressing for performance
- Any unnecessary delay by party in breach before notice given
- Specify the right to elect to treat the contract at an end if there is no compliance

Repudiation/Anticipatory Breach

An innocent party can terminate a contract if the other party repudiates the contract either at the time of performance or before performance falls due (anticipatory breach)

Repudiation refers to a party's conduct indicating an intention to no longer be bound by the contract or to fulfil it only in a manner substantially inconsistent with their obligations

- *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd v Anor (2007)*

If so the innocent party is entitled to accept the repudiation, thereby discharging themselves from further performance (electing to terminate contract) and sue for damages

- *Shevill v Builders Licensing Board (1982)*

This is not 'lightly inferred'. Repudiation must be of a condition or at least multiple breaches of warranties (e.g. time)

- *Progressive Mailing House Pty Ltd v Tabali (1985)*

Actual breach vs Repudiation

Objective assessment: what would a reasonable person in the position of the plaintiff make of the defendant's conduct?

Actual breach	Repudiation
<ol style="list-style-type: none"> 1. There must be an actual breach. 2. Right to terminate depends upon classification of breached term. 	<ol style="list-style-type: none"> 1. No need to show an actual breach – but often proof of actual breaches is compelling evidence of repudiation; and 2. The focus is the defaulting party's conduct: has s/he behaved in such a way that a reasonable person would conclude that s/he will not perform the contract as required?

Examples of repudiating conduct

Repudiating conduct	Case
Failure to perform an essential term that had no time specified for performance	<i>Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd</i> (1989)
Multiple breaches of warranties	<i>Progressive Mailing House Pty Ltd v Tabali</i> (1985)
Terminating a contract without following the procedure provided in the contract	<i>Amann Aviation Pty Ltd v Commonwealth of Australia</i> (1990)
Persisting in performance of a contract based upon an incorrect interpretation	<i>Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd</i> (1938)

Express repudiation

- No longer intended to be bound by the contract
- E.g. express statement saying they're not willing

Implied repudiation

- By actions make it impossible to perform the contract
- E.g. where a party breaches a contract by unjustifiably interpreting the contract in an erroneous way
 - o Law unclear where one party erroneously interprets the contract

If implied repudiation by conduct

- An objective test is applied on whether the reasonable person would believe the party's conduct indicates they repudiated the contract
 - o *Laurinda Pty Ltd v Capalaba Park Shopping Pty Ltd* (1989)
- Total disability to complete the contractual obligation must be proved in fact
 - o *Universal Cargo Carriers v Citati* [1957]
 - Contract for U to carry C's cargo on ship sailing from Basrah carrying 6000 tonnes of metal to Buenos Aires - \$28/tonne, price of scrap metal went up between contracting, takes many days to load ship fully
 - Three days before ship meant to leave C's cargo still haven't arrived at dock for loading so U cancelled contract and ship sailed
 - Expert said impossible to load 6000 tonnes in 3 days thus reasonable person in U's position would have concluded C repudiated thus lawful termination – 'anticipatory breach means simply that a party is in breach from the moment that his actual breach becomes inevitable'
 -

If wrongful repudiation

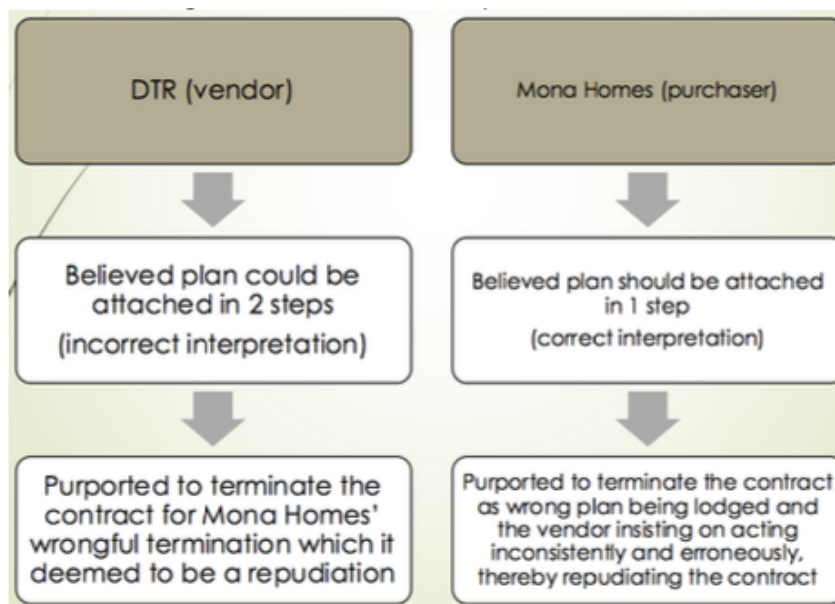
E.g. If party thought it was breach of condition and terminates, and court decides it was a breach of warranty, it is wrongful termination (they repudiated)

- Where a party has relied on an invalid ground for terminating may be able to justify the termination by reference to other grounds that may be available

- Courts have looked to the bona fide of the person relying upon an incorrect interpretation to determine whether they have in fact repudiated

DTR Nominees v Mona Home (1978)

- DTR had large amount of land to subdivide – 9/35 blocks purchased by M to build homes – under contract
- DTR to have whole 35 subdivided and a plan submitted to contract – DTR only subdivided M's area – M called it repudiation as essential time term
- Court held wasn't as there was still 12 months available for DTR to get plans lodged and approved and DTR had honestly believed that interpretation
- There was express right to rescind in event of non-registration within 12 months



There are cases where a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. IN either event an intention to repudiate the contract could not be attributed to him.

OUTCOME: DTR didn't repudiate, so M's attempt to terminate was repudiation. DTR not in position to terminate because incorrect interpretation indicates not ready, willing and able to perform own true obligations. Therefore, *neither party had properly terminated the contract so was ultimately found to be abandoned.*

If anticipatory breach

A party who by words or conduct indicates an intention not to perform a contractual obligation (promise) before performance falls due commits an anticipatory breach

- If so, the innocent party can act as though the breach anticipated by the conduct of the other party has actually occurred
- They need not wait until this event before terminating or seeking specific performance

○ *Universal Cargo Carriers v Citati* [1957]

- In order to terminate for anticipatory breach, they must be ready, willing and able to perform their contractual obligations

Example:

- *Foran v Wright* (1989)

- Sale of land, due to be complete 22 June and time was of essence – June 20 vendors advised purchaser they unable to settle on 22nd because unable to complete registration of a right of way required by contract – purchasers chose not to terminate for anticipatory breach
- June 22 neither party attempted to settle - June 24 purchasers purported to terminate contract and claim return of deposit, now relying on actual breach (because chose not to terminate for anticipatory breach)
- Vendors contended that purported termination invalid because on date purchasers didn't have funds available and were not themselves ready and willing
- HC held purchasers validly terminated and entitled to return of deposit as purchasers not 'substantially incapable' of raising finance



Election

A breach of an essential term – or conduct amounting to repudiation – does not automatically terminate the contract. The innocent party must elect to either terminate or affirm the contract.

Knowledge needed to elect

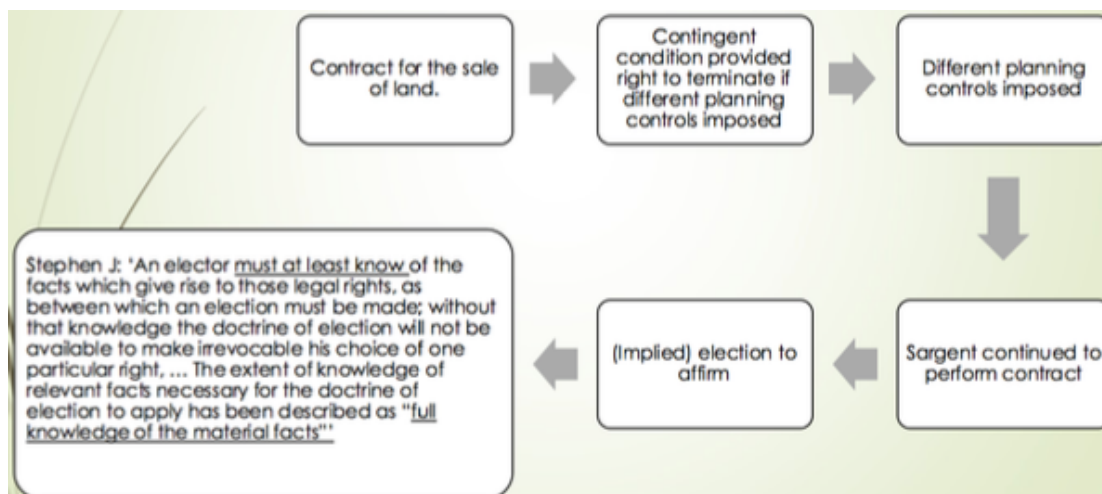
- Knows facts giving rise to right to elect
- Know that the facts give legal ability to terminate

If electing to terminate under express contractual right

- Knowledge of legal ability is assumed

Sergent v ASL Developments (1974)

- S agreed to sell land to A – contract contained contingent condition providing either party had right to terminate if certain planning controls over land different than those described in contract
- Planning controls imposed that were different to those described in contract, thus parties had contractual right to elect to terminate
- After controls imposed however, S continued to contract obligations
- Accept payments from purchaser, requested pay rates and applies to change land to Torrens Title
- 32 months after contract entered into, S purported to terminate under contingent conditions
- Held elector must have full knowledge of material facts giving rise to legal rights which they did, so by S continuing to perform after becoming aware that different planning controls had been imposed demonstrated an election to affirm the contract



If electing to terminate under implied common law right

- It is debateable whether actual knowledge of legal ability is needed or only constructive knowledge is required

How to elect

If under express right

- Follow procedure under contract – *Commonwealth v Amann (1991)*

If under implied common law right

- Must give notice (unequivocal action) (actual or constructive communication)
- If time if not of the essence, give notice making time of essence, then terminate for non-compliance with notice

Restrictions on rights to terminate

Ready, willing and able to perform (only is implied common law right – if express right, no need for this – *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd [2009]*)

If actual breach:

- Where both parties have obligations that are concurrent, the innocent party must tender their performance of their obligations to the other party terminating for breach (e.g. delivery of good to buyer)
 - o Unnecessary to be ready and able if it would be futile
 - o *Mahoney v Lindsay (1980)*

If anticipatory breach (repudiation accepted)

- The innocent party must be ready, willing and able to perform at the time of repudiation (must not be 'substantially disabled' from performing at the time set for performance)
 - o *Foran v Wright (1989)*

If anticipatory breach – repudiation not accepted

- It may not be required to perform obligations that fall due after repudiation
- If the party later termination for breach, then they are usually only required to show they were willing and ready to perform at the time of anticipatory breach

The innocent party will lose the right to **terminate** if:

- Equitable principles
 - o Estoppel (including waiver or affirmation)
- Delay: the right to terminate will be lost if exercised with undue delay – the failure to terminate beforehand could be taken as affirmative
- Relief against forfeiture (not assessable)
 - o There is an equitable jurisdiction to restrain termination of the contract for a breach of an essential time provision, where the breaching stands to lose something of value if the contract is terminated for their late performance
 - *Tanwar Enterprises Pty Ltd v Cauchi (2003)*

The innocent party will lose the right to **affirm** if:

- Further performance is impossible
- Duty to mitigate
- Frustration
 - o *Avery v Bowden (1856)*
- Where cooperation of other party required or there is no legitimate interest continuing with performance

If cooperation of the other party is required or there is no legitimate interest continuing with performance

- They ought not to be allowed to saddle the other party with an additional burden with no benefit to him/herself
- *White & Carter (Councils) Ltd v McGregor [1962]*

The court may cease to allow an innocent party to enforce his/her contract according to strict legal terms if the conduct is wholly unreasonable

- *Clea Shipping Corporation v Bulk Oil International Ltd [1984]*

Performance / Actions for payment

A party must perform according to the standard required within the required time.

If no specified standard of performance

- The standard required will be determined by construction or form an implied term

If no specified time

- It will be what is reasonable in the circumstances

If no specified order which parties are to perform obligation

- It will be a matter for construction

If breach of contract established and only partially performed

- If a breach of contract is established and the contract has only been partially performed, the aggrieved party may receive damages and elect to continue with performance
- If the other party objects to continued performance, the aggrieved party may seek specific performance
- The aggrieved party may also seek to terminate the contract – but will only succeed if the breach gives rights to terminate

Termination/discharge

- Discharged prospectively
 - o A contract is effective up to the point of termination (e.g. if title as already passed – new owner gets good title)
 - o Difference between vitiating factors which cause rescission (contract never existed) however if termination, everything prior to the termination stands

The contract is not undone. It is a valid and enforceable contract that continued to bind the parties. Parties are only excused from performance of future, main obligations. Acts of past performance remain unaffected

- *McDonalds v Dennys Lascelled Ltd (1933)*

Exceptions for termination:

While primary obligations are discharged, it may be in some circumstances that secondary obligations may continue to bind the parties (terms that remain after the contract). In

Heymans v Darwins [1942] the court held that clause lived on

- Exclusion clauses
- Confidentiality clauses
- Restraints of trade clauses
- Agreed damages clauses
- Dispute resolution clauses
- Force Majeure clauses

Vitiating factors

- Discharged **retrospectively**
- The contract is undone
- Parties are to be restored to their pre-contractual positions by returning anything that was transferred under the contract
- However, this is still subject to the rules of rescission
 - o *McDonalds v Dennys Ltd (1933)*

Termination by performance: classifications

Dependant obligations (usually this classification)

- The obligation for one party to perform an obligation is dependant upon the other party performing a particular obligation
- E.g. obligation to pay wedding singer will depend on when they do the gig

Concurrent obligations

- E.g. conveyancing
- The performance of obligations is dependant upon the other party performing at the same time

Independent obligations

- The parties can call on one another to perform at any time
- It is not condition on one party to have performed before the other

Termination by performance

Performance for a contract should be exact for insignificant defects. Some contracts require **exact performance** however others may allow discharge by **substantial performance**. The consequences for failing to perform will need to be determined.

Element 1: Determine whether the contract is entire or divisible

If entire contract

- E.g. one lump sum after work completed
- A party must perform all their obligations under the contract before being entitled to the contract payment/performance from the other party

Example:

- The contract may expressly state 'total purchase price payable only after work is fully completed'
 - o Thus the contract provides for a lump sum and there is no provision for a *pro rata* formula (e.g. \$500 for 1 unit completed)
 - o In this case, the party is only to be paid the lump sum upon the completion of performance
 - *Hoenig v Isaacs [1952]*
 - H owned flats, I agreed to decorate for 750 pounds payable by 2 instalments and balance on completion, H paid 400 pounds

then refused to pay other 350 because of poor workmanship that led to defects costing 56 pounds

- Court held it was an entire performance contract, and therefore H had to pay entire 750 pounds as agreed minus cost of defects

If divisible contract (e.g. payment by instalments)

- There is a divisible contract if the contract price can be apportioned between the obligations/performance assignment to the other party

Government of Newfoundland v Newfoundland Railway Co (1888)

- Construction of railways, each 5 miles Gov. was to transfer 25 000 acres of land
- Contract terminated, sued for money owed for every 5 mile completed, had done 17
- Court held they could be paid for this part

Steele v Tardiani (1946)

- Use this because other case is English
- Contract infinitely divisible, each divisible applications is entire and is only satisfied by complete performance
- Had to chop wood into certain lengths but chopped at wrong lengths, farmer refused to pay for what they had done
- Court held was divisible
- Court held they could claim quantum meruit because they were never corrected on their work

If contract for building house is usually divisible

Element 2: Determine whether the contract requires exact performance

The general rule is that the contract price is only payable AFTER exact performance of the whole contract.

Where a party agrees to be bound by obligations for a lump sum, they may only usually sue for the payment of substantial performance – the court will not find in favour of a party who had made an express agreement and failed to perform.

Cutter v Powell (1795)

- Signed as merchant on ship, would be paid if he does duties as second mate, starts 2 month voyage, died 6 weeks in
- Wife made claim for salary of entire trip, argued he didn't perform
- Refused to pay any part of the sum, wife unsuccessful
- He had not fulfilled obligation as it was an entire contract

If divisible contract

- Work out whether each divisible contract requires exact performance

Exceptions:

- Divisible contract (e.g. payment by instalments)
 - o If a contract is able to be divided into multiple separate obligations, it may be that it is each separate obligations that requires exact performance
- If de minimus non curat lex
 - o The law does not concern itself with trivialities
 - *Shipton Anderson v Weil Bros [1912]*
 - Purchaser could not reject wheat for being 55 pounds over the 4 950 tonnes required
 - Was trivial deviation

Element 3: If substantial performance

The court may prefer a less strict requirement of substantial performance

- Unless the breach goes to the root of the matter (e.g. abandonment of work when it is only half done) the employer cannot resist payment of the price
 - o He must pay it and bring a cross-claim for the defects and omissions, or alternatively set them up in diminution of the price
 - o It is always open to the parties by express words to make entire performance a condition precedent
 - o *Hoenig v Isaacs [1952]*
 - I employed H to decorate and furnish flat, payment of 740 pounds instalments with balance on completion, when finished I refused to pay rest of 350 pounds due to defects which cost 55 pounds to fix
 - Only minor, defect rectifiable and small in cost, builder substantially filled obligations
 - Court held substantial performance, entitled to payment of remaining price with deduction for cost to remedy defects which was 55 pounds

Substantial performance is to be determined by assessing:

1: The nature of the defect (question of fact)

2: Whether performance is near completion

3: Are defects rectifiable and are costs minor or proportionate with the purchase price

- Cost to rectify roughly <10% according to *Bolton*
- *Bolton v Mahadeva [1972]*
 - o Hot water service – 174 pounds over 560 pounds
 - o Court held not substantial performance – damage too great
 - o If rectifying defects is something that can't be done by some slight amendment of the system, then contract is not substantially performed

4: Is what was provided actually what was contracted for?

- *Connor v Stainton (1924)*
 - o Use this for **authority**
 - o Contract to build fence with post 12 feet apart, built up to 18 feet apart

- Held cost of rectifying would have been half of purchase price but he fixed it without cost to rectify but it was an entirely different character from that agreed
- E.g. if using plastic instead of wood that was agreed on to build fence
- *ACN 002 804 702 (Formerly Brooks Building) v McDonald [2009]*
 - 'It is also relevant to ask how significant is the breach and did the owner receive substantially the whole of the benefit which the contract was intended to provide?'
- *Cordon v Lesdor [2010]*
 - "It must at least encompass that the works said to have been completed substantially are reasonably fit for their contemplated occupation and use"

If substantial performance

- If a entire contract there is not entitlement to the contract price
- If substantial performance is of a divisible contract the contract price is for the divisible part less set off for rectification of defects

Element 4: If voluntary acceptance of partial performance

If a party freely agrees to accept partial performance then they are required to pay for the work completed

- The party must have had the choice to freely accept or not
- *Sumpter v Hedges [1898]*
 - Builder abandoned agreement to build 2 houses half way through completion because of costs
 - D had to complete work himself with left over materials, builder sued for work already completed
 - Court rejected as it was entire contract, was not D's fault, there was no promise to pay for partial work
 - Builder said it was accepted voluntarily
 - Can only be inferred in D had option to accept or not
 - In this case D had no choice but to accept partial performance because he was left with a half completed house on his land
 - Not required to pay for labour but had to pay for materials left on property which he used because builder claimed quantum meruit

Element 5: If obstruction of performance (discharges the other party)

If there is an obstruction of performance, it discharges the other party

- *Startup v McDonald (1843)*
 - S selling 10 tonnes of oil to M to be delivered before end of March but M refused to accept on last day because it was delivered 8.30pm at night
 - Obstructed by purchaser, S entitled to damages for non acceptance

Element 6: If waiver/estoppel

A party under a contract is free to waive complete performance of an obligation that is for their benefit. If the party waives the need for the other party to perform their obligation either at all or to the level required by the contract, the waiving party cannot reverse the waiver.

If no other remedies available, may look to equity (quantum meruit) (not assessable):

- If there are no other remedies available, the party may look to equity and the specific restitutionary claim of 'Quantum Meruit' (as much as they are worth – where there is part performance, the party may be provided with something for what they have completed)

ELEMENTS

- Unenforceable/terminated contract
 - o No claim can be made in quantum meruit for a valid and enforceable contract
- Request by the defendant for goods/services
 - o Usually this is evident
- Where an inconvertible benefit is bestowed on the defendant that is freely accepted
 - o This may be problematic with breached contracts as partial performance is generally not beneficial and often the innocent party has no choice but to accept
 - o Only option was to claim quantum meruit for the materials left on land; allowed to claim quantum meruit as they were never corrected on cutting wood in wrong length
- Where the defendant would be unjustly enriched at the expense of the plaintiff if a reasonable amount is not paid by the defendant
 - o Usually this is evident.

ALTERNATIVE: ACTION FOR DEBT (Not Assessable)

A contracting party who has performed their obligations may claim money owed (contract price) under the contract through an action for debt following the termination of a contract rather than through a claim of damages.

- A party may even recover a debt where the party has breached the contract and the contract has been terminated as a result of the breach
- The party the debt is being claimed against needs to prove any defence of payment.
- If the party claiming an action in debt was not in breach, they cannot claim an action for damages for the same sum.

Requirements (for action for debt):

- The contract must impose an obligation to pay a certain/ascertainable sum of money, and the right to the payment of the sum must have been accrued
 - o *Westralian Farmers Ltd v Cth Agricultural Service Engineers Ltd (1936)*
 - o A debt will accrue where the consideration for the payment in question has been provided.
- The party generally must have earned the payment by performance

- What amounts to sufficient performance to enable an action for debt depends on the distinction between entire and divisible obligations and the doctrine of substantial performance

If entire obligation:

- The entire obligation must be wholly performed in order for a party to be entitled to the payment (*Cutter v Powell* (1795))

If divisible obligation:

- The party will be entitled to payments for each instalment, however, each instalment may require entire or substantial performance

If substantial performance:

- Substantial performance will allow the party to recover the contract price even if the obligations have not been fully performed as long as performance is substantial
- Performance and the nature of the defects will be considered to determine whether the performance is substantial (e.g. are defects of minor or trivial nature, or was it substantially underperformed?)
 - *Hoenig v Isaacs* [1952]

If DEPOSIT made:

- If contract incomplete because of fault of purchaser (purchaser not entitled to repayment):
- A purchaser cannot abandon his contract and recover the deposit as it would enable him/her to take advantage of his own wrong
 - *Howe v Smith* (1884)
 - Contract for sale of real estate for 12,500 pounds, contract provided for payment of 500 pounds as deposit and in part payment of purchase money, purchaser failed to complete contract, vendor rescinded and resold property
 - Court held purchaser not entitled to repayment of deposit;
- If contract incomplete because of fault of vendor (seller) (purchaser entitled to repayment):
 - If the vendor was in breach and does not complete the transaction, the purchaser is entitled to repayment of the deposit.
- If deposit due but has not been paid yet when vendor terminates due to purchaser's breach:
 - If a deposit is due but is not paid when the vendor terminates the contract due to the purchaser's breach, the vendor cannot recover the deposit as a debt
 - *Lowe v Hope* [1970]
 - There are however, some authorities that state otherwise, and that the vendor possesses the right to the deposit
 - *Farrant v Leburn* [1970]

Agreement

Termination by agreement can consist of

- Express/implied term that automatically terminates the contract or gives one party the right to do so
- An agreement between the parties - after the contract has commenced – to terminate it
- Novation, Waiver, Abandonment

Termination by term in original agreement

Express term/power

- A contract may include an express term providing how the contract may be terminated
- This term:
 - o May specify a fixed time period where the contract will automatically 'expire' or
 - o May provide a broad discretionary right to terminate 'at will', or
 - o May provide a broad discretion right to terminate by giving a fixed period of notice in situations where there is
 - No existing problem with current performance (e.g. employment contract) and
 - An existing problem with current performance (e.g. the other party in breach)

Implied term/power

- There may be implied power to terminate a contract if there is no date of completion (contract ongoing/indefinite relationship)
- There must be reasonable notice of termination given
- The period of notice will vary depending on the circumstances
 - o *Crawford Fitting Co v Sydney Valve & Fittings Co (1988)*
 - 6 months notice was sufficient
 - "Period of notice must be sufficiently long to enable the other party to deploy their labour and equipment in alternative employment, to carry out commitment, to bring current negotiations to fruition and to wing up the association in a business-like manner"
- Not implied in every case of an open-ended contract that such a term is to be implied
 - o *State Bank of NSW v Commonwealth Savings Bank Ltd (1985)*
 - Agreement in 1931 that Cth bank would acquire this bank, share equally in profits
 - In 1982 Cth bank wanted to terminate due to alleged breach by State Bank
 - Indirectly moved into savings industry and completion
 - Had been intended for long term – needed reasonable notice

Contingent Conditions

NOTE: The word 'condition' here just means conditional, not a term that is an essential promise

Parties may include a contingent condition which is outside the responsibility of the parties (e.g. approval of finance, licenses, weather conditions). A contract may be terminated where there is a failure of a contingent condition.

Condition precedent

- A condition precedent is a term in an agreement that provides either that no contract arises until a specified event occurs **or** that performance of the agreement must wait until the specified event occurs
- *Perri v Coolangatta Investments*
 - o Had to sell property before buying another
- *Meehan v Jones*
 - o Conditional upon obtaining finance
 - o Duty to act honestly

Termination by subsequent agreement

Parties may terminate a contract through a subsequent agreement where each party agrees to release each other from the contract. The agreement must comply with the rules of contract formation (includes consideration)

1: Mutual/Bilateral Discharge (contract performed or partially performed by both parties)

- Each party may agree to release the other from performing - the rest of the contract to be discharged
 - o *Summers v Commonwealth (1918)*
- There are no formal requirements to discharge
- A party may orally discharge a contract required to be in writing (but must comply with writing requirement if carrying the contract rather than terminating)
 - o *Tallerman and Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1956)*

2: Release known as unilateral discharge (compromise of cause of action)

A promise to release the defaulting party needs to be supported by consideration. This type of release is called **accord and satisfaction**

- The purchase of release from an obligation by means of valuable consideration rather than actual performance of the obligation itself
- The accord is the agreement where the obligation is discharged
- The satisfaction is the consideration making the agreement operative
 - o *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd [1933]*

Accord executory

- The original contract is not terminated until the released party provides the satisfaction promised under the accord
- If the released party does not provide the satisfaction, the releasing party can sue on the original contract
- But, the releasing party cannot sue under the accord executory

Accord and immediate satisfaction

- The original contract is immediately terminated as the releasing party accepts the released party's **promise** as full satisfaction
- If the released party does not perform the promise, the releasing party cannot sue on the original contract – must sue on the new contract (the accord)

Accord executory or accord and immediate satisfaction?

- It **depends on what the parties bargained for**
- E.g. If a new promise is enough to discharge the original contract, but it is not acted upon then the innocent party has to sue for breach of that new promise
 - o If execution of the new consideration was intended before release of the old contract, the innocent party can sue on the old contract if the consideration remains unexecuted
 - o The courts are more likely to say consideration was intended to be performed rather than just a promise

3: Novation

A novation discharges the original contract between two parties (the continuing party and the outgoing party) and substitutes it with a new contract between the continuing party and a new party (the incoming party) containing the same obligations as the original. The incoming party must perform the contractual obligations under the new contract that were formerly owed by the outgoing party under the original contract.

4: Waiver

(Connected with estoppel)

Where one party leads the other party who is in breach to reasonably believe strict performance is not required.

A waiver is the unilateral abandonment of a right or claim. It may apply where a party – by conduct or inaction – demonstrates that it will not enforce a right under a contract and the other party alters its position on that basis. There needs to be unequivocal words or conduct, including a deliberate failure to assert a right up to the latest possible time.

5: Abandonment

If the conduct of the parties indicates that they have abandoned the contract, it is viewed as if the parties have made a subsequent agreement to terminate.

This may be inferred where:

- Both parties indicate that they don't consider the contract should be performed further
 - *DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978)*
 - Notices of termination
 - By the time they commenced proceedings it was apparent they don't consider the contract was in effect
 - The contract deemed abandoned and thereby termination
- An inordinate length of time has passed with neither party trying to perform or call the other to perform
 - *Fitzgerald v Masters (1956)*
 - Contract for sale of house
 - Wasn't completed in 20 years thus abandoned

If one party partly performed contract (even after length period of inactivity)

- The courts are less likely to deem the contract abandoned if one party has partly performed the contract, even after a length period of inactivity

Termination or Variation

When parties have modified pre-existing contractual relations between them, it is sometimes difficult to work out whether they have terminated the pre-existing contract and replaced it with an entirely new one or merely varied the existing one.

If large degree of change about material items

- Suggests the parties intended to discharge and form a new agreement
- Likely termination

If new contract cannot stand alone without referring back to original

- It is likely that it is only a variation

If contract required to be in writing to be enforceable

- Can be entirely terminated by oral agreement but if it merely varies, the variation must be in writing
 - *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd (1957)*

Frustration

Original performance rule – historical development of the ‘absolute contract rule

- Absolute contract rule:
 - o Contractual promises bound a promisor strictly, no matter how burdensome the contractual terms might have become through unforeseen accident without fault of either party
 - *Paradine v Jane (1967)*
 - P sued for rent for lease agreement, needed to lease the property to make money, D said he was sent from land by prince of Germany – held still had to pay rent
- Modification:
 - o *Taylor v Caldwell (1863)* – destruction of the subject matter excused both parties from the contract
 - Hired building to give concerts and fetes, a fire destroyed building, tried to sue under absolute contract rule for failing to provide the building, held both parties excused

Modern definition of frustration

- Frustration arises when an event occurs without fault of either party, and where the contract makes no sufficient provision which so significantly changes the nature (not merely the expense) of the contractual obligations from what the parties could have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances
 - o In such a case, both parties are discharged from further performance
- *National Carriers Ltd v Panalpina (Northern) Ltd [1981]*
 - o Lease of warehouse for 10 year term
 - o 18 months in the council closed road and people couldn't get in
 - o Contract was not regarding keeping the road open
 - o Held frustration can apply to contract for land but did not apply here as it was only 18 months about of 10 years

The frustrating event changes the nature of the performance to such an extent that there is no longer any real agreement between the parties

- Performance becomes impossible or commercially unfeasible
- *Codelfa Construction Pty Ltd State Rail Authority of New South Wales (1982)*
 - o Australian HC case – authority for frustration

2 steps to determine if there is frustration

Codelfa Construction Pty Ltd State Rail Authority of New South Wales (1982)

1: What is the contract about

- What are its terms?
- What is the object of the contract?

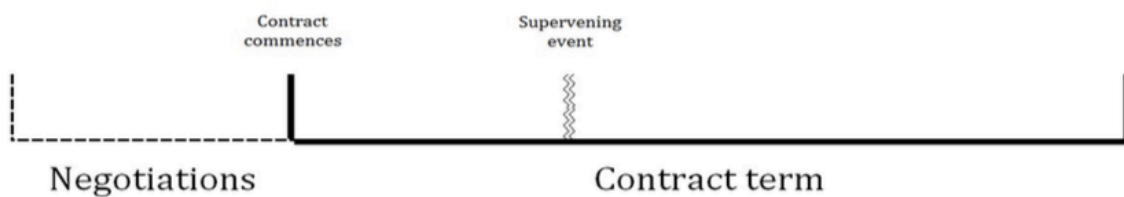
2: What is the effect or impact of the supervening event on the contract?

- The important point is to look at the effect of the supervening event rather than the event itself

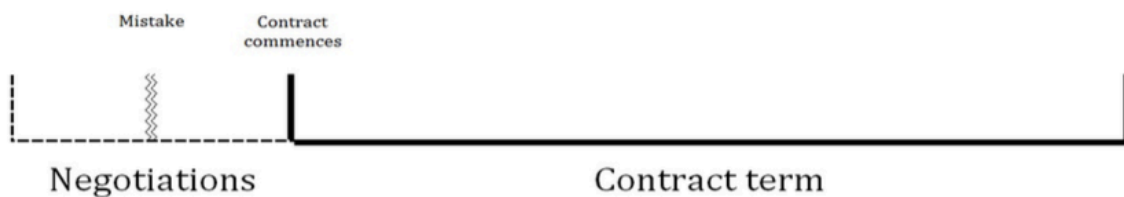
Relationship with mistake

- E.g. if contract to use building for concerts, if burnt down after the contract made then its frustration, if burnt down before the contract is made and neither party knew then its common mistake

Frustration



Mistake



Elements of Frustration

1: Supervening event causes a fundamental or a radical change to the performance of the contract (to the nature of the contractual rights and obligations)

Change of law makes performance illegal

Example constituting frustration:

- *Fibrosa Spolka Akcyjna v Fairbairn Combe Barbour (1943)*
 - o Contract between British and Polish companies
 - o Supply of machinery into Poland
 - o Polish paid deposit
 - o WWII made it illegal to supply goods to enemy countries
 - o Frustrated contract as made performance impossible/illegal

Example NOT constituting frustration:

- *Scanlon's New Neon v Tooheys (1943)*
 - o S manufactured advertising signs on buildings for T
 - o Agreement to pay monthly rent

- War started mid way
- Government banned neon signs due to blackouts
- No term they had to be turned on
- HC held no requirement for it to be lit so was not frustrated

Subject matter destroyed

(Note timing – common mistake v frustration)

Taylor v Caldwell (1863)

- Contract for use of building, specifically music hall
- Hall destroyed by fire after contract had been formed
- Held contract frustrated

Failure of an expected contingency or triggering event

(condition precedent)

Example constituting frustration:

- *Krell v Henry [1903]*
 - Rented room overlooking spot where E crowned, understood purpose
 - Didn't happen, held it was foundational to contract, thus frustrated

Example NOT constituting frustration:

- *Herne Bay Steamboat v Hutton [1903]* (same event as above, note difference)
 - Contract for boat hire to see E crowned on water, also didn't happen
 - Held not frustrated because there could have been more than one purpose

Failure of continuing contingency or event necessary to allow continued performance

Examples constituting frustration:

- *Harlock v Beal [1916]*
 - 2 year contract for man to serve on crew ship
 - WWI started
 - Ship captured by Germans, man imprisoned
 - Man's wife sued for husband's wages under contract
 - Held contract was frustrated so couldn't get wages
- *Codelfa v SRA (1982)*
 - Nature of contract had significantly changed
 - Longer time and costed more to complete and sought more payment
 - Held nature of obligations radically changed and not commercially feasible thus frustrated
- *Beaton v McDevitt (1987)*
 - M owned land and expected to be rezoned
 - Gave some land to B rent free farming with permaculture and promised to transfer back to M once rezoning took place
 - B occupied land and built house and road for several years

- Council never rezoned land
- Held contract frustrated as was radically different

Examples NOT constituting frustration:

- *Davis Contractors v Fareham Urban District Council (1956)*
 - Building houses
 - Would cost \$17 000 more than anticipated
 - Argued frustration but failed

Contracts of personal service

A contract will be frustrated in the circumstances of death/incapacity/imprisonment unless the party has put themselves into the situation (*Horlock v Beal [1916]*)

Government interference

Examples constituting frustration:

- *Metropolitan Water Board v Dick Kerr [1918]*
 - 6 year contract to make dam
 - Minister ordered to stop, equipment needed to be sold for war
 - Substantial and long interruption thus contract frustrated
- *Brisbane City Council v Group Project (1979)*
 - B to rezone land to residential and G would make substantial provisions to services e.g. construct footpaths
 - B rezoning, state government took land to build school
 - G questioned the need to fulfil their obligation because didn't get the land for housing
 - Held contract frustrated because radically different
 - Government conduct destroyed G's purpose

Example NOT constituting frustration

- *Tsakiroglou v Noble Thorl [1962]*
 - Closing of canal
 - Would have delayed by 4 weeks taking another route
 - Contract didn't specify time period
 - Held no specific route agreed to, thus increased transport costs taking another route was not enough for frustration

A 'radical change'

Key authority: *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales (1982)*

- C couldn't work due to resident's injunction
- C sought more money from S on '*quantum meruit*' basis (e.g. additional funds than provided for in contract)
- Argued contract frustrated due to residents injunction
- Basis of contract fundamentally changed

- Held contract frustrated as both parties contemplated performance of contract based on assumption of 3 shifts 7 days a week
- So after injunctions there was a radical change in the nature of obligations so contract now commercially unfeasible

There must be such a change in the significance of the obligation that, if performance, would be a different thing than that contracted for

- *Davis Contractors Ltd v Fareham Urban District Council* [1956]
 - o Weather was bad couldn't get labour/materials = not good enough for frustration
 - o 78 houses over 8 months
 - o Took 22 months because of bad weather and material and labour shortages

The fact that it becomes more onerous or more expensive than what a party thought it not a frustration

- It must be more than merely more onerous or more expensive
- It must be positively unjust to hold the parties bound
 - o *The Eugenia* [1964]
 - Canal became a 'dangerous zone' as TE which carried iron and steel sailed towards it
 - Charterers in breach of general war clause in contract saying to avoid dangerous zones
 - Alternative was to sail around different route which would take much longer
 - Ship seized as canal was closed
 - Charterers claimed contract frustrated
 - Owners of the iron and steel claimed breach of contract
 - Held no frustration as was self-induced by sailing into the canal
 - Cannot rely on self induced frustration
 - If they took a different route it wouldn't have been frustrated either

If delay

It must seriously affect the intended performance of the contract

- A mere delay is not enough
- There must be a probability of a long delay
- Parties do not need to wait for the delay to occur
 - o *Bank Line Ltd v Arthur Capel and Co* [1919]
 - Ship owner agreed to let steamship for 12 months
 - Before delivered ship was taken by British government to help in war
 - Released 4 months later
 - Court accept frustrated on day of requisition as parties had no idea how long ship could have been out for
- If long term contract (less easily frustrated than short term)
 - o *National Carriers Ltd v Panalpina (Northern) Ltd* [1981]

- Tenant was denied access to property for 20 months out of 10 year term with almost 3 years left on lease
- Held no frustration
- *Davis Contractors Ltd v Fareham Urban District Council* [1956]
 - Delay due to weather and labour/materials not sufficient
 - Delay foreseeable

If increase in cost

A mere rise in expenditure is not sufficient to frustrate a contract. The event must render the contract to be performed in a different kind from that originally contemplated by parties

- *Tsakiroglou v Noble Thorl* [1962]
- *The Eugenia* [1964]

Effect of event:



2: Neither party caused/instigated the supervening event

Is self-induced frustration – cannot rely on – won't be frustration

- A party cannot rely on self-induced frustration to discharge a contract
- *Maritime Fish v Ocean Trawlers* (1935)
 - A chartered boat/trawler
 - Both parties knew it was illegal without licence
 - Gave 3 licenses used for other boats at the time
 - Argued frustration – held no frustration as it was self-induced – A chose not to provide license to particular ship

Onus on proving self-induced frustration on party alleging it

- The onus of proof rests upon the party alleging the self-induced frustration
 - o *Joseph Constantine v Imperial Smelting (1942)*
 - D chartered ship to carry cargo, engine exploded and damaged ship just before loading
 - D argued frustration, other party alleged negligence – onus on them to prove
 - Held frustration

3: Supervening event unforeseeable and not contemplated by the parties at contract formation – it follows that there must be no term in the contract to deal with the event

Frustration will not apply if a supervening event is actually foreseen, or reasonably foreseeable as very likely to happen, and no provision is made in the contract but the parties may be taken as assuming the risk that it will occur

Example NOT constituting frustration:

- *Davis Contractors v Fareham Urban District Council (1956)*
 - o Builder to complete 78 houses in 8 months for fixed price
 - o Took 22 months because of bad weather and shortage of labour and material
 - o Builder claimed frustration
 - o Court held no frustration
 - o Parties should have foreseen cause of delay and no special contractual stipulation of possibility of labour and material being unavailable

Example constituting frustration

- *Simmons v Hay (1964)*
 - o Employee became ill
 - o Employer paid him for 4 months
 - o Employee dismissed, sued for dismissal
 - o Held frustration because employer could not foresee that employee would be so ill, would only foresee employee to take a couple of days off for being sick

Frustration will not apply if the parties did foresee the event and inserted a term in the contract to cover the event

- For example, force majeure clause (lists a number of potentially frustrating events such as strikes)

Example NOT constituting frustration:

- *Claude Neon v Hardie (1970)*
 - o P hired neon advertising sign to be installed
 - o Included clause that if tenancy changed then remaining payment required
 - o Requested to remain for 3 years
 - o Tenant argued frustration as they did not have premises anymore
 - o Held no frustration because they contemplated it

Example constituting frustration:

- *Coldelfa* (1982)
 - o There were terms regarding reduced working hours and noise pollution
 - o Held terms did cover what actually occurred thus wasn't contemplated



PROBLEM Q's: if contract FRUSTRATED move onto EFFECT – mention common law outcome, then go through statute

Effect of frustration at common law

PROBLEM Qs: MENTION COMMON LAW OUTCOME THEN MOVE ONTO STATUTE

Old common law: losses tend to lie where they fall

Rights and Liability between commencement date and frustration date

- All rights and liabilities which have unconditionally accrued (accumulated) prior to the frustrating event remain
 - o *Cutter v Powell* (1795)
 - If entire contract and only partly performed = no remedy
- The parties can ignore the legal result of the frustrating event and continue performance
 - o *Heytesbury v Subiaco City Council* [2000]
 - Lease – council amended town planning but parties chose to ignore it

If money paid in advance

Money paid in advance may be recoverable after frustration

If express term about how prepaid money is to be dealt with if frustration

- The court will follow the contract

If no express term

- If there is no express term, money paid in advance by one party to another before performance is tendered by that party may be recoverable as a restitutionary remedy of total failure of consideration
- *Fibrosa Spolka Akcyjna v Fairbairn Combe Barbour Ltd* [1943]
 - o Fib able to recover deposit

If expenses incurred by party in performing contract before frustration (not recoverable)

- Expenses occurred by party in performing the contract before the frustration is not recoverable
- There is no apportionment for partial performance
 - o *Fibrosa Spolka Akcyjna v Fairbairn Combe Barbour Ltd* [1943]
 - Fib pays \$1000 deposit up front (the issue)
 - Fair spends a lot of money constructing machinery and preparing to deliver
 - Contract frustrated by WWII before Fair obliged to deliver and before Fib obliged to pay rest of purchase price
 - Held Fib's deposit recoverable
 - Fair's expensive not recoverable
 - Approved in *Baltic Shipping Co v Dillon* (1993)

If work done prior to date of frustration and no contractual provision

- If a party completes their obligation prior to frustration, then they will be entitled to their payment
- However, if the obligations are only partly performed and it is an entire contract they will not
 - o *Butter v Powell* (1795)
- Damages for failing to complete the contract are not available to either party
- Specific performance to force completion of the contract is not available

If work is done after frustration

- Is contract expressly indicates how work done after frustration is to be dealt with
 - o The court will follow the contract
- If no contractual provision
 - o The aggrieved party may perhaps seek restitution (quantum meruit)
 - *Coldelfa* (1982)

Effect of Frustration at Statute

Frustrated Contracts Act 1978 (NSW)

PROBLEM Qs: mention common law outcome, then statute

The effect of finding frustration may give a result that seems unfair. Statute has intervened

- The act provides no definition of frustration
- The purpose of the Act is to guide adjustment of the rights and liability of the parties upon the happening of a frustrating event

- Parties can adjust their positions by reference to the Act independently of the court

Section 6: certain contracts excluded

- E.g. the charter parties, carriage of goods by sea, contracts of insurance, contracts expressly excluding the Act

Section 7: discharge of prior promise

- May have rights to sue for damages

Section 8: Calculation of damages

- *Upper Hunter Timbers v Forestry Commission* [1999]
 - One party performed obligations before frustrating event
 - Entitled to be paid by other party

Section 10: compensation for total performance by 1 party

Section 11: compensation for partial performance

- Complex if prior to frustration
- Proportioned in equitable manner

Section 12: return of money

- Return of money paid prior to frustration
- All money returned if total failure of consideration
- If partial performance then s 11 applies

Section 13: apportionment of loss if wasted expenditure

- *Fibrosa*
 - If expenses incurred prior to frustrated to prepare to perform – provides for loss to be shared between parties

Section 15: court adjustments if parties cannot self adjust