

# Contract Law exam notes

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## Ordinary claim skeleton

To weave in authority (case and legislation):

- \_\_\_\_ is authority for the proposition that \_\_\_\_\_. In these circumstances therefore \_\_\_\_\_.
- \_\_\_\_ is authority that there is justification for a \_\_\_\_\_.
- - 'the application of s\_\_ will result in \_\_\_\_\_'

1) '\_\_\_\_ ('A') may have a case against \_\_\_\_ ('B') for his/her [state which action .e. possible breach of contract?].

2) What remedy would Plaintiff be seeking? – **may need to consider at end!**

- a. Has D breached the contract? For breach of contract: Type(s) of loss(es) if sue for damages (i.e. consequential, direct or expectation OR liquidated damages, deposits, rectification, account of profits or gains-based damages). Explain damages with *Robinson*. Quantify the losses with the figures given.
  - i. ONLY IF DAMAGES INADEQUATE: Address specific performance  
→ Possibly put at the end... D will be arguing limitations on the award of damages.
    - 1) Has D's breach caused P's loss? (Causation, how many defendants?)
    - 2) Remoteness: *Hadley v Baxendale*. (Conclude after each limb for each set of damages)
    - 3) Mitigation
- b. Action for debt to recover money owed if the right to the money has accrued.
  - i. Need to say the benefits of this: Easier B.O.P than damages as only 2 elements, no mitigation issues, no need to show loss and the breaching party can still claim per *Young v Queensland Trustees*.
  - ii. Two elements to establish: 1) the valid contract imposes an obligation to pay and (2) the right to the payments has accrued (here address performance issues): (*Westralian Farmers v Commonwealth Agricultural Service Engineers*).
    1. The validity of the contract may be an incorporation issue! So if on the facts talk about terms...
    2. For the payment to have accrued, per *McDonald v Dennys Lascelles*, must have earned the payments by at least substantially performing them. – *go to performance*
- c. Unjust enrichment claim to get restitutionary remedies. *Normally used where a contract is void or terminated!* The common law basis for this is: D is obliged to refund the money or pay reasonable remuneration for goods/services provided by the plaintiff. Three main types of actions that can be brought:
  - iii. Action for money had and received: Where there is a fee paid to the defendant for performance of an obligation, and that obligation is never performed! This results in *a total failure of consideration*, so the defendant

is unjustly enriched. Thus, the plaintiff will sue to have the money returned  
[NOT AN ACTION FOR DEBT!]

iv. *Quantum Meruit*: to recover 'fair and reasonable remuneration' for services performed: *Sopov v Kane* and *Sumpter v Hedges*

v. *Quantum Valebant*: to recover a 'fair and reasonable price' for goods delivered: *Sumpter v Hedges*

1. *NOTE: For the two Quantum claims look for a request for the goods/services or free acceptance. This will show the defendant was unjustly enriched at the plaintiff's expense.*

d. Consider Estoppel as an alternative to breach or unjust enrichment claims. Will possibly gain the minimum equity or compensation to reflect the value of the promise!

*NOTE: Depending on question may need to consider these last.*

- 2) Does the doctrine of Privity apply? Consider the exceptions and the cases of *Coulls v Bagot*, *Wilson v Darling Island*, *Trident v McNiece*, and *Beswick v Beswick*. Also note that for estoppel under Privity, the leading case is *Trident*. Consider if Defendant should be estopped from relying on lack of Privity.
- 3) Terms and Interpretation issues! Are the terms express or implied? Are they incorporated (is there a signature?)?
  - a. Any exclusion clauses? If so, are they incorporated or do they apply (interpretation)?
  - b. Is the contract wholly in writing? If so, possibly consider the PER is verbal terms are to be added. (Links to misinformation and the breach of contract claim).
- 4) Performance issues: Need to consider:
  - a. Standards of performance
  - b. Time of performance
  - c. Good Faith and Fiduciary Duties
  - d. Order of performance
  - e. Conditional obligations (entire/divisible – substantial performance?)
  - f. Concurrent obligations (Sale of Goods Act)
- 5) Termination: Is there a right to terminate the contract prior to complete performance?
  - a. Common law rights to terminate:
    - i. Breach of an essential term
      1. Are there time stipulations? Is time of the essence?
    - ii. Fundamental breach of an intermediate term
    - iii. Repudiation
  - b. Express rights to terminate
  - c. Implied rights to terminate

*\*\*The doctrine of election is relevant for above three. The party must exercise their right to terminate, or affirm the contract*
  - d. Frustration
  - e. Termination by agreement
- 6) Misinformation: Look for two parties entering into a contract. A may have been misinformed and has various remedies. – See topic for overview
- 7) Unconscionability/unfairness:
  - a. Does the doctrine of unconscionable bargains apply?

- b. Married Woman's Equity. Does it apply (or is it another relationship of trust and confidence?)
  - c. ACL s20 for conduct in trade or commerce. OR ss 21/22.
  - d. Unfair terms? ACL ss23/24/25/26
- 8) Other vitiating factors.
- 9) Overall conclusion

**Notes:**

- Always argue your clients case first!
- If need more facts in any of the steps then say that in the answer!
- For bonus points, deal with non-issues quickly but mention them
- Look for missing facts!
- **USE SUBHEADINGS!**
- Make a tentative conclusion on each issue/sub-issue before moving on to the next. But, if could go either way, make an assumption so can continue!

## Contractual Remedies

**1. Self-help:** A remedy that does not require any court litigation (Thus, advise this first?) It can occur in 3 avenues:

1. **Withholding performance:** If you are not happy with a good or service you receive, then do not pay for it (*i.e. but depends on the order of how the contractual terms will be performed*).
2. **Termination:** If unhappy with contractual obligations performed, could terminate contract.
3. **Deposits and advance payments:** Structure payment situation to favour yourself. Commonly used as a security for performance. <- *Keeping a deposit...*

**2. Compensation (damages): Beware of Action for Debt!** *If inadequate explain why and then go to enforcement below.* Any breach of contract entitles the aggrieved party to seek damages. Also, *per Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd, damages will still apply if the Plaintiff terminates the contract.*

**1. State:** *Robinson v Harman*, endorsed and applied in *Tabcorp Holdings v Bowen Investments*, is authority that where a party sustains loss from a breach of contract, they are to be awarded damages to place them in the same situation as if the contract had been performed. *E.g. having uncompleted work finished, or difference in profits due to breach, or per s 49 of the Sale of Goods Act the seller may sue for not accepted goods (damages are those reasonably expected i.e. costs), or per s 50 of the Sale of Goods Act for undelivered goods the additional costs of buying replacement goods, or per s 52(3) for defective goods, compare value of the goods as promised to those supplied. (If can't ascertain expectation loss, use McRae).*

- But, **unless the Plaintiff can prove they actually suffered loss, (or quantify loss) the award will be nominal (*Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd*).**

**1a. Loss of bargain damages:** awarded if can terminate contract to remedy no longer having the contract. They are based on: the price the plaintiff would have received if the contract had been performed as promised, less the price the plaintiff would receive by entering into a substitute contract.

- *BUT, Shevill v Builders Licensing Board*, affirmed in *Progressive Mailing House v Tabali*, is authority that you cannot claim Loss of Bargain damages for an express right to terminate, unless, the plaintiff would also have been entitled to terminate for the same breach under the common law rules for termination.
- *To avoid this, include an 'Anti-Shevill' clause, like in Gumland Property Holdings v Duffy Bros – e.g. Any of this term breach will allow the aggrieved party to terminate and sue for loss of bargain damages.*

**1b. State if relevant:** *Damages will usually be assessed at the date of contractual breach (Johnson v Perez). However, per Johnson v Agnew this can be varied if the loss is not reasonably apparent at time of breach (like dodgy house building). In this case, damages will be assessed at the time the loss is known. Further, the court will normally award interest on the judgement sum, as seen in s 30C of the Supreme Court Act or per Hungerfords v Walker.*

**1C. State if relevant:** Per the Limitation of Actions Act s 35, actions in contract law must be commenced within 6 years of a breach. (P.s. for equitable remedies, Plaintiff mustn't be unduly delayed).

**2. Difficulties:** Damages must be assessed, no matter how difficult.

**2a. Loss of chance:** *Chaplin v Hicks*: Facts: P entered in a competition, but her application was not considered properly, so she sued. The court awarded a value to reflect the chance she lost to win the prize of working in acting industry.

**2b. reliance loss:** Reliance loss may be awarded (costs reasonably incurred on relying on/carrying out the contract) where the contract was terminated, or unable to be performed:

- *McRae v CDC*: Facts: McRae's marine salvage business was employed by CDC to salvage an oil tanker that did not actually exist. As such, he could not show that he suffered loss as the expected profits were unknown. Held: Where expectation loss (i.e. *Robinson principle*) cannot be ascertained, reliance loss may be awarded (i.e. the costs reasonably incurred of relying on/carrying out the contract).
- BUT, this will not be awarded where, even if the contract had been performed, the plaintiff would not have recouped their expenditure incurred in reliance on the contract being performed (*Commonwealth v Amann Aviation*).

**3. If relevant: Non-pecuniary loss (rarely applied):** Generally, damages for mental distress or pain/suffering are only recoverable if consequent upon physical injury or physical discomfort (*Baltic Shipping v Dillon*).

HOWEVER, Per *Baltic Shipping v Dillon* an exception exists if the specific aim of the promise breached was to create happiness or avoid distress.

- *Baltic*: Plaintiff paid for a cruise, it sank before it finished. Held: The court awarded her damages for disappointment and distress, since the object of the contract was to provide enjoyment.
- *Silverman v Silverman*: Husband and wife divorced. Husband promised not to harass/stalk, but did. Wife was able to recover damages.

**4. If relevant: Liquidated damages and penalty clauses:** Parties may stipulate a sum to be paid in the event of a particular breach.

**4a. Determine if liquidated damages:** This will be enforceable as liquidated damages if it is a genuine pre-estimate of likely loss. Whereas, per *Dunlop* reaffirmed in *Ringrow* a penalty is an extravagant sum that does not reflect the estimated loss for a breach. A penalty is unenforceable.

- *Dunlop v New Garage*: Dunlop sued its retailer for reselling Dunlop tyres at a lower price than specified. The contract specified damages to be £5 per tyre. Held: This was not a penalty as it was a genuine pre-estimate of Dunlop's loss.

**4b. Determine if the payment is a deposit, or instalment payment, as the rule against penalties will not apply to deposits. See consequences of termination for deposit determination criteria.**

- *Luu v Sovereign Investments*: Deposits are usually 10%, but here it was a penalty as it was only to be paid upon a breach of the contract. Thus, it was unenforceable.