

CLAW1001 LECTURE 5: CONTRACT 2 – COMPONENTS OF A VALID CONTRACT

Essential elements of a contract:

- **Agreement:** offer + acceptance of the offer.
- **Intention to create legal relations:** business v social.
- **Consideration** (simple contracts only – not for deeds): quid pro quo (something for something).
- **Capacity:** ability to enter a contract.
- **Consent:** genuine and willing consent.
- **Legality:** legal objects and purpose.

Types of contract:

- Simple contracts:
 - Require consideration to be enforceable.
 - Refers to the type (as distinct from 'formal'), not the content (can be complex).
- Formal contracts (deeds or contracts under seal):
 - Specific form – 'signed, sealed and delivered'.
 - Can be enforced without consideration (exception to the rule).

Consideration: price paid by the promisee for the promisor's promise. Can take the form of:

- Benefit to the promisor (directly), e.g. cash.
- Detriment to the promisee incurred at the promisor's request (benefit to a third party at the direction of the promisor).

Note: it ALWAYS moves from the promisee.

Rules of consideration:

1. Must move from the promisee. *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847: an act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.
2. Must not be past (i.e. occurred before the agreement).
3. Must not be illusory (i.e. impossible to enforce).
4. Must be sufficient (i.e. need not be adequate).

1. Cannot be past: good consideration must be either:

- Executed (present), or executory (future), but cannot be past (no consideration).

Anderson v Glass (1868) 5 WW&AB(L) 152: cannot enforce promise to increase pay for work already done.

Note (exceptions): where past acts or forbearance are done at the request of the promisor, when there is an understanding between the parties that the services would be paid for (e.g. professional services such as accounting, legal advice).

Roscorla v Thomas (1842) 3 QB 234:

- Plaintiff purchased a horse from the Defendant.
- After the purchase, the Defendant, at the request of the Plaintiff, promised the Plaintiff that the horse was 'sound and free from vice'.
- Horse proved not to be 'sound and free from vice', rather very vicious.
- The Plaintiff sued the Defendant for breach of promise.
- **Held:** the Plaintiff's only consideration to the Defendant was the price for the promise to sell the horse. Thus, it was past (and thus no) consideration for any promise that the horse was 'sound and free from vice' – Plaintiff failed.

2. Cannot be illusory: cannot be impossible to enforce.

White v Bluett (1853) 23 LJ Ex 36:

- A son had given to his father a promise to 'stop complaining' as consideration for the father's forgiveness of a debt.
- **Held:** the son's promise to 'stop complaining' was not consideration for the father's promise because it was too vague. The father did not have to forgive the debt.

Sheils v Drysdale (1880) 6 VLR 126:

- A promise was given by a married woman to care for her parents for as long as they lived, in return for an interest in their land.
- **Held:** the agreement was void for uncertainty because it did not apply to any particular land (the parents owned more than one parcel of land).

3. Must be sufficient (but not adequate): Must be consideration for the purpose of consideration in the eyes of the law (e.g. \$1,000 for a \$100,000 car) – sufficient but not adequate. Consideration exists.

- Of value or forming part of the consideration: YES.
- Amounting to commercial or equivalent value: NO.
- Performance of an existing public duty: NO.

- Performance of an existing contractual duty: NO. A new contract must be made.
- Part payment of an existing debt: NO.

Chappell & Co v Nestle Co Ltd [1960] AC 87:

- Chapel owns copyright in “Rockin’ Shoes” song. Nestle manufactures confectionary.
- Nestle offers the public ‘records’ of the song in exchange for one shilling and sixpence and the wrappers of 3 bars of Nestlé’s chocolate valued at sixpence each.
- Copyright legislation permitted Nestle to use the copyright so long as the copyright owner was paid a certain percentage of the ‘ordinary retail selling price’ of the record.
- Chappell sued Nestle arguing that it was in breach of the legislation which contemplated the payment of money only (not money + wrappers) and thus the contract was not lawful.
- **Held:** as Nestlé’s purpose was to increase the sales of its chocolate bars, the supply of the 3 wrappers (evidencing such sales) formed part of the consideration (they were not merely a qualifying condition to enter the contract).
- That the 3 wrappers were considered to be of no value to Nestle was irrelevant – a contracting party can stipulate for whatever consideration it chooses.

Consideration may not be sufficient where:

Performance of a **public duty**:

contra *Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270:

- Glasbrook owned a mine where there was industrial unrest/violence.
- Glasbrook approached the local council and asked for the presence of a police contingency at the mine to ensure there was no more violence/breach of peace.
- Glasbrook offered to pay consideration for the service. The council provided police.
- Afterward, the council asked Glasbrook to pay the consideration. Glasbrook refused on the grounds that the police were performing a public duty – no contract exists.
- It was ruled that consideration must be paid because the police were going beyond their public duty to serve and protect (i.e. they would not usually be at the mine).

Performance of an **existing contractual duty**:

Stilk v Myrick [1809] 2 Camp 317:

- Ship set sail around many ports. At 1 port, a number of crew members defected.
- Captain/owner told remaining crew he would pay them extra if they remained on board until the ship arrived back at the original port. Upon arrival, he refused to pay.
- Court ruled crew should not be paid – they were fulfilling an existing contractual duty.

contra *Hartley v Ponsonby* (1857) 7 E&B 872:

- Same situation as *Stilk v Myrick*.
- Crew were successful because the journey was dangerous and thus different.
- Crew went beyond their contractual duties to get the ship back to the original port.

Payment of an **existing debt**:

Foakes v Beer (1884) 9 App Cas 605: consideration is required for a promise to accept a part payment.

Hirachand Punamchand v Temple [1911] 2 KB 330: if a third party payment is involved, it is an exception to the rule. If a party sued for the remaining amount, it would be a fraud on the 3rd party (who made the payment) given they thought their payment would end the matter.

Estoppel: VERY IMPORTANT LEGAL DEVICE. Designed to stop people breaking promises.

- Stops a party from enforcing their strict contractual rights.
- In essence, a party is not allowed to break their promise.
- The doctrine of promissory estoppel is important where:
 - No consideration exists.
 - The formalities of making a contract have not been satisfied and estoppel will prevent unconscionable conduct.

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130: the Plaintiff made a promise to the Defendant to charge a lower rent during war time (due to decreased demand). Once the war ended in 1945 and the flats were all let again, the Plaintiff brought legal action to establish that the previous rental should be reinstated. He was successful.

Walton Stores v Maher (Interstate) Ltd (1988) 164 CLR 387:

- Walton stores (the equivalent of Harvey Norman) went to Maher and said you have property in the location we wish to operate from.
- They requested that Mr Maher knock down the building and build a new one, more suited to Walton Stores image.
- If Maher did this, Walton Stores would sign a 10x10 lease on the property.
- Maher demolished the building and started building a new one. Half way through, Walton Stores said they did not want to go through with the deal.
- Maher took the matter to court and won based on Estoppel.

Estoppel **elements**:

The assumption: the promisee, on reasonable grounds, assumed that a particular legal relationship existed or would exist between the parties.

Promisor responsible for the assumption: the promisor either induced the assumption or, being aware that the promisee had made the assumption, deliberately remained silent in circumstances where the promisor could have reasonably been expected to speak up.

The reliance: the promisee acted or refrained from acting on the faith of the assumption.

Promisor's intent: the promisor knew or intended the promisee to rely on the assumption.

The detriment: the promisee will suffer a detriment if the promisor is permitted to revoke the promise.

Loss: the promisor has failed to act or avoid the detriment being suffered by the promisee.

Contractual capacity: issues involving groups such as:

- Minors (persons under the age of 18 years).
- Corporations.
- Incapacitated persons (mentally impaired, intoxicated, bankrupts).

Minors: minors are bound if they understand the contract and it is for their benefit (**s19**) (i.e. for 'necessaries' – reasonable comfort according to lifestyle), or if it involves the sale or purchase of property (**s20**). *Minors (Property and Contracts) Act 1970* (NSW).

Corporations: act through agents having actual or apparent authority (absence of authority may result in the contract being of no effect).

Mentally impaired/intoxicated: contract can be avoided by mentally impaired or intoxicated party if the other party was or should have been aware that the mentally impaired or intoxicated party did not understand the contract.

Bankrupts: bankruptcy disclosed/discovered when contracting.

Legality – statutory illegality. Statutory illegality involves statutory interpretation.

Is the contract expressly prohibited? E.g: illegal and unenforceable.

All other types of express or implied prohibitions need to be considered as regards outcome. Illegal? Void? Unenforceable?

Legality – common law illegality. This is about classification. Examples:

- Furtherance of a crime: illegal.
- Sexual immorality: illegal.
- Oust court jurisdiction: void.
- Unreasonable restraints of trade: void.

Consent – factors affecting consent.

What are the factors affecting the contract?

- *Non est factum*
- Mistake
- Misrepresentation
- Unconscionable conduct
- Undue influence
- Duress

How do these factors affect the contract?

- Contract is void, or
- Contract is voidable.

Contract is void:

- Contract does not exist and so is of no legal effect.
- Contract ineffective with no need for parties to take any further action.
- No rights or obligations – neither party can recover damages for breach, and neither party can enforce the promises.
- Alternative remedies may arise independently of the contract for the return of money and/or property exchanged pursuant to the void of the contract.

Contract is voidable:

- Contract does not exist but one of the parties has the legal right to 'avoid' or not perform.
- Contract is effective until one party takes action to terminate/rescind the contract.
- **Terminate**: means end a contract after a part performance from which time onwards further performance is not required.
- **Rescind**: means to restore the parties to the position they were in before the contract. Rescission must be effected promptly.

Mistake: different types of mistakes have different effects on the contract:

Common mistake: both parties make the same mistake as to the existence or identity of the subject matter of the contract. The contract is void *ab initio* (from the beginning).

Scott v Coulson [1903] 1 Ch 249: both parties to the assignment of an insurance contract made the (same) mistake of assuming that the insured was alive but, at the time of the assignment, the insured had already died.

McCrae v Commonwealth Disposals Commission (1951) 84 CLR 377:

- McCrae put in a tender to a commission to get the coordinates of a ship wreck.
- He was given the coordinates and a full equipped boat in order to find the wreck.
- He didn't find the wreck, and told the commission that they gave him the wrong coordinates.
- The commission argued common mistake – they didn't realise it wasn't there.

- Court ruled in favour of McCrae. They said he could have been led into a mistake that the wreck was there, but the commission promised that there was a wreck (subject matter of the contract) in that location.

Leaf v International Galleries [1950] 2 KB 86:

- Leaf purchased a painting from an art gallery, only to realise it was a copy.
- Leaf sues the gallery, and is unsuccessful.
- Leaf was arguing the quality of the painting, which was not the subject matter of the contract.
- If he wanted to ensure it was the original, he should have made the gallery promise.

Mutual mistake: both parties make a different mistake as to the terms of the contract. The contract is void *ab initio* (from the beginning). Cannot infer any agreement between parties.

Raffles v Wichelhaus (1864) 159 ER 375:

- Two ships called 'Peerless' leaving Bombay carrying cotton.
- One ship departs in October, other departs in December.
- Seller offers to sell cotton to purchaser delivered by 'Peerless' (December).
- Purchaser agrees to buy cotton from seller delivered by 'Peerless' (October).
- Purchaser refused to accept (late) delivery and the seller sued for breach of contract.
- **Held:** purchaser not bound to accept delivery. Contract void due to mutual mistake.

Unilateral mistake: only one party is mistaken and the other party is aware of the mistake, and tries to take advantage of that mistake. Contract is voidable (at the option of the innocent party) if:

- Written contract.
- Serious mistake about a fundamental term.
- Knowledge: other party is aware of mistake.
- Unconscionable conduct: other party deliberately takes advantage.

Taylor v Johnson (1983) 151 CLR 422:

- Contract (for land) stipulated at a price of '\$15,000.
- Seller believed that the price for land was \$15,000 per acre, not total price.
- Purchaser deliberately ensured that the seller did not become aware of the mistake and attempted to purchase the land (10 acres) for a total of \$15,000.

- Seller sought rectification of the contract.
- Purchaser sought an order for specific performance.
- **Held:** because the remedies sought were those of equity (not common law), the remedy ordered for the consequences of unilateral mistake was rescission due to the nature of the seller's mistake and the purchaser's unconscionable conduct.

Identity of one of the parties: contract is void for mistake only where the identity of the other party is of vital importance to the mistaken party, thereby displaying an intention to contract only with that other (specific) party.

Lewis v Averay [1972] 1 QB 198:

- Lewis agreed to sell his car for £450 to a person purporting to be Richard Greene, star of 'Adventures of Robin Hood' but who, in fact, was a rogue.
- The rogue drew a cheque and signed it 'R A Greene'.
- Lewis handed the car to the rogue who proceeded to sell it to an innocent third party, Averay. Lewis sued Averay in tort for conversion of the car.
- **Held:** a contract existed between Lewis and the rogue, and then between the rogue and Averay. The contract between Lewis and the rogue was voidable.
- However, that contract was not avoided (rescinded) by Lewis before the contract between the rogue and Averay. Averay obtained good title to the car.

Document: *non est factum*: a unilateral mistake as to the nature of a document signed by the plaintiff where the document was fundamentally and radically different in character from that which the plaintiff believed was being signed. Contract is void *ab initio*.

Petelin v Cullen (1975) 132 CLR 355:

- Petelin, who could not read English, accepted a payment of £50 and, in exchange, gave Cullen an option for 6 months to buy Petelin's property at a stated price.
- This option was not exercised within the option period and so lapsed 6 months later.
- Subsequently, Cullen gave Petelin another £50 and asked him to sign a document that Cullen said was a receipt for the second payment.
- However, the document was really an extension of the option.
- When Cullen exercised the option, Petelin refused to transfer the property and Cullen sued for specific performance.
- **Held:** court refused to exercise its discretion to order specific performance on the grounds that the document Petelin signed was fundamentally and radically different from the one that he thought he was signing and, his failure to read and understand the document was not due to carelessness on his part.

Saunders v Anglia Building Society [1971] AC 1004:

- Saunders, a 78-year-old widow, signed a document which her nephew's business partner had told her was a gift of her home to her nephew but was, in fact, a deed of assignment of the home to the nephew's business partner.
- Consequently, the building society sought to obtain possession of the house.
- **Held:** Saunders plea of non est factum failed. The court held that there was no fundamental or radical difference between what she had signed and what she thought she was signing. Either way, the document was a transfer.

Misrepresentation: a false statement of fact, past or present, made by one person (representor) to another person (representee) during pre-contractual negotiations which induces the representee to enter into the contract. Different types of misrepresentation. The type of misrepresentation determines the type of remedy:

- **Fraudulent**: tort.
- **Negligent**: tort of negligent misstatement.
- **Innocent**: no remedy in tort law or in contract (rescission only).
- **Statutory**: misleading or deceptive conduct.

Unconscionable conduct: in your mind, you know what you're doing is wrong. For example:

- One party is under a special disability (e.g. age, illiteracy, illness, gender).
- Other party knew or ought to have known of that special disability.
- The conduct was in the circumstances not consistent with good conscience.

Effect: contract is voidable entitling the innocent party to rescind the contract.

Undue influence: dominant/stronger party abuses the influence s/he has over the will of the subservient/weaker party in order to obtain some undue benefit.

- Special relationship is required (e.g. professional and client).
- Undue influence is presumed to exist unless proven otherwise.
- Where a high degree of trust and confidence has developed between the parties.
- Once established, the onus of proof is on the dominant party to prove that the contract was voluntary.

Effect: contract is voidable, but the opportunity to avoid the contract may be lost if delayed.

Duress: illegitimate pressure to contract exerted by one party over, and against the will of, another party (no special relationship required). Effect: contract is voidable. Types:

Duress of the **person**: *Barton v Armstrong* (1973) 47 ALJR 781: Barton entered into several contracts with Armstrong and was able to show that he had received death threats prior to entering into the contracts. However, he was unable to show that he would not have entered into the same contracts in the absence of the death threats. The contracts were held to be voidable despite this inability.

Economic duress: *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] 1 CQB 705: a contract to build a ship stated the agreed price in US dollars. The US devalued their currency by 10%. Hyundai Construction threatened to stop work on the project unless a new contract was signed including a 10% price increase. North Ocean Shipping agreed to this but later took legal action to recover the additional 10% on the grounds of economic duress. Action failed. It was held that the second contract was voidable but by delaying legal action until nine months after completion, North Ocean Shipping had affirmed new contract.

Statutory improvements:

Contracts Review Act 1980 (NSW):

s7(1): court can make orders where a contract is harsh, oppressive, unconscionable or unjust in the circumstances at the time it was made, such as making any one or more of the following orders:

- Refuse to enforce any or all of the provisions of the contract.
- Declaring the contract void, in whole or part.
- Varying, in whole or part, any provision of the contract.

Competition and Consumer Act 2010 (Cth): s18 a person must not, in trade or commerce, engage in conduct that is misleading or deceptive.